

“IT’S A SHAM!”: HOW SHAM POLITICAL CANDIDATES ARE THREATENING DEMOCRACY

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Abstract

By means of the U.S. election system, democracy in America is under attack—from within. If action is not taken, the public’s trust in elections will plummet to the lowest point in the history of this country. This Note brings to light a little-known political trick: sham political candidates. Political operatives place sham candidates on the ballot to siphon votes from opposing candidates. And the most shocking fact of it all is that it is completely legal. This Note identifies how sham candidates have impacted the modern election, while also examining the history of U.S. elections and election laws. This Note proceeds by demonstrating how the current law is inadequate to protect the integrity of elections from sham candidates and identifies some key characteristics of a sham candidacy. It continues to propose a new statutory framework to be enacted—including an analysis of procedural vehicles in which to effectuate this change—to close the loophole that political operatives use to successfully employ sham candidates. Finally, this Note rebuts procedural and substantive objections to the statute and evaluates its success. Most notably, this Note calls on legislators across America to fix this nation’s electoral system before it is too late.

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INTRODUCTION

“Dear Jack – Don’t buy a single vote more than necessary – I’ll be damned if I am going to pay for a landslide.”¹

The American election system is the cornerstone of this nation—the integrity of one’s vote is the foundation of a democratic republic.² The Constitution of the United States of America established the United States as a democratic republic, meaning that the government is elected by and for the people.³ So, what happens when the government is not *elected* by the people but rather *bought* by a small group of political operatives? What happens when government officials are illegitimately “elected” through the means of lying, cheating, and stealing?

Illegitimate elections are a valid concern in the modern-day American election system. Legitimate elections are predicated on the idea that voting is free and fair to all qualified U.S. citizens.⁴ An election is legitimate to the extent that it is conducted in accordance with rules established through the appropriate legal and political processes of a society.⁵ Electoral legitimacy is elastic and can survive in the face of significant violations.⁶ Only if those violations are widespread,

1. John F. Kennedy, United States Senator, Massachusetts, Remarks at the Gridiron Club, Washington D.C. (Mar. 15, 1958) (quotation marks omitted). This quote was given by John F. Kennedy following his election to the U.S. Senate. Kennedy’s 1946 election to the U.S. House of Representatives continues to be one of the most corrupt elections in modern-day America with accusations that Kennedy’s father paid for a sham candidate to enter the race to siphon votes from Kennedy’s opponent. See *infra* Section I.A.

2. Tom McClintock, Representative, U.S. House of Representatives, The Foundation of Democracy is the Integrity of the Vote (Nov. 17, 2020).

3. U.S. CITIZENSHIP AND IMMIGRATION SERVS., PARTICIPATING IN A DEMOCRACY 1, https://www.uscis.gov/sites/default/files/document/lesson-plans/Intermediate_RightsandResponsibilities_handouts.pdf [<https://perma.cc/7BAR-X5Z8>].

4. Election Administration and Voting Systems Map, DEMOCRACY FUND (Aug. 31, 2017), <https://democracyfund.org/idea/election-administration-and-voting-systems-map/> [<https://perma.cc/HX9R-P4AQ>].

5. DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 2–3 (Univ. of Chicago Press ed., 2004).

6. *Id.* at 3.

deliberate, and consequential do they undermine legitimacy.⁷ The most fundamental principle defining credible elections is that they must reflect the free expression of the will of the people.⁸ Just over 136,800,000 people voted in the 2016 Election.⁹ When polled, only sixty-five percent of Americans said that they believe the U.S. election system is free and fair.¹⁰ In discussing electoral integrity, the Global Commission on Elections, Democracy and Security noted that:

At its root, electoral integrity is a political problem . . . [It] depends on public confidence in electoral and political processes. It is not enough to reform institutions; citizens need to be convinced that changes are real and deserve their confidence. Inclusiveness, transparency, and accountability are all fundamental to developing that confidence.¹¹

The basis for public trust is shaped by the broader political context in which elections take place—not just by the quality of the electoral process itself.¹² Democratic elections work only if both losers and winners see the outcome as the result of a fair, legitimate process.¹³ If this country's political system becomes so fractured that Americans do not trust their own electoral system, then the state of this country could be in a peril never before seen.¹⁴

Before you disregard this Note as just a perpetuation of the "Big Lie"¹⁵ or other controversial political pressures, rest assured that this Note does not aim to stoke division or fear based on political leanings. Rather, the

7. *Id.*

8. *Supporting Free and Fair Elections*, U.S. AGENCY FOR INT'L DEV. (June 10, 2021), <https://www.usaid.gov/democracy/supporting-free-and-fair-elections> [<https://perma.cc/NJ5R-MGGR>].

9. HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, ELECTION STATISTICS: 1920 TO PRESENT 82, <https://history.house.gov/Institution/Election-Statistics/> [<https://perma.cc/7JZL-F6YA>] (follow "pdf" hyperlink associated with "2016 Election Statistics").

10. Nick Laughlin & Peyton Shelburne, *How Voters' Trust in Elections Shifted in Response to Biden's Victory*, MORNING CONSULT (Jan. 27, 2021), <https://morningconsult.com/form/tracking-voter-trust-in-elections/> [<https://perma.cc/5E26-GEU3>].

11. GLOBAL COMM'N ON ELECTIONS, DEMOCRACY & SEC., *DEEPENING DEMOCRACY: A STRATEGY FOR IMPROVING THE INTEGRITY OF ELECTIONS WORLDWIDE* 16 (Sept. 2012).

12. MAARTEN HALFF, KOFI ANNAN FOUNDATION, *POL'Y BRIEF NO. 1, CONFIDENCE IN ELECTIONS AND THE ACCEPTANCE OF RESULTS* 5 (2016).

13. Shaun Bowler et al., *Election Administration and Perceptions of Fair Elections*, 38 *ELECTORAL STUD.* 1, 1 (2015).

14. See Andrew Sullivan, *What Happens if Americans Stop Trusting the System?*, N.Y. MAG. (Nov. 19, 2018), <https://nymag.com/intelligencer/2018/11/andrew-sullivan-what-happens-if-no-one-trusts-the-system.html> [<https://perma.cc/QEG2-AJ9W>].

15. Melissa Block, *The Clear and Present Danger of Trump's Enduring 'Big Lie'*, NPR (Dec. 23, 2021, 5:00 AM), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election> [<https://perma.cc/83UK-JZLP>].

goal of this Note is to shed light on a relatively new and generally not litigated, well-kept political secret: sham candidates. First, this Note will go into the history of rigging elections.¹⁶ Then, it will describe what a sham candidate is, and how one rigs an election using a sham candidate.¹⁷ Specifically, this Note will examine one of the first major sham candidates to face criminal charges.¹⁸ Part II of this Note will explain the historical background of U.S. election laws, including federal election laws, state elections laws, and ballot qualification laws.¹⁹ Part III goes into further detail about what a sham candidate is, how to spot one as a voter in an election, how to create and use a sham candidate (for informational purposes only), and why the current election laws are inadequate in deterring against such fraud.²⁰ Part IV of this Note aims to close the so-called “sham candidate loophole” by proposing a statutory framework and various methods for effectuating such change.²¹ Finally, Part V looks forward and evaluates the proposed change in law, highlighting key approval and criticism of such change.²²

I. HOW TO RIG AN ELECTION

On one hand, an election can have many problems—technical mistakes, poor administration, discriminatory voter qualification laws, and even individual voter fraud—without it being considered “rigged.”²³ On the other hand, an election can be rigged from a “top-down and total intentional manipulation” of the results.²⁴ For example, former President Lyndon B. Johnson’s election to the U.S. Senate is a modern example of how an election can be rigged in today’s America.²⁵ The former President won the Democratic primary by a mere eighty-seven votes after two hundred votes were allegedly added to the “infamous Ballot Box 13.”²⁶ However, when people think of a rigged election, they think of the 2000 Presidential Election.²⁷ Central to the controversy was the Speaker of the

16. See *infra* Part I.

17. See *infra* Section I.A.

18. *Id.*

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part V.

23. Lily Rothman, *Has an Election Ever Been Rigged in U.S. History?*, TIME (Oct. 19, 2016, 4:58 PM), <https://time.com/4536566/rigged-election-american-history/> [<https://perma.cc/V4DU-D4C9>].

24. *Id.*

25. See, e.g., Martin Tolchin, *How Johnson Won Election He’d Lost*, N.Y. TIMES, Feb. 11, 1990, at 30.

26. See, e.g., *id.*

27. See, e.g., Kim Lane Scheppelle, *When the Law Doesn’t Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PENN. L. REV. 1361, 1362–64 (2001).

Florida House of Representatives' threat to use his constitutionally-granted power to sidestep the popular vote altogether and opt for his own slate of electors to the Presidential Electoral College were the Florida Supreme Court to sanction a recount.²⁸

Historically elections have been "rigged" in different ways. Sham elections have plagued U.S. democracy since as early as 1792.²⁹ Two of the most prevalent trends of election rigging in the nineteenth century involved "big-city bosses" of the North and explicitly racist voting laws in the South.³⁰ In the North, "big-city bosses" would consolidate their power in cities like New York, Philadelphia, and Boston; have their supporters vote multiple times under various aliases; and even kidnap election officials.³¹ In the South, election officials would require literacy tests, "good character tests," and other implicitly racist obstacles to disenfranchise Black voters and poor White voters.³² And the former Confederate states adopted openly discriminatory constitutions that limited Black Americans' access to voting.³³

While the United States has moved beyond the adoption of openly discriminatory constitutions and election laws, new trends have evolved that are threatening America's democratic elections. Recent allegations of election fraud have included computer glitches,³⁴ telemarketing phone scams,³⁵ and ballots bought with cash.³⁶ As society has progressed and political operatives have become smarter, a new election rigging phenomenon has entered the scene: sham candidates. A sham political candidate—sometimes called a shadow or ghost candidate³⁷—is a person

28. Andrew Gumbel, *Election Fraud and the Myths of American Democracy*, in 75 SOC. RSCH. 1109, 1111 (2008).

29. Edward B. Foley, *The Founders' Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 28–29 (2010).

30. Gumbel, *supra* note 28, at 1115.

31. *Id.*

32. *Id.*

33. *Voting Rights for African Americans*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-african-americans/> [https://perma.cc/2T39-T792].

34. Gumbel, *supra* note 28, at 1116. In 2002, a Republican elected county judge used an alleged computer glitch as an excuse to change 7,000 ballots in the Alabama gubernatorial election from the Democratic incumbent to the Republican challenger after poll-watchers and elections officials went home. *Id.*

35. *Beware of Voting Scams*, PENN. OFFICE OF THE ATT'Y GEN., <https://www.attorneygeneral.gov/protect-yourself/consumer-advisories/beware-of-voting-scams/> [https://perma.cc/R235-CBA6].

36. Mike Clary, *Vote-Fraud Scandal Casts a Shadow on Mayoral Election*, L.A. TIMES (Nov. 13, 1997, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1997-nov-13-mn-53266-story.html> [https://perma.cc/H3E4-ESG4].

37. Eric Zorn, *Sham Candidates Are an Affront to Democracy. Here's How to Get Rid of Them.*, CHI. TRIB. (Aug. 17, 2018, 6:00 PM), <https://www.chicagotribune.com/columns/eric-zorn/ct-perspec-zorn-madigan-gonzales-sham-candidates-0819-20180816-story.html> [https://

who files to run for election with the sole intent of attempting to spoil the election to the benefit of another candidate.³⁸ Sham candidates are a scheming political trick that aims to clog the ballot to confuse voters and dilute the strength of an opponent.³⁹ Sham candidates do not have any serious intention of raising money, attending candidate debates, meeting constituents, or winning—instead, these candidates enter the race simply to siphon votes from a competitor.⁴⁰

A. *How Sham Candidates Threaten Elections*

On June 10, 2020, Alex Rodriguez filed to run for the Florida State Senate District 37 in Miami, Florida, as a candidate with no party affiliation.⁴¹ Rodriguez paid \$1,187.88 to enter the race and have his name on the ballot.⁴² Rodriguez ran no formal campaign—he did not fundraise, he had no website, and he did not appear at any candidate events.⁴³ Prosecutors allege that Rodriguez was targeted by GOP political operatives to enter into the Senate race to siphon votes from Democratic incumbent State Senator José Javier Rodriguez, a candidate with the same surname as Alex Rodriguez.⁴⁴ Florida State Senate District 37 is a democratic-leaning district in which Hillary Clinton took almost sixty percent of the vote and Senator Rodriguez himself won by over 5,500 votes in the 2016 Election.⁴⁵ In the 2020 Election, however, the

perma.cc/DG24-VW8U]. Additional names for sham candidates include phantom, dummy, plant, straw, or bogus candidates. *Id.*

38. Teo Armus, *Latinas for Trump Founder Unseated Florida Democrat After ‘Shadow Candidate’ With His Surname Entered the Race*, WASH. POST (Nov. 20, 2020, 6:31 AM), <https://www.washingtonpost.com/nation/2020/11/20/florida-election-trump-senator-rodriguez/> [<https://perma.cc/5ZLU-M9QZ>].

39. Zorn, *supra* note 37.

40. CST Editorial Board, *Who Can Keep Sham Candidates From Screwing up Elections? You*, CHI. SUN TIMES (Feb. 17, 2020, 7:00 PM), <https://chicago.suntimes.com/2020/2/17/21141324/sham-candidates-elections-michael-madigan-suntimes-editorial> [<https://perma.cc/YC9L-M86B>].

41. FLA. DEP’T OF STATE, CANDIDATE OATH – STATE AND LOCAL PARTISAN OFFICE (June 10, 2020, 5:41 PM) (on file with author).

42. FLA. DEP’T OF STATE, CHECK (June 12, 2020, 8:40 AM) (on file with author).

43. Sun Sentinel Editorial Board, Editorial, *Evidence of Fraud in a Florida Election. Where’s the Outrage?*, S. FLA. SUN SENTINEL (Nov. 29, 2020, 6:07 AM), <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-election-fraud-20201125-ifg6ssys35bjrp7bes6xzizon4-story.html> [<https://perma.cc/S55A-Y3QF>].

44. Terry Spencer, *Candidate Pleads Guilty in Alleged Florida Vote Scam*, ASSOCIATED PRESS (Aug. 24, 2021), <https://apnews.com/article/florida-5343b101e96d5c7f42d1ee54da7cc0ce> [<https://perma.cc/GB76-6SH4>].

45. *Florida 37th District State Senate Results: Jose Rodriguez Wins*, N.Y. TIMES (Aug. 1, 2017, 11:23 AM), <https://www.nytimes.com/elections/2016/results/florida-state-senate-district-37> [<https://perma.cc/E4KH-UW8X>]; Matthew Isbell, *Presidential Results by Florida Senate District and the Impact of Redistricting*, MCI MAPS (Feb. 24, 2017), <https://mcimaps.com/>

Republican candidate won the election by just thirty-two votes, while sham candidate Alex Rodriguez received over six thousand votes.⁴⁶ This election has resulted in countless local, state, and federal investigations and arrests because of illegal campaign finance violations.⁴⁷ One thing is clear, however—what Rodriguez did was completely legal in the state of Florida,⁴⁸ and likely would be in the majority of jurisdictions nationwide.

Alex Rodriguez's fraud on the Florida electorate is not unique. This type of fraud has happened throughout the history of American elections, documented as early as 1824.⁴⁹ In 1946, an Irish-American and future President of the United States, John F. Kennedy (JFK), ran against an Italian-American, Joe Russo, in the Democratic primary for the U.S. House of Representatives in a district in which the Italians and the Irish were ethnically dominant.⁵⁰ JFK's father allegedly found another Italian named Joseph Russo and paid him to enter the Democratic primary race in an attempt to split the non-Kennedy votes between the two men surnamed Russo, pushing Kennedy to win the primary.⁵¹ While there was no legal recourse for Joe Russo to have similarly-named Joseph Russo removed from the ballot,⁵² the Kennedys' seemingly fraudulent act was completely legal.

While the purpose of this Note is not to identify all the rigged or sham elections in the history of the United States, it is important to highlight that sham candidates do in fact exist and exist with enough prevalence to pose a threat to this nation's democratic republic. The central goal of this Note is to shed light on a single method of rigging an election—sham political candidates—and to propose a simple statutory solution that will

presidential-results-by-florida-senate-district-and-the-effects-of-redistricting/ [https://perma.cc/VXA4-76GE].

46. Spencer, *supra* note 44.

47. *Id.* While Alex Rodriguez listed an address in Palmetto Bay, Florida, when he filed to run, he said he lived in Boca Raton, Florida—over two counties away from the office he sought to hold. Sun Sentinel Editorial Board, *supra* note 43.

48. It is important to acknowledge that while Alex Rodriguez and his associates were arrested for their actions in the 2020 Election, they were arrested for campaign finance violations—not for their actions in defrauding the election by using a sham candidate.

49. See James Traub, *America's First 'Rigged' Presidential Election*, WALL ST. J. (Oct. 28, 2016, 10:43 AM), <https://www.wsj.com/articles/americas-first-rigged-presidential-election-1477664458> [https://perma.cc/WN5Q-6KK3].

50. Elaine Kamarck, *A Short History of Campaign Dirty Tricks Before Twitter and Facebook*, in CYBERSECURITY AND ELECTION INTERFERENCE (The Brookings Inst., July 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/07/11/a-short-history-of-campaign-dirty-tricks-before-twitter-and-facebook/> [https://perma.cc/2ESJ-NRMW].

51. *Id.*; Rich Rubino, *What's in a Name? In Politics, Perhaps a Lot More Than One Might Think*, HUFFPOST (July 5, 2014), https://www.huffpost.com/entry/whats-in-a-name-in-politi_b_5265022 [https://perma.cc/MD5P-ENX5].

52. Rubino, *supra* note 51.

tighten election laws and stabilize the public's trust in the cornerstone of democracy: the U.S. election system.

II. HISTORICAL BACKGROUND OF ELECTION LAWS

Article I, Section 4 of the U.S. Constitution directs and empowers the states to determine the “[t]imes, [p]laces and [m]anner” of congressional elections, subject to Congress’s authority to “make or alter” state regulations.⁵³ The clause gives each level of government the power to “enact a complete code for such elections, including rules concerning public notices, voter registration, voter protection, fraud prevention, vote counting, and determination of election results.”⁵⁴ Both state and federal roles with respect to elections are contemplated under the constitutional framework for elections.⁵⁵ Although the Constitution makes states the primary regulator of congressional elections, it vests in Congress the power to pass federal laws regulating congressional elections, preempting any contrary state statutes.⁵⁶ Thus, it is important to differentiate between federal election laws—and the extent to which the federal government has power to change federal election laws—and state election laws.

A. Federal Election Laws

The foundation of federal election law was largely created through constitutional amendment. As early as 1804, constitutional amendments expanded voting rights, prescribed certain methods of electing federal officials, and enfranchised voters.⁵⁷ Federal election law has been further expanded by federal legislation passed by Congress. The first major congressional act dealing with voting rights was the Enforcement Act of 1870.⁵⁸ This legislation provided that all citizens were to be given equal opportunity to fulfill voting prerequisites or become qualified to vote.⁵⁹ The next major development in the field of federal election law dealt with campaign finance. Congress passed multiple acts to regulate from whom

53. U.S. CONST. art. I, § 4; see Michael T. Morley & Franita Tolson, *Common Interpretation: Elections Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/750> [<https://perma.cc/JT5C-PAD5>].

54. Morley & Tolson, *supra* note 53.

55. U.S. GEN. ACCT. OFF., GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 3 (2001).

56. Morley & Tolson, *supra* note 53.

57. Charles R. Barr, *The Developing Field of Federal Election Law*, 14 WASHBURN L.J. 434, 436 (1975). The Twelfth, Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twentieth, Twenty-Second, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments to the U.S. Constitution were enacted during a period in which Congress was heavily concerned with election reform. *Id.* at 435–36.

58. Enforcement Act, ch. 114, 16 Stat. 140 (1870).

59. *Id.* § 2.

campaign contributions could be solicited.⁶⁰ Midway through the twentieth century, Congress passed multiple acts affecting campaign communications and voting rights.⁶¹ And finally, Congress created the Federal Elections Commission in 1974 to enforce and administer federal election law and campaign finance law.⁶² The Court has upheld congressional action in protecting the right of suffrage against both official and private abridgment.⁶³ While this list is not exhaustive, it is important to understand that the federal government has done its part to regulate elections in certain circumstances.

B. *State Election Laws*

As discussed above, the U.S. Constitution grants the states the power to regulate federal elections.⁶⁴ The Constitution also provides for a federal role with respect to decision-making about elections, and Congress has exercised such powers in a number of instances.⁶⁵ However, the U.S. election system is one that is “highly decentralized.”⁶⁶ Elections are administered by “thousands of state and local systems”—not a “single, unified national system.”⁶⁷ As described by the U.S. Supreme Court, “the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.”⁶⁸ It is the

60. *See, e.g.*, Tillman Act of 1907, ch. 420, 34 Stat. 864; Act of Mar. 4, 1909, ch. 321, §§ 118–22, 35 Stat. 1110; Act of June 25, 1910, ch. 392, 36 Stat. 822, *as amended by* Act of Aug. 19, 1911, ch. 33, § 1, 37 Stat. 25; Act of Aug. 23, 1912, ch. 349, 37 Stat. 360.

61. *See, e.g.*, Communications Act of 1934, tit. III, § 315, 48 Stat. 1064, 1088 (codified as amended, 47 U.S.C. § 315 (1970)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–73p (1970)); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285 § 3, 84 Stat. 314, 315, *amending* 42 U.S.C. § 1973b(a) (1970).

62. Pub. L. No. 93-443, 88 Stat. 1263.

63. *United States v. Classic*, 313 U.S. 299, 314–15 (1941); *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976); *see, e.g.*, National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg-1–gg-18) (requiring certain agencies, such as motor vehicle agencies and public assistance offices, to offer eligible voters opportunities to register to vote).

64. U.S. CONST. art. I, § 4.

65. KENNETH R. THOMAS, CONG. RSCH. SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 1–2 (2014).

66. KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 1 (2019).

67. *Id.*

68. *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (holding that state regulation of the elections process must involve “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself”). *See generally* *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (finding that the

states—not the federal government—that regulate the elections process, including, for example, “ballot access, absentee voting requirements, the establishment of voting places, provision of Election Day workers, and the counting and certification of the votes.”⁶⁹ State legislatures, with input from their governors, can make state laws about the administration of elections and make or initiate election administration amendments to their state constitutions.⁷⁰ Certain state laws and constitutions empower state or local officials to make decisions about the “administration of elections.”⁷¹

C. Ballot Qualification

Pursuant to Article I, Section 4 of the U.S. Constitution, the rules governing how candidates get on the ballot are “set by each state.”⁷² Because the states are vested with the power to set their own rules, it creates a situation in which there is little uniformity.⁷³ Some states require a filing fee to be paid to qualify.⁷⁴ Some require a petition in the form of a proportional number of signatures from electors within the district in which a candidate is running.⁷⁵ Other states require a combination of the two, or the choice between paying a fee or qualifying by petition.⁷⁶ And finally, some states require neither, but rather simply a pledge of loyalty to the political party.⁷⁷

The first and most prevalent method of ballot qualification is a filing fee.⁷⁸ Twenty-six states, representing 224 congressional districts, require that candidates may qualify for the ballot by simply paying a filing fee.⁷⁹ The rules governing ballot qualification, including the amount of filing fees, are set by each individual state, resulting in a serious lack of uniformity.⁸⁰ Filing fees range from a fixed amount to a percentage of the

states are empowered by Article I, Section 2, and the Seventeenth Amendment to establish voter qualifications determining who may vote in congressional elections).

69. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-6, ELDERLY VOTERS: INFORMATION ON PROMISING PRACTICES COULD STRENGTHEN THE INTEGRITY OF THE VOTING PROCESS IN LONG-TERM CARE FACILITIES 4 (2009).

70. *Amending State Constitutions*, BALLOTPEdia, https://ballotpedia.org/Amending_state_constitutions [<https://perma.cc/7N2B-K7CB>].

71. SHANTON, *supra* note 66, at 3.

72. Stephen Ansolabehere & Alan Gerber, *The Effects of Filing Fees and Petition Requirements on U.S. House Elections*, 21 LEGIS. STUD. Q. 249, 251 (1996).

73. *Id.*

74. *Id.* at 252 tbl.1.

75. *Id.*

76. *Id.*

77. *Id.* at 251.

78. *Id.*

79. *Id.*

80. *Id.*

salary of the office sought by the candidate.⁸¹ Filing fees are controversial in election law for many reasons beyond the scope of this Note.⁸² This Note argues against filing fees as the sole method for ballot qualification, as a filing fee presents a quick and easy way to defraud the American voters.

The second most common method of ballot qualification, and the method for which this Note advocates, is by petition. The petition process is a method of ballot qualification that does not require the payment of a filing fee or party assessment, but instead requires that a candidate for office obtain signatures from a specified number of persons in the district in which the candidate seeks elected office.⁸³ A nominating petition is generally used for candidates to access the ballot as part of a major political party.⁸⁴ The rationale for requiring a petition is to deter frivolous candidates from running for a party's nomination.⁸⁵ A nominating petition presents four categories of issues: "numerical standards, signatory qualifications, deadlines, and distributional requirements."⁸⁶ The U.S. Supreme Court rejected a requirement in which candidates needed to collect petitions from 15% of registered voters to qualify for the ballot, but suggested in dictum that a 1% requirement would be acceptable.⁸⁷ Just three years later, however, the Court upheld a Georgia petition requirement of 5%, stressing that percentage requirements are to be considered in the context of the total ballot access requirements.⁸⁸ States have imposed various signatory requirements on petitions with the

81. *Id.*

82. See Thomas Stratmann, *Ballot Access Restrictions and Candidate Entry in Elections*, 21 EUR. J. POL. ECON. 59, 61–62 (2005) for an informative discussion as to how filing fees act as a gatekeeping mechanism in modern-day elections; *see also* *Bullock v. Carter*, 405 U.S. 134, 140–41 (1972) (finding that filing fees are in violation of an individual's equal protection under the Fourteenth Amendment unless a state provides an alternative manner to qualify for low-income candidates); *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (upholding *Bullock* in its finding that filing fees are unconstitutional unless an alternative method is provided for qualification).

83. FLA. STAT. § 99.095(1) (2022).

84. James S. Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 UTAH L. REV. 290, 318–19 (1974).

85. EDWARD D. FEIGENBAUM & JAMES A. PALMER, *BALLOT ACCESS 1: ISSUES AND OPTIONS* 33 (William C. Kimberling ed., 1988).

86. Jardine, *supra* note 84, at 319.

87. *Williams v. Rhodes*, 393 U.S. 23, 33 n.9 (1968) (dictum).

88. *Jeness v. Forston*, 403 U.S. 431, 432 (1971); *see also* *Am. Party v. White*, 415 U.S. 767, 789–90 (1974) (upholding a 500 signature requirement); *Jackson v. Ogilvie*, 325 F. Supp. 864, 866–67 (N.D. Ill. 1971) (upholding a 5% signature requirement), *aff'd*, 403 U.S. 925 (1971); *Socialist Lab. Party v. Rhodes*, 318 F. Supp. 1262, 1268 (S.D. Ohio 1970) (striking down a 7% requirement), *aff'd*, 409 U.S. 942 (1972); *People's Const. Party v. Evans*, 491 P.2d 520, 521–22 (N.M. 1971) (upholding a 3% requirement). *But see* *Coffelt v. Bryant*, 381 S.W.2d 731, 734 (Ark. 1964) (upholding a 15% requirement).

minimum condition that the signer must be a registered voter.⁸⁹ While states have the right to regulate their own elections, the Court has rejected attempts to limit who can sign a petition.⁹⁰ As James S. Jardine notes, “If the purpose of the law is to ensure valid signatures, it may be achieved by checking signatures against voting rolls; if the purpose is to penalize citizens who falsely represent themselves as qualified signatories, it is unjust to penalize the candidates by increasing their costs.”⁹¹

The third category of issues with respect to nominating petitions is the deadline for collecting petitions. The Court has found that a six-month period for collecting petitions is acceptable.⁹² However, lower courts have invalidated deadlines that are shorter.⁹³ This third category generally is not at issue because states have implemented longer periods to collect petitions.⁹⁴ The final category is distribution requirements. A distribution requirement is where candidates are required to obtain a specified number of petitions from specific localities.⁹⁵ The Supreme Court struck down an Illinois distribution requirement in *Moore v. Ogilvie*,⁹⁶ relying on the *Reynolds v. Sims*⁹⁷ “one man, one vote” reapportionment theory.⁹⁸ Lower courts began subsequently invalidating distribution requirements,⁹⁹ but

89. See *Stout v. Black*, 289 N.E.2d 456, 458–59 (Ill. App. Ct. 1972); Note, *Minority Party Access to the Ballot*, 1971 DUKE L.J. 451, 458–60 (1971); Comment, *Legal Obstacles to Minority Party Success*, 57 YALE L.J. 1276, 1278–80 (1948).

90. *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 997 (S.D.N.Y.), *aff'd*, 400 U.S. 806 (1970) (rejecting a provision limiting signatories to persons who had been registered to vote in the last general election), *aff'd*, 400 U.S. 806 (1970); see also UTAH CODE ANN. § 20-3-38 (1969), *repealed by* 1994 Utah Laws ch. 1, § 74 (enacting a petition requirement that required all petitions to be notarized, which was ripe with constitutional challenge and ultimately repealed by statute), *repealed by* 1994 Utah Laws ch. 1, § 74.

91. Jardine, *supra* note 84, at 321.

92. See *Jeness*, 403 U.S. at 438.

93. See, e.g., *People's Party v. Tucker*, 347 F. Supp. 1, 4 (M.D. Pa. 1972) (holding unconstitutional and subsequently invalidating a twenty-one-day period for collecting petitions).

94. See, e.g., COLO. REV. STAT. § 1-4-801(6) (allowing for nearly a year to gather signatures for a petition).

95. See, e.g., ch. 46 ILL. COMP. STAT. § 10-3 (1943) (requiring that candidates obtain “the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties within the State”).

96. 394 U.S. 814 (1969).

97. 377 U.S. 533 (1964).

98. *Moore*, 394 U.S. at 819.

99. See, e.g., *Baird v. Davoren*, 346 F. Supp. 515, 522–23 (D. Mass. 1972) (upholding a maximum of one-third of signatures from any county); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1272 (S.D. Ohio 1970) (upholding a law requiring that at least two hundred signatures come from thirty different counties), *aff'd*, 409 U.S. 942 (1972); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 991 (S.D.N.Y. 1970) (upholding a requirement that a candidate must obtain at least fifty signatures from each county of the state), *aff'd*, 400 U.S. 806 (1970).

courts will likely uphold distribution requirements where the requirement is "relatively minor."¹⁰⁰

III. HOW TO IDENTIFY A SHAM POLITICAL CANDIDATE

Longtime Speaker of the Illinois House of Representatives and Chairman of the Illinois Democratic Party Michael Madigan faced allegations of running two sham candidates in the 2016 Election.¹⁰¹ Speaker Madigan faced Jason Gonzales in the 2016 Democratic primary election for the Illinois House of Representatives District 22.¹⁰² Allegations surfaced that Speaker Madigan's political action committee backed two unlikely-to-win candidates with Hispanic surnames in the election to confuse Hispanic voters planning to vote for Gonzales, a Hispanic candidate.¹⁰³ The two alleged sham candidates were Joe Barboza and Grasiela Rodriguez.¹⁰⁴ Speaker Madigan won the primary election, defeating opponent Jason Gonzales.¹⁰⁵

Gonzales filed a section 1983 suit action against Speaker Madigan alleging that his opponent conspired with other individuals and organizations to place two "sham" candidates with Hispanic surnames on the ballot in the primary election in an effort to dilute Gonzales's electoral support, ultimately violating Gonzales's equal protection rights.¹⁰⁶ The *Gonzales* court turned to the *Smith v. Cherry*¹⁰⁷ decision for a series of critical factors used to evaluate an equal protection violation in an election.¹⁰⁸ The factors are:

- (1) the ballot must include a "sham" candidate, defined to mean a candidate who has promised to step down in favor of another person if elected;
- (2) the fraud must be undisclosed;
- (3) there must be a reasonable possibility that the sham

100. Jardine, *supra* note 84, at 322.

101. *Supreme Court Declines to Take up Madigan Opponent's Appeal in Legal Challenge over Alleged Sham Candidates*, CHI. TRIB. (Nov. 5, 2021, 6:12 PM), <https://thechicagodailytribune.com/supreme-court-declines-to-take-up-madigan-opponents-appeal-in-legal-challenge-over-alleged-sham-candidates-chicago-tribune/> [<https://perma.cc/GE9C-L2AH>].

102. Tom Schuba, *Race to Watch: Illinois House of Representatives District 22*, NBC CHI. (Feb. 25, 2016, 2:03 PM), <https://www.nbcchicago.com/news/local/race-to-watch-illinois-house-of-representatives-district-22/2020046/> [<https://perma.cc/9T64-SQY8>].

103. *Supreme Court Declines*, *supra* note 101.

104. Austin Berg, *Madigan Aides Sought out, Assisted Alleged 'Sham' Candidates in Primary Election*, MADISON - ST. CLAIR REC. (Feb. 5, 2019), <https://madisonrecord.com/stories/511756328-madigan-aides-sought-out-assisted-alleged-sham-candidates-in-primary-election> [<https://perma.cc/LF22-R8M5>].

105. Amanda Vinicky, *Madigan, and His Match: Challenger Jason Gonzales*, NPR ILL. (Mar. 8, 2016, 8:51 PM), <https://www.nprillinois.org/statehouse/2016-03-08/madigan-and-his-match-challenger-jason-gonzales> [<https://perma.cc/G8CV-8KWT>].

106. *Gonzales v. Madigan*, 403 F. Supp. 3d 670, 674 (N.D. Ill. 2019).

107. 489 F.2d 1098 (7th Cir. 1973).

108. *Gonzales*, 403 F. Supp. 3d at 674.

candidacy affected the outcome of the election; and (4) the alleged misconduct must constitute state action.¹⁰⁹

While the situation analyzed in *Gonzales* is not the same as how candidates use sham candidates today, it presents a first-of-its-kind look at how a sham candidate might be litigated in the courts.

A. *Creating a Successful Sham Candidate*

Step 1. Identify an electorate that would be susceptible to a sham candidate—in other, not as kind words, an electorate that a sham candidate could easily confuse and manipulate. Someone who intends to use a sham candidate to win an election must target a locality that would fall prey to the fraud of a sham candidate. For example, a less educated electorate or an electorate that primarily speaks a language other than English might be susceptible electorates for a successful sham candidate. Electorates that are not as involved in politics or do not do their own research into the candidates might also be possible electorates to use a sham candidate to manipulate an election.

Step 2. Find someone willing to be a sham candidate. Finding a candidate that would be a successful sham candidate is likely the most difficult—yet most important—step in the process. Examples of successful sham candidates are candidates with the same name as the incumbent opponent,¹¹⁰ candidates that fit a specific demographic,¹¹¹ and candidates that can run as a third-party in a district that might be amenable to minor-party candidates.¹¹² The challenge lies in encouraging someone to be the sham candidate without breaking federal or state campaign contributions laws. As this Note previously discussed, running as a sham candidate is not illegal, but accepting financial contributions to do so is illegal.¹¹³

Step 3. File your sham candidate's qualification paperwork with the state's department of elections. Filing the required paperwork and paying the filing fee is the simplest part of manufacturing a sham candidate—something this Note aims to fix. In states such as Florida, California, and Texas, candidates seeking access to the ballot need not collect petitions to run but simply pay a filing fee.¹¹⁴ Localities in which candidates simply file paperwork and pay a qualifying fee are ripe with the possibility of sham candidates because of the simplicity in accessing the ballot.

109. *Id.*

110. Anna Nemtsova, *Putin's New Dirty Trick to Win Elections Has Candidates Battling Their Doppelgängers*, DAILY BEAST (Sept. 18, 2021, 9:34 AM), <https://www.thedailybeast.com/doppelgangers-battle-it-out-in-vladimir-putins-rigged-elections> [<https://perma.cc/4B8B-B7HN>].

111. Zorn, *supra* note 37.

112. *Id.*

113. See *supra* note 48 and accompanying discussion.

114. Ansolabehere & Gerber, *supra* note 72, at 252 tbl.1.

Step 4 (Optional). Run a sham campaign on behalf of your sham candidate. The final, but optional, step in the manufacturing of a successful sham candidate is to run a shadow campaign. While this step is optional because sham candidates have successfully altered elections without running a sham campaign,¹¹⁵ the final step in the process is to operate a campaign on behalf of the sham candidate.¹¹⁶ In one successful sham campaign, the White sham candidate sent out a mailer¹¹⁷ to a majority Black neighborhood featuring a stock image of a Black woman purporting to be the sham candidate.¹¹⁸

B. *The Inadequacy of Current Election Laws*

At this point, one should be questioning how sham candidate schemes are legal. This Note seeks to inform readers about a significant loophole in this country's election laws. This Section delves into current election laws and sham candidates to explain the legality of sham candidates.

The following are two ballot qualification statutes from Florida and North Carolina, states that have both fallen victim to sham candidates. Florida's qualification statute states:

[E]ach person seeking to qualify for nomination or election to a federal, state, or multicounty district office, . . . shall file his or her qualification papers with, and pay the qualifying fee, which shall consist of the filing fee and election assessment, and party assessment, . . . or qualify by the petition process¹¹⁹

115. See, e.g., *supra* Section I.A and accompanying discussion about sham candidate Alex Rodriguez.

116. See, e.g., Lizette Alvarez & Steve Eder, *Political Cloud Relegates Marco Rubio's Onetime Insider to the Outside*, N.Y. TIMES (Mar. 11, 2016), <https://www.nytimes.com/2016/03/12/us/marco-rubio-david-rivera.html?timespastHighlight=david,rivera,alliegro> [<https://perma.cc/952A-D8QK>]. Congressman David Rivera has been the center of many state and federal investigations into his role in secretly funneling tens of thousands of dollars into a political action committee to finance a sham candidate in the 2012 election. *Id.* This money was used to pay for the sham candidate's advertisements, automatic phone calls to voters, and other expenses with the goal of undercutting Congressman Rivera's democratic opponent. *Id.*

117. Colloquially known as a mailer, political mail is defined as "any mailpiece sent for political campaign purposes by a registered candidate, a campaign committee, or a committee of a political party to promote candidates, referendums, or campaigns." OFFICE OF THE INSPECTOR GENERAL, UNITED STATES POSTAL SERVICE, REP. NO. 20-225-R20, PROCESSING READINESS OF ELECTION AND POLITICAL MAIL DURING THE 2020 GENERAL ELECTIONS 1 (2020).

118. Matt Dixon, *Mystery Florida Donor Targets Key Senate Races with Misleading Mailers*, POLITICO (Oct. 20, 2020, 3:15 PM), <https://www.politico.com/states/florida/story/2020/10/20/mystery-florida-donor-targets-key-senate-races-with-misleading-mailers-1327678> [<https://perma.cc/Z2WA-9S2S>].

119. FLA. STAT. § 99.061(1) (2022).

Dissecting Florida's candidate qualification statute provides a simple process to have one's name on the ballot: file qualification papers and pay the qualifying fee (or qualify by petition to avoid constitutional equal protection issues discussed in *Bullock v. Carter*¹²⁰ and *Lubin v. Panish*¹²¹).¹²² North Carolina's qualification statute demonstrates the same issue as seen in Florida's:

No one shall be voted for in a primary election without having filed a notice of candidacy with the appropriate board of elections, State or county, as required by this section To this end every candidate for selection as the nominee of a political party shall file with and place in the possession of the board of elections . . . a notice and pledge At the time of filing a notice of candidacy, each candidate shall pay to the board of elections . . . a filing fee for the office sought¹²³

North Carolina's ballot qualification statute presents a very similar situation in which a candidate may simply file a notice of candidacy, take a pledge, and pay a filing fee.¹²⁴ For the sake of brevity, this Note will not discuss every state that has a flawed qualification statute. What is important to understand is that this problem is not unique to one or two states—the majority of states across the country are at risk of being targeted by sham candidates.

Take, for example, Florida and Alex Rodriguez—the sham Florida State Senate candidate in Miami with the same Hispanic last name of incumbent Senator José Javier Rodríguez. Running a sham candidate is not a crime in Florida—it is a shady political trick.¹²⁵ Alex Rodriguez was not charged with defrauding the electorate or tampering with an election; Rodriguez was charged with accepting illegal campaign contributions.¹²⁶ Looking at Florida's election laws, Rodriguez followed the law: he filed his qualification papers with the State of Florida's

120. 405 U.S. 134 (1972).

121. 415 U.S. 709 (1974).

122. FLA. STAT. § 99.061(1) (2022).

123. N.C. GEN. STAT. § 163-106 to 107 (2021).

124. N.C. GEN. STAT. § 163-106 (2021); N.C. GEN. STAT. § 163-107 (2021).

125. *Ex-Florida Senator Frank Artiles Facing Charges in Sham Candidate Probe*, NBC S. FLA. (Mar. 22, 2021, 10:28 AM), <https://www.nbcmiami.com/news/local/ex-florida-senator-frank-artiles-facing-charges-in-sham-candidate-probe/2408763/> [<https://perma.cc/2AVE-S7EC>].

126. Spencer, *supra* note 44. Rodriguez was also charged with lying on official campaign documents, however that charge stemmed from a discrepancy with his address. *Ex-Florida Senator*, *supra* note 125.

Secretary of State¹²⁷ and he paid his qualifying fee.¹²⁸ Rodriguez did not do anything illegal by running as a sham candidate. The legality of this leaves voters asking, "What can we do if a sham candidate enters the race?" The answer is nothing.¹²⁹

While there are certainly positives to making it easier for political parties and political candidates to access the ballot,¹³⁰ this Note takes a different approach and argues the opposite: restrict ballot access to save democracy. Following the laws of these two states, the four-step plan to manufacture a successful sham candidate is completely legal. These two statutes present a legal loophole in which a political operative can successfully thwart the will of American voters with the use of a sham political candidate. This Note argues that this loophole should be closed by federal legislation. If Congress is not willing to act, the President should take executive action to close the loophole. Alternatively, if the President is not willing or not able to take the appropriate executive action, this Note calls on the states to effectuate their own legislation. If all fifty states close the sham candidate loophole, public confidence will be restored in the election system, and in turn, democracy.

IV. PROPOSED CHANGE

This Part proposes a legislative framework to solve the issue of sham candidates. The statutory framework is threefold: (1) it disposes of qualification by filing fee; (2) it amends the standard oath of office to include a series of requirements that the candidate wishes to serve in the office if elected; and (3) it creates a new crime, punishable by a felony, for defrauding an election or assisting the candidate in defrauding an election.

Method of qualifying for election to federal, state, county, or district office; form of candidate oath.—

(1) Each person seeking to qualify for nomination or election to a federal, state, county, or district office, shall file his or her qualification papers, meet the petition requirements, and pay the qualifying fee, which shall consist of the filing fee and election assessment, and party

127. FLA. DEP'T OF STATE, CANDIDATE OATH – STATE AND LOCAL PARTISAN OFFICE (June 10, 2020, 5:41 PM) (on file with author); *see* FLA. STAT. § 99.061(1) (2022).

128. FLA. DEP'T OF STATE, CHECK (June 12, 2020, 8:40 AM) (on file with author); *see* FLA. STAT. § 99.061(1) (2022).

129. *See, e.g., Local Campaign Was Model for Using Spoilers in Florida Statehouse Races*, GAINESVILLE SUN (Aug. 8, 2021, 6:00 AM), <https://www.gainesville.com/story/opinion/2021/08/08/editorial-run-spoiler-perry-enneking-race-provided-state-model/5471600001/> [<https://perma.cc/3HSZ-2Z85>] (reporting that the State Attorney refused to file charges against a sham candidate because there is nothing illegal that was done).

130. Daniel Baracskey, *Ballot Access*, in THE FIRST AMENDMENT ENCYCLOPEDIA (The Free Speech Center ed., 2009).

assessment, if any has been levied, to the Department of State, and qualify by the petition process.

(2) Each person seeking to qualify for nomination or election to a federal, state, or multicounty district office, shall take and subscribe to the following oath or affirmation in writing, where knowingly and willfully violating the oath or affirmation is punishable by felony:

Before me, an officer authorized to administer oaths, personally appeared [please print name as you wish it to appear on the ballot], to me well known, who, being sworn, says that he or she is a candidate for the office of [insert office sought]; that he or she desires to hold the office for which he or she is nominated or elected; that he or she will remove himself or herself from the ballot if he or she no longer desires to hold the office for which he or she is nominated or elected; that he or she is qualified under the Constitution and laws of the United States to hold the office to which he or she desires to be nominated or elected; that he or she has qualified for no other public office in the state, the term of which office or any part thereof runs concurrent with that of the office he or she seeks; and that he or she will support the Constitution of the United States.

Protection against fraudulent elections.—

(1) Each person that knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of the State of a legal and impartially conducted election process shall be punishable by felony.

(2) Each person that knowingly and willfully aids, abets, counsels, commands, induces, or procures a fraudulent election, is punishable as a principal.

A. Effect of Proposed Change

To be widely accepted as a viable option for closing the sham candidate loophole, the proposed statutory framework must fix the problem, and it must be effective in doing so. When proposing new legislation, the first step in the process is to start with an “idea of what will make this country better or stronger.”¹³¹ After an idea is developed, the second step is to write a bill that provides a solution to the problem identified in step one.¹³² In the present situation, this nation has a problem in sham candidates. A legislator must then develop a solution to close the sham candidate loophole. The reason we need this statutory change is because society must counteract what harm sham candidates bring to democracy. The judiciary generally stays out of politics and will excuse

131. Tom Carper, *How a Bill Becomes a Law*, U.S. S., <https://www.carper.senate.gov/public/index.cfm/how-a-bill-becomes-a-law#B3576BA3-BFB9-4320-96ED-57E4CFFE7892> [<https://perma.cc/3WVZ-UBBF>].

132. *Id.*

itself from resolving federal election contests.¹³³ Thus, this nation needs statutory change that disallows sham candidates.

The proposed statute does three things: (1) it requires every candidate for elected office in the United States of America to qualify for the ballot by petition; (2) it requires every candidate for elected office to take an oath of office that requires candidates to affirm that they desire the office they seek; and (3) it criminalizes, punishable by felony, actions to defraud an election or attempt to defraud an election, including aiding and abetting a candidate's actions to defraud or attempt to defraud an election. The question to ask oneself in crafting legislation is: "Will this legislation be successful and effective in solving the problem at hand?" The answer is yes. While this statute is not designed to defeat all forms of fraud on the electorate, it is specifically drafted to close the sham candidate loophole. Nonetheless, it does much more by requiring qualification by petition. No longer may candidates simply cut a check for \$1,187.88 and qualify for the ballot.¹³⁴ By requiring qualification by petition and including criminal penalties for those that knowingly and willfully defraud or attempt to defraud an election, potential sham candidates must stop and ask themselves if what they are doing is worth it. This statute will not only make it harder to defraud an election as a sham candidate, but it will deter those contemplating using sham candidates.

B. *Methods of Enactment*

While the above proposed framework is presented in a statutory form, there are three other options that could have the same or similar effect on thwarting sham candidacies. This framework could be passed by federal legislation, executive action, or individual state legislation.

Article I, Section 4 of the U.S. Constitution vests in Congress the power to pass federal laws regulating congressional elections, preempting any contrary state statutes.¹³⁵ The Supreme Court has held that the right to vote for Members of Congress is derived from the Constitution, and that Congress therefore may legislate under this section of the Article to protect the integrity of this right.¹³⁶ Congress may protect the right of suffrage against both official and private abridgment.¹³⁷ Where a primary election is an integral part of the procedure of choice, the right to vote in

133. Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction Over Election Contests, and the Political Question Doctrine*, 72 FLA. L. REV. 1153, 1198 (2020).

134. In 2020, sham candidate Alex Rodriguez in Miami-Dade County, Florida, wrote a check for \$1,187.88 to qualify for the ballot. FLA. DEP'T OF STATE, CHECK (June 12, 2020, 8:40 AM) (on file with author); see FLA. STAT. § 99.061(1) (2022).

135. Morley & Tolson, *supra* note 53.

136. *United States v. Classic*, 313 U.S. 299, 314–15 (1941).

137. *Id.* at 315; *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976).

that primary election is subject to congressional protection.¹³⁸ The Court has protected the sanctity of the right to vote by protecting the right to cast a ballot and have it counted honestly;¹³⁹ providing freedom from personal violence and intimidation;¹⁴⁰ safeguarding against a failure to count ballots lawfully cast;¹⁴¹ and protecting against the dilution of lawfully cast votes.¹⁴² To accomplish these ends necessary under the Elections Clause, Congress has been empowered to adopt the statutes of the states and enforce them by its own action.¹⁴³ It may, in short, use its power under this clause, combined with the Necessary and Proper Clause,¹⁴⁴ to regulate the times, places, and manner of electing Members of Congress so as to fully safeguard the integrity of the process.¹⁴⁵

The second method in enacting the proposed framework above is through presidential executive action. Article II of the United States Constitution states that “[t]he executive Power shall be vested in a President of the United States . . . [t]he President shall be Commander in Chief of the Army and Navy of the United States, [and] . . . he shall take care that the laws be faithfully executed”¹⁴⁶ The President’s ability to issue executive orders and proclamations is also derived from express

138. *Classic*, 313 U.S. at 315–21. The authority of *Newberry v. United States*, 256 U.S. 232 (1921), to the contrary, has been vitiated. See *United States v. Wurzbach*, 280 U.S. 396, 398 (1930).

139. *United States v. Mosley*, 238 U.S. 383, 386 (1915); *United States v. Saylor*, 322 U.S. 385, 387 (1944).

140. *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884).

141. *Mosley*, 238 U.S. at 386.

142. *Saylor*, 322 U.S. at 386.

143. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 383 (1880); *Ex parte Clarke*, 100 U.S. 399, 403–04 (1880); *United States v. Gale*, 109 U.S. 65, 66–67 (1883); *In re Coy*, 127 U.S. 731, 752–53 (1888).

144. U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause allows Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” *Id.* It grants Congress the powers that are implied in the Constitution, but that are not explicitly stated. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405–06 (1819).

145. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), however, Justice Hugo Black grounded his vote to uphold the age reduction in federal elections and the presidential voting residency provision sections of the Voting Rights Act Amendments of 1970 on this clause. See generally *Oregon v. Mitchell*, 400 U.S. 112, 119–35 (1970) (Black, J.). Four Justices specifically rejected this construction, *id.* at 209–12 (Harlan, J., concurring in part and dissenting in part), 288–92 (Stewart, J., Berger, C.J., and Blackmun, J., concurring in part and dissenting in part), and the other four implicitly rejected it by relying on totally different sections of the Constitution in coming to the same conclusions as did Justice Black, *id.* at 135, 140–41 (Douglas, J., concurring in part and dissenting in part), 231 (Brennan, J., White, J., and Marshall, J., concurring in part and dissenting in part).

146. U.S. CONST. art. II, §§ 1–3.

or implied statutory authority from Congress.¹⁴⁷ However, the President's executive action was significantly limited in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁴⁸ in which the Court explained that the President's power to issue executive orders must stem from either an "act of Congress or from the Constitution itself."¹⁴⁹ Following *Youngstown*, the Court has followed Justice Robert H. Jackson's "tripartite test" set forth in *Youngstown* as the current standard of review for an executive order or proclamation with a determination of whether the executive order is closely related to the statute upon which it relies.¹⁵⁰ The courts may also look to Congress's intent in a given act of legislation if necessary,¹⁵¹ or they may make their determination based on the topic of the executive action.¹⁵² As has been demonstrated, the courts are more likely to give deference if the issue involves "foreign affairs or national security than when [it] involve[s] economic, political or social matters."¹⁵³ Elections in modern-day America are a matter of national security, and thus executive action may be an acceptable vehicle for the change this country needs.

The final method to enact the proposed statutory framework presents the most challenging method of change: a fifty-state effort to pass the legislation in each individual state legislature. The U.S. Constitution vests the power in the states to determine the "[t]imes, [p]laces and [m]anner of holding Elections for Senators and Representatives."¹⁵⁴ What this means is that each individual state has the power to regulate not only its own elections, but the federal elections of its state.¹⁵⁵ While the federal government cannot pass laws regulating elections except for protecting the integrity of one's vote, the country is witnessing coordinated campaigns amongst political parties to pass specific legislation in every state to achieve goals they could not in Congress.¹⁵⁶ If Congress and the

147. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952). In such instances where Congress statutorily grants the President the authority to act, his authority is at its peak, whereas the President is at its lowest ebb of power when acting against the express or implied will of Congress. *Id.* at 635 (Jackson, J., concurring).

148. 343 U.S. 579 (1952).

149. *Id.* at 585.

150. JOHN CONTRUBIS, CONG. RSCH. SERV., 95-772A, EXECUTIVE ORDERS AND PROCLAMATIONS, at CRS-15 (1999).

151. *Id.*

152. *Id.*

153. *Id.*

154. U.S. CONST. art. I, § 4, cl. 1.

155. See, e.g., Zach Montellaro & Daniel Payne, *Republicans Want to Change State Election Laws. Here's How They're Doing It.*, POLITICO (June 5, 2021, 7:00 AM), <https://www.politico.com/news/2021/06/05/republi-can-texas-georgia-election-laws-491808> [<https://perma.cc/8LEA-RXZA>] (noting that state legislatures are passing similar voter restrictions laws so as to have a national effect).

156. See, e.g., *id.*; Stephen Groves, *GOP-Led States See Texas Law as Model to Restrict Abortions*, ASSOCIATED PRESS (Sept. 2, 2021), <https://apnews.com/article/health-religion-us->

President come to the conclusion that they do not have the power to effectuate legislative or executive change to protect democracy from sham candidates, it would be necessary for the states to individually pass the proposed legislation.

C. *Challenges to Proposed Change*

As with any law regulating elections, this proposed statute will likely draw the ire of many critics. Critics on one end might take issue with the actual substance of the proposed statute, while critics on the other end might take issue with the procedural mechanisms for effectuating such change. These criticisms and challenges are fair and should be discussed. However, this Note advocates for change. Whether change is made through congressional legislation or executive action, and whether the statute includes criminal penalties or simply civil penalties, this change is necessary and should draw wide support. This Section discusses both substantive and procedural challenges to the proposed statute by first analyzing the actual language of the statute and looking into how successful it might be in defeating sham candidates, and then discussing the two most central challenges to the way the change might be effectuated: federalism and executive overreach concerns.

1. Substantive Challenges

The first challenge to the proposed statutory framework is to the criminal penalties associated with knowingly and willfully violating the oath of candidacy instead of a civil fine. In proposing a criminal penalty for procuring a sham candidate or filing to run as a sham candidate, the goal is to deter future acts of fraud on U.S. elections. A classic theory in criminal law is that by imposing severe penalties to punish offenders, potential offenders will be deterred from committing such a crime.¹⁵⁷ Opponents to the statute proposed above will argue that a felony is too heavy-handed of a penalty, but a fraudulent election that thwarts the will of the voters is itself a serious crime against democracy. Although sham candidate Alex Rodriguez faces prison time for his involvement in the vote-siphoning scheme, his prison time does not stem from his actual sham candidacy but rather from accepting illegal campaign

supreme-court-laws-23c373f3252d511f15ccc170887c30e2 [https://perma.cc/U7MP-KEAS]; Richard F. Potthoff, *The National Popular Vote Proposal Is Doomed if Even Only One State Rejects Plurality Voting for President*, LONDON SCH. OF ECON. & POL SCI. (Dec. 2, 2021), <https://blogs.lse.ac.uk/usappblog/2021/12/02/the-national-popular-vote-proposal-is-doomed-if-even-only-one-state-rejects-plurality-voting-for-president/> [https://perma.cc/S8SR-V6XQ].

157. Anthony Ellis, *A Deterrence Theory of Punishment*, 53 PHIL. Q. 337, 337 (2003).

contributions.¹⁵⁸ The political operative, Frank Artiles, who coordinated the Rodriguez sham candidacy also faces prison time, not from his coordination of the scheme, but rather for illegally funneling money from political action committees to Rodriguez's sham campaign.¹⁵⁹ This is because what Rodriguez and Artiles did with respect to operating and employing a sham candidate was not illegal.

Elections have consequences. Senator Ileana Garcia won the election and is now a voting member in the Florida Senate. Senator Garcia has voted for legislation that, presumably, former Senator José Javier Rodríguez would not have voted for, including some of Florida's most politicized legislation in recent history such as Florida's "voter suppression law,"¹⁶⁰ Florida's "anti-riot bill,"¹⁶¹ and Florida's "anti-transgender athlete bill."¹⁶² The Democratic voters that mistakenly voted for Alex Rodriguez, whom they thought was incumbent Senator Rodríguez, do not have their interests represented by Senator Garcia. The State of Florida has been changed by the Rodriguez sham candidacy, the voters of Senator Garcia's district have been defrauded, and thus, criminal penalties are needed to deter and punish the coordination and carrying out of sham candidacies.¹⁶³

Another legitimate criticism to the proposed statute is that it could have a chilling effect on individuals seeking to run for office, specifically people with limited resources or people that run controversial publicity campaigns. A chilling effect is the "result of a law or practice that seriously discourages the exercise of a constitutional right, such as the

158. *Florida Ethics Panel Recommends \$20k Fine for Sham Candidate*, ASSOCIATED PRESS (Oct. 27, 2021), <https://apnews.com/article/elections-miami-florida-campaigns-tallahassee-b230b79861e92b7e4f03be7447141e98> [<https://perma.cc/Q3RY-SH4Q>].

159. *Id.*

160. S.B. 90, 90th Leg., 123d Sess. (Fla. 2021); Eliza Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, BRENNAN CTR. FOR JUST. (May 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law> [<https://perma.cc/78WX-ECRZ>].

161. H.B. 1, 90th Leg., 123d Sess. (Fla. 2021); Bobby Caina Calvan, *Florida 'Anti-Riot' Bill Goes to Governor amid Racial Strife*, ASSOCIATED PRESS (Apr. 15, 2021), <https://apnews.com/article/race-and-ethnicity-legislature-florida-ron-desantis-death-of-george-floyd-ed554b00260af498fa30ca4b534fb643> [<https://perma.cc/B2XA-KLPR>].

162. S.B. 1028, 90th Leg., 123d Sess. (Fla. 2021); *On the First Day of Pride Month, Florida Signed a Transgender Athlete Bill into Law*, NPR (June 2, 2021, 7:54 AM), <https://www.npr.org/2021/06/02/1002405412/on-the-first-day-of-pride-month-florida-signed-a-transgender-athlete-bill-into-l> [<https://perma.cc/YBW8-Z55E>].

163. To maintain neutrality and point out biases when they are apparent, it is important to stress that no link has been drawn between Senator Garcia and the ploy to place a sham candidate on the ballot. Additionally, since the drafting of this Note, Senator Garcia won re-election to her senate seat without the shadow of a sham candidacy hanging over her election. Finally, nothing in this Note intends to point any blame whatsoever towards Senator Garcia. This Note maintains that the Senator has done nothing wrong and has since been democratically and fairly elected to the Florida Senate.

right to appeal or the right of free speech.”¹⁶⁴ While the effect of legislation on the rights of individuals is always a valid concern, this Note takes the position that the proposed statute would not deter people with limited resources from running for office and would not open the door for politically motivated prosecutions. Most importantly, this statute presents the opportunity to access the ballot *without* having to spend money. For many reasons, this should promote open and easy access to the ballot in a way that does not adversely disadvantage those who cannot afford to pay the fee, or those that are dissuaded from running for election because of the fee.¹⁶⁵ Ballot qualification fees are controversial.¹⁶⁶ Many states have ruled that ballot fees are an unconstitutional property qualification for state-elected office.¹⁶⁷ While this Note does not necessarily advocate for the removal of ballot qualification fees, it does advocate for the more favorable use of qualification by petition—possibly in addition to ballot qualification fees—rather than the sole use of such fees.

A final substantive challenge to the proposed statute is that the statute could have unforeseen negative effects such as an increased occurrence of politically motivated prosecutions. This concern could be especially relevant for candidates that have run activist-like campaigns, such as Ralph Nader.¹⁶⁸ This Note does not aim to persecute individuals such as

164. *Chilling Effect*, BLACK’S LAW DICTIONARY (11th ed. 2019).

165. Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. PENN. L. REV. 109, 112–13 (1971).

166. Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 AM. U. L. REV. 1283, 1284 (2005).

167. See, e.g., *Johnson v. Grand Forks Cnty.*, 113 N.W. 1071, 1076 (N.D. 1907) (invalidating North Dakota’s requirement that candidates pay a fee to access the ballot as an unconstitutional property qualification); *People ex rel. Breckton v. Bd. of Election Comm’rs*, 77 N.E. 321, 323 (Ill. 1906), *overruled by* *People ex rel Lindstrand v. Emmerson*, 165 N.E. 217 (Ill. 1929); *Ledgerwood v. Pitts*, 125 S.W. 1036, 1046 (Tenn. 1906) (striking Tennessee’s ballot fee because it “makes an arbitrary, capricious, and unreasonable classification of candidates in providing that persons who are able to pay the prescribed fees may enter the primary, while other men who are equally capable and worthy are excluded because of their pecuniary inability to pay the prescribed fee”); *Ballinger v. McLaughlin*, 116 N.W. 70, 71 (S.D. 1908) (finding South Dakota’s filing fee to be “an arbitrary tax” and “clearly unconstitutional”); *Kelso v. Cook*, 110 N.E. 987, 997 (Ind. 1916) (invalidating filing fees that are arbitrarily based on candidates’ salaries); *State ex rel. Adair v. Drexel*, 105 N.W. 174, 179 (Neb. 1905) (striking a fee that charged more than the expense of placing a name on the ballot as being “arbitrary”).

168. Ralph Nader is an American political activist that ran for President of the United States four times, running with the Green Party twice, the Reform Party once, and as an independent once. *Ralph Nader*, BALLOTPEDIA, https://ballotpedia.org/Ralph_Nader [<https://perma.cc/2H5F-M547>]. Nader is more famously known for running what some Democrats allege as a “spoiler campaign” in the 2000 Election, where Nader earned over ninety thousand votes. Tunku Varadarajan, *Don’t Call Him a ‘Spoiler’*, WALL ST. J. (May 31, 2008, 12:01 AM), <https://www.wsj.com/articles/SB121218925042534249> [<https://perma.cc/DT22-E4SU>]. A 2003 study found that Nader’s candidacy was a critical factor in Bush’s victory, and a 2004 study found

Ralph Nader, but it does aim to stop sham candidates such as Alex Rodriguez. What makes Nader's situation significantly different from that of a sham candidate such as Alex Rodriguez is that Nader never possessed the intent element to defraud an election as required under the proposed statute.¹⁶⁹ The purpose of the proposed statute is not to criminalize every third-party candidate that runs for office and earns votes—the intent requirement of the statute is specifically drafted to require a prosecutor to prove that a candidate intended to defraud the electorate of a free and fair election. Substantive challenges are a valid concern of this Note, and this Note advocates for a particularly drafted statute with the goal of criminalizing the use of sham candidates to siphon votes with the purpose of defrauding the electorate of a fair election.

2. Procedural Challenges

The first procedural challenge to this proposed statute is a federalism argument. Federalism is the “legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments.”¹⁷⁰ As the Supreme Court has recognized, states “possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause,”¹⁷¹ the provision of the Constitution that makes federal law the “supreme Law of the Land” and prohibits states from contravening lawful enactments of Congress.¹⁷² The Constitution “imposes two broad limitations on the powers” of the legislative branch.¹⁷³ First, the Constitution sets forth “enumerated powers” that create what is often referred to as an “internal limit” on the powers of the legislative branch¹⁷⁴—in other words, the powers of the legislative branch

that Nader voters had the profile of likely voters with a preference for Democratic candidates; thus, voters were therefore likely to vote for Gore over Bush in the absence of Nader's candidacy. See Christopher S. P. Magee, *Third-Party Candidates and the 2000 Presidential Election*, 84 SOC. SCI. Q. 574, 574–75 (2003); Priscilla L. Southwell, *Nader Voters in the 2000 Presidential Election: What Would they Have Done Without Him?*, 41 SOC. SCI. J. 423, 423 (2004).

169. See *supra* Section IV (“Each person that knowingly and willfully . . . defrauds . . . the residents . . . of a legal and impartially conducted election process shall be punish[ed] . . .”).

170. *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

171. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

172. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

173. ANDREW NOLAN ET AL., CONG. RSCH. SERV., R45323, FEDERALISM-BASED LIMITATIONS ON CONGRESSIONAL POWER: AN OVERVIEW 2 (2018).

174. *Id.*

are restricted by what they expressly provide for.¹⁷⁵ Second, the Constitution imposes “external” constraints on congressional action—affirmative prohibitions found elsewhere in the text or structure of the Constitution.¹⁷⁶ Congress’s enumerated powers are explicitly laid out in the Constitution and include the Spending Clause,¹⁷⁷ the Commerce Clause,¹⁷⁸ Congress’s treaty power,¹⁷⁹ Congress’s powers under the Civil War Amendments,¹⁸⁰ and the Necessary and Proper Clause.¹⁸¹ On the other hand, external limitations to Congress’s authority can be found through the “anti-commandeering” doctrine;¹⁸² various limitations to Congress’s spending power such as the clear notice requirement,¹⁸³ the

175. See, e.g., *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 43–44 (1869) (“That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms . . .”).

176. See, e.g., *United States v. Comstock*, 560 U.S. 126, 135 (2010) (noting that a “a federal statute, in addition to being authorized by Art. I, § 8, must also ‘not [be] prohibited’ by the Constitution”) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); see also *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (“[L]egislative powers are, however, limited not only by the scope of the Framers’ affirmative delegation, but also by the principle ‘that they may not be exercised in a way that violates other specific provisions of the Constitution.’”).

177. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes . . .”).

178. *Id.* cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

179. U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty . . .”); *id.* art. II, § 2, cl. 2 (“[The President] shall have Power, *by and with the Advice and Consent of the Senate*, to make Treaties . . .”) (emphasis added); *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (concluding that Congress generally has the power to enact legislation to implement a treaty even where it would lack such power in the treaty’s absence).

180. U.S. CONST. amend. XIII, § 1; *id.* amend. XIV, § 1; *id.* amend. XV, § 1.

181. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

182. The “anti-commandeering” doctrine generally prohibits the federal government from requiring states and localities to adopt or enforce federal policies. See, e.g., *Printz v. United States*, 521 U.S. 898, 921, 929–30 (1997) (concluding that Congress cannot require states to enforce or implement federal policies, even where the relevant federal legislation merely requires state officials to perform “discrete, ministerial tasks”); *New York v. United States*, 505 U.S. 144, 175–78 (1992) (reasoning that in light of the absence of an enumerated constitutional power to issue commands to state governments and the Tenth Amendment’s reservation of state sovereignty, Congress may not “commandeer” or “conscript” state governments into implementing federal policies by “directly compelling them to enact and enforce a federal regulatory program”).

183. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (holding that if Congress intends to place conditions on the receipt of federal funds by states, it “must do so unambiguously,” thereby “enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation”).

relatedness requirement,¹⁸⁴ an independent constitutional bar,¹⁸⁵ and the anti-coercion doctrine;¹⁸⁶ the Eleventh Amendment;¹⁸⁷ and the Equal Sovereignty Doctrine.¹⁸⁸

In the modern era of congressional authority and federal legislation, there have been two “competing conceptions of federalism.”¹⁸⁹ One conception was displayed in the Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹⁰ which held that the Constitution does not insulate state governments from the reach of generally applicable laws enacted pursuant to Congress’s power under the Commerce Clause.¹⁹¹ In so holding, the Court concluded that the “principal and basic limit” on Congress’s powers vis-à-vis the states is “the built-in restraints that our system provides through state participation in federal governmental action,” in other words, the primary means to enforce federalism-based limits on Congress’s powers would be through the “political processes” (i.e., Congress’s and the President’s discretion) and not through the Court.¹⁹² This conception of federalism has largely been supplanted in recent years with the view that the judiciary must safeguard state governments from federal overreach.¹⁹³ This competing conception was exemplified in the Court’s decision in *United States v. Lopez*,¹⁹⁴ which held that a federal law forbidding possession of a gun within one thousand feet of a school exceeded Congress’s powers under the Commerce Clause.¹⁹⁵ Justice Anthony Kennedy noted in his concurrence in *Lopez* that the political branches continue to have a central

184. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[C]onditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.”).

185. *Id.* at 208 (stating that constitutional provisions other than the Spending Clause “may provide an independent bar to the conditional grant of federal funds”).

186. *Id.* at 211 (explaining that just as Congress may not require states to adopt or enforce federal policy under the anti-commandeering doctrine, Congress may not attach conditions to the receipt of federal funding when “the financial inducement” offered by such funding is “so coercive as to pass the point at which pressure turns into compulsion”).

187. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

188. The equal sovereignty doctrine is the “fundamental principle” that the “Nation ‘was and is a union of states, equal in power, dignity and authority.’” *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013).

189. Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1768–69 (2006).

190. 469 U.S. 528 (1985).

191. *See id.* at 547.

192. *Id.* at 556.

193. Chemerinsky, *supra* note 189, at 1768–69.

194. 514 U.S. 549 (1995).

195. *See id.* at 552.

role in recognizing the limits on Congress's powers to enact legislation that potentially intrude on areas reserved to state governments.¹⁹⁶

The second likely procedural challenge to the proposed statute attacks the manner in which the President of the United States can effectively enact such change. If Congress fails to enact the statutory framework through legislative action, this Note advocates for the enactment of the statute through presidential executive orders. A presidential executive order is an "order issued by or on behalf of the President, [usually] intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow."¹⁹⁷ Executive orders are not acts of Congress; Congress may not amend, approve, reject, or overturn them.¹⁹⁸ Congress, oftentimes, will pass legislation that attempts to thwart a President's ability to issue executive orders, such as by removing funding.¹⁹⁹ However, the only true way to effectively overturn an executive order is for a sitting U.S. President to issue another executive order to that effect.²⁰⁰ Historically, the Executive Branch has relied on parts of the U.S. Constitution—specifically Article II—as support for issuing executive orders and proclamations.²⁰¹ Article II states, in pertinent part, that "the executive Power shall be vested in a President of the United States of America[,]" and that "he shall take Care that the Laws be faithfully executed"²⁰² However, the President's power is also derived from the express and implied statutory authority from Congress.²⁰³

The modern adaptation of presidential authority came with President Harry S. Truman's use of presidential executive power in seizing the United States steel industry at the onset of the Korean Conflict.²⁰⁴ Upon the announcement of a nation-wide strike of the steel industries, President Truman issued an executive order authorizing the Secretary of Commerce to take possession of and operate most of the nation's steel mills.²⁰⁵ After the litigation moved its way through the federal courts, the Supreme Court found that the President had acted without statutory or

196. *See id.* at 577 (Kennedy, J., concurring).

197. *Executive Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).

198. *What Is an Executive Order?*, AM. BAR ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/ [<https://perma.cc/3LVM-WMEU>].

199. *Id.*

200. *Id.*

201. CONTRUBIS, *supra* note 150, at CRS-1 to -2.

202. U.S. CONST. art. II, §§ 1, 3.

203. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In such instances where Congress statutorily grants the President the authority to act, his authority is at its peak. *Id.* at 635 (Jackson, J., concurring).

204. CONTRUBIS, *supra* note 150, at CRS-5.

205. Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952).

constitutional authority and declined to entertain the contention that presidential power should be implied from the aggregate of his powers under the Constitution.²⁰⁶ The Court emphasized that the President has the power to make sure the laws are faithfully executed, not to make them.²⁰⁷ However, what has come from the decision in *Youngstown* was Justice Jackson's three-part framework for analyzing the exercising of presidential power through executive orders:

When the President acts pursuant to an express or implied authorization of Congress, this authority, is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the entire matter.²⁰⁸

While this framework may be "over-simplified,"²⁰⁹ the courts continue to adhere to its standards.²¹⁰ Historically, matters involving foreign affairs or national security are given more deference by the judiciary than those that involve economic, political, or social matters.²¹¹ Thus, should Congress fail to enact the proposed statute, the President should have the power to effectuate it through executive action.

CONCLUSION

America's democracy is under attack and the future of the nation stands in the crosshairs.²¹² But democracy is not broken for the reasons

206. *Youngstown*, 343 U.S. at 588–89. The "aggregate of powers" theory of presidential power states that the President has and may exercise a reservoir of implied powers created by the accumulation of the total of express powers vested in him by the Constitution and the statutes. *Id.* at 587. Thus, executive orders will often start with a recital of the so-called powers vested in the President as President, as Commander in Chief, etc. *Id.* at 588.

207. *Id.* at 587.

208. *Id.* at 635–38 (Jackson, J., concurring).

209. This is as described by Justice Jackson himself in his concurrence in *Youngstown*. *Id.* at 635.

210. See *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)); *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 788 (D.C. Cir. 1979).

211. CONTRUBIS, *supra* note 150, at CRS-15.

212. In a brief search of CNN, Fox News, and AP News (in an attempt to be nonpartisan by using sources from the perceived political left, right, and center), you will find that voting rights

one might think or the reasons the news implies. The news will tell you that democracy is broken because former President Donald Trump incited a violent attack on the Capitol,²¹³ or President Joe Biden bypassed the Constitution with overreaching and tyrannical executive actions,²¹⁴ or that President Biden enacted an unconstitutional vaccination mandate violating the rights of millions of Americans.²¹⁵ This Note does not aim to incite ideological beliefs or political differences but rather to explain how democracy is under attack from an unlikely source: the U.S. election system itself. The United States of America's election system has withstood the test of time.²¹⁶ In 2020, the U.S. election system withstood an attack from a sitting president claiming that the election was stolen.²¹⁷ But this nation's democracy persevered and now faces an unlikely adversary: sham political candidates.

This Note is not intended to be a catchall of attempts to trick voters. There are countless problems facing elections: false smear campaigns run by opponents, fake news or a media that fails to report the entire truth, candidates that change their own name to appeal to a dominant ethnicity, etc. But what this Note does is differentiate between everyday campaign issues and a tactic that is intended to defraud the electorate. This Note

in America are under attack. *See, e.g.*, Fredreka Schouten, *Pro-Trump Republicans Try to Rewrite State Election Laws as a Voting Rights Showdown Looms in Congress*, CNN (Jan. 9, 2022, 11:26 PM), <https://www.cnn.com/2022/01/09/politics/gop-election-voting-rights-battleground-states/index.html> [<https://perma.cc/H2U9-KDGC>]; Brian Slodysko, *Invoking Jan. 6, Dems Pivot to Fight for Voting Legislation*, ASSOCIATED PRESS (Jan. 10, 2022), <https://apnews.com/article/capitol-siege-voting-rights-joe-biden-senate-elections-election-2020-5b63509f7e1407bfde54ddce7c072174> [<https://perma.cc/RJ95-MK9N>]; Yael Halon, *Texas Lawmaker Says Dem Voting Rights Bill an Assault on Democracy: We're 'Tired of the Swamp Games'*, FOX NEWS (Dec. 27, 2021, 9:22 PM), <https://www.foxnews.com/media/chip-roy-fires-voting-rights-elections-bill-swamp-games> [<https://perma.cc/FMS9-CK5C>].

213. Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html> [<https://perma.cc/72KJ-TLF7>].

214. Charles Cooke, Opinion, *President Biden's Extension of the Eviction Moratorium is Unconstitutional and He Knows It*, USA TODAY (Aug. 5, 2021, 4:19 PM), <https://www.usatoday.com/story/opinion/2021/08/05/eviction-moratorium-delta-variant-brett-kavanaugh-unconstitutional/5498649001/> [<https://perma.cc/C6R4-6FK5>].

215. Rebecca Rainey, *Federal Court Blocks Biden Administration's Vaccination Mandate*, POLITICO (Nov. 6, 2021, 4:02 PM), <https://www.politico.com/news/2021/11/06/biden-vaccine-order-blocked-federal-court-519908> [<https://perma.cc/9EYF-Q7P8>].

216. Lawrence Norden et. al., *Our Election System Is Resilient — But Still Has Room for Improvement*, BRENNAN CTR. FOR JUST. (Sept. 22, 2020), <https://www.brennancenter.org/our-work/research-reports/our-election-system-resilient-still-has-room-improvement> [<https://perma.cc/HX2A-TP7W>].

217. Philip Rucker, *Trump Escalates Baseless Attacks on Election with 46-Minute Video Rant*, WASH. POST (Dec. 2, 2020, 8:00 PM), https://www.washingtonpost.com/politics/trump-election-video/2020/12/02/f6c8d63c-34e8-11eb-a997-1f4c53d2a747_story.html [<https://perma.cc/35TU-YHZW>].

focuses solely on sham candidates and proposes a two-part solution to rid American democracy of such: first, require that every candidate for elected office—from President of the United States all the way down to a local office—qualify for the ballot by petition, and not by simply signing a check; and, second, require every candidate take an oath of office that they do in fact wish to hold the office they seek, punishable by felony. There will be critics—that much is certain. However, protecting the sanctity of elections should be on the forefront of this nation's concerns, regardless of political party. The point of this Note is that sham candidates are not a politically controversial topic. All parties benefit from closing the sham candidate loophole. Passing legislation defeating sham candidates by closing the loophole is something that political parties professing many different ideologies would and should support.

As enthusiastic as this Note is for closing the sham candidate loophole, it is important to also recognize and evaluate the opposition to such measures. Conservatives very well may oppose "big government"²¹⁸ congressional action or executive overreach, whereas Democrats might oppose individual states passing their own versions of legislation for inefficiency reasons. This Note does not aim to dismiss these criticisms—there are valid concerns. Rather, this Note takes the position that there is a problem with the way states conduct elections and it needs to stop. This Note proposes legislation to pass at the federal level but does not necessarily dismiss unique opportunities to effectuate the change. This Note provides alternative methods for effectuating the change that is needed to close the sham candidate loophole. This Note advocates the central position that elections in this country are the cornerstone of democracy. Safe and legitimate elections are what separate this country from anarchy. Protecting the sanctity and integrity of the American political election is the chief goal of this Note.

Elections have consequences. When a sham candidate tips the scale in an election, there are consequences. As seen in the State of Florida, sham candidate Alex Rodriguez siphoned enough votes from the incumbent senator in a district that heavily favored that incumbent senator, and the underdog candidate won. That underdog—now state senator—has voted on and helped pass a multitude of social and political reforms against which that incumbent senator would have likely stood firm in opposition. Failing to close the sham candidate loophole could have irreversible consequences that threaten democracy everywhere. After all, "the ignorance of one voter in a democracy impairs the security of all"²¹⁹

218. PEW RESEARCH CENTER, BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY 10 (2021).

219. John F. Kennedy, President, United States of America, Address at the Vanderbilt University 90th Anniversary Convocation (May 18, 1963).

