THE ENFORCEMENT ACT OF 1870, FEDERAL JURISDICTION OVER ELECTION CONTESTS, AND THE POLITICAL QUESTION DOCTRINE

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Abstract

A lingering provision of a major Reconstruction Era law, the Enforcement Act of 1870, 28 U.S.C. § 1344, grants federal courts jurisdiction over election contests arising from alleged Fifteenth Amendment violations, except for the positions of presidential elector, member of Congress, and state legislator. Some courts have erroneously construed this provision as categorically denying the federal judiciary subject-matter jurisdiction over any constitutional challenges, including by voters, to the outcomes of presidential, congressional, or state legislative elections. This pernicious line of authority periodically re-emerges to wrongly preclude litigants from attempting to vindicate their right to vote in federal court.

More broadly, § 1344 points to a fundamental indeterminacy at the heart of the electoral process. The Reconstruction Era Congress sought to preclude federal courts from adjudicating constitutional challenges concerning congressional and presidential elections because the Constitution grants the chambers of Congress themselves the authority to resolve them. Yet subsequent grants of subject-matter jurisdiction allow federal courts to adjudicate such disputes. Thus, different branches of the federal government may come to different conclusions as to whether the Constitution requires or forbids certain votes to be counted.

Ultimately, it appears that the Constitution enshrines departmentalism, rather than judicial supremacy, in the realm of federal elections and voting rights. When federal courts conclude that the Constitution either requires or forbids the counting of certain votes in congressional or presidential elections, those rulings are not binding on the chambers of Congress. Furthermore, the political question doctrine acts as a modern replacement for § 1344's jurisdictional restrictions with regard to federal elections. Once the chambers of Congress have initiated the process of exercising their constitutional prerogative to determine an election's outcome, the federal judiciary should decline to get involved in all but the most extreme circumstances.

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INTRODUCTION

In 2018, the U.S. Court of Appeals for the Fifth Circuit held in *Keyes v. Gunn*[1] that federal courts lack subject-matter jurisdiction to hear post-election constitutional challenges to state officials' refusal to count certain votes in federal or state legislative races.[2] The court based its ruling on an obscure remnant of a Reconstruction Era statute, the Enforcement Act of 1870,[3] presently codified at 28 U.S.C. § 1344.[4]

Section 1344 grants district courts jurisdiction "of any civil action" authorized by law "to recover possession of any office," *except* that of presidential elector, U.S. Senator, U.S. Representative (or delegate), or member of a state legislature.[5] This jurisdictional grant applies where "the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude."[6] Section 1344 specifies that a court's

1. 890 F.3d 232 (5th Cir.), *cert. denied*, 139 S. Ct. 434 (2018).

2. *Id.* at 236–39.

3. *See* ch. 114, § 23, 16 Stat. 140, 146 (1870) (codified as amended at 28 U.S.C. § 1344 (2018)). The Supreme Court has referred to this statute by a wide variety of names, including the Force Act of 1870, Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019); the Voting Rights Act of 1870, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 612 (1987); and the 1870 Civil Rights Act, Smith v. Wade, 461 U.S. 30, 37 n.5 (1983).

4. *Keyes*, 890 F.3d at 236–37.

5. 28 U.S.C. § 1344.

6. *Id.* For brevity, this Article will use the term "racial discrimination" and its variants broadly to refer to discrimination based on "race, color, or previous condition of servitude."

jurisdiction extends "only so far as to determine the rights of the parties to office by reason of the denial of the right [to vote], guaranteed by the Constitution . . . and secured by any law."[7] *Keyes* held that § 1344's language excluding lawsuits concerning federal and state legislative elections completely precludes the federal judiciary from hearing challenges affecting the outcomes of such elections under other jurisdictional statutes.[8] *Moore's Federal Practice* endorses the court's ruling.[9]

Keyes is merely the latest in a line of Fifth Circuit precedents that have misinterpreted and misapplied § 1344 for more than seventy years.[10] This interpretation—which is also binding on the U.S. Court of Appeals for the Eleventh Circuit[11]—wrongly prevents voters from even attempting to enforce their constitutional rights in federal and state legislative races through post-election federal litigation. More broadly, however, § 1344 implicates four overarching issues.

First, § 1344 underscores the fundamental indeterminacy over which branch of government—Congress or the courts—has ultimate constitutional authority to determine the outcomes of federal elections.[12] The Constitution empowers the chambers of Congress to not only determine the "Elections" and "Returns" of their own members,[13] but also count electoral votes.[14] Yet the federal judiciary generally enforces constitutional rights, enjoining congressional acts that violate the Constitution as the courts have interpreted it.[15] And over the course of the twentieth century, the Supreme Court recognized an ever-broader array

7. *Id.*

8. *Keyes*, 890 F.3d at 237.

9. *See* Martin H. Redish, *Election Disputes Under 28 U.S.C. § 1344*, *in* 15A MOORE'S FEDERAL PRACTICE: CIVIL § 104.48 (Daniel R. Coquillette et al. eds., 3d ed. 2020) ("[F]ederal courts may not hear election contests involving any of the excluded offices.").

10. *See, e.g.*, *Keyes*, 890 F.3d at 236–38; Hubbard v. Ammerman, 465 F.2d 1169, 1180 (5th Cir. 1972); Johnson v. Stevenson, 170 F.2d 108, 110 (5th Cir. 1948).

11. *See* Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (accepting as binding precedent all rulings of the former Fifth Circuit handed down before October 1, 1981, when the Eleventh Circuit became independent).

12. *See generally* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (arguing that post-election constitutional challenges are political questions that federal courts should decline to hear).

13. U.S. CONST. art. I, § 5, cl. 1.

14. *Id.* art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the [electoral] Votes shall then be counted."); *accord id.* amend. XII.

15. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

of voting rights under the Fourteenth Amendment.[16] The Court has even occasionally imposed its view of the Constitution in areas constitutionally committed to Congress's exclusive discretion.[17]

The Reconstruction Congress crafted § 1344 to preserve its constitutional prerogative to determine the outcomes of federal elections and prevent interbranch disputes.[18] It intended that provision to bar federal courts from adjudicating the main type of election-related constitutional challenge that would have arisen at the time: alleged violations of the Fifteenth Amendment.[19] As Congress later expanded the scope of federal courts' jurisdiction to include voting-related claims[20] and the Court recognized new voting-related constitutional rights, however, Congress did not amend § 1344 to keep up. Federal courts—at least those outside the Fifth and Eleventh Circuits—may therefore adjudicate post-election constitutional challenges under other jurisdictional statutes, unencumbered by § 1344's restrictions.[21] Two difficult questions consequently arise: (1) whether the Constitution's grants of authority to Congress to resolve congressional and presidential elections allow it to ignore the federal judiciary's constitutional rulings in cases concerning the results of such elections, and (2) whether the Court would attempt to enforce those rulings by overturning Congress's determinations.

Second, § 1344 squarely implicates Congress's authority to curtail the jurisdiction of either the federal judiciary as a whole,[22] or federal district courts specifically, over constitutional claims. Commentators and courts have long debated the scope of Congress's power to restrict federal courts' jurisdiction.[23] But little attention has yet been given to whether

16. *See* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2098–112 (2018).

17. *See* Powell v. McCormack, 395 U.S. 486, 521 (1969).

18. *See infra* note 296 and accompanying text.

19. *See infra* note 394 and accompanying text (explaining why § 1344 is best understood as a jurisdiction-stripping measure, even though it only refers to federal district courts).

20. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2018)) (granting federal district courts federal-question jurisdiction, subject to an amount-in-controversy requirement); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 28 U.S.C. § 1343(a)(3) (2018)) (granting federal district courts jurisdiction over cases involving alleged violations of constitutional rights under color of state law).

21. *See infra* Part II.

22. *See infra* notes 390–394 and accompanying text.

23. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 271–72 (1985) (arguing that Article III's repeated use of the phrase "all cases" means that Congress must give some federal court jurisdiction over each type of dispute characterized as a "case," including cases arising under the U.S. Constitution); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 15 & n.55 (2019) (citing articles rejecting the notion that either Article III or separation-of-powers principles limit Congress's authority over federal courts' jurisdiction); Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the*

Congress may enact a measure such as § 1344—or even broader variations—specifically prohibiting federal district courts, or the federal judiciary more broadly, from enforcing constitutionally protected voting rights.

Third, § 1344 is an important part of the story of Congress's failure to protect the voting rights of African Americans following the Civil War, particularly in southern states. Section 1344 reflects Congress's assertion of sole constitutional authority to determine the outcomes of federal elections, including by enforcing the Fifteenth Amendment's restrictions. Congress's later refusal to exercise that power to enforce African Americans' voting rights and combat discrimination allowed southern states to systematically disenfranchise African Americans for the better part of the twentieth century,[24] until the Voting Rights Act of 1965 opened the door to greater minority participation in our political system.[25]

Finally, § 1344 bolsters the notion that the original understanding and intent behind the Equal Protection Clause were that it protected civil rights, rather than political rights such as the right to vote. The Enforcement Act provided an unprecedented panoply of new protections for African Americans' voting rights. Yet, § 1344 granted federal courts jurisdiction only over Fifteenth Amendment violations (and only when they affected the results of certain types of elections). One plausible explanation for that jurisdictional limitation is that the Fourteenth Amendment was not understood as protecting voting rights.

Section 1344 has received very limited attention in academic literature. Most of the seminal works on federal jurisdiction do not discuss it,[26] while others touch on it only briefly.[27] This Article appears to be the first to offer a comprehensive analysis of the statute and the constitutional issues it raises. This Article demonstrates that, despite rulings such as *Keyes*,[28] § 1344 does not pose an obstacle to most voting

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"Jurisdiction" of the "Federal Courts," 78 TEX. L. REV. 1405, 1422–23 (2000) (arguing that the Due Process Clause, rather than Article III, limits Congress's authority over the federal judiciary's jurisdiction); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 888–916 (2011) (documenting how the federal judiciary's political supporters have repeatedly used the vetogates of the legislative process to block jurisdiction-stripping proposals).

24. *See infra* Section I.E.

25. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702 (2014)).

26. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION (7th ed. 2016); RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015).

27. *See, e.g.*, Richard D. Freer, *Elections*, *in* 13D FEDERAL PRACTICE AND PROCEDURE § 3576 (Charles Alan Wright & Arthur Miller eds., 3d ed. 2019) (talking briefly about § 1344 in its discussion of elections and federal question jurisdiction); Redish, *supra* note 9, § 104.48 (mentioning § 1344 briefly and later stating that "it may be doubted if today Section 1344 has any application at all").

28. 890 F.3d 232, 236, 239–40 (5th Cir.), *cert. denied*, 139 S. Ct. 434 (2018).

rights cases brought under other jurisdictional statutes. Nevertheless, the political question doctrine likely restricts federal courts' authority to adjudicate constitutional challenges to the results of a federal election once Congress has taken up the matter.

Part I begins by discussing the statutory context in which § 1344 was enacted—the Enforcement Act of 1870. This Part delves into the statute's structure and legislative history, including the post-Reconstruction and Congress's oddly incomplete effort to repeal it. After examining the range of circumstances in which courts have applied § 1344, this Part concludes by explaining how Congress failed to exercise the very authority to prevent racial discrimination in federal elections that the statute reserved exclusively for Congress.

Part II argues that § 1344 is much narrower than the Fifth Circuit concluded. It applies only when a candidate sues in federal court, claiming that unconstitutional racial discrimination against voters caused her to lose an election. It is inapplicable to other types of plaintiffs and other causes of action, to which other grants of jurisdiction apply.[29] Perhaps most importantly, § 1344's restrictions do not limit the scope of a federal court's jurisdiction under other statutes.

Finally, Part III examines the larger issues that § 1344 implicates. The Constitution likely empowers Congress to prohibit either federal district courts in particular, or the federal judiciary as a whole, from adjudicating cases concerning the constitutional right to vote. Moreover, even if a federal court has statutory subject-matter jurisdiction over a case involving a federal election, the political question doctrine likely precludes it from exercising that jurisdiction once Congress has begun exercising its constitutional prerogative to determine that election's outcome.[30] A brief conclusion follows.

I. THE ENFORCEMENT ACT OF 1870

Congress enacted § 1344 in part to protect its constitutional prerogatives by excluding federal district courts from adjudicating election contests arising from unconstitutional racial discrimination in federal elections. The statute likewise denied district courts jurisdiction over such contests concerning elections for state legislatures to preserve the historical privilege of state legislative chambers to determine the elections and returns of their respective members. Before exploring the proper interpretation of § 1344 and the constitutional issues it implicates, it is necessary to understand the provision's background. This Part begins

29. *See, e.g.*, 28 U.S.C. § 1331 (2018) (federal question jurisdiction); *id.* § 1343(a)(3) (providing district courts jurisdiction over cases arising from constitutional or statutory violations of provisions guaranteeing "equal rights"); *id.* § 1343(a)(4) (providing district courts jurisdiction over cases arising from violations of federal laws protecting voting rights).

30. *See supra* notes 13–14 and accompanying text.

by examining the statute through which § 1344 was enacted, the Enforcement Act of 1870.[31] It then delves into the Act's legislative history, reviewing evidence of the Reconstruction Congress's intent and purpose in enacting it. This Part also examines the post-Reconstruction Congress's botched attempt to repeal § 1344, before exploring the judiciary's history of interpreting it.

A. *Statutory Provisions*

Section 1344 originated in the Enforcement Act of 1870.[32] Congress passed the Enforcement Act shortly after ratifying the Fifteenth Amendment.[33] The Act was intended to protect African Americans, primarily in southern states, from increasing violence by white supremacist groups such as the Ku Klux Klan (KKK) and Knights of the White Camellia, particularly with regard to the exercise of voting rights.[34] As Professor Franita Tolson explains, the law was "framed as an effort to enforce the mandates of the Fifteenth Amendment," but the final version "went beyond prohibiting abridgements or denials of the right to vote on the basis of race."[35]

The Enforcement Act began by prohibiting public officials from engaging in racial discrimination against people attempting to vote or fulfill the prerequisites for voting (i.e., registering).[36] Violations of these provisions were misdemeanors, and victims of racial discrimination

31. Ch. 114, 16 Stat. 140 (1870).

32. *Id.*

33. *See* U.S. CONST. amend. XV, § 1.

34. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3668–69 (1870) (statement of Sen. Spencer); *see also* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 118–21, 144–48 (2019) (explaining that Congress enacted the Enforcement Act to combat violent resistance to African American voting in the South); RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–96, at 90, 190 (2017) (discussing the racial violence in the South during Reconstruction and the government's response).

35. Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 357 (2019).

36. Enforcement Act §§ 1–2, 16 Stat. at 140; *see* Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019) (describing the Enforcement Act as "the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment").

Section 3 of the Act specified that, if a public official wrongly refused to allow an eligible person to register or fulfill any other prerequisites for voting, those requirements must be deemed fulfilled and the person's vote must be accepted, counted, and given full effect. Enforcement Act § 3, 16 Stat. at 140–41. In the 1875 case *United States v. Reese*, 92 U.S. 214 (1876), the Supreme Court held that this provision was unconstitutional because it applied to anyone who was wrongly prevented from registering to vote, regardless of whether such denial was on racial grounds, *id.* at 218, 221 ("The third section does not in express terms limit the offence of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race . . . .").

could sue the officials responsible for $500 and attorney's fees.[37] The Act also contained several prohibitions on voter intimidation and violence against voters, but the Supreme Court struck down several of them. For example, § 4 of the Act made it a misdemeanor to obstruct anyone from either voting or fulfilling the requirements for voting through force, bribery, intimidation, or other unlawful means.[38] Later sections of the Act made such conduct a felony when it involved congressional elections.[39] Again, victims could also sue an offender for $500 in statutory damages and attorney's fees.[40] In the midst of Reconstruction, the Court held that § 4 exceeded Congress's power to enforce the Fifteenth Amendment.[41] The Court explained that § 4 was not properly tailored to combating racial discrimination in voting because it prohibited intimidation, bribery, and other interference with voters without regard to whether the actor was motivated by the voter's race.[42]

The Act established even broader protections against race-based voter intimidation. For example, it was a misdemeanor to prevent, impede, or intimidate anyone for whom the Fifteenth Amendment protected the right to vote from exercising that right.[43] This provision prohibited not only direct forms of interference, such as bribery and threats of violence, but more subtle forms, as well, such as threatening to fire a person from their job or evict them from their home.[44] The Supreme Court invalidated this provision in the early twentieth century in *James v. Bowman*[45] on the grounds it exceeded the scope of Congress's authority under the Fifteenth Amendment.[46] The Court explained that the Fifteenth Amendment prohibited discrimination only by the federal government and states concerning voting rights, and "d[id] not contemplate wrongful individual acts."[47]

The Act also imposed a wide range of new protections against voter fraud. Professor Jocelyn Benson explains that the Act was "the first significant federal statute aimed at combating election fraud."[48] The Act

37. Enforcement Act §§ 2–3, 16 Stat. at 140–41.

38. *Id.* § 4, 16 Stat. at 141.

39. *Id.* §§ 19–20, 16 Stat. at 144–45.

40. *Id.* § 4, 16 Stat. at 141.

41. *Reese*, 92 U.S. at 220–21.

42. *Id.* at 220 (holding that § 4 contained "no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment").

43. Enforcement Act § 5, 16 Stat. at 141.

44. *Id.*

45. 190 U.S. 127 (1903).

46. *See id.* at 136, 142.

47. *Id.* at 136.

48. Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 9 (2009).

made it a crime to vote more than once, register or vote despite being ineligible to do so, or unlawfully secure the right to vote in a congressional election.[49] It also prohibited the impersonation of any living, dead, or fictitious person for the purpose of registering or voting.[50] The Act contained a later section prohibiting election officials from failing or refusing to perform their duties, or falsifying the results, specifically in congressional elections.[51]

Other sections were aimed specifically at KKK-fueled violence. The provisions that would eventually be codified in amended form as 18 U.S.C. § 241 made it a federal offense to conspire or "go in disguise upon the public highway" or onto someone else's property with intent to either violate the Act or "prevent or hinder [the] free exercise and enjoyment" of any constitutional right or privilege.[52] These offenses were felonies, and anyone convicted of them was disqualified from holding federal office.[53] If a person violated any state law in the course of committing such offenses, the Act also treated that as an independent federal offense and a federal court could impose the penalties specified in state law.[54]

As its name suggests, the Act also contained a wide range of powerful enforcement mechanisms. Federal marshals, district attorneys, and "every other officer who may be specifically empowered by the President" were directed to arrest and try offenders.[55] Marshals who refused to execute warrants issued under the Act were subject to a $1,000 fine, payable to the victim of the underlying violation.[56] Circuit courts were directed to appoint commissioners to facilitate the "arrest and examination" of alleged offenders.[57] These commissioners were empowered to appoint other "suitable persons" to execute warrants, and those people in turn could summon the posse comitatus, militia, or federal military forces to help them execute their duties and enforce the Fifteenth

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49. Enforcement Act §§ 19–20, 16 Stat. at 144–45.

50. *Id.* Additionally, the Act made it illegal to induce or compel an election official to register or accept a vote from an ineligible person, refuse to register or receive votes from qualified voters, or falsify an election's results. *Id.* The Supreme Court held that a subsequent version of this provision applied even when the defendants did not engage in violence. *See* United States v. Mosley, 238 U.S. 383, 387–88 (1915). That later version of the statute prohibited only conduct that violated particular voters' individual rights, however, rather than "political, non-judicable" interests common to the public as a whole. United States v. Bathgate, 246 U.S. 220, 226–27 (1918).

51. Enforcement Act § 22, 16 Stat. at 145–46.

52. *Id.* § 6, 16 Stat. at 141.

53. *Id.*

54. *Id.* § 7, 16 Stat. at 141.

55. *Id.* § 9, 16 Stat. at 142. The Act made it an offense to help suspected violators escape, or to obstruct a federal officer or other authorized person while they were executing a warrant under the Act or arresting a suspected violator. *Id.* § 11, 16 Stat. at 142–43.

56. *Id.* § 10, 16 Stat. at 142.

57. *Id.* § 9, 16 Stat. at 142.

Amendment.[58] The President could also order the military to assist in enforcing the Act.[59]

The Enforcement Act contained several other critical provisions not directly related to voting rights or racial violence. It directed federal district attorneys to seek writs of quo warranto against former Confederates serving in federal or state office—except for members of Congress or state legislatures[60]—in violation of the Fourteenth Amendment's Disqualification Clause.[61] It also re-enacted[62] and expanded upon the Civil Rights Act of 1866.[63] Congress had originally passed the Civil Rights Act under the Thirteenth Amendment; by re-enacting it, Congress sought to alleviate doubts about its constitutionality by invoking its authority under the Fourteenth Amendment's Enforcement Clause, as well.[64] In the forerunner to the modern 42 U.S.C. § 1981, the Enforcement Act further specified that all people would have the same right "as is enjoyed by white citizens" to make and enforce contracts, participate in judicial proceedings, and receive "the full and equal benefit of all laws and proceedings for the security of person and property."[65] Moreover, no one could be subject to punishments, taxes, or licensure requirements based on their race.[66] Violation of these rights under color of state law was a criminal offense.[67]

Finally, the Act contained several grants of jurisdiction to the federal judiciary. It gave federal courts exclusive jurisdiction over criminal violations of the statute, and allowed circuit courts to hear civil actions arising under it, as well.[68] Section 23 of the Act also specified that any person who is "defeated or deprived of his election to any office"—except for the offices of presidential elector, representative or delegate to Congress, or member of a state legislature—due to denial of the right to vote on account of race may sue "to recover possession of such office."[69]

58. *Id.* § 10, 16 Stat. at 142. Such designees were entitled to compensation for their services. *Id.* § 12, 16 Stat. at 143.

59. *Id.* § 13, 16 Stat. at 143.

60. *Id.* § 14, 16 Stat. at 143. Anyone who sought, accepted, or held any federal or state office in violation of the Disqualification Clause was guilty of a misdemeanor. *Id.* § 15, 16 Stat. at 143–44.

61. U.S. CONST. amend. XIV, § 3.

62. Enforcement Act § 18, 16 Stat. at 144.

63. Ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

64. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1291–93 (1866) (statement of Rep. Bingham); *id.* at 2961 (statement of Sen. Poland) (noting that Congress's power to enact the Civil Rights Act of 1866 "has been doubted and denied by persons entitled to high consideration").

65. Enforcement Act § 16, 16 Stat. at 144.

66. *Id.* The provision permitted states to tax immigrants from foreign countries, but required such taxes to be uniform, regardless of the person's country of origin. *Id.*

67. *Id.* § 17, 16 Stat. at 144.

68. *Id.* § 8, 16 Stat. at 142.

69. *Id.* §§ 19–20, at 146.

It further declared that the candidate's "right to hold and enjoy such office, and the emoluments thereof, shall not be impaired."[70] The law gave federal district and circuit courts concurrent jurisdiction with state courts "to determine the rights of the parties to such office" where the "sole question" concerning a plaintiff's title was the denial of the right to vote on account of race.[71] Over the century and a half that followed, § 23 evolved into the modern 28 U.S.C. § 1344.

B. *Legislative History*

Representative John Bingham, a radical Republican, introduced the Enforcement Act in the House of Representatives in February 1870.[72] The original bill would have enforced the Fifteenth Amendment by guaranteeing African Americans the same voting rights as white citizens[73] and prohibiting states from refusing to accept an eligible person's vote on account of his race.[74] The rest of the bill sought to prevent states with poll taxes from implementing them in a racially discriminatory manner.[75] It broadly granted jurisdiction to the federal courts over the misdemeanors, forfeitures, and civil causes of action created by the Act.[76] There were no provisions concerning election contests, however. The House Judiciary Committee reported the bill with additional prohibitions on voter intimidation and the use of force to prevent African Americans from voting.[77] The House passed the bill under a suspension of the rules by a vote of 131 to 44, with 53 abstentions.[78]

The Senate Judiciary Committee reported its own bill prohibiting racial discrimination in voting, which contained the various provisions authorizing enforcement by federal marshals, specially appointed commissioners, posses comitatus, and even the military found in the final

70. *Id.*

71. *Id.* At the time, both district and circuit courts could act as trial courts that exercised original jurisdiction over cases. *See* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 711–12 (2020) (discussing district and circuit courts as they existed in the early judiciary).

72. *See* H.R. 1293, 41st Cong. (as introduced in the House, Feb. 21, 1870). For an abbreviated version of § 1344's legislative history, see Harrison v. Hadley, 11 F. Cas. 649, 652–53 (C.C.E.D. Ark. 1873) (No. 6137).

73. H.R. 1293 § 1.

74. *Id.* § 6.

75. *Id.* § 4. In particular, in states where poll taxes were required to vote, the bill prohibited election officials from refusing to levy them against African Americans (which would have rendered them ineligible to vote), accept payment from African Americans, or record the fact that an African American paid a poll tax. *Id.*

76. *Id.* § 7.

77. H.R. 1293, 41st Cong. §§ 2, 9 (as reported by H. Comm. on the Judiciary, Mar. 9, 1870).

78. CONG. GLOBE, 41st Cong., 2d Sess. 3504 (1870).

statute.[79] Section 5 of the Senate Judiciary Committee's proposal further specified:

> [A]ny person who shall be deprived of any office, except that of member of Congress or member of a State Legislature, by reason of the violation of the provisions of this act, shall be entitled to recover possession of such office by writ of *mandamus* or other appropriate proceeding; and the circuit and district courts of the United States shall have concurrent jurisdiction [with the proper state courts[80]] of all cases arising under this section.[81]

The committee's proposal separately gave federal courts jurisdiction over criminal prosecutions and civil suits arising under the Act.[82] Republican Senator Matthew Carpenter explained that "[o]f course" the exception for congressional and state legislative races was included "because the Congress and the Legislature are the exclusive judges of the qualifications and elections of their members."[83]

Some Senators, such as Democratic Senator George Vickers of Maryland, objected that Congress lacked constitutional authority to pass the Act.[84] Senator Vickers explained that the Constitution gives states the right to "regulate suffrage," and "[t]he General Government had no control over it."[85] He maintained that, although the Fifteenth Amendment prohibited states from denying African Americans the right to vote on account of race, the bill went much further than that.[86] "If Congress can pass such an act as this," he argued, "it can take the whole subject of suffrage and elections under its control, and pass an election law regulating the appointment of judges of election, and their returns."[87]

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79. *Id.* at 3480 (quoting sections 7 through 12 of the Senate Judiciary Committee's bill); *see also id.* at 3489 (agreeing by unanimous consent to replace the original bill with the substitute reported by the Senate Judiciary Committee). Several senators objected to allowing the military to enforce voting rights laws, particularly at polling places. *Id.* at 3484 (statement of Sen. Vickers); *id.* at 3565–66 (statement of Sen. Thurman); *id.* at 3568 (statement of Sen. Stockton); *id.* at 3657 (statement of Sen. Williams).

80. This clause appears to have been added by unanimous consent. *Id.* at 3565, 3570.

81. *Id.* at 3480 (quoting § 5 of the Senate Judiciary Committee's proposed bill).

82. *Id.* (quoting § 6 of the Senate Judiciary Committee's proposed bill). At the outset of its debates, the Senate added provisions to the committee's bill enforcing the Constitution's disqualification provisions and reenacting the Civil Rights Act of 1866. *Id.*

83. *Id.* at 3563 (statement of Sen. Carpenter).

84. *Id.* at 3481 (statement of Sen. Vickers).

85. *Id.*

86. *Id.*

87. *Id.* Senator Vickers also argued that the Fifteenth Amendment had not been properly ratified. He pointed out that New York had revoked its ratification, the Indiana legislature had ratified the amendment without a quorum in violation of its state constitution, and several southern states had been coerced into approving it. *Id.* Additionally, legislators in many other states had been elected before the issue of ratification arose, meaning the public did not have the chance to

Much of the early Senate debate focused on whether to proceed with the House bill or instead replace it with the bill reported by the Judiciary Committee.[88] Senator Matthew Hale Carpenter, a Republican from Wisconsin, declared that Section 5 of the Act is "the great distinction in doctrine and philosophy between the" House and Senate bills.[89] The House bill only provided remedies against people who prevented African Americans from voting.[90] The Senate bill enforced the Fifteenth Amendment more comprehensively by "giv[ing] effect to the votes of colored persons offered at the polls."[91]

Senator Allen G. Thurman, a Democrat representing Ohio, vigorously opposed Section 5 of the bill. He argued that federal courts could not effectively adjudicate election contests because they lacked the resources to canvass a state's votes.[92] Senator Thurman also pointed out the possibility of intergovernmental conflicts if a state legislature and federal court both attempted to resolve the same election contest.[93] He asked,

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take the issue into account when voting for those legislators. *Id.* at 3481–82; *cf.* Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 577–81 (2002) (arguing that the Fourteenth Amendment's ratification was invalid because the Republican Congress lacked authority under Article V to exclude southern states from the Senate unless they assented to it); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1652–59 (2013) (explaining how northern Republican states had forced the Fourteenth Amendment on former Confederate states); Coleman v. Miller, 307 U.S. 433, 449–50 (1939) (holding that the validity of the Fourteenth Amendment's ratification is a political question subject to the exclusive discretion of the political branches). Vickers further argued that the Fifteenth Amendment should be construed as applying only to elections for federal office. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3481 (1870) (statement of Sen. Vickers).

Democratic Senator Allen G. Thurman of Ohio buttressed these objections, suggesting that the Senate should wait to see if states voluntarily complied with the Fifteenth Amendment on their own before enacting enforcement legislation. *Id.* at 3485 (statement of Sen. Thurman). He also warned that granting $500 in statutory damages to victims of voting rights violations would induce people to perjure themselves by falsely claiming they had been prevented from registering or voting. *Id.* at 3486. Democratic Senator John Stockton of New Jersey objected to the lack of a *mens rea* requirement for the offenses the Judiciary Committee's bill created. *Id.* at 3567 (statement of Sen. Stockton).

88. Republican Senator William Stewart of Nevada objected that the House bill was too narrow because it did not protect African Americans seeking to register to vote and lacked the enforcement mechanisms—federal agents, posse comitatus, and the military—authorized by the Senate Judiciary Committee's bill. *Id.* at 3559–61 (statement of Sen. Stewart). In contrast, Senator Stockton argued that the House bill was unconstitutionally narrow because many of its protections were limited exclusively to African Americans. *Id.* at 3567 (statement of Sen. Stockton).

89. *Id.* at 3563 (statement of Sen. Carpenter).

90. *Id.*

91. *Id.*

92. *See id.* at 3564 (statement of Sen. Thurman).

93. *Id.* (statement of Sen. Thurman) ("Now, suppose a contest is commenced under the State law, and another proceeding is commenced in the United States district court 'by writ of

"Suppose the senate of the great State of New York should decide in favor of the incumbent, and your little bit of a one-horse judge—I beg pardon for using such a slang expression—your little district judge of the United States should decide it the other way?"[94]

Senator Thurman argued that it was particularly problematic to allow federal courts to decide which of a state's competing slates of presidential electors had been elected.[95] "Just think of such a question being brought before a district judge of the United States—the question who is elected President of the United States!"[96] He later cautioned that the bill could impact "every little office" at both the state and local levels, as well, including "constable, township trustee, fence-viewer, [and] hog reeve."[97] He also objected to Section 5 of the Act's authorization of mandamus as a potential remedy in election contests.[98]

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mandamus or other appropriate proceeding;' which jurisdiction is superior? Which decision is to be obeyed?").

94. *Id.* at 3487.

95. *Id.*

96. *Id.*; *see also id.* at 3564 ("[Y]ou may have the spectacle of seeing a contest for the Presidency in a district court of the United States."). Later in his comments, Senator Thurman objected to allowing the President to not only call out military force because of the "danger of a little cheating at the election," but delegate his authority to do so. *Id.* at 3488. Senator Thurman vigorously objected to the notion of allowing troops to be stationed at polling places. *Id.*

97. *Id.* at 3564; *see also id.* at 3486 (discussing gubernatorial and state supreme court elections); *id.* at 3570 (statement of Sen. Sherman) (arguing that Congress should not grant federal courts jurisdiction over election contests involving Fifteenth Amendment violations because "thousands of cases may turn upon votes admitted or excluded on the ground of color").

98. He exclaimed in outrage, "Ye gods! [A] writ of *mandamus* to recover possession of an office!" *Id.* at 3486 (statement of Sen. Thurman). Senator Thurman declared that a writ of mandamus "is never a proper proceeding in cases of contested election." *Id.* (emphasis omitted); *see also id.* ("[I]n no case whatsoever is a *mandamus* the proper remedy for the purpose of trying the question between A B and C D, which of them is entitled to an office."). In England, a court would issue such a writ to a corporation when someone was entitled to be a burgess or corporator. *Id.*; *see also id.* at 3616 (statement of Sen. Howard) ("[A] writ of mandamus is used only in cases where a party in possession of an office owes a special, defined duty to some one . . . and where the conditions for its performance have been fully performed, so that it is the plain, clear duty of the officer to perform the act. It is not issued even in doubtful cases . . . ." (emphasis omitted)).

Senator Stewart insisted that mandamus was a proper remedy in at least some election contests. *Id.* at 3560 (statement of Sen. Stewart) ("[A] mandamus is an appropriate proceeding in all cases where there is a refusal to count the votes. Cases may very frequently arise where the officers will refuse to count the votes at all because negroes have voted." (emphasis omitted)). He noted, however, that mandamus would likely be unavailable if election officials had already declared someone the winner. *Id.* at 3616. Senator Thurman, in response, acknowledged that mandamus may be used to compel election officials to perform ministerial acts, such as counting votes in an election. *Id.* at 3560 (statement of Sen. Thurman). He nevertheless argued that the writ cannot constrain an official's "judgment or discretion," and therefore cannot compel election officials to accept or count particular ballots. *Id.* (explaining that mandamus "would only lie to compel them to count votes; but as to counting a particular vote it would not lie. . . . [W]herever there is judgment or discretion to be exercised by an officer, whether he be a ministerial officer or a judicial officer, the writ of *mandamus* cannot control that discretion."). He also explained

Other Senators added to these objections. For example, one claimed that allowing courts to "decide contested elections" exceeded Congress's power to "protect[] persons in the right to vote."[99] Another argued that states already had remedies—typically quo warranto—to challenge an incumbent's right to hold office, and Congress lacked authority to interfere with them.[100]

Following this debate, Republican Senator William Stewart of Nevada consented to removing Section 5 of the Act.[101] But after the Senate added various provisions to combat voter fraud,[102] Senator Carpenter moved to restore a somewhat expanded version of it.[103] His proposed amendment stated that anyone who was "deprived of, or fail[ed] to be elected to any office"—except for members of Congress or a state legislature—due to a violation of the Act or the Fifteenth Amendment was "entitled to hold such office[,] . . . perform [its] duties and receive [its] emoluments."[104] The amendment specified that the claimant "may recover the possession of such office by quo warranto or other appropriate proceeding" in federal or state court.[105] Senator Carpenter explained that the proposed language would allow a court to count votes from those who had been improperly prevented from voting.[106]

Senator George Henry Williams, an Oregon Republican, warned that this measure would shift responsibility for resolving elections "from the executive to the judicial department of the country."[107] Several Senators also complained that it required courts to determine elections' outcomes based on votes that were never actually cast, using testimony about how

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that, if African Americans were prevented from voting, "you cannot order [election officials] by *mandamus* to count a vote that never had an existence, but where there was simply an offer to vote." *Id.*

99. *Id.* at 3570 (statement of Sen. Trumbull).

100. *Id.* at 3654 (statement of Sen. Howard).

101. *Id.* (statement of Sen. Stewart). He also agreed to delete a provision that would have allowed the President to order a district judge to hold court in a particular place within that judge's district to adjudicate alleged violations of the Act. *Id.* at 3655.

102. *Id.* at 3664 (introducing amendment); *id.* at 3672 (deleting provision that would have protected public political meetings); *id.* at 3678 (enacting amendment). Senator Sherman explained that the amendment was aimed at "repeaters," or people who vote multiple times in the same election. *Id.* at 3809 (statement of Sen. Sherman). He argued that "the open violators of the law in the city of New York . . . make the elective franchise a farce and a fraud . . . . [T]here is in the city of New York a degree of corruption in the elective franchise that exists nowhere else in the wide world . . . ." *Id.* Repeaters could not be tried in state court because "the judges themselves are elected by [them]." *Id.*

103. *Id.* at 3680 (statement of Sen. Carpenter).

104. *Id.*

105. *Id.* (emphasis omitted).

106. *Id.*

107. *Id.* at 3681 (statement of Sen. Williams).

people would have voted if they had not been prevented from doing so.[108] To mollify these concerns, Senator Carpenter amended his proposal so that it applied only to a person "who offered his vote at the election."[109] The Senate added the provision to the Judiciary Committee's bill by a vote of 24–22.[110]

The Senate Committee of the Whole reported the Judiciary Committee's bill as amended,[111] substituted it for the House bill,[112] and adopted it by a vote of 43–8.[113] The House, however, nonconcurred in the Senate's version of the bill and requested a conference.[114] Among other changes, the conference committee recommended striking out the Senate's language about election contests and replacing it with a new section.

The compromise provision began by declaring that a candidate—except someone running for presidential elector, Representative in Congress, or state legislature—who loses an election because people who attempted to vote were denied that right due to racial discrimination shall not be prevented from holding that office.[115] Rather, the candidate may bring "any appropriate suit or proceeding to recover possession of such office."[116] Federal circuit and district courts could exercise jurisdiction concurrent with state courts in cases where it appeared that the "sole question touching the title to such office" was whether citizens who had tried to vote in the election had been denied the right to vote on racial grounds.[117] The court's jurisdiction would extend "so far as to determine

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108. *See, e.g.*, *id.* at 3680 (statement of Sen. Thurman); *id.* at 3681 (statement of Sen. Williams); *id.* (statement of Sen. Morton).

109. *Id.* at 3682.

110. *Id.* Senator Carpenter's amendment was included in the bill as Section 21. *Id.* at 3690; *accord* H.R. 1293, 41st Cong. § 21 (as returned to House with Senate Amendments, May 23, 1870).

111. CONG. GLOBE, 41st Cong., 2d Sess. 3687 (1870).

112. *Id.* at 3688.

113. *Id.* at 3690.

114. *Id.* at 3726; *see also id.* at 3705 (appointing Senate conferees).

115. *Id.* at 3753 ("[W]henever any person shall be defeated or deprived of his election to any office, except elector of President or Vice President, Representative or Delegate in Congress, or member of a State Legislature, by reason of the denial to any citizen or citizens who shall offer to vote of the right to vote on account of race, color, or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial . . . .").

116. *Id.*

117. *Id.* ("[I]n cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides; and said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof . . . .").

the rights of the parties to such office by reason of" Fifteenth Amendment violations.[118]

This was the first version of the proposal that prevented federal courts from adjudicating Fifteenth Amendment challenges to presidential elections, though no one expressly mentioned the addition. Senator Stewart explained that this provision was crafted "to give a remedy in a specific case": where people who offered to vote were prevented from doing so based on their color.[119] The losing candidate could go to federal court "on that particular question, so that effect should be given to the voice of the voters."[120] To ensure the provision would "not cover any other case than that specific one," the conference committee drafted its language "very carefully, narrowing it down to the particular issue where the right to vote is denied for that specific reason."[121] Senator Stewart emphasized that the provision did not "draw[] anything else before the United States courts."[122] Instead, it was intended only to give "effect to this fifteenth amendment."[123]

Representative Bingham, the bill's sponsor in the House, explained that he would have preferred to avoid the issue of election contests entirely, but was content that the conference committee had narrowed the statutory language sufficiently to avoid any constitutional problems.[124] He explained that the committee believed "that the courts of the United States under no possible condition of things should be authorized to intervene to settle any case of contest whatever about the election of members of Congress" or presidential electors.[125] "The decision of such question [was left] precisely where the express words of the Constitution leave it, to the Houses of Congress severally . . . ."[126] The committee similarly sought to exclude federal courts from election contests concerning state legislators, because state constitutions required such disputes "to be settled exclusively" by legislatures themselves.[127]

Representative Bingham explained that, for state and local offices other than state legislators, in contrast, the bill "does not confer [U.S.] courts any power . . . to intervene in . . . any election [except] to determine [if] the person offering his vote shall have it rejected simply on the ground that his [Fifteenth Amendment] right . . . is denied."[128] He did not intend

118. *Id.*
119. *Id.* (statement of Sen. Stewart).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 3872 (statement of Rep. Bingham).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

"to extend . . . the power of the courts of the United States over any question whatever of election beyond the express letter of this section itself."[129] Representative Bingham added, "I do not believe under any possible condition of things it would be necessary, as the Constitution now stands," to grant federal courts "any [further] jurisdiction over . . . contested elections."[130] The Senate approved the conference report 48–11,[131] while the House did so 133–58, with 39 abstentions.[132]

Thus, although radical Republicans sought to dramatically expand federal protection of voting rights, they acted very circumspectly when it came to federal courts' power to resolve election contests. The bill created a wide range of new federal offenses and private rights of action to protect African Americans' voting rights. And it contained sweeping provisions that sought to ensure adequate enforcement by federal marshals, district attorneys, private appointees, posses, and even the military. Nevertheless, the Enforcement Act excluded congressional and state legislative elections from both Section 23, which granted federal courts jurisdiction over election contests arising from Fifteenth Amendment violations, as well as Section 14, which allowed federal district attorneys to seek writs of quo warranto to remove public officials holding office in violation of the Fourteenth Amendment's Disqualification Clause. Through these exclusions, Congress refused to share what it viewed to be its exclusive constitutional prerogative: determining the elections and returns of its own members. As a policy matter, Congress extended similar deference to state legislatures over state legislative elections, as well.

Section 1344's grant of jurisdiction only over Fifteenth Amendment claims may bolster the notion that the Fourteenth Amendment was not originally intended or understood as protecting political rights, such as the right to vote. Many scholars have argued that the Reconstruction Congress enacted the Fourteenth Amendment against the backdrop of the "tripartite theory" of rights.[133] The tripartite theory distinguished among three distinct sets of rights: (1) *civil rights*, which were those rights necessary to be recognized as a juridical person capable of participating in civil society, such as the rights to make contracts, acquire and hold property, and sue and be sued; (2) *political rights*, which were the rights integral to self-government, including the rights to vote, hold office, and

129. *Id.*
130. *Id.*
131. *Id.* at 3809.
132. *Id.* at 3884.
133. JACK M. BALKIN, LIVING ORIGINALISM 222–23 (2011).

serve on juries; and (3) *social rights*, which embraced the right to engage in private social and economic relationships on an equal basis.[134]

These scholars have argued that Congress's original intent, and the public's original understanding, was that the Fourteenth Amendment protected only civil rights, rather than political or social rights.[135] This understanding is confirmed by § 2 of the Fourteenth Amendment, which contains one of the Constitution's only mentions of an affirmative right to vote.[136] Section 2 did not actually require states to extend voting rights to anyone, but rather left them with a choice. States could either expand the franchise to all male citizens who were at least twenty-one, or refuse to do so and have their representation in the House—and, by extension, the electoral college—reduced.[137] Supreme Court cases from the late nineteenth century likewise refused to apply the Fourteenth Amendment in the context of political[138] or social[139] rights.

Congress enacted § 1344 as part of the Enforcement Act, which contained a sweeping range of powerful, unprecedented measures to enforce African Americans' voting rights.[140] Despite Congress's clear intent to vigorously protect voting rights, § 1344 gave federal courts jurisdiction only over election contests involving Fifteenth Amendment claims in local, county, and some state races.[141] As discussed earlier, Congress excluded federal races and state legislative races from this provision because it believed that final authority to resolve those matters lay with other entities.[142] The legislative history does not explain, however, why Congress restricted § 1344 to Fifteenth Amendment

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134. *See, e.g.*, *id.* (explaining the "tripartite theory" of rights in detail); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 216–18 & 217 n.* (1998) (discussing the distinction between civil and political rights); *see also* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 102–06 (1990) (explaining the problem of the "State Action" theory and the differing understandings of the Fourteenth Amendment at the time of its enactment).

135. BALKIN, *supra* note 133, at 222–23; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1024 (1995) ("Political and social rights, it was agreed, were not civil rights and were not protected.").

136. U.S. CONST. amend. XIV, § 2.

137. Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. L. FORUM 279, 292–93, 303–05, 318, 331, 334.

138. *See, e.g.*, Minor v. Happersett, 88 U.S. 162, 175 (1874) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one.").

139. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 14 (1883) (holding that the Fourteenth Amendment did not empower Congress to "lay[] down rules for the conduct of individuals in society towards each other"); Plessy v. Ferguson, 163 U.S. 537, 548–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

140. *See supra* Section I.A.

141. Enforcement Act of 1870, ch. 114, § 23, 16 Stat. 140, 146 (1870) (codified as amended at 28 U.S.C. § 1344 (2018)).

142. *See supra* notes 83, 121–130 and accompanying text; *see also supra* notes 93–96, 99 and accompanying text.

claims. Indeed, no one even mentioned the possibility of including Fourteenth Amendment claims within this jurisdictional grant at any point throughout the legislative debates. One persuasive explanation for this omission is that Congress did not believe that any constitutional provisions other than the Fifteenth Amendment could give rise to an election contest or judicially enforceable right to vote, including for freedmen in southern states facing racial discrimination.

C. *The Inadvertently Partial Repeal*

A few years after passing the Enforcement Act, Congress adopted the Revised Statutes of 1874, codifying all of federal law into a single source, organized by subject matter.[143] Because the Revised Statutes contained separate titles for criminal offenses,[144] jurisdictional provisions,[145] and substantive election laws,[146] provisions from statutes like the Enforcement Act were revised and split among several different titles.[147] The Revised Statutes superseded the acts through which Congress had originally adopted those provisions.

The substantive components of § 23 of the Enforcement Act—which, confusingly, also mentioned jurisdictional issues—were codified in Title XXVI ("Elective Franchise") of the Revised Statutes as § 2010.[148] Section 2010 stated that whenever a candidate was "defeated or deprived of his election to any office"—except that of presidential elector, congressional representative or delegate, or state legislator—because a citizen who "offer[ed] to vote" had been deprived of his right to vote on account of race, that candidate's "right to hold and enjoy such office . . . shall not be impaired by such denial."[149] Instead, the candidate "may bring any appropriate suit or proceeding to recover possession of such office."[150] The candidate may sue in federal court when "it appears that the sole question touching the title to such office arises" from Fifteenth Amendment violations.[151] The federal courts had jurisdiction "to determine the rights of the parties to such office" by reason of the Fifteenth Amendment violations.[152]

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143. *See* Act of June 20, 1874, ch. 333, 18 Stat. 113 (providing for publication of the revised statutes and the laws of the United States).

144. *See* REV. STAT. tit. LXX, ch. 7, §§ 5506–32 (1878).

145. *See id.* tit. XII, ch. 3, §§ 563–71, ch. 7, §§ 629–57, ch. 11, §§ 687–710.

146. *See id.* tit. XXVI, §§ 2002–31.

147. *Cf.* Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, FORDHAM L. REV. (forthcoming 2020) (manuscript at 9–10) (on file with author) (explaining how the Revised Statutes sometimes codified a statute's text within multiple sections).

148. REV. STAT. tit. XXVI, § 2010.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

The jurisdictional components of Section 23, which mirrored the substantive components' language, were codified in § 563 of the Revised Statutes for district courts[153] and § 629 for circuit courts.[154] These provisions granted federal courts jurisdiction over all suits "authorized by law to be brought" to "recover possession of any office"—except for presidential elector, congressional representative or delegate, or state legislator—where "it appears that the sole question touching the title to such office arises out of" Fifteenth Amendment violations.[155] Consistent with the limits of § 2010's cause of action, these provisions specified that such jurisdiction extended "only so far as to determine the rights" guaranteed by the Constitution "and secured by any law" to vote.[156]

Following the Compromise of 1877, Congress ended Reconstruction and allowed white supremacy to grow unchecked throughout the former Confederacy.[157] In 1894, as part of its ongoing post-Reconstruction efforts to curtail federal enforcement of constitutional protections in southern states, Congress repealed many provisions of the civil rights acts that it had enacted during the postwar period,[158] including most of the Enforcement Act of 1870.[159] The repeal statute eliminated most of the Enforcement Act's substantive provisions that regulated the electoral process, including those codified at § 2010 of the Revised Statutes. Oddly, however, the repeal statute did not remove the analogous jurisdictional provisions (i.e., §§ 563(13) and 629(13)). Congress created an apparently unintended anomaly by retaining a statutory grant of jurisdiction over a substantive cause of action that it had eliminated.

During the debates over the repeal statute, Representative Henry St. George Tucker of Virginia explained that Congress was repealing § 2010 because that provision applied to state-created offices.[160] State courts, he argued, should be primarily responsible for resolving disputes concerning such offices.[161] And if state courts failed to adequately enforce the Fifteenth Amendment, the losing candidate could appeal to the Supreme

153. *Id.* tit. XIII, ch. 3, § 563(13).

154. *Id.* ch. 7, § 629(13).

155. *Id.* ch. 3, § 563(13), ch. 7, § 629(13).

156. *Id.*

157. *See* WHITE, *supra* note 34, at 276.

158. South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) ("As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894."), *abrogated by* Shelby Cty. v. Holder, 570 U.S. 529 (2013); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 206 n.17 (1970) (listing several repealed provisions).

159. *See* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 36 (repealing most of the Enforcement Act's provisions).

160. 25 CONG. REC. 1810 (1893) (statement of Rep. Tucker).

161. *Id.*

Court.[162] Representative Tucker further argued that, since states create the right to vote, they should also have the power to enforce it.[163] Additionally, "reconstruction measures" such as the Enforcement Act were "unhappy reminders of a period in our history forever gone, except from the memory of the people."[164] He concluded by assuring the House that states were just as interested as the federal government in ensuring that their representatives were properly elected.[165] Echoing those sentiments, Representative William Henry Denson of Alabama declared that the states had possessed "supreme plenary governmental authority and sovereign jurisdiction" over elections for state offices long before the federal government existed, and the Constitution did not authorize the federal government to "invade" that authority.[166]

The committee reports accompanying the repeal measure provide no insight into why Congress allowed the Enforcement Act's jurisdictional provisions to remain. The House majority report,[167] which the Senate adopted,[168] did not discuss the jurisdictional issue or election contests at all. The Senate minority report explained only that § 2010 gave "a right of action in the national courts to any citizen deprived of any office," other than federal offices or a seat in the state legislature, "by reason of the denial of the right of suffrage on account of color."[169] Nothing in the legislative history explains why Congress would have repealed the substantive sections of the Enforcement Act that authorized election contests, while allowing federal courts to retain jurisdiction over such matters. From the repeal statute's legislative history, it appears to have been an oversight stemming from the fact that the Revised Statutes split the Enforcement Act's substantive and jurisdictional provisions into separate sections.

As drafted, however, the provisions of the Enforcement Act that survived repeal—§§ 563(13) and 629(13) of the Revised Statutes—authorized federal courts to hear not only election contests specifically

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 2031 (statement of Sen. Denson). Another representative conflated the substantive and jurisdictional provisions of the Revised Statutes, declaring, "One of the sections which the bill proposes to repeal gives the United States courts jurisdiction to try the right and title to a State office in certain cases, an invasion of and an insult to State authority and dignity which should no longer be tolerated." *Id.* at 2286 (statement of Rep. Oates); *see also* 26 CONG. REC. 1633 (1894) (statement of Rep. Turpie) (arguing that allowing courts to exercise jurisdiction over election contests causes the public to lose respect for the judiciary, since such disputes are "not always pure, not always honest, not always of the most scrupulous character").

167. H. REP. NO. 53-18 (1893).

168. S. REP. NO. 53-113 (1893).

169. *Id.*, pt. 2, at 19 (1894).

under § 2010, but more broadly any suits that were "authorized by law to be brought" to "recover possession of any office."[170] Although Congress had repealed the cause of action created by the Enforcement Act itself, these jurisdictional provisions still authorized candidates to bring other claims in federal court for Fifteenth Amendment violations.[171]

Section 563(13) was later recodified as § 24(15) of the Judicial Code of 1911.[172] Section 629(13) was deleted because the 1911 Code abolished the circuit courts.[173] Congress reworded the surviving provision to grant district courts original jurisdiction of "all suits . . . authorized by law to be brought" to "recover possession of any office"—except for presidential elector, Representative or Delegate to Congress, or member of a state legislature—so long as "the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude."[174] As before, the provision specified that the court's jurisdiction extended "only so far as to determine the rights of the parties to such office by reason of the denial of" the constitutional right to vote.[175] Congress later recodified this provision yet again with slight modifications in the modern U.S. Code as 28 U.S.C. § 1344.[176] Most notably, Congress added U.S. Senator to the list of races excluded from § 1344's grant of jurisdiction,[177] to reflect the Seventeenth Amendment's ratification.[178]

D. *History of Judicial Application*

When originally enacted in 1870, the provision eventually codified as § 1344 empowered federal courts to remedy racial discrimination and enforce the Fifteenth Amendment in elections for local, county, and certain (i.e., nonlegislative) state-level offices.[179] The following year,

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170. REV. STAT. tit. XIII, ch. 3, § 563(13), ch. 7, § 629(13) (1878).

171. *But see* Redish, *supra* note 9, § 104.48 ("[B]ecause it provides jurisdiction only of actions 'authorized by law,' it may be doubted if today Section 1344 has any application at all.").

172. Pub. L. No. 61-475, § 24(15), 36 Stat. 1087, 1092 (1911) (repealed 1948).

173. *Id.* § 289, 36 Stat. at 1167.

174. *Id.* § 24(15), 36 Stat. at 1092.

175. *Id.* The provision was phrased very awkwardly, stating that the court's jurisdiction "shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States." *Id.*

176. Judicial Code of 1948, Pub. L. No. 80-773, § 1344, 62 Stat. 869, 932 (codified as amended at 28 U.S.C. § 1344 (2018)).

177. *Id.*

178. U.S. CONST. amend. XVII, § 1.

179. Enforcement Act of 1870, Pub. L. No. 41-114, § 23, 16 Stat. 140, 146 (codified as amended at 28 U.S.C. § 1344 (2018)).

Congress enacted the Civil Rights Act of 1871,[180] which contained an additional jurisdictional grant for constitutional violations that were committed under color of state law.[181] A few years later, in 1875, Congress granted federal courts general federal question jurisdiction.[182] The federal question statute did not completely supplant the Enforcement Act's jurisdictional provision upon its enactment, however, because it was subject to an amount-in-controversy requirement, which Congress increased several times over the following century[183] before abolishing it in 1980.[184]

Shortly after the Enforcement Act became effective, the U.S. Circuit Court for Louisiana invoked it to exercise jurisdiction over an election contest for Governor of Louisiana.[185] Republican candidate William Kellogg had run in a hotly contested race against Democrat John McEnery. Kellogg alleged that 10,000 citizens had been unconstitutionally prevented from voting because of their race.[186] He further claimed that Governor Henry Warmoth had established "an illegally constituted" canvassing board that was going to disregard 10,000 votes from other African Americans due to racial discrimination.[187] The federal circuit court agreed that the Governor had created an illegal board to canvass the election returns, and it was preventing the validly constituted board from doing its job.[188] The court held that the "legal board" was "entitled to [the court's] protection."[189]

A few days later, the court ordered a federal marshal to take control of the State House,[190] and President Ulysses S. Grant authorized federal

180. Ch. 22, § 1, 17 Stat. 13 (codified as amended at 28 U.S.C. § 1343(a)(3); 42 U.S.C. § 1983 (2018)).

181. *Id.* § 1, 17 Stat. at 13. As with the Enforcement Act, the Civil Rights Act originally contained a single provision which both conferred jurisdiction on federal courts and created a substantive right of action. The Revised Statutes, adopted in 1874, split the jurisdictional, *see* REV. STAT. tit. XIII, ch. 3, § 563(12); *id.* tit. XIII, ch. 7, § 629(16) (1874), and substantive, *see id.* tit. XXIV, § 1979, components of that provision into separate sections.

182. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2018)).

183. *See* Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415, 415 (increasing the amount-in-controversy requirement for federal question cases to $10,000); Judicial Code of 1911, Pub. L. No. 61-475, § 24(1), 36 Stat. 1087, 1091 (increasing it to $3,000); Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552 (increasing it to $2,000).

184. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.

185. Kellogg v. Warmouth, 14 F. Cas. 257, 259 (C.C.D. La. 1872) (No. 7667).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Andrew Buttaro, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135, 153–54 (2015).

troops to assist.[191] "Flanked by more than one hundred federal troops, the Kellogg legislature summarily established a quorum, impeached Governor Warmoth, and declared Kellogg the winner of the gubernatorial contest."[192] McEnery "and his supporters refused to accept the results and for several months acted as if they were the legitimate government of the state—there were two separate gubernatorial inaugurations and two rival legislatures met separately."[193]

McEnery's intransigence exacerbated racial and political hatred that culminated in the Colfax Massacre. After several months of struggle, Kellogg's supporters, including many African Americans, had been able to seize control of a courthouse.[194] A mob of white McEnery supporters, including Klansmen and former Confederate soldiers, with the support of a cannon, attacked the courthouse.[195] The mob burned it to the ground and killed scores of Kellogg supporters who surrendered.[196]

Almost one hundred members of the mob were prosecuted under the Enforcement Act, but only three were convicted.[197] And even those three defendants went free. The Supreme Court held that their indictments were unconstitutionally vague in *United States v. Cruikshank*,[198] because the indictments did not specify which particular constitutional rights of the African American victims the defendants intended to violate.[199]

Cruikshank "'crippled' the federal government's power to enforce the Reconstruction Amendments to protect blacks from white terror, speeding the collapse of Reconstruction in the South."[200] And following the Compromise of 1877, when federal troops were no longer available to protect Kellogg and enforce federal courts' rulings concerning disputed elections, the federal judiciary became unwilling to continue

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191. CHARLES LANE, THE DAY FREEDOM DIED 13 (2008).

192. Buttaro, *supra* note 190, at 153–54.

193. Charles McClain, *California Carpetbagger: The Career of Henry Dibble*, 28 QUINNIPIAC L. REV. 885, 925 (2010).

194. LANE, *supra* note 191, at 70.

195. LAWRENCE GOLDSTONE, INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1903, at 88 (2011).

196. *Id.* at 88–89; LANE, *supra* note 191, at 265–66; *see* Buttaro, *supra* note 190, at 154.

197. *See* McDonald v. City of Chicago, 561 U.S. 742, 757 (2010); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1149 (2000).

198. 92 U.S. 542 (1875), *abrogated on other grounds by McDonald*, 561 U.S. 742.

199. *Id.* at 557, 559 ("There is no specification of any particular right. The language is broad enough to cover all. . . . [The indictments] lack the certainty and precision required by the established rules of criminal pleading.").

200. Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 74 (2019) (quoting FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION 17 (2000)).

enforcing African Americans' Fifteenth Amendment rights in southern states.[201]

Throughout the following century, plaintiffs in election-related cases often invoked § 1344 along with the Civil Rights Act's jurisdictional provision, now codified at § 1343(a)(3).[202] Plaintiffs applied this approach in racial gerrymandering cases and litigation under § 5 of the Voting Rights Act, for example.[203] In *McGill v. Ryals*,[204] the plaintiffs invoked §§ 1343 and 1344 in a lawsuit asking the court to order a special election on the grounds that the county's election system had systematically and unconstitutionally excluded African Americans.[205] Some plaintiffs have even included § 1344 among the jurisdictional statutes they cited in election-related challenges that did not involve racial discrimination.[206]

Courts likewise seldom bothered distinguishing between §§ 1343 and 1344. One district court cited both provisions as its jurisdictional basis for adjudicating a Fifteenth Amendment challenge to a city's annexation

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201. *See, e.g.*, Johnson v. Jumel, 13 F. Cas. 755, 757–58 (C.C.D. La. 1877) (No. 7392) (declining to exercise jurisdiction where the petitioner had been elected to state office, but four months later was removed by state authorities who claimed he had not actually won the election, on the grounds that the Enforcement Act granted federal jurisdiction only over a candidate's initial election to office, rather than subsequent ousters).

202. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 28 U.S.C. § 1343(a)(3) (2018)). In 1957, Congress further expanded the federal judiciary's jurisdiction with the Civil Rights Act of 1957, Pub. L. No. 85-315, § 121, 71 Stat. 634, 637 (codified at 28 U.S.C. § 1343(a)(4)). That statute grants district courts jurisdiction over any civil actions for damages or equitable relief under any federal law "providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343(a)(4).

203. *See* Kirksey v. Bd. of Supervisors, 402 F. Supp. 658, 660 (S.D. Miss. 1975) (noting plaintiffs' allegation that the court had jurisdiction under 28 U.S.C. §§ 1343–44 to hear their challenge to an alleged racial gerrymander of county supervisor districts brought under the Fourteenth and Fifteenth Amendments and § 5 of the Voting Rights Act), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd*, 554 F.2d 139 (5th Cir. 1977) (en banc).

204. 253 F. Supp. 374 (M.D. Ala. 1966).

205. *Id.* at 374–75. The court dismissed the case on the ground that such equitable relief was inappropriate, though its reasoning also sounded in laches. *Id.* at 376–77. The court explained that the plaintiffs had not sought relief either before the elections at issue or "within a reasonable time thereafter." *Id.* at 376. Thus, ordering new elections would disrupt ongoing government operations, and the plaintiffs would have the opportunity to vote for most of the underlying offices in fair elections in less than three years. *Id.* at 377.

206. *See, e.g.*, McCarthy v. Austin, 423 F. Supp. 990, 993–94 (W.D. Mich. 1976) (noting that the plaintiffs alleged federal jurisdiction under 28 U.S.C. §§ 1331, 1343(2)–(4), and 1344 in a challenge under the First and Fourteenth Amendments to a state law prohibiting independent candidates from running for President); *see also* Good v. Roy, 459 F. Supp. 403, 404–05 (D. Kan. 1978) (noting that the plaintiffs alleged federal jurisdiction under §§ 1343, 1344, and 1357 in a challenge to a candidate's allegedly fraudulent claim of having been endorsed by the American Medical Association); *cf.* Oliverson v. W. Valley City, 875 F. Supp. 1465, 1468 (D. Utah 1995) (noting that the constitutional challenge to state laws regulating sexual conduct was brought under §§ 1343 and 1344).

of certain adjacent territory.[207] The plaintiffs alleged the annexation was motivated by a desire to dilute African Americans' voting strength in local elections in violation of the Fifteenth Amendment.[208] Another court relied on those provisions as its jurisdictional basis for hearing a challenge to a county Democratic party's decision to elect its executive committee on an at-large basis, rather than a district-by-district basis.[209]

Following the elimination of 28 U.S.C. § 1331's amount-in-controversy requirement in 1980,[210] many constitutional challenges involving voting rights invoked §§ 1331, 1343, and 1344, even though § 1331 was independently sufficient to establish the district court's jurisdiction. Courts have cited these provisions together as part of their jurisdictional basis for adjudicating racial vote-dilution challenges to at-large districts[211] and other redistricting cases,[212] as well as to a claim that a state had unconstitutionally adopted a system of appointing local school

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207. *See* Holt v. City of Richmond, 334 F. Supp. 228, 230, 232, 237 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093, 1100 (4th Cir. 1972); *see also* Consumer Party v. Tucker, 364 F. Supp. 594, 598 (E.D. Pa. 1973) (exercising jurisdiction under §§ 1331, 1343(3), and 1344 in a challenge under the First, Fourteenth, and Fifteenth Amendments to state law requirements concerning the number of signatures a person must obtain to appear as a candidate on the ballot, and the timeframe for collecting such signatures).

208. *Id.*

209. Smith v. Paris, 257 F. Supp. 901, 902 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967). The district court concluded that the at-large system for elections was unconstitutional and enjoined the county party from continuing to use it. *Id.* at 905–06. It declined, however, to either invalidate the election that had already occurred or order the party to appoint the plaintiffs as members of the executive committee. *Id.* at 906. The court pointed out that the plaintiffs waited until the evening before the election to file their lawsuit. *Id.* at 905. It declared, "Clearly, had the suit been filed at an earlier date, adequate relief could have been granted prior to [the day of the election], thus obviating the necessity of upsetting the election. Although the plaintiffs, and the class they represent, may have suffered a wrong, they have aggravated it by their own undue delay." *Id.* at 906.

210. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (codified as amended at 28 U.S.C. § 1331 (2018)).

211. *See, e.g.*, York v. City of St. Gabriel, 89 F. Supp. 3d 843, 847–48 (M.D. La. 2015) (exercising jurisdiction under §§ 1331, 1343, and 1344); Clarke v. City of Cincinnati, No. C-1-92-278, 1993 WL 761489, at *17 (S.D. Ohio July 8, 1993) (same), *aff'd*, 40 F.3d 807 (6th Cir. 1994); Houston v. Haley, 663 F. Supp. 346, 349 (N.D. Miss. 1987) (same), *aff'd*, 859 F.2d 341 (5th Cir. 1988), *vacated and remanded*, 869 F.2d 807 (5th Cir. 1989); Citizens for a Better Gretna v. City of Gretna, 636 F. Supp. 1113, 1131 (E.D. La. 1986) (same), *aff'd*, 834 F.2d 496 (5th Cir. 1987); Hall v. Louisiana, 108 F. Supp. 3d 419, 422–24 (M.D. La. 2015) (same), *aff'd*, 884 F.3d 546 (5th Cir. 2018); *cf.* Valenti v. Mitchell, 790 F. Supp. 551, 555 (E.D. Pa.) (explaining that a constitutional challenge to a legislative map that the state supreme court had adopted was pending before a three-judge federal district court panel in a different case "under 28 U.S.C. §§ 2284 and 1344"), *aff'd*, 962 F.2d 288 (3d Cir. 1992).

212. *See, e.g.*, Smith v. Walthall Cty., 157 F.R.D. 388, 390 (S.D. Miss. 1994) (exercising jurisdiction under §§ 1331, 1343, and 1344 to redistricting challenge under Section 2 of the Voting Rights Act).

board members to prevent African Americans from being elected.[213] In *Scott v. Garlock*,[214] the defendants invoked § 1344 defensively, arguing that a federal court could not hear an election contest unless it fell within that provision's narrow parameters, but the court dismissed the complaint on the merits.[215] Courts have periodically rejected litigants' attempts to assert jurisdiction under § 1344 in cases that clearly fell outside its scope.[216]

Since 1948, the U.S. Court of Appeals for the Fifth Circuit has applied a particularly aggressive interpretation of § 1344. In *Johnson v. Stevenson*,[217] former Texas Governor Coke Stevenson challenged the results of the Texas Democratic primary for U.S. Senate, in which then-Representative Lyndon B. Johnson had ostensibly beaten him by a narrow margin.[218] After Election Day, local party officials added an extra 202 votes to the results for Precinct 13 in Jim Wells County, allowing Johnson to barely edge out Stevenson.[219]

As Professor Ned Foley vividly explains, when Stevenson's attorneys inspected the election records, they saw

> the 202 extra names added for Johnson (plus the one more name added for Stevenson) at the end of the voter list, in different ink and handwriting from all the previous voters, but in the same ink and handwriting as each other. They also noticed that these extra names were in alphabetical order, going through the alphabet multiple times.[220]

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213. *See, e.g.*, Irby v. Fitz-Hugh, 693 F. Supp. 424, 431 (E.D. Va. 1988) (exercising jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1344, and 2201–02 in a challenge under the Equal Protection Clause, Fifteenth Amendment, and Section 2 of the Voting Rights Act to Virginia's decision to have appointed, rather than elected, school boards), *aff'd*, 889 F.2d 1352 (4th Cir. 1989).

214. No. 2:18-cv-981-WKW-WC, 2019 WL 4200400, at *2 (M.D. Ala. July 31, 2019), *report and recommendation adopted*, 2019 WL 4197112 (M.D. Ala. Sept. 4, 2019), *appeal dismissed*, No. 19-14516-E, 2020 WL 2537635 (11th Cir. Apr. 28, 2020).

215. *Id.* at *7–8.

216. *See, e.g.*, Bierley v. Sambroak, No. 13-326 (Erie), 2014 WL 710004, at *1, *5 & n.4 (W.D. Pa. Feb. 25, 2014) (holding that § 1344 was "patently inapplicable" in a case where a voter alleged that a candidate should not be permitted to run due to candidate's allegedly improper judicial acts, because the claim did not satisfy any of § 1344's elements); *see also* Trujillo v. Taos Mun. Sch., No. CIV 94-1350 LH/LCS, 1995 WL 868603, at *2 n.3 (D.N.M. Aug. 10, 1995) ("express[ing] . . . skepticism" about whether § 1344 gave the court jurisdiction over a constitutional challenge to a public school student's expulsion), *aff'd*, 91 F.3d 160 (10th Cir. 1996).

217. 170 F.2d 108 (5th Cir. 1948).

218. *Id.* at 109.

219. EDWARD B. FOLEY, BALLOT BATTLES 209 (2016); 4 ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER 152–53 (2012).

220. FOLEY, *supra* note 219, at 209; *see also* CARO, *supra* note 219, at 327–28.

Stevenson's lawyers contacted several of the voters at the end of the list, and they all swore that they had not voted.[221] Additionally, "the last person named before the switch in ink signed an affidavit swearing that he voted shortly before the polls closed."[222] His testimony bolstered the notion that the other names that appeared on the list in a different color ink had been fraudulently added after the polls closed.[223]

Based on this election fraud, Stevenson sued in federal court.[224] He sought an injunction prohibiting Democratic state officials from certifying Johnson as the winner of the primary and barring the Secretary of State from printing Johnson's name on the general election ballot.[225] Stevenson also requested a declaration that he was "the true nominee."[226] The district court, finding that election fraud had likely occurred, issued the requested temporary restraining order.[227] The district judge also appointed a special master to examine the ballots from Precinct 13.[228]

After the Fifth Circuit declined to stay the court's order, Johnson's lawyers won a stay from Circuit Justice Hugo Black.[229] Consistent with *Taylor v. Beckham*,[230] Black stated, "The legal principle involved was not complicated: federal courts are supposed to stay out of state elections."[231] The Supreme Court declined to vacate Black's stay.[232] His order came down before the special master located the correct ballot box to recount the votes, and it brought the proceedings to a halt.[233]

A few weeks later, the Fifth Circuit reversed the trial court's underlying order and directed that the case be dismissed.[234] The court held that, regardless of whether voter fraud had occurred, it lacked jurisdiction to award equitable relief.[235] It explained that, because Stevenson was challenging the legality of certain votes and the declared outcome of the election, the lawsuit was an election contest.[236] Although

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221. FOLEY, *supra* note 219, at 210.

222. *Id.*

223. *Id.*

224. *See* Johnson v. Stevenson, 170 F.2d 108, 109 (5th Cir. 1948).

225. *Id.*

226. *Id.* at 108–09.

227. *Id.*

228. FOLEY, *supra* note 219, at 213.

229. *Id.* at 214.

230. 178 U.S. 548, 580 (1900).

231. FOLEY, *supra* note 219, at 214 (quoting ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 376 (1994)).

232. Johnson v. Stevenson, 335 U.S. 801 (1948) (order).

233. FOLEY, *supra* note 219, at 215.

234. Johnson v. Stevenson, 170 F.2d 108, 111 (5th Cir. 1948).

235. *Id.* at 109 ("[W]hatever may be the truth as to the fraudulent returns . . . the subject matter is not one to be taken cognizance of by the district court for the exercise of equitable relief.").

236. *Id.*

state law allowed for election contests, a federal court lacked jurisdiction to get involved because the Constitution grants the U.S. Senate itself ultimate authority to resolve disputes concerning Senate elections.[237]

The court acknowledged that Stevenson had invoked the Civil Rights Act's jurisdictional provision, § 1343, but it held that the Enforcement Act, § 1344, demonstrated Congress's "manifest purpose to keep the judicial department from intervening, even by the usually available law writ of quo warranto, in the election of these high functionaries in the executive and legislative departments."[238] The court added, "The aim of [§ 1344] . . . is to enable the district court to interfere in elections only to the limited extent it prescribes and to exclude it altogether from interfering with the election of a Senator or with the constitutional right of the Senate to judge of his election in all its steps or stages."[239] The court added in the alternative that, even if § 1344's prohibition did not apply, the court still lacked jurisdiction under § 1343 because fraud and other violations of state law in a primary election did not violate the Constitution.[240]

It appears that a Texas federal district court followed *Johnson*, or at least ruled consistently with it, in dismissing a challenge to the results of the 1960 presidential election in Texas.[241] John F. Kennedy had won Texas by 40,000 votes, but there was substantial evidence of widespread voter and election fraud.[242] Kennedy's running mate, Lyndon Johnson—who by this time had become Senator Majority Leader—had tremendous influence over the Texas Democratic political machine.[243] One scholar contends, "By comparing poll books to the vote count, it was clear that 100,000 votes had been counted that simply did not exist."[244] There was also evidence that election officials disqualified over 100,000 Republican ballots, yet counted thousands of votes for Kennedy with the same errors.[245] The district court, however, ruled "that Federal courts did not have jurisdiction in vote contests."[246]

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237. *Id.* at 109–10.

238. *Id.*

239. *Id.*

240. *Id.* at 110–11 (holding that the Constitution did not protect the right of a candidate to a fair primary).

241. L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 350 n.110 (1961).

242. *See* FOLEY, *supra* note 219, at 218–20.

243. *Id.*

244. *Id.* at 219 (quoting W.J. RORABAUGH, THE MAKING OF A PRESIDENT: KENNEDY, NIXON, AND THE 1960 ELECTION 198 (2009)).

245. *Id.*

246. *Texas Recount Denied*, N.Y. TIMES, Dec. 13, 1960, at 23.

The Fifth Circuit applied that principle again in the 1972 case *Hubbard v. Ammerman*,[247] involving an election contest over the Democratic nomination for a county judgeship.[248] The county's Democratic party determined that Jim Ammerman had received more votes than his opponent, James Collins, and certified him as its nominee.[249] Collins filed an election contest in state court, claiming that illegally cast absentee ballots had been counted for Ammerman.[250] Ammerman, in turn, counterclaimed, contending that out-of-precinct ballots had been illegally counted for Collins.[251] The state trial court concluded that, due to the large number of illegal votes, a new primary should be held.[252]

While an appeal was pending to the Texas Court of Civil Appeals, various voters in the district who had supported Collins filed a federal lawsuit.[253] They claimed that the ballot box had been stuffed with fraudulent votes cast in the name of African American voters.[254] This conduct "constituted preying upon" African Americans and interfered with their right to vote in violation of the Fifteenth Amendment.[255] The federal district court entered a preliminary injunction enjoining election officials from holding the general election for county judge.[256]

After the date for the general election passed without the race being held due to the federal injunction, the state court determined that the election contest was moot and dismissed it.[257] The federal district court later ruled in favor of Collins on the merits.[258] It concluded that some African Americans had been prevented from voting in the primary because fraudulent absentee ballots had been cast in their names.[259] The court declared that Collins should have won the primary and ordered that a general election be held with Collins as the Democratic nominee.[260]

The Fifth Circuit reversed.[261] It began by declaring that § 1344 is the only jurisdictional statute that allows a district court to hear a "state or local election contest (primary or general) to . . . decide the issue of who

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247. 465 F.2d 1169 (5th Cir. 1972).

248. *Id.* at 1170.

249. *Id.*

250. *Id.* at 1172.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 1172–73.

255. *Id.* at 1173.

256. *Id.*

257. *Id.* at 1174.

258. *Id.* at 1175.

259. *Id.*

260. *Id.*

261. *Id.* at 1180, 1183 ("[T]he District Court was clearly without jurisdiction to entertain this election contest under 28 U.S.C. § 1344.").

has received a majority of the votes legally cast."[262] The Fifth Circuit held that the district court lacked jurisdiction under § 1344 because none of the plaintiffs was the candidate allegedly entitled to the office at issue.[263] Moreover, none of the plaintiffs had claimed that they, in particular, had been discriminated against because of their race.[264]

Most recently, *Keyes v. Gunn*[265] involved the 2015 general election for a seat in the Mississippi House of Representatives.[266] In one county within the legislative district, thirty people voted by "affidavit ballot"[267] (i.e., provisional ballot).[268] The county election commission decided that only nine of those ballots were valid.[269] Based on that determination, the election ended in a tie.[270] Pursuant to Mississippi law, the candidates drew straws to determine the winner and the incumbent Democrat prevailed.[271]

The losing candidate filed an election contest in the state House of Representatives.[272] As in all states, the Mississippi Constitution contains a provision specifying that each house of the legislature is the sole judge of its members' elections and returns.[273] A special legislative committee appointed to investigate the matter concluded that five of the affidavit ballots that the county election commission had counted were invalid.[274] The voters who cast them had not updated their voter registrations after moving to different voting precincts.[275] The House adopted the committee report and seated the challenger, a Republican.[276]

Five of the voters, whose affidavit ballots had been originally counted by the county election commission, sued the Mississippi House of Representatives, the Speaker, and the special committee members in the U.S. District Court for the Southern District of Mississippi.[277] The voters alleged that they had voted for the Democratic candidate and their ballots

262. *Id.* at 1180.

263. *Id.*

264. *Id.*

265. 890 F.3d 232 (5th Cir.), *cert. denied*, 139 S. Ct. 434 (2018).

266. *Id.*

267. MISS. CODE ANN. § 23-15-573(1)(b) (2020) (listing circumstances under which a voter must cast an affidavit ballot); *see also* 52 U.S.C. § 21082(a)(2) (2012) (establishing minimum federal standards for when voters must be permitted to cast provisional ballots).

268. *Keyes*, 890 F.3d at 234.

269. *Id.*

270. *Id.*

271. *Id.* (citing MISS. CODE ANN § 23-15-605).

272. *Id.*

273. MISS. CONST. art. 4, § 38 ("Each house shall elect its own officers, and shall judge of the qualifications, return and election of its own members.").

274. *Keyes*, 890 F.3d at 234.

275. *Id.*

276. *Id.*

277. *Id.* at 234–35.

were likely the ones that the legislature had rejected.[278] That rejection, they argued, violated the Equal Protection Clause.[279]

The district court held that the Mississippi House of Representatives had sovereign immunity from suit, but legislative immunity did not protect any of the individual defendants.[280] The court further stated that, although it lacked subject-matter jurisdiction to determine the outcome of the state legislative race, it could adjudicate whether the Equal Protection Clause required that the plaintiffs' votes be counted.[281] Quoting John Hart Ely, the court concluded that the state legislature could not be trusted to determine whether the electoral process for the legislature itself had broken down[282]—despite the state constitution's express grant of power over the matter to the legislature.[283] In a footnote, the district court rejected the notion that § 1344 "controls the present suit and altogether prevents this Court from exercising jurisdiction."[284]

The defendants took an immediate interlocutory appeal under the collateral order doctrine concerning the legislators' immunity defenses,[285] and the Fifth Circuit reversed.[286] Even though subject-matter jurisdiction is not immediately appealable on its own, the Fifth Circuit asserted that Article III required it to begin by confirming "the jurisdiction both of this court and of the district court."[287] The court then held that, by enacting § 1344, "Congress has restricted the subject matter jurisdiction of federal courts as it relates to election disputes."[288] If a case "contest[s] the results of an election, then it must fall within the exceptions allowing federal jurisdiction under 28 U.S.C. § 1344."[289] Citing Fifth Circuit precedent going back nearly seventy years,[290] the

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278. *Id.* at 235.

279. *Id.*

280. Keyes v. Gunn, 230 F. Supp. 3d 588, 596 (S.D. Miss. 2017), *rev'd*, 890 F.3d 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018).

281. *Id.* at 593 ("To the extent plaintiffs seek an order determining who received a majority of votes or declaring [the Democratic candidate] the lawful Representative of District 79, that portion of the complaint must be dismissed."); *see also id.* (holding that "[t]his Court lacks jurisdiction to grant [the] remed[y]" of declaring a winner in a state legislative election).

282. *Id.* at 594 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980)).

283. MISS. CONST. art. 4, § 38.

284. *Keyes*, 230 F. Supp. 3d at 593 n.3 (citing Powell v. McCormack, 395 U.S. 486, 516 (1969)).

285. Keyes v. Gunn, 890 F.3d 232, 235 n.4 (5th Cir.), *cert. denied*, 139 S. Ct. 434 (2018).

286. *Id.* at 240.

287. *Id.* at 235; *see also id.* at 235 n.4.

288. *Id.* at 236.

289. *Id.*

290. *See, e.g.*, Hubbard v. Ammerman, 465 F.2d 1169, 1180 (5th Cir. 1972); Johnson v. Stevenson, 170 F.2d 108, 110–11 (5th Cir. 1948).

court held, "[F]ederal courts may not hear an election contest involving the office of a 'member of a state legislature.'"[291]

The plaintiff voters argued that they had not brought an election contest, but rather an Equal Protection claim challenging the legislature's refusal to count their votes.[292] They did not ask the court to determine the election's outcome, but rather sought an injunction prohibiting the defendants from rejecting their votes. The court, however, concluded that § 1344's limitations on federal jurisdiction applied regardless of how the plaintiffs characterized their claim, because the district court's ruling would determine the outcome of a state legislative race.[293] Thus, the Fifth Circuit dismissed the plaintiffs' Equal Protection claim for lack of subject-matter jurisdiction under § 1344.[294] The Supreme Court denied certiorari without dissent.[295] *Keyes* confirms that, under binding Fifth Circuit precedent, federal courts lack subject-matter jurisdiction over any post-election constitutional challenges relating to federal or state legislative offices. As Part II demonstrates, this construction of § 1344 is patently invalid.

E. *Congress's Failure to Protect African Americans' Voting Rights*

By enacting § 1344, the Reconstruction Congress excluded federal district courts from adjudicating election contests for federal offices that arose from Fifteenth Amendment violations to preserve its sole constitutional prerogative to determine the outcomes of federal elections.[296] Just a few years earlier, Congress had similarly drafted § 2

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291. *Keyes*, 890 F.3d at 236–37 (quoting 28 U.S.C. § 1344 (2012)).

292. *Id.* at 237.

293. *Id.* at 239–40 ("[W]hatever name is attached to the plaintiffs' claim, the unavoidable outcome of litigating the claim determines who won and who lost a disputed election for a state legislative seat.").

294. *Id.* at 240.

295. Keyes v. Gunn, 139 S. Ct. 434 (2018).

296. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3563 (1870) (statement of Sen. Carpenter) (explaining that the Enforcement Act's jurisdictional provision for election contests excluded congressional and state legislative races "because the Congress and the Legislature are the exclusive judges of the qualifications and elections of their members"); *id.* at 3570 (statement of Sen. Trumbell) (arguing that allowing courts to decide election contests went beyond the scope of Congress's power to protect voting rights); *id.* at 3872 (statement of Rep. Bingham) (declaring that "the express words of the Constitution leave" power to resolve any disputes about congressional or presidential elections "to the Houses of Congress severally"); *see also id.* at 3563–64 (statement of Sen. Thurman) ("Just think of such a question being brought before a district judge of the United States—the question who is elected President of the United States! . . . [Y]ou may have the spectacle of seeing a contest for the Presidency in a district court of the United States."); *id.* at 3681 (statement of Sen. Williams) (cautioning that § 1344 would shift power to resolve elections "from the executive to the judicial department of the country"); *see also infra* note 438 and accompanying text; *cf.* U.S. CONST. art. I, § 5, cl. 1; *id.* art. II, § 1, cl. 3; *id.* amend. XII.

of the Fourteenth Amendment to preserve its power to enforce voting rights. Section 2 provides that a state that denies the right to vote to any male citizen residents who are at least twenty-one and have not been convicted of crimes will lose some of its representation in the House of Representatives (and, by extension, the electoral college).[297]

Consistent with these provisions, in the 1903 case *Giles v. Harris*,[298] the Supreme Court completely disclaimed any ability or responsibility for dismantling systemic voter suppression of African Americans throughout southern states.[299] In *Giles*, the Court affirmed dismissal of an African American voter's petition to require officials in Montgomery, Alabama, to register African American voters.[300] The Court explained that it could not grant effective relief because it was not "prepared" to have court officers "supervise the voting in that State."[301] As Professor Rick Pildes explains, such a step was seen as being far outside the scope of the judicial power at the time.[302] The *Giles* Court concluded, "Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[303] Thus, the Court not only struck down numerous Reconstruction Era laws that Congress had enacted to protect African Americans and their voting rights,[304] but flatly refused to step in to protect those rights itself.

At about the same time, the Court further precluded the federal judiciary from remedying constitutional violations in the electoral process in *Taylor v. Beckham*.[305] The Democrat-controlled state board of election commissioners declared that the Republican candidate, William S. Taylor, had won the state's gubernatorial election, and he took office.[306] The state legislature later overturned the board's determination, concluding that the Democratic candidate had won. "[T]wo partisan armies arrayed against each other in Frankfort, [and] civil war in the state

297. U.S. CONST. amend. XIV, § 2. The Nineteenth Amendment rendered the limitation to men unenforceable, *see id.* amend. XIX, while the Twenty-Sixth Amendment effectively lowered the applicable age to 18, *see id.* amend. XXVI, § 1.

298. 189 U.S. 475 (1903).

299. *See id.* at 488.

300. *See id.* at 482, 488.

301. *Id.*

302. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 306 & n.45 (2000).

303. *Giles*, 189 U.S. at 488.

304. *See, e.g.*, James v. Bowman, 190 U.S. 127, 142 (1903); United States v. Reese, 92 U.S. 214, 220–21 (1876); *see also* The Civil Rights Cases, 109 U.S. 3, 14 (1883); United States v. Cruikshank, 92 U.S. 542, 568–69 (1876); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1443 (2006).

305. 178 U.S. 548 (1900).

306. FOLEY, *supra* note 219219, at 171.

was a real risk. Taylor asked President McKinley," a fellow Republican, "to send in federal troops, but McKinley refused."[307]

Taylor refused to vacate the Governor's office, and the Kentucky state courts issued a writ of quo warranto ousting him.[308] The state courts refused to reconsider the merits of the legislature's determination and rejected Taylor's objections under the U.S. Constitution.[309] He contended, among other things, that the legislature's conclusion was fraudulent, and that the legislature had overturned the state board's decision on purely political grounds. The Supreme Court refused to exercise jurisdiction over Taylor's appeal of the constitutional issues under the political question doctrine.[310] That ruling precluded federal courts from disturbing the conclusions of state election officials, legislatures, and courts concerning the results of state elections.[311] *Taylor* "set the precedent . . . that the US Supreme Court would not involve itself in a state's vote-counting disputes."[312] Over a half-century later, the Court eventually adopted a broader view of the federal judiciary's jurisdiction in election cases,[313] and it adjudicated a Fourteenth Amendment challenge to a state's ballot-counting process in its 2000 ruling in *Bush v. Gore*.[314]

Despite the post-Reconstruction Court's general refusal to get involved in election-related disputes, as well as Congress's own assertions of authority to determine the outcomes of federal elections, Congress's record was checkered. For example, although several states continued to disenfranchise African Americans and others following the Fourteenth Amendment's ratification, Congress declined to reduce those states' representation in Congress under § 2 of the Fourteenth Amendment following the census of 1870.[315] On the other hand, in the decades after the Civil War, the House of Representatives "used its constitutional power under the 'Qualifications Clause' to set aside election results in over 30 cases from Southern states in which the House

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307. *Id.* at 172.

308. *See* Taylor v. Beckham, 56 S.W. 177, 182–83 (Ky. Ct. App. 1900), *writ of error dismissed*, 178 U.S. 548 (1900).

309. *Id.* at 183.

310. *Taylor*, 178 U.S. at 580 ("We must decline to take jurisdiction on the ground of deprivation of rights embraced by the Fourteenth Amendment, without due process of law, or of the violation of the guarantee of a republican form of government by reason of similar deprivation.").

311. *See* Steven F. Huefner & Edward B. Foley, *The Judicialization of Politics: The Challenge of the ALI Principles of Election Law Project*, 79 BROOK. L. REV. 551, 555 n.15 (2014) ("[T]he settled law was that federal courts would not supervise state electoral processes.").

312. FOLEY, *supra* note 219, at 176.

313. Baker v. Carr, 369 U.S. 186, 237 (1962) (establishing the modern political question doctrine).

314. 531 U.S. 98 (2000).

315. Morley, *supra* note 137, at 324–27.

Elections Committee concluded that black voters had been excluded due to fraud, violence, or intimidation."[316]

In the 1890s, however, Congress repealed many Reconstruction measures protecting African Americans,[317] including most of the Enforcement Act.[318] And by 1904, the House had fully changed course, disclaiming any responsibility for protecting African Americans' voting rights. House Committee on Elections No. 1 issued a unanimous report in *Dantzler v. Lever*, an election contest for a House seat in South Carolina.[319] The losing candidate contended that South Carolina had failed to conduct a legal election, because its constitution and election laws violated the federal Reconstruction Act's[320] requirement that former Confederate states recognize and enforce constitutionally protected voting rights.[321] The challenger pointed out that, following the withdrawal of Union troops in the Compromise of 1877, South Carolina adopted a new constitution with property and educational qualifications for voting that disenfranchised thousands of African American voters.[322] If the district's disenfranchised African American population had been permitted to vote, the challenger alleged, he would have won.[323]

The committee report stated that, if the House awarded relief to the challenger, it would have to similarly invalidate elections throughout the entire South.[324] "Most of [those] States," the report explained, "have adopted new constitutions said to be in conflict with the terms and provisions of the reconstruction acts readmitting them to representation in Congress."[325] Moreover, those states would be unable to hold new elections until they adopted new constitutions and revised their election codes to get rid of the illegal provisions.[326]

The report went on to declare, "[A] legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies."[327] Any person who believes he was improperly barred from voting may "bring suit in a proper court for the purpose of enforcing [their] right or recovering damages for its denial," and may appeal their

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316. Pildes, *supra* note 302, at 308 (citing Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—and Beyond*, 57 MISS. L.J. 591, 627 n.156 (1987)).

317. *See* Act of Feb. 8, 1894, ch. 25, 28 Stat. 36, 36 (1894); Tolson, *supra* note 35, at 467.

318. *See supra* Section I.C.

319. H.R. REP. NO. 58-1740, at 1 (1904).

320. Ch. 70, 15 Stat. 73 (1868).

321. H.R. REP. NO. 58-1740, at 1.

322. *See id.* at 1–2.

323. *Id.* at 2.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 3.

claims, "if necessary, to the Supreme Court of the United States."[328] A ruling from the Supreme Court would be "a positive declaration of the law of the land which could not be denied or challenged."[329] The judiciary, rather than the House, was "a proper forum for the decision of constitutional and other judicial questions."[330] The House adopted the committee report and voted to dismiss the election contest without debate or even a recorded vote.[331] Thus, decades after asserting its constitutional prerogative to resolve issues—including Fifteenth Amendment violations—relating to federal elections, the House flatly refused to even consider African Americans' claims that southern states were systematically disenfranchising them in blatant violation of both the Constitution and federal law. It was not until Congress enacted the Voting Rights Act of 1965[332] that the federal government resumed even more vigorous protection of voting rights for African Americans and other racial minorities.

II. INTERPRETING 28 U.S.C. § 1344

The Fifth Circuit has misconstrued 28 U.S.C. § 1344 as being a federal district court's sole source of subject-matter jurisdiction over any constitutional challenges to election results, regardless of the identities of the plaintiffs, nature of the claims, or relief sought. As a result, that court erroneously interprets § 1344's restrictions as precluding district courts from exercising subject-matter jurisdiction over constitutional challenges to the administration or results of completed presidential, congressional, or state legislative elections.[333]

The Fifth Circuit's interpretation of § 1344 is patently incorrect. Its precedents on this issue, from *Johnson v. Stevenson*[334] in 1948 to *Keyes v. Gunn* in 2018,[335] threaten to cause unnecessary confusion and prevent federal courts from rectifying constitutional problems affecting federal elections. Section 1344 grants district courts original jurisdiction over "any civil action to recover possession of any office" where the "sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color, or previous condition of servitude."[336] It reiterates that "jurisdiction under this

328. *Id.*
329. *Id.*
330. *Id.*
331. 38 CONG. REC. 3429 (Mar. 18, 1904).
332. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702 (2014)).
333. Keyes v. Gunn, 890 F.3d 232, 236 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018).
334. 170 F.2d 108, 109 (5th Cir. 1948).
335. 890 F.3d at 236.
336. 28 U.S.C. § 1344 (2018).

section" extends only to determine "the rights of the parties to office" by reason of the denial of the constitutional and statutory right to vote.[337] The provision further specifies that it does not grant district courts jurisdiction over suits for recovery of the offices of presidential elector, U.S. Senator or Representative, or member of a state legislature.[338]

The Fifth Circuit has misconstrued § 1344's scope in virtually every respect, including the plaintiffs, remedies, and claims to which the statute applies, as well as its purported exclusivity. Properly interpreted, § 1344 imposes a narrow jurisdictional limitation on lawsuits brought by a certain type of plaintiff (candidates), seeking a specific type of relief (appointment to public office), based on a particular type of claim (violations of voters' Fifteenth Amendment rights). And, most importantly, the statute's restrictions do not extend to other, independent jurisdictional grants. Federal courts remain free to hear constitutional claims under § 1331 involving federal or state legislative elections without regard to § 1344's constraints. As discussed in Section III.B, however, the political question and other restrictions limit their ability to exercise this statutory jurisdiction.

First, and most obviously, § 1344 and its attendant limitations apply only to "civil action[s] to recover possession of any office."[339] This means it is potentially applicable only where a candidate is the plaintiff.[340] Section 1344 is simply irrelevant to lawsuits brought by voters. Second, relatedly, § 1344 applies only where the relief the plaintiff seeks is to "recover possession" of the office at issue.[341] The statute does not apply to a lawsuit for an injunction to compel election officials to count or canvass certain contested ballots, treat as valid voters' unsuccessful attempts to cast ballots, or reject certain invalid or fraudulent ballots. Nor does the statute apply where the plaintiffs seek a court order requiring election officials to hold a new election due to pervasive racial discrimination.[342] Rather, § 1344 applies only where the plaintiff asks the

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337. *Id.*

338. *Id.*

339. *Id.*

340. Dubuclet v. Louisiana, 103 U.S. 550, 553 (1880) ("This section provides for an original suit by one out of office to get in . . . ."); Kinnell v. Obama, No. 13-4066-JAR-DJW, 2013 U.S. Dist. LEXIS 185823, at *6 (D. Kan. Aug. 5, 2013) (holding that § 1344 grants jurisdiction only where the plaintiff alleges "that he is personally entitled to recover possession of an office for which he was a candidate"), *adopted by* 2014 U.S. Dist. LEXIS 28580 (D. Kan. Mar. 6, 2014); *see also* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 371 ("Candidates for specified offices who claimed to have been defeated because of the unlawful exclusion of qualified voters were given a remedy to recover the office to which they were entitled.").

341. 28 U.S.C. § 1344.

342. Gray v. Main, 291 F. Supp. 998, 1001 (M.D. Ala. 1966) (holding that § 1344 does not apply where a court must decide "whether the holding of a new election is an appropriate means

court to "declare the winner[]" of an election.[343] Of course, when a court mandates that certain ballots be counted or rejected, an unavoidable consequence may be that a particular candidate is declared the winner. But such collateral effects of a court order are insufficient to bring a lawsuit within § 1344's scope.[344]

In *Johnson v. Jumel*,[345] the circuit court may have construed this requirement too narrowly, although its primary concern was likely to avoid antagonizing white Democratic officials and violent mobs after Reconstruction ended. The petitioner had been elected as Louisiana's auditor of public accounts in the election of 1876.[346] Approximately 10,000 people were denied the right to vote in that race due to racial discrimination, but election officials "correct[ed]" those "errors and wrongs" during the counting process, allowing the petitioner to prevail.[347] A few months later, however, as part of the Compromise of 1877, President Rutherford B. Hayes withdrew all remaining Union troops from the former Confederate states, including Louisiana, allowing white Democrats to seize control of the state governments.[348] A newly installed Louisiana state government under Governor Francis Nicholls[349] ousted the petitioner from office, claiming that he had not been validly elected.[350] The new administration declared that all the votes cast by

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to remedy the discrimination," instead of "whether one candidate or the other should have been elected").

343. Hobson v. Hansen, 265 F. Supp. 902, 921 n.6 (D.D.C. 1967); *see Gray*, 291 F. Supp. at 1000 (holding that § 1344 applies where the court must make a "specific adjudication" that candidates are "entitled to the offices they sought"); *cf. Dubuclet*, 103 U.S. at 553 (holding that the circuit court did not have jurisdiction where the candidate involved was already "in office under his election duly declared pursuant to the laws of the State"); Kellogg v. Warmouth, 14 F. Cas. 257, 259 (C.C.D. La. 1872) (No. 7667) (holding that § 1344 does not allow a federal court "to make a governor of a state," but rather "to aid in making known the voice of the people" in accordance with the Constitution and federal law).

344. *Gray*, 291 F. Supp. at 1000–01; *see, e.g.*, Bierley v. Sambroak, No. 13-326 (Erie), 2014 WL 710004, at *5 & n.4 (W.D. Pa. Feb. 25, 2014) (holding that § 1344 does not allow the court to exercise jurisdiction over a lawsuit alleging that a candidate for state court judge was "unfit for public office," because the plaintiff did not seek to "'recover possession' of an elected office" (quoting 28 U.S.C. § 1344)); *cf.* Edelman v. Jordan, 415 U.S. 651, 668 (1974) (holding that a prospective equitable decree which has the "ancillary effect" of requiring state officials to spend money from the treasury is not equivalent to a judgment for retrospective damages from the treasury).

345. 13 F. Cas. 755 (C.C.D. La. 1877) (No. 7392).

346. *Id.* at 756.

347. *Id.* at 756–57.

348. *See* JAMES K. HOGUE, UNCIVIL WAR 175–76 (2006); ARI HOOGENBOOM, THE PRESIDENCY OF RUTHERFORD B. HAYES 67 (1988).

349. *See* Donald Grier Stephenson, Jr., *The Waite Court at the Bar of History*, 81 DENV. U. L. REV. 449, 473 n.208 (2003) (detailing "the disputed elections of 1876").

350. *Johnson*, 13 F. Cas. at 757 (noting that the petitioner alleged that a new "government established by domestic violence, insurrection and revolution" had removed him from office).

African Americans who had been prevented from voting should be counted against the petitioner.[351]

The federal circuit court refused to exercise jurisdiction over the petitioner's claim.[352] It declared, "[P]etitioner has not been defeated or deprived of any election; but, on the contrary, was elected and was declared elected by the competent state authority, was duly commissioned, and retained his office for the period of four months."[353] The court further explained that the Enforcement Act does not give the court jurisdiction "merely to enable a party to physically retain or regain an office to which he had a title established by an election."[354]

Thus, the *Johnson* court correctly held that § 1344 does not grant jurisdiction over all allegedly improper removals from office. Nevertheless, it failed to recognize that the statute is broad enough to apply where the basis for removal is that the incumbent had been invalidly elected because people had been denied the right to vote on account of race. The Nicholls Administration removed the petitioner because it concluded that he had lost the election.[355] The fact that the state reached this conclusion belatedly, after the petitioner held office for four months, should not have prevented the federal court from hearing the case. It appears the federal judge simply manufactured a basis to refuse jurisdiction to avoid antagonizing the new Democratic government, since federal troops no longer remained to protect the judiciary or assist with enforcing its judgments.

Third, § 1344 applies only where a candidate claims that she lost due to racial discrimination against people who voted or attempted to vote, in violation of the Fifteenth Amendment.[356] The court may determine whether an election's outcome was affected by racial discrimination "in any of the stages of an election, in registration, in the receipt of votes, the certificates of the votes by the local authorities, or the final canvass of the votes or the certificate of election by the returning board."[357] However, the statute does not allow federal courts to adjudicate election contests where only fraud or errors unrelated to racial discrimination occurred.[358]

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351. *Id.*

352. *Id.* at 758.

353. *Id.* at 757.

354. *Id.* at 758.

355. *Id.* at 757.

356. 28 U.S.C. § 1344 (2018); *see* Griffin v. Burns, 570 F.2d 1065, 1076 n.13 (1st Cir. 1978) (commenting that § 1344 "relates solely to racially-based denials of the right to vote").

357. *Johnson*, 13 F. Cas. at 757; *see also id.* (holding that the court's jurisdiction under § 1344 "extends from the first act required to be done in the matter of an election down to and including the final and effective canvass of the votes").

358. *See, e.g.*, Harrison v. Hadley, 11 F. Cas. 649, 651–53 (C.C.E.D. Ark. 1873) (No. 6137) (dismissing petition under the Enforcement Act because "the alleged frauds were perpetrated without reference to the 'race, color or previous condition of servitude' of the voters or candidates,

Fourth, and perhaps most importantly, § 1344's exclusion of election contests for federal and state legislative offices from the district court's jurisdiction applies only to suits brought under § 1344 itself. This language does not create a cross-cutting limitation on other statutory grants of jurisdiction to federal courts.[359] Although § 1344 was the only jurisdictional basis for bringing voting rights claims in federal court at the time of its enactment, Congress subsequently enacted the Civil Rights Act of 1871. That statute, as amended, grants district courts jurisdiction over actions to redress deprivations under color of state law "of any rights, privileges, or immunities secured by the Constitution."[360] Congress later expanded district courts' jurisdiction even further by conferring general federal question jurisdiction upon them[361] and, in 1980, removing the amount-in-controversy requirement for such cases.[362]

Section 1344's denial of subject-matter jurisdiction over election contests for presidential elector, Congress, or state legislature does not apply to other independent grants of jurisdiction.[363] When Congress completely prohibits the federal courts from adjudicating certain types of cases, it does so through freestanding statutory provisions, rather than embedding such restrictions within a particular jurisdictional grant.[364] In

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and, if perpetrated, were prompted by no other or different motive than that which ordinarily impels men to commit such crimes"); Kinnell v. Obama, No: 13-4066-JAR-DLW, 2013 U.S. Dist. LEXIS 185823, at *6–7 (D. Kan. Aug. 5, 2013) (holding that § 1344 did not apply where the plaintiff alleged that he was unconstitutionally prohibited from voting because he was a felon, rather than due to racial discrimination), *adopted by* 2014 U.S. Dist. LEXIS 28580 (D. Kan. Mar. 6, 2014); *see also* Hobson v. Hansen, 265 F. Supp. 902, 921 n.6 (D.D.C. 1967) (explaining that § 1344 applies to "state and municipal elections contaminated by alleged deprivations of the right to vote on account of race").

359. *Cf.* Redish, *supra* note 9, § 104.48 ("[F]ederal courts may not hear election contests involving any of the excluded offices.").

360. Ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 28 U.S.C. § 1343(a)(3) (2018)). This provision also confers jurisdiction over violations, under color of state law, of federal laws "providing for equal rights of citizens or of all persons within the jurisdiction of the United States." § 1343(a)(3); *see* Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 607–09 (1979). A later enactment also grants district courts jurisdiction over suits under federal laws "for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343(a)(4).

361. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2018)).

362. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.

363. *Cf.* Griffin v. Burns, 570 F.2d 1065, 1076 n.13 (1st Cir. 1978) (noting that the Fifth Circuit's narrow interpretation of § 1344 fails to take account of other civil rights statutes).

364. *See, e.g.*, Tax Anti-Injunction Act, 26 U.S.C. § 7421 (2018) (restricting all courts' jurisdiction to restrain the assessment or collection of federal taxes); Johnson Act, 28 U.S.C. § 1342 (2018) (restricting district courts' jurisdiction to enjoin state agencies' rate orders); Norris-LaGuardia Act, 29 U.S.C. § 101 (2018) (restricting federal courts' jurisdiction to issue labor injunctions); *see also* Anti-Injunction Act, 28 U.S.C. § 2283 (2018) (prohibiting federal courts from staying state court proceedings, except in certain circumstances).

contrast, when Congress imposes restrictions on a particular grant of subject-matter jurisdiction, litigants may avoid them by invoking other grants instead. For example, when § 1331's federal question jurisdiction was subject to an amount-in-controversy requirement, litigants with civil rights claims that did not satisfy that requirement could proceed under § 1343(4).[365] Thus, federal or state legislative candidates who wish to allege that they have been wrongly excluded from office due to racial discrimination against voters may proceed under § 1331, even if jurisdiction under § 1344 is lacking.

The Supreme Court confirmed this understanding in *Powell v. McCormack*.[366] Adam Clayton Powell, Jr. had been elected to the U.S. House of Representatives in the 90th Congress.[367] The House voted that he was not qualified to be seated due to allegations that he had "diverted" House funds for his personal use and "made false reports" about it during his previous term.[368] Powell sued in federal court, seeking an injunction compelling the Speaker to administer his oath as Representative.[369] He also asked the court to order the House Sergeant-at-Arms, Clerk, and Doorkeeper to afford him the privileges of Representatives.[370] By the time the case reached the Supreme Court, however, the 90th congressional term was over.[371] He was reelected to the House in the 91st Congress, and the House seated him for that term.[372] The Court nevertheless allowed his claim for backpay to proceed.[373]

The Court held that § 1331 created subject-matter jurisdiction because the case's outcome "depend[ed] directly on construction of the Constitution."[374] The defendants argued that the federal judiciary could not entertain the case because § 1344 "specifically excludes suits concerning the office of Congressman."[375] Rejecting that argument, the Court held that § 1344 "is limited to election challenges where a denial of the right to vote in violation of the Fifteenth Amendment is alleged."[376] It added, "[T]here is absolutely no indication that the passage of this Act

365. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412 n.1 (1968); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 508 (1939) (holding that, where litigants did not satisfy the amount-in-controversy requirement to bring a federal question claim, they could instead proceed under an alternate jurisdictional basis).

366. 395 U.S. 486 (1969).

367. *Id.* at 489.

368. *Id.* at 492–93.

369. *Id.* at 493–94.

370. *Id.*

371. *Id.* at 494.

372. *Id.*

373. *Id.* at 496.

374. *Id.* at 516.

375. *Id.* at 515.

376. *Id.* at 516.

evidences an intention to impose other restrictions on the broad grant of jurisdiction in § 1331."[377] Thus, there was no basis for exporting Congress's restrictions on jurisdiction under § 1344 to claims brought under other, independent jurisdictional grants.

III. FEDERAL COURTS AND FEDERAL ELECTIONS

The enactment of general federal question jurisdiction, followed by the elimination of the amount-in-controversy requirement, greatly limited the practical implications of § 1344's restrictions. Those restrictions nevertheless raise intriguing questions going to the heart of our constitutional order. First, the statute is a rare example of Congress expressly denying federal district courts—and, at least in part, the U.S. Supreme Court—jurisdiction to enforce constitutional rights. Second, the statute highlights the uncertainty over which branch of government—Congress or the courts—has the ultimate power to determine the outcomes of federal elections.[378]

A. *Jurisdiction Stripping and the Right to Vote*

The Enforcement Act's restrictions on district courts' jurisdiction appear to be constitutionally valid. Indeed, Congress likely could have gone even further by completely excluding the federal judiciary, including the Supreme Court, from adjudicating election-related claims.

The Constitution mandates the Supreme Court's existence,[379] but leaves the creation of lower courts to Congress's discretion.[380] Congress's power to create inferior federal courts has generally been understood to include the authority to determine the bounds of their subject-matter jurisdiction,[381] so long as Congress does not violate the Suspension

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377. *Id.*

378. Congressional and presidential elections raise different constitutional issues than elections for state legislatures. Even though 28 U.S.C. § 1344 applies to all of those elections, the analysis in this Part is limited to federal elections.

379. U.S. CONST. art. III, § 1, cl. 1 ("The judicial power of the United States, shall be vested in one Supreme Court . . . .").

380. *Id.* art. I, § 8, cl. 9 (granting Congress power "[t]o constitute Tribunals inferior to the [S]upreme Court"); *id.* art. III, § 1 (specifying that the judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

381. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein."); *see also* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.").

Clause.[382] And while the Constitution specifies the outer bounds of the Court's original jurisdiction,[383] it expressly allows Congress to create "Exceptions" to the Court's appellate jurisdiction.[384] Historically, Congress has used this power to prevent the Court from adjudicating important constitutional issues; for the first century of the nation's history, the Supreme Court lacked appellate jurisdiction in federal criminal matters, including capital cases.[385]

Some scholars have argued, however, that Congress's power over the federal judiciary's jurisdiction does not allow it to completely bar federal courts from enforcing constitutional rights.[386] These arguments may

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382. *See* U.S. CONST. art. I, § 9, cl. 2 (guaranteeing the writ of habeas corpus in peacetime); Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that Congress may not deprive the federal courts of jurisdiction to issue writs of habeas corpus without providing an adequate substitute remedy).

383. *See* U.S. CONST. art. III, § 2, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803).

384. U.S. CONST. art. III, § 2, cl. 2; *see Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) (holding that Congress may prohibit the Supreme Court from hearing appeals in habeas cases, but emphasizing that the petitioners could still seek habeas relief directly from the Court); *see also* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 930–33, 948–78 (2013) (documenting how Congress has used its power under the Exceptions Clause to establish and expand certiorari jurisdiction to enable the Court to focus its limited resources on resolving important federal questions and ensuring national uniformity); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908 (1984) ("The text of article III, the *McCardle* decision, the bulk of Supreme Court dicta, congressional practice, and the constitutional scheme of checks and balances all contribute to a compelling argument that there are no substantial internal limits on Congress's article III power to limit the Court's appellate jurisdiction."); *cf.* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 252–53, 268–300 (2012) (documenting how the executive branch has repeatedly opposed efforts to completely preclude Supreme Court review of, or otherwise strip federal jurisdiction over, constitutional claims). *But see* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872) (holding that Congress may not strip the Supreme Court of jurisdiction over appeals from the Court of Claims only in cases in which the claimant had received a presidential pardon for aiding the Confederacy); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1511–12 (2000) (arguing that Congress may not prohibit the Court from issuing supervisory writs to lower courts to enforce the Court's constitutional supremacy by compelling lower courts to "conform their decisions to the clear dictates of law").

385. *See* Morley, *supra* note 71, at 712 & nn.75–77.

386. *See, e.g.*, Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 70 (1981) (arguing that Congress cannot use its authority over federal jurisdiction to prevent federal enforcement of certain disfavored constitutional rights); Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L.L. REV. 129, 145–46 (1981) (arguing that Congress cannot selectively deny federal jurisdiction only for certain types of rights, because such restrictions would express hostility toward those rights and implicitly encourage state and local officials to violate them); *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1134–35 (2010)

apply with special force in the unique area of voting rights. Section 1344 implicates this long-debated question of whether the Constitution limits Congress's ability to withdraw certain issues from the federal judiciary's jurisdiction. As explained earlier, § 1344 grants federal district courts subject-matter jurisdiction to adjudicate election contests arising from racial discrimination against voters.[387] It prohibits them from exercising such jurisdiction, however, with regard to claims arising from completed federal or state legislative elections.[388] Thus, § 1344 and its restrictions apply only to the original jurisdiction of district courts. As a practical matter, it also precludes the courts of appeals from hearing appeals in cases excluded from the district courts' jurisdiction, as well. On its face, § 1344 does not limit the U.S. Supreme Court's jurisdiction to hear appeals from state courts in any election contests, including those for federal or state legislative offices.[389] One might therefore argue that it does not completely strip the federal judiciary of jurisdiction over election contests for federal offices or state legislatures.

In some respects, however, § 1344 may still be considered a jurisdiction-stripping statute. At the time of the statute's enactment in 1870, the U.S. Supreme Court had jurisdiction over appeals from a state's highest court in constitutional cases only when that court upheld the challenged state action and rejected the constitutional claim.[390] When the state court ruled in favor of a federal constitutional claim and invalidated the state's action, in contrast, the Court could not hear the appeal. Accordingly, when Congress enacted the Enforcement Act, the Court would have been unable to hear appeals from state courts in Fifteenth Amendment cases where the plaintiffs prevailed. In other words, the Enforcement Act, together with the Judiciary Act of 1789, completely barred the federal judiciary from hearing at least some election-related constitutional cases.[391]

Moreover, when Congress passed the Enforcement Act, it sought to exclude the federal judiciary as a whole—not just federal district courts—from resolving federal election contests.[392] The Reconstruction Congress believed that the Constitution made it the sole judge of congressional

("Congress cannot use its power to control jurisdiction to preclude constitutionally necessary remedies for the violation of constitutional rights. . . . [I]t should be . . . unthinkable today that Congress could lawfully preclude all judicial jurisdiction to provide remedies for vote dilution or invidious discrimination . . . ." (quotation marks omitted)).

387. 28 U.S.C. § 1344 (2018).

388. *Id.*

389. *Id.*

390. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

391. Congress did not grant the Supreme Court plenary *certiorari* jurisdiction over appeals from states' highest courts when they upheld federal constitutional claims until 1914. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

392. *See supra* note 296 and accompanying text.

elections and returns, as well as the validity of electoral votes for President.[393] Most members objected to the notion of the federal judiciary—not just federal district courts—getting involved in federal elections.[394] The Supreme Court's involvement in a case concerning a federal election's results would intrude equally upon Congress's constitutional prerogatives, regardless of whether the case were appealed from a lower federal court or a state supreme court. Consequently, although the Enforcement Act did not completely exclude the Supreme Court from hearing all Fifteenth Amendment issues relating to federal elections, it may be deemed a jurisdiction-stripping statute in both purpose and effect.

Regardless, one can easily imagine even more extreme variations of § 1344. Congress might have forbidden any federal courts from exercising subject-matter jurisdiction under any jurisdictional statute over Fifteenth Amendment challenges to the results of congressional, presidential, or state legislative elections. Alternatively, Congress could have completely prohibited federal courts from entertaining any type of constitutional challenge to the results of such elections. Indeed, that is similar to how the Fifth Circuit has interpreted § 1344.[395]

Such scenarios are not too far removed from the federal judiciary's jurisdiction before Congress passed the Enforcement Act. At the time, Congress had not yet conferred general federal question jurisdiction on federal trial courts. And election contests almost always involved citizens of the same state, thereby excluding diversity jurisdiction. Consequently, prior to the Enforcement Act, there would have been no way to bring a Fifteenth Amendment challenge in federal court to the results of elections for any office. And, as discussed above, the Supreme Court only had jurisdiction to hear appeals from state supreme courts if they rejected a party's constitutional claims.[396] So, prior to the Enforcement Act, federal district courts—and, to a lesser extent, the federal judiciary as a whole—were excluded from hearing constitutional challenges to elections. If anything, the Enforcement Act's limited grant of federal jurisdiction over Fifteenth Amendment challenges to the results of certain elections was a step toward ameliorating that situation.

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393. *Id.*

394. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3753 (1870) (statement of Sen. Stewart) (emphasizing that the conference committee's version of § 1344 did not "draw[] anything else before the United States Courts"); *id.* at 3681 (statement of Sen. Williams) (objecting to allowing the "judicial department" to resolve elections); *id.* at 3872 (statement of Rep. Bingham) (agreeing that Congress should not empower "the courts of the United States" to resolve contests concerning federal elections). *But see id.* at 3564 (statement of Sen. Thurman) (claiming it would be ridiculous for a district judge to resolve a presidential election).

395. *See supra* notes 234–240, 262–264, 288–295 and accompanying text.

396. Ch. 20, § 25, 1 Stat. 73, 85–86.

Congress likely possesses constitutional authority to completely exclude the federal judiciary, including the Supreme Court, from hearing constitutional challenges to the results of elections, particularly federal elections, for three reasons. First, the Reconstruction Amendments' Enforcement Clauses[397] grant Congress broad discretion over the protection of substantive rights those provisions create.[398] The Enforcement Clauses, combined with Congress's authority over the lower federal courts and the Supreme Court's appellate jurisdiction,[399] appear to grant Congress the authority to determine the extent to which the federal courts should be responsible for enforcing constitutional rights.

Second, historical practice makes it difficult for either voters or candidates to assert a constitutional right to have a federal court in general, or the Supreme Court in particular, hear election-related constitutional claims. Federal district courts lacked authority to hear constitutional challenges relating to federal elections until the 1870s.[400] And for decades, the Supreme Court has exercised purely discretionary *certiorari* jurisdiction over appeals from a state's highest court in cases involving constitutional challenges to state and local officials' actions.[401] The Supreme Court's plenary discretion to refuse to hear the constitutional claims of state-court litigants—including those involuntarily relegated to state court[402]—makes it difficult for such litigants to assert they have the constitutional right to federal review.

Finally, the Constitution expressly grants authority to determine the outcomes of federal elections to Congress. States may also assert a strong sovereign interest in determining their own leaders.[403] Professor Henry Hart suggests in his famous dialogue that Congress may not limit the

397. *See, e.g.*, U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *accord id.* amend. XIII, § 2; *id.* amend. XIV, § 5.

398. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (analogizing Congress's sweeping enforcement discretion under § 5 of the Fourteenth Amendment to its power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18); South Carolina v. Katzenbach, 383 U.S. 301, 326–27 (1966) (same for Congress's power to enforce the Fifteenth Amendment); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–43 (1968) (upholding broad congressional power to enforce the Thirteenth Amendment). *But see* City of Boerne v. Flores, 527 U.S. 507, 529–30 (1996) (holding that remedial legislation enacted under § 5 of the Fourteenth Amendment must be "congruent and proportional" to actual violations of constitutional rights, as defined by the U.S. Supreme Court, that are demonstrated in the legislative record).

399. *See supra* notes 379–384 and accompanying text.

400. *See supra* notes 179–184 and accompanying text.

401. *See* 28 U.S.C. § 1257(a) (2018).

402. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 41 (1971) (reversing a federal district court's injunction against a state criminal prosecution).

403. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

Supreme Court's jurisdiction in a way that "destroy[s] [its] essential role . . . in the constitutional plan."[404] Professor Richard Fallon similarly suggests that a law completely withdrawing federal jurisdiction over certain types of cases based on congressional antipathy toward particular constitutional rights "would violate the Constitution as appropriately interpreted in light of precedent," functional considerations, and "less than wholly conclusive evidence concerning the original understanding."[405] But denying the Supreme Court, or federal courts more broadly, jurisdiction over constitutional claims arising from the electoral process is unlikely to destroy their role within the constitutional system. As the legislative history of § 1344 itself demonstrates, such a law could plausibly arise from Congress's desire to maintain its own institutional authority—and that of state legislatures—rather than a desire to undermine voting rights.[406]

The structure of the Constitution delegates primary responsibility over most important aspects of federal elections to political entities.[407] Congress and state legislatures determine the time, place, and manner of congressional elections.[408] Congress similarly sets the times for presidential elections and the casting of electoral votes;[409] state legislatures regulate the manner in which presidential elections are conducted[410] and presidential electors cast their electoral votes.[411] The Constitution grants each chamber of Congress the prerogative to judge the "Elections, Returns and Qualifications of its own members,"[412] while

404. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

405. Fallon, *supra* note 386, at 1086.

406. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3563 (1870) (statement of Sen. Carpenter) (explaining that "[o]f course" § 1344's exceptions for congressional and state legislative races were included "because the Congress and the Legislature are the exclusive judges of the qualifications and elections of their members"); *id.* at 3872 (statement of Rep. Bingham) (stating that the conference committee believed "that the courts of the United States under no possible condition of things should be authorized to intervene to settle any case of contest whatever about the election of members of Congress" or presidential electors, and that the Enforcement Act left "decision of such question precisely where the express words of the Constitution leave it, to the Houses of Congress severally"); *id.* at 3754 (statement of Sen. Stewart) (explaining that the Enforcement Act gave full "effect to the fifteenth amendment," despite limiting the types of elections subject to federal jurisdiction); *see also id.* at 3486 (statement of Sen. Thurman) (warning against allowing a state and a federal court to reach different conclusions concerning the outcome of the same election); *id.* at 3487 ("Just think of such a question being brought before a district judge of the United States—the question who is elected President of the United States!").

407. *See* Morley, *supra* note 16, at 2090–91.

408. U.S. CONST. art. I, § 4, cl. 1.

409. *Id.* art. II, § 1, cl. 4.

410. *Id.* art. II, § 1, cl. 2.

411. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020); Colo. Dep't of State v. Baca, 140 S. Ct. 2316 (2020) (per curiam).

412. U.S. CONST. art. I, § 5, cl. 1.

the chambers meet in joint session to count and determine the validity of electoral votes.[413] Even Section Two of the Fourteenth Amendment makes Congress at least primarily responsible for reducing the representation of states that fail to extend the right to vote as specified.[414] In light of this pervasive structural allocation of authority to political entities over virtually all aspects of federal elections, including the power to determine their outcomes, it is unlikely that exercising jurisdiction in such matters is an essential, core function of the judiciary.

Restrictions on federal courts' jurisdiction over constitutional claims relating to federal elections, such as those in § 1344, are most problematic under a plain-meaning interpretation of Article III. Professor Akhil Amar refers to this approach as a "neo-Federalist" interpretation.[415] This view can be traced back to one of the three competing theories[416] presented in Justice Story's opinion in *Martin v. Hunter's Lessee*.[417] Justice Story pointed out that Article III's jurisdictional menu identifies three types of "cases," each defined by their subject matter, and six types of "controversies," each defined by the nature of the parties involved.[418] Article III includes the word "all" before granting jurisdiction over each

413. *Id.* amend. XII; *accord id.* art. II, § 1, cl. 3; *see also* 3 U.S.C. § 15 (2018) (describing the procedure for counting electoral votes).

414. *See supra* notes 136–137 and accompanying text.

415. Amar, *supra* note 23, at 272 (explaining that, under his "neo-Federalist synthesis of Article III . . . [a]ll cases arising under *federal* law—whether in law, equity, or admiralty—must be capable of final resolution by a *federal* judge" (emphasis in original)).

416. *See* FALLON ET AL., *supra* note 26, at 309–10.

417. 14 U.S. (1 Wheat.) 304 (1816). A second theory of Article III presented in *Hunter's Lessee* is that some federal court must be able to exercise some type of jurisdiction, either original or appellate, over each of the nine types of cases and controversies identified in Article III. *Id.* at 330–31. This view arises from Article III's mandatory language which specifies that the judicial power "shall be vested" in the federal courts. *See id.* at 331. Under this theory, Congress has "a duty to vest *the whole judicial power*," in either original or appellate form, in some combination of federal courts. *Id.* at 330 (emphasis in original).

Finally, *Hunter's Lessee* contended that Article III's provisions concerning the Supreme Court's jurisdiction implicitly require Congress to confer at least some jurisdiction on lower federal courts. *Id.* at 331. Justice Story pointed out that the Constitution grants the Supreme Court original jurisdiction over two specified types of disputes, and appellate jurisdiction "in all other cases," subject to any exceptions Congress establishes. *Id.* at 330–31, 338. In matters in which state courts are unable to exercise jurisdiction, the only way the Supreme Court would be able to exercise this presumptively required appellate jurisdiction would be if lower federal courts heard those cases in the first instance. *Id.* at 331. Thus, Congress must "create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance." *Id.* (emphasis omitted). This theory seems unpersuasive, however, because Congress's failure to create lower federal courts to adjudicate matters outside of state courts' jurisdiction—if any such matters exist—could be deemed to implicitly create an exception to the Supreme Court's appellate jurisdiction, at least as a practical matter.

418. *Id.* at 333–34, 336, 347.

type of "case," but omits that term when referring to "controversies."[419] Justice Story suggested that this "difference of phraseology" implies "a difference of constitutional intention."[420] One plausible inference is that Congress must grant federal courts jurisdiction over each dispute that qualifies as a case, but not those that qualify only as controversies.[421] Justice Story explained that disputes designated as cases may be of such "vital importance" that federal jurisdiction is required, while the federal government might have less of an interest in ensuring that its own courts adjudicate controversies.[422]

This theory presents a strong impediment to attempts by Congress to bar federal courts from adjudicating constitutional issues relating to federal elections. Constitutional claims, including alleged violations of voting rights under the Fifteenth Amendment, are "cases" that would fall within the federal judiciary's mandatory jurisdiction under this framework. Consequently, under a plain-meaning interpretation of Article III, federal courts could not be completely excluded from adjudicating such matters. But the Supreme Court has yet to embrace this interpretation, and it is contrary to historical practice dating back to the Judiciary Act of 1789, which substantially limited the jurisdiction of both the lower courts and the Supreme Court to hear federal question cases.[423] Moreover, as the next Section discusses, completely excluding federal courts from adjudicating at least some types of election contests and other cases directly impacting the outcomes of completed federal elections may prevent a constitutional crisis, by precluding different branches of the federal government from directly or indirectly declaring different winners.

B. *Departmentalism vs. Judicial Supremacy in Federal Elections*

Section 1344 gives federal courts jurisdiction over election contests arising from alleged Fifteenth Amendment violations. As discussed above, Congress excluded elections for federal office from this jurisdictional provision to preserve its sole constitutional prerogative to

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419. *Id.* at 334.

420. *Id.*; *accord* Amar, *supra* note 23, at 240–42.

421. *Hunter's Lessee*, 14 U.S. at 334 ("[I]t may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class [controversies] to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate."); *see also* Amar, *supra* note 23, at 206 (arguing that Article III requires that "some federal court—supreme or inferior—be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case").

422. *Hunter's Lessee*, 14 U.S. at 334–36; *see also* Amar, *supra* note 23, at 246–54 (explaining the importance of each type of case).

423. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

determine the outcomes of federal elections.[424] The Constitution grants the chambers of Congress exclusive authority to determine the elections and returns of their members,[425] and to count electoral votes.[426] These grants of authority are integral components of the Constitution's original structure, which treats federal elections as primarily political processes subject to the virtually plenary control of political entities.[427]

With the enactment of general federal question jurisdiction under § 1331,[428] as well as § 1343's additional jurisdictional grant,[429] § 1344's restrictions—properly interpreted—no longer completely preclude federal courts from hearing constitutional challenges concerning the results of federal elections.[430] The question therefore arises whether either the political question doctrine or other constitutional restrictions preclude federal courts from adjudicating certain types of issues relating to federal elections.[431] And if a federal court—potentially including the U.S. Supreme Court—determines that the Constitution requires or prohibits the counting of certain votes, may that court attempt to enforce its judgment if Congress independently interprets the Constitution for itself and reaches its own conclusions? Although a full examination of this issue would require its own article, if not book, this Section offers some initial thoughts.

In *Baker v. Carr*,[432] the Supreme Court held that the political question doctrine prohibits federal courts from exercising jurisdiction over a matter if there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department[,] . . . an unusual need for unquestioning adherence to a political decision already made[,] or . . . [a] potentiality of embarrassment from multifarious pronouncements by various departments on one question."[433] All of these considerations

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424. *See supra* note 296 and accompanying text. Congress likewise barred federal courts from invoking the Enforcement Act's jurisdictional grant to adjudicate Fifteenth Amendment challenges to the outcomes of elections for state legislatures. 28 U.S.C. § 1344. That decision reflected Congress's policy judgment to defer to state legislatures' traditional authority to determine the elections and returns of their own members. The political question concerns discussed in this Section do not directly apply to state legislative elections.

425. U.S. CONST. art. I, § 5, cl. 1.

426. *Id.* art. II, § 1, cl. 3; *id.* amend. XII; *see* Barkow, *supra* note 12, at 280 ("The original understanding of Article II supports the textual analysis that questions regarding the validity of votes by electors are to be determined by the political branches, not the courts.").

427. *See supra* notes 407–414 and accompanying text.

428. 28 U.S.C. § 1331.

429. *Id.* § 1343(a)(3); *see also id.* § 1343(a)(4).

430. *See supra* Part II.

431. *Cf.* Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) (holding that the State of Florida's recount procedures in the 2000 presidential election violated the Equal Protection Clause).

432. 369 U.S. 186 (1962).

433. *Id.* at 217.

apply in the context of federal elections. The Constitution expressly grants Congress the authority to determine the outcomes of congressional and presidential elections.[434] By adhering to Congress's determinations concerning the outcomes of federal elections, federal courts can prevent political instability, loss of public confidence in the electoral process, and a protracted stalemate over governmental power. And the prospect of competing Presidents or members of Congress—particularly if control of a chamber were at stake—each claiming the right to hold office based on a different branch of government's conclusions, would be the quintessential example of "embarrassment," both domestically and internationally.

For reasons such as these, many states have concluded that it would be problematic for their judiciaries to adjudicate disputes concerning the outcomes of federal elections. The statutes of some states do not grant their courts jurisdiction over election contests for federal office.[435] In other states, the state courts themselves have declined to exercise jurisdiction to adjudicate election contests for federal offices, due to Congress's power over those issues.[436]

Before a federal election reaches the stage at which Congress reviews or determines the results, a federal court may nevertheless exercise jurisdiction over constitutional challenges, and state and local election officials are bound by its judgment. In *Roudebush v. Hartke*,[437] the Supreme Court held that states may order recounts or engage in other post-election proceedings, so long as they do not "frustrate[] the Senate's ability to make an independent final judgment" about the outcome of a Senate race.[438] By this reasoning, a federal court may exercise jurisdiction over a post-election challenge, so long as doing so does not prejudice the ability of the chambers of Congress to ultimately revisit and resolve the matter for themselves *de novo*.[439]

Allowing Congress to reconsider the underlying issues after a federal court makes constitutional rulings in an election case may raise Article III

434. *See supra* notes 412–413 and accompanying text.

435. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-2041 to -2042 (2020) (allowing quo warranto proceedings to recover state offices only). *But see* ARK. CODE ANN. § 7-5-801 (2020) (conferring a right of action on "any candidate" to contest "any election" in state court).

436. *See, e.g.*, LaCaze v. Johnson, 305 So. 2d 140, 146 (La. Ct. App. 1974); *cf.* McPherson v. Flynn, 397 So. 2d 665, 667–68 (Fla. 1981) (holding that a state court lacked subject-matter jurisdiction over an election contest concerning a seat in the state legislature because it was a political question that only the legislature itself could resolve).

437. 405 U.S. 15 (1972).

438. *Id.* at 25.

439. *But see* Barkow, *supra* note 12, at 300 ("[T]he Article II question in the *Bush* cases presented a strong candidate for application of the political question doctrine. The text and structure of Article II, the original understanding, Congress's subsequent understanding when a similar issue arose, and prudential factors all make a strong case for congressional resolution.").

questions concerning the finality of the court's judgment.[440] Neither Congress nor its members are generally parties to post-election litigation, however, (except for any members involved in their personal capacities as candidates), and therefore are not bound by the court's judgment as a matter of collateral estoppel or res judicata.[441] Moreover, Congress's ultimate power to determine the outcome of a federal election after an Article III court has ruled on it is comparable to its ultimate power to decide whether to appropriate funds to satisfy judgments,[442] even after Article III courts have issued rulings against the government.[443] And the Supreme Court's willingness to consider the constitutionality of the vote-counting procedures in Florida's recount following the 2000 presidential election suggests that Article III courts are not categorically precluded from adjudicating post-election constitutional cases concerning federal elections—though the majority in *Bush v. Gore* did not address possible "finality" or political question concerns.[444]

Once state officials have finally certified the results of a federal election and the matter has passed to Congress, however, federal courts are likely barred from adjudicating cases relating to that election, including challenges to Congress's actions.[445] As a threshold matter, a

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440. *See* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render."); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.2 (1792); *see also* Gordon v. United States, 117 U.S. 697, 702 (1865) (holding that Congress may not establish an Article III court whose judgment "would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect").

441. *See* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (holding that a court's judgments have a res judicata effect on third-party nonlitigants only under certain limited circumstances).

442. U.S. CONST. art. I, § 9, cl. 7.

443. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 570 (1962) (plurality op.) (expressing "doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power").

444. 531 U.S. 98 (2000) (per curiam); *see* Barkow, *supra* note 12, at 298; *see also* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 73 (2000) (per curiam).

445. *See, e.g.*, Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (holding that federal courts lack jurisdiction to "review . . . the proceedings of the House of Representatives" in an election contest, "without need to rely upon the amorphous and partly prudential doctrine of 'political questions,'" because the decision to "seat an individual or to recognize that person as the winner of [a House] election. . . . resides entirely with the House"); McIntyre v. Fallahay, 766 F.2d 1078, 1081, 1087 (7th Cir. 1985) ("Because the dispute is not justiciable, it is inappropriate for a federal court even to intimate how Congress ought to have decided. . . . Because the House has settled the election contest, nothing this or any other court can do will affect who represents Indiana's Eighth Congressional District through the end of 1986."); *see also* Webster v. Doe, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting) ("Claims concerning constitutional violations committed in these contexts—for example, the rather grave constitutional claim that an election has been stolen—cannot be addressed to the courts."); Dornan v. Sanchez, 978 F. Supp. 1315, 1325–26 (C.D. Cal. 1997).

range of doctrines, such as sovereign immunity,[446] Speech and Debate Immunity,[447] and constraints on equitable relief would pose substantial barriers. Even if a plaintiff could overcome these obstacles, the political question doctrine would still likely bar the federal court from exercising subject-matter jurisdiction. In dicta in *Barry v. United States*,[448] for example, the Court held that the Senate's judgment concerning the election of a member "is beyond the authority of any other tribunal to review."[449] Likewise, *Nixon v. United States*[450] held that, because the Constitution grants the Senate "sole" power to try impeachments,[451] the adequacy of the Senate's impeachment procedure was a political question outside the federal judiciary's jurisdiction.[452]

Powell v. McCormack complicates the analysis.[453] The *Powell* Court was willing to hold that the House acted unconstitutionally in refusing to seat Adam Clayton Powell, even though the Constitution grants each chamber of Congress the exclusive prerogative to determine the "Elections, Returns and Qualifications"[454] of its own members.[455] The Court reviewed the House's decision on the merits and concluded that it had excluded Powell based on improper factors outside the qualifications expressly set forth in the Constitution.[456] *Powell* raises the possibility that the Court might likewise be willing to review Congress' actions, at least at the margins, when exercising its sole constitutional power to resolve federal elections.[457]

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446. *See* Library of Cong. v. Shaw, 478 U.S. 310, 314–15 (1986), *superseded by statute on other grounds as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994); *see, e.g.*, Kenner v. Cong. of the U.S., 467 F.2d 952, 953 (5th Cir. 1972) (per curiam).

447. U.S. CONST. art. I, § 6, cl. 1; *see* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501–03 (1975).

448. 279 U.S. 597 (1929).

449. *Id.* at 613.

450. 506 U.S. 224 (1993).

451. U.S. CONST. art. I, § 3, cl. 6.

452. *Nixon*, 506 U.S. at 235–36.

453. 395 U.S. 486, 489 (1969).

454. U.S. CONST. art. I, § 5, cl. 1.

455. *Powell*, 395 U.S. at 550.

456. *Id.* ("[W]e hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership."). Though the pertinent constitutional considerations differ, the Court also was willing to hold that a state legislative chamber's decision to exclude an elected member based on his advocacy against U.S. involvement in Vietnam violated the First Amendment, despite the legislature's sole authority under the state constitution to judge its members' qualifications. *See* Bond v. Floyd, 385 U.S. 116, 123–25, 130–31, 136–37 (1966).

457. Moreover when a federal court—especially the Supreme Court—has previously issued a ruling concerning constitutional issues in a particular federal election, it is unclear whether the Court would adopt a judicial supremacy approach by attempting to prevent Congress from ignoring or superseding that determination. *Cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he

Thus, uncertainty remains about which branch of government is ultimately responsible for resolving constitutional issues relating to completed federal elections. It is remarkable that, over two centuries after our Founding, such a foundational issue at the very heart of the electoral process remains unresolved. The possibility that different branches of the federal government may come to different conclusions about the winner of a federal race—particularly the Presidency—creates a substantial risk of instability.

Precisely because Congress has greater democratic legitimacy and more closely reflects the current will of the people, courts should defer to the legislative branch in resolving contested federal elections. The alternative is the specter of an unelected, life-tenured federal judiciary attempting to install a candidate. At this point, the political question doctrine counsels a dash of legal realism. The judiciary has "neither Force nor Will, but merely judgment."[458] Though federal courts may adjudicate post-election constitutional issues to compel actions by state officials, they should not attempt to impose their conclusions on Congress, which can credibly claim exclusive power under the Constitution to have the final word.

Once a chamber of Congress resolves a congressional election, or the chambers of Congress together resolve a presidential election, the only circumstance in which it might be potentially defensible for the Court to intervene is in the extreme and unlikely case where Congress did not purport to act on an arguably plausible basis. For example, in *Nixon*, the Supreme Court held that the Senate has the sole constitutional prerogative to decide for itself what procedures to use in an impeachment "trial."[459] Justice Souter's concurring opinion added, however, "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy,' judicial interference might well be appropriate."[460] In such cases, Justice Souter suggested that "the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence."[461]

When a chamber of Congress exercises its exclusive constitutional

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federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

458. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

459. Nixon v. United States, 506 U.S. 224, 234, 238 (1993).

460. *Id.* at 253–54 (Souter, J., concurring) (quoting *id.* at 239 (White, J., concurring)).

461. *Id.* at 254.

authority to judge a member's qualifications, it must actually judge the qualifications set forth in the Constitution, rather than engaging in some broader evaluation of the person's character.[462] Similarly, when the Senate exercises its "sole Power" to try impeachments,[463] it must ensure that some trial-like proceeding occurs, even though it has sweeping discretion over what satisfies that standard.[464] And when exercising its sole constitutional authority to determine its members' elections and returns, or to determine the validity of electoral votes, the chambers of Congress must base their conclusions in some plausible way on the actual election that occurred. Congress may not rely on exclusively political considerations, completely arbitrary determinations with no basis in fact, or blatant violations of fundamental constitutional principles (such as refusing to count certain votes based on race in violation of the Fifteenth Amendment).[465] Even then, the Supreme Court may be ultimately unable to compel a truly recalcitrant Congress to seat a member or president against Congress's will. To avoid provoking such a destabilizing constitutional crisis, federal courts should rely on the political question doctrine to avoid exercising jurisdiction over a challenge to the outcome of a federal election once proceedings relating to that election have commenced in Congress, in all but the most extreme cases. Thus, the impulse that led the Reconstruction Congress to deny federal district courts subject-matter jurisdiction over election contests for federal office was largely correct.

CONCLUSION

Section 1344, a lingering remnant of the Enforcement Act of 1870,[466] has little practical utility in the modern era due to broader subsequent jurisdictional grants.[467] The Fifth Circuit, however, has dangerously misconstrued the statute.[468] Despite the Fifth Circuit's rulings to the contrary, § 1344 does not strip federal courts of jurisdiction to resolve post-election constitutional challenges that voters bring under other statutory grants of jurisdiction. Nevertheless, both § 1344 itself and the

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462. Powell v. McCormack, 395 U.S. 486, 548 (1969) ("[T]he Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. . . . Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution.").

463. U.S. CONST. art. I, § 3, cl. 6.

464. *Nixon*, 506 U.S. at 253 (Souter, J., concurring).

465. *See Powell*, 395 U.S. at 550 (holding that the qualifications of members of Congress must be judged on constitutional grounds); Baker v. Carr, 369 U.S. 186, 217 (1962) (noting that courts must still review political activity if it exceeds constitutional authority).

466. Ch. 114, § 23, 16 Stat. 140, 146 (codified as amended at 28 U.S.C. § 1344 (2018)).

467. 28 U.S.C. § 1331 (2018) (federal question jurisdiction); *id.* § 1343(a)(3) (jurisdiction for constitutional violations); *id.* § 1343(a)(4) (jurisdiction over violations of voting rights laws).

468. *See supra* notes 217–295 and accompanying text.

Fifth Circuit's reasoning point to the potential difficulties in having different branches of the federal government reach different conclusions about the outcome of a federal election—particularly a presidential election or congressional election that would determine political control of a chamber.

When the chambers of Congress exercise their constitutional authority to determine the outcome of a federal election, they are not bound by federal courts' earlier rulings in the matter. Once Congress, or a chamber of Congress, initiates proceedings to exercise that authority, a federal court should neither seek to enforce its view of the proper outcome nor review Congress's decision. A court's only potentially valid role—if any—is to ensure that Congress actually *did* purport to determine the election's outcome, rather than installing a public officer as a sheer act of political power with no plausible basis in the election's actual results. Because the Court is generally ill-situated to attempt to impose its will on a defiant Congress as to the proper outcome of a federal election—particularly a presidential election—it should exercise this authority only in extraordinarily rare, extreme cases. Such a direct confrontation between two branches of the federal government concerning federal office could be a constitutional crisis that delegitimatizes the ultimate outcome, no matter how it is resolved. Foreseeing this problem, the Reconstruction Congress sought to strip federal district courts of jurisdiction over post-election constitutional challenges. Because subsequent expansions of federal courts' jurisdiction have made § 1344's jurisdictional limits ineffectual,[469] the political question doctrine[470] must replace them.

469. *See* § 23, 16 Stat. at 146.

470. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).