BRENNAN
CENTER
FOR JUSTICE

LEGAL ANALYSIS OF CONGRESS' CONSTITUTIONAL AUTHORITY TO RESTORE VOTING RIGHTS TO PEOPLE WITH CRIMINAL HISTORIES

This memo addresses the constitutionality of the Democracy Restoration Act (DRA), Title I, subtitle E of the For the People Act, which would permit all individuals who are not incarcerated to vote in federal elections, regardless of whether they have a criminal record that makes them ineligible to vote in state elections. The Brennan Center for Justice at NYU School of Law believes that such legislation is constitutional and that there are two sources for Congress' authority to enact subtitle E: (1) the Election Clause of Article I, section 4; and (2) Congress' enforcement powers under the Fourteenth and Fifteenth Amendments.

I. The Election Clause and Congress' Inherent Authority to Regulate Federal Elections

Congress has very broad powers to regulate federal elections under the Election Clause of Article I, section 4. This clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of chusing Senators." Indeed, the Clause was drafted with the intent of giving Congress great power to check the abuses of the States in regulating elections. Madison explained that without providing Congress this power, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." James Madison, *Notes of Debates in the Federal Convention of 1787* 423-24 (Athens: Ohio Univ. Press, 1985) (notes from Aug. 9, 1787). At the time of its drafting, it was understood to reserve such broad power to the federal government that the Clause engendered a great deal of opposition from anti-federalists, whose protests were ultimately unsuccessful.. Jackson Turner Main, *The Antifederalists: Critics of the Constitution, 1781-1788* 149-51 (Chapel Hill: Univ. of North Carolina Press, 1961).

Although the text of the Election Clause references regulating the time, place and manner of congressional elections, it has consistently been read more expansively to include Congress' authority to regulate presidential elections, as well as its authority to regulate other voting requirements for federal elections, including voter eligibility. *See, e.g., Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).

Mitchell upheld Congress' ability to lower the voting age in federal elections. In doing so, the Court clearly endorsed Congress' "ultimate supervisory power" over federal elections, including setting the qualification for voters. 400 U.S. at 124. Although a majority of Justices did not agree on the basis for Congress' power to set voter qualifications – some based the power on the Election Clause, others on Congress' enforcement powers – the Court itself has not viewed this disagreement as undercutting *Mitchell*'s holding. *See Kusper*, 414 U.S. at 57.

Even in those few instances where federal legislation would conflict with a state constitution, the legislation could nevertheless be implemented pursuant to the Supremacy Clause in Article VI of the Constitution, which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Opponents of the legislation argue that notwithstanding its extremely broad power to regulate federal elections, Congress lacks the power to directly set qualifications for voters in federal elections because of the Qualifications Clauses of Article I and the Seventeenth Amendment. Opponents reason that since both clauses provide that voters in congressional elections "shall have the Qualifications requisite" for voters in state legislative elections, that must mean qualifications of voters in congressional elections must be identical to the qualifications of voters determined by States for State elections.

In support of this argument, they point to dictum from a 2013 decision from the Supreme Court, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) ("*ITCA*"). In an opinion penned by Justice Scalia, the Court signaled an unwillingness to extend the reasoning of the four Justices in *Oregon v. Mitchell* that relied on the Elections Clause to allow for congressional control over voter qualifications. Unlike in *Mitchell*, the question of Congress' power to regulate voter qualifications was not squarely before the Court in *ITCA*. Instead, the Court was addressing whether Congress could require a State to accept the federal voter registration form without imposing additional documentary requirements. The Court held that Congress was not attempting to expand (or contract) voter qualifications, but rather to prescribe registration procedures, so the interplay between the Elections Clause and the Qualifications Clauses was not really implicated.

Moreover, this argument does not accord with Supreme Court precedent that more directly addresses the scope of the Qualifications Clauses. As the Supreme Court's decision in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), makes clear, the Qualifications Clause of Article I, which the Seventeenth Amendment adopted verbatim, was not intended to limit congressional power, or to require that qualifications for voting in federal elections be the same as those for voting in state elections. Instead, as the Court explained, "[f]ar from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections." *Id.* at 229. The Court concluded that the fundamental purpose of the Qualifications Clauses is satisfied if all those qualified to vote in state elections are also qualified to vote in federal elections. *Id.* Because the proposed recommendation expands rather than limits the group of qualified voters in federal elections, it does not run afoul of the Qualifications Clauses.

Recent cases interpreting the Elections Clause in the context of redistricting legislation underscore the fact that the purpose of the Elections Clause was to empower the voters and prevent State legislatures, and the parties that control them, from entrenching themselves in power by rigging election rules. The Supreme Court made this point clear in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2672 & 2677 (2015), relying heavily on Madison's explanation of its

importance. This reasoning was then recently embraced by the three-judge district court in *Common Cause v Rucho*, 318 F. Supp. 3d 777, 937-38 (2018), which relied on the Elections Clause to strike down a partisan gerrymander by North Carolina's legislature because it represented just such an attempt at entrenchment. These cases confirm the fact that the Elections Clause exists in part to protect the direct relationship envisioned by the Framers between voters and Congress. They also provide an additional reason for finding in the Clause the congressional power to limit criminal disenfranchisement powers. That is, at a time when it has become clear that criminal disenfranchisement laws are viewed as a bulwark against advances by one party, and a method for entrenching power, the Elections Clause should be read to provide Congress with the power to prevent this attempt by legislators to choose their voters.

II. Congress' Enforcement Powers under the Fourteenth and Fifteenth Amendments

Congress' enforcement powers under the Fourteenth and Fifteenth Amendments provide an additional basis for congressional authority to permit all individuals who are not incarcerated to participate in federal elections, even though some may be disenfranchised under state law as the result of criminal convictions. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the power to enforce the Amendments "by appropriate legislation." The Supreme Court has described this enforcement power as "a broad power indeed" – one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for unconstitutional actions. *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

The right to vote, and the right to do so free of racial discrimination, are fundamental rights. Laws that are enacted out of racially discriminatory intent violate the Fourteenth Amendment generally, and violate the Fifteenth Amendment when they restrict voting. It is long settled by the Supreme Court that Congress' enforcement powers are a grant of broad authority to eradicate any racial discrimination in voting.

The Supreme Court has established an analysis for determining whether legislation falls within Congress' enforcement powers under the Fourteenth Amendment: the legislation must exhibit "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The first part of this analysis requires identifying the constitutional right that Congress seeks to enforce. *Lane*, 541 U.S. at 520. In order for Congress to properly utilize its enforcement powers, its legislation must be clearly remedial in nature – that is, aimed at remedying past constitutional violations – rather than expanding constitutional rights. The second part of the test determines whether the legislation is "an appropriate response" to a "history and pattern of unequal treatment." *Id.*

Rather than serving as a rigid doctrinal test, the Court's analysis has functioned as a sliding scale – making clear that Congress' enforcement authority is at its most expansive, and that "congruence and proportionality" are most likely to be found, when protecting against discrimination based on suspect classifications, *see e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003), or when protecting fundamental rights, *see Lane*, 541 U.S. at 523. Because the For the People Act protects the right to vote, arguably the most fundamental constitutional right, and attempts to remedy past and present racial discrimination, it meets the *Boerne-Lane* standard.

When acting pursuant to the Fifteenth Amendment, Congress's enforcement powers are at their pinnacle because such legislation involves both the fundamental right to vote and the suspect category

of race. Indeed, the Court has "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." *Lopez v. Monterey County*, 525 U.S. 266, 294 (U.S. 1999) (citing *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). Legislation enforcing the Fifteenth Amendment is afforded deferential review from the courts because it necessarily protects against racial discrimination and deprivations of the fundamental right to vote. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

While the Supreme Court has found that Congress exceeded its Fourteenth Amendment powers when passing legislation requiring states to remedy various forms of discrimination, the concerns animating the Court are not present in legislation designed to combat race discrimination in voting. For example, in *Boerne*, the Court found that Congress exceeded its enforcement powers in passing the Religious Freedom Restoration Act (RFRA), which prohibited both federal and state governments from "substantially burdening" a person's exercise of religion, concluding that the law "attempted a substantive change in constitutional protections." 521 U.S. at 532. The Court rejected an attempt by Congress to "say what the law is," *Boerne*, 521 U.S. at 537 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), the clear province of the courts.

Other cases have similarly been skeptical of Congressional action to combat discrimination unrelated to racial classifications or fundamental rights. *See, e.g. Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (concluding that Congress could not enforce the Americans with Disabilities Act against state governments, and explaining that the "ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act"); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (finding that Congress did not have the power to enforce the Age Discrimination in Employment Act against state governments and pointing to protection of voting rights as a valid use of congressional enforcement powers).

Finally, despite the power Congress has to act to remedy racially discriminatory voting laws, the Court struck down Section 4(b) of the Voting Rights Act, which provided the coverage formula for determining the reach of the Act's anti-discriminatory preclearance provision, in *Shelby County v. Holder*, 570 U.S. 529 (2013). But, as the dissent in that case noted, the majority did not purport to alter the deferential review applied in such cases. *Id.* at 569 (Ginsburg, J., dissenting). Instead, the Court struck down the coverage formula because it held that in the years since the law's initial passage, Congress had not sufficiently updated the formula or the record of discrimination that justified it in order to establish Section 4(b) as an appropriate remedial measure. *Id.* at 552-53.

Thus, in enacting the DRA, Congress should create a record of evidence that criminal disenfranchisement provisions have resulted in a "history and pattern of unequal treatment."[1] *Lane*, 541 U.S. at 520. It can do so by demonstrating that racial discrimination was a substantial or motivating factor in the adoption of specific felony disenfranchisement laws, and that racially neutral laws have been implemented or enforced in a discriminatory manner. *See Hibbs*, 538 U.S. at 731-32 (finding evidence that state medical leave laws discriminated on the basis of gender both intentionally and in the

[1] After the Civil War and enactment of the Fifteenth Amendment, numerous southern states adopted criminal disenfranchisement provisions, along with literacy tests and poll taxes, to exclude newly enfranchised African American voters. Criminal disenfranchisement provisions today continue to have a substantially greater impact on minorities, especially African American men. This disparate effect is particularly dramatic in states with laws that permanently disenfranchise criminal offenders. In some states, it is estimated that 30 percent of Black men are currently disenfranchised. For more information *see* Erika Wood, *Restoring the Right to Vote* (2009), available at http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/.

way in which they were applied). The findings section of the current legislation provides a strong foundation for building this record.

Opponents of the DRA may argue that Section 2 of the Fourteenth Amendment limits Congress' enforcement authority. That section provides for a reduction in a State's congressional representation "when the right to vote at any election. . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime* . . . ." U.S. Const. Amend. XIV, § 2 (emphasis added). Relying on this language, the Supreme Court rejected a nonracial equal protection challenge to California's felony disenfranchisement law in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

As long as the DRA is securely framed as legislation aimed at remedying past and current racial discrimination in the voting system, reliance on *Richardson* is misguided. In a subsequent decision, the Court clarified that Section 2 of the Fourteenth Amendment does not limit the Equal Protection Clause's prohibition on felony disenfranchisement laws that deny voting rights *on account of race*. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [felony disenfranchisement laws] which otherwise violate § 1 of the Fourteenth Amendment.").

Even if Section 2 were found to somehow limit Congress' power under the Fourteenth Amendment to reach criminal disenfranchisement laws with racially discriminatory results, the Fifteenth Amendment's subsequent broad ban on race discrimination in voting clearly carries no such exception. The language and legislative history of the Fifteenth Amendment reveal that it does not replicate or incorporate Section 2, but replaces it with a clean ban on any disenfranchisement based on race. The Fifteenth Amendment takes a diametrically different approach from the Fourteenth Amendment. A few years after the Fifteenth Amendment was ratified, the Supreme Court explained that the Amendment "invested citizens . . . with a new constitutional right which is within the protecting power of Congress. The right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude." *United States v. Reese*, 92 U.S. 214, 218 (1875).

III. Conclusion

We believe that both the Elections Clause, which provides Congress with broad powers over federal elections, and Congress' enforcement powers under the Fourteenth and Fifteenth Amendments, offer two separate bases for congressional authority to pass the Democracy Restoration Act.