

ELECTION LAW FEDERALISM – DRAFT

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This Article provides the first comprehensive account of non-Voting Rights Act federal voting laws. Section 5 of the Voting Rights Act—long the most effective voting rights law in American history—was disabled by the Supreme Court in *Shelby County v. Holder*. Section 2 of the Voting Rights Act is in the crosshairs. As the Supreme Court becomes more hostile to race-based antidiscrimination laws like the Voting Rights Act, Congress will turn to race-neutral, election administration-based reforms to strengthen the right to vote. Indeed, many proposals for reform post-*Shelby County* have taken this form. The laws examined in this Article—the National Voter Registration Act of 1993 (NVRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and the Help America Vote Act (HAVA)—regulate major aspects of the elections process: voter registration, absentee ballots, voting machine technology, and accessibility for disabled persons. These statutes, and the kind of election regulation they illustrate, both represent the future of federal election law and present previously unstudied challenges with implications for election law broadly.

Federal legislation that seeks to regulate and standardize elections implicates complicated relationships among federal, state, and local governments. This domain of “election law federalism” has two distinct features: 1) unusually expansive federal power to legislate pursuant to the Elections Clause; and 2) widespread state prerogative to delegate election responsibilities to local government. Because of these unique characteristics, federal election laws of the kind discussed in this Article run in perceived tension with traditional federalism doctrines like the anti-

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commandeering principle and state authority to organize its own subdivisions. That tension has led to enforcement difficulties and widespread noncompliance with the statutes. This Article proposes reforms that would allow federal election legislation to accommodate the realities of the elections system and more effectively optimize the roles of federal, state, and local governments within the elections system.

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INTRODUCTION

The Supreme Court recently hobbled section 5 of the Voting Rights Act in *Shelby County v. Holder*.¹ Section 2—the Voting Rights Act’s other major antidiscrimination provision—is in the crosshairs.² This Article presents the first comprehensive examination of the important federal voting laws still on the books after *Shelby County*.³ Perhaps because these laws have traditionally operated in the shadow of the Voting Rights Act,

¹ 133 S. Ct. 2612 (2013) (striking down Section 4(b) and disabling Section 5 of the Voting Rights Act of 1965). Before *Shelby County*, Section 5 was one of the most effective civil rights laws in United States history and certainly the most transformative voting rights law. See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act A Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1710-12 (2004).

² See Guy-Uriel E. Charles, *Section 2 Is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENUMBRA 219, 220-21 & n.8 (2012) (describing passages from the Supreme Court that cast doubt on section 2’s constitutionality and noting that “[n]o sophisticated student of voting *221 rights would be surprised if the Court were to strike down Section 2 or Section 5 as unconstitutional within the next two to five years.”); (Joshua S. Sellers, *The Irony of Ideology: Statutory Interpretation and the Constitutionality of Section Two of the Voting Rights Act* (Feb. 2015) (unpublished manuscript) (on file with author) (describing legal theories underpinning impending constitutional attacks on section 2); Roger Clegg & Hans A. von Spakovsky, Legal Memorandum, “*Disparate Impact*” and Section 2 of the Voting Rights Act, 119 THE HERITAGE FOUNDATION 1, 4 (2014) (arguing that it would be unconstitutional to read section 2 to prohibit voting practices that have a disparate impact on minority groups, and that section 2 should be read only to prohibit voting practices with disparate treatment), available at <http://www.heritage.org/research/reports/2014/03/disperate-impact-and-section-2-of-the-voting-rights-act>.

³ A number of articles discuss these statutes individually, mostly in the context of the substantive policies they regulate. They do not, however, discuss the laws collectively or in the broader context of the federal system. See, e.g., Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833 (2013) (describing different kinds of accommodations available to military and overseas voters pursuant to UOCAVA litigation); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453 (2008) (discussing the NVRA and HAVA as they relate to voter registration and proposing reforms intended to expand registration); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711 (2005) (linking HAVA’s election administration principles to equality norms for voting rights); Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45 (1996) (describing some of the early constitutional challenges to the NVRA). The few pieces that have examined these statutes collectively have done so in very different contexts. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009) (discussing and defending a “Democracy Canon” that reinforces the right to vote in the context of statutory interpretation); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Statutes*, 44 IND. L. REV. 113 (2010) (advocating for more robust private rights of action for election laws).

little scholarly literature evaluates how these laws operate within the diverse set of legal relationships implicated by election law.⁴ And yet the statutes present challenges with implications for election law broadly.

Specifically, this Article investigates the National Voter Registration Act of 1993 (NVRA),⁵ the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁶ and the Help America Vote Act (HAVA)⁷ (collectively, the “Federal Election Statutes”). The NVRA requires states to offer voter registration opportunities at certain state offices.⁸ UOCAVA requires states to transmit ballots to military and overseas voters in time for those voters to cast their ballots.⁹ HAVA requires states to adopt voting machine technology and ensure accessibility.¹⁰ Each statute holds states responsible for ensuring that their elections meet conditions the federal government believes to be necessary for a fair electoral process.

The Federal Election Statutes differ in character from the Voting Rights Act in two important ways. First, they take a race-neutral approach. Whereas the Voting Rights Act takes an antidiscrimination approach by prohibiting vote discrimination on the basis of race or color,¹¹ these statutes create universal civil rights in the context of election administration. That is, they create a series of election-related responsibilities for states that are designed to facilitate a fair elections process. The obligations attach regardless of the race or color of the voter. Since *Shelby County*, a number of commentators have suggested that as the Supreme Court becomes more and more hostile to antidiscrimination legislation,¹² the Federal Election

⁴ Recent articles to engage with federalism and election law have done so in the context of power struggles between the federal government and states, but have overlooked the important role of *local governments* in the elections process and in the federalist structure. See Franita Tolson, *Reinventing Sovereignty?: Federalism As A Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012) (arguing that the concept of state sovereignty is irrelevant to the constitutionality of the Voting Rights Act because the Elections Clause demonstrates that states have no true sovereignty in the context of elections).

⁵ National Voter Registration Act of 1993, 52 U.S.C. §§ 20501-20511.

⁶ Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311.

⁷ Help America Vote Act of 2002, 52 U.S.C. §§ 20901-21145.

⁸ See *infra* Subsection I.A.1.

⁹ See *infra* Subsection I.A.2.

¹⁰ See *infra* Subsection I.A.3.

¹¹ See, e.g., 52 U.S.C. § 10301(a) (Section 2 of the Voting Rights Act, prohibiting “denial or abridgement of the right of any citizen of the United States to vote on account of race or color”).

¹² See, e.g., *Shelby County*, 133 S. Ct. 2612 (striking down section 4(b) and disabling section 5 of the Voting Rights Act); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (exhibiting hostility toward the University of Texas’s affirmative action scheme). See generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755-73

Statutes may provide a model for fortifying the right to vote in a manner palatable to the Court.¹³ Despite a race-neutral approach, the statutes can affect the role of race and class in elections. Voter registration rates, for example, vary widely by race and income;¹⁴ the NVRA can play a role in remedying those inequalities by mandating access to voter registration.

Second, the enforcement mechanism of the Federal Election Statutes differs from those of the Voting Rights Act, which impose liability directly on jurisdictions for their own discriminatory actions.¹⁵ By contrast, the Federal Election Statutes hold states liable for noncompliance even though local governments, and not states themselves, assume most election administration responsibilities. This enforcement mechanism is reasonable: it would be nearly impossible for the federal government to enforce these statutes against the thousands of counties and municipalities that actually administer elections.¹⁶ But it also creates a *liability mismatch* that is

(2011) (describing the Court’s recent hostility to traditional civil rights laws in a number of contexts).

¹³ For a discussion of moving from an antidiscrimination model to an administration-based model in election law, see Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006) (advocating transitioning away from the antidiscrimination model of the Voting Rights Act toward the more universal, “right-to-vote” approach adopted by HAVA and the NVRA); Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL’Y REV. 71, 73 (2014) (proposing facially race-neutral compromise legislation to both expand voter registration opportunities and require voter identification for federal elections). For a discussion of universalist approaches to civil rights generally, see Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838 (2014).

¹⁴ The U.S. Census Bureau estimates that as of 2008, whereas seventy-two percent of White citizen adults and seventy percent of Black citizen adults were registered to vote, only fifty-nine percent of Hispanic citizen adults were registered; similarly, whereas eighty-six percent of those earning \$150,000 or more per year were registered, only sixty-two percent of those making less than \$10,000 per year were registered. U.S. Census Bureau, Current Population Survey, Nov. 2008, available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html>. See also Dēmos, *Registering Millions* (noting that America suffers “from wide gaps in voter registration by both race and class”), <http://www.demos.org/registering-millions-success-and-potential-national-voter-registration-act-20>.

¹⁵ Section 2 of the Voting Rights Act, for example, prohibits any voting qualification or prerequisite that discriminates on the basis of race or color, no matter the jurisdiction. See 52 U.S.C. § 10301(a). This is true of other prominent civil rights statutes as well. See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601-3619 (prohibiting housing discrimination by placing liability directly on housing providers like landlords and real estate companies).

¹⁶ See Brief for the United States as Appellant at 36, *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (arguing that “[f]orcing the United States to proceed locality-by-locality in enforcing the NVRA’s list-maintenance requirements would severely strain the federal government’s resources and inevitably leave many NVRA violations

reflected in both state briefing and court decisions pursuant to these statutes. States regularly argue that 1) counties, not states, are the proper defendants in these suits; and 2) states discharge whatever statutory responsibilities they retain through some oversight of local government. Courts have largely rejected the idea that states may evade liability by delegating responsibility to counties,¹⁷ but questions exist as to whether and how the federal government may force states to enforce the statutes against their own local governments, especially where no cause of action exists under state law.¹⁸ To this day, states continue to make arguments that their highly decentralized system of election administration exempts them from complying with the statutes and instead imposes that burden on local governments. This belief may help explain the widespread noncompliance with these statutes.¹⁹ At the very least, the mismatch creates a roadblock to effective enforcement of the statutes.

This Article argues that these state arguments, doctrinal murkiness, and widespread noncompliance persist because the relationships implicated by the election administration statutes are not well understood and exist in perceived tension with other well-developed legal doctrines. For example, the statutes affect state sovereignty in ways that have not been explained by courts, litigants, or Congress. The statutes require states to either organize their subdivisions in order to either effectively oversee certain kinds of election administration or administer elections themselves. The statutes require this potential rearrangement even though organizing and delegating power to political subdivisions has long been seen as the very essence of state sovereignty.²⁰ Furthermore, the statutes require state actors to regulate

unremedied”).

¹⁷ See *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008) (finding the Ohio Secretary of State responsible for “implementation and enforcement” of the NVRA); *United States v. New York*, 255 F. Supp. 2d 73, 79 (E.D.N.Y. 2003) (“It would be plainly unreasonable to permit a mandatorily designated State agency to shed its NVRA responsibilities because it has chosen to delegate the rendering of its services to local municipal agencies.”).

¹⁸ See *United States v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008) (holding that “Missouri cannot be required to *enforce* the NVRA against” local election authorities (emphasis in original)).

¹⁹ See generally *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* at 15-18 (2014) (noting widespread compliance problems with these statutes) [hereinafter *The American Voting Experience: Report and Recommendations*], available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

²⁰ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (“The number, nature, and duration of the powers conferred upon [cities] . . . rests in the absolute discretion of the

local governments and elections in ways state law might not ordinarily permit. That mandate runs up uncomfortably against anti-commandeering principles²¹ (even if it does not violate them) and engages a doctrinal area that remains underdeveloped.²²

Election law itself is “hyperfederalized”; that is, many key election decisions get made at the local level.²³ The Constitution initiates decentralization by placing the primary responsibility for holding elections with states.²⁴ States have further decentralized election administration by delegating most election administration responsibilities to local governments.²⁵ Moreover, each state’s election law is unique; states apportion election administration responsibility between state officials and local governments in different ways.²⁶ Elections are hyperfederalized therefore not only because states push election decisions down to the local level, but because the quality of decentralization, including legal relationships between counties and states, varies by state. As a result, the Federal Election Statutes implicate an unusual number of federalism relationships through all three levels of government.²⁷

state.”); *see also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 41 (1988) (“The guarantee clause . . . restricts the federal government’s power to interfere with the organizational structure and governmental processes chosen by a state’s residents.”).

²¹ The federal government “may not compel the States to enact or administer a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

²² *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2037-38 (2014) (noting as an open question “whether Congress can give state actors powers that they do not have under their own state laws”); Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 677 (2001) (noting that relying on federal law to justify action not authorized under state law “implicates the integrity of state sovereignty”).

²³ ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 3 (2009).

²⁴ *See* Elections Clause, U.S. CONST. art. 1, § 4 (noting 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 also that “the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators” (emphasis added)).

²⁵ *See generally* HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 122-23 (2007) (book review).

²⁶ *See* Note, *Toward A Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2323-27 (2005).

²⁷ The Supreme Court recently issued an NVRA case that touched on some of these relationships. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (holding that an Arizona law requiring proof of citizenship to register to vote was preempted by the NVRA).

I call the federal-state-local relationships implicated by the statutes “election law federalism.”²⁸ Election law federalism is defined by two distinct features—expansive federal power to regulate and widespread state prerogative to delegate—that both partly explain the widespread noncompliance with the Federal Election Statutes and raise unique federalism and policy questions for election law.²⁹ This Article argues that the right question to ask when seeking to understand and enforce federal laws within the context of election law federalism is how to achieve the best blend of federal, state, and local involvement. It proposes a framework for best optimizing that blend.

This analysis not only helps us better understand the three statutes in question, but also any future election law where Congress holds states liable for election administration responsibilities. For example, Congress could require states to institute standardized training requirements for poll workers.³⁰ Since most states delegate poll worker training to local governments,³¹ that law would implicate the same relationships and challenges implicated by the Federal Election Statutes. The election law federalism model provides a helpful framework for understanding the legal and practical relationships at issue.

Part I begins by describing the Federal Election Statutes, noncompliance problems with the statutes, and the prominence of the statutes post-Section 5. It proceeds to describe the federal enforcement actions against states for violating the Federal Election Statutes and the context of state-local conflict from which those actions arise. The actions illustrate both the complex

²⁸ This term was used once before, in a brief case summary of a redistricting case. The case summary mentions the term only in the title, and contains no discussion of what it might mean. See Jonathan H. Steinberg & Aimee Dudovitz, *Branch v. Smith-Election Law Federalism After Bush v. Gore: Are State Courts Unconstitutional Interlopers in Congressional Redistricting?*, 2 *ELECTION L.J.* 91 (2003).

The term “election law federalism” follows a number of other studies about federalism as it relates to specific policy areas. See, e.g., Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 *U. CHI. LEGAL F.* 57, 66 (2007). Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *STAN. L. REV.* 289 (2012).

²⁹ Courts and scholars have discussed federalism and voting rights before – particularly in the context of the “federalism costs” of the Voting Rights Act. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Federalism, and Voting Rights* at 1-2 (listing Supreme Court cases mentioning these costs), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611795. Here, I mean something different: not the costs to state sovereignty of the Federal Election Statutes, but rather the set of federal-state-local relationships implicated by the statutes and the balance of power—both formal and functional—inherent in those relationships.

³⁰ For an example of what a proposal to regulate poll worker training might look like, see *The American Voting Experience: Report and Recommendations* at 47.

³¹ See *infra* notes 235-237 and accompanying text.

federal-state-local relationships implicated by the statutes and the difficulty regulating elections in a world where multiple sovereigns can claim responsibility for elections. Part II defines election law federalism and situates it within a broader set of federalism relationships implicated by other policy areas. Part III evaluates the promise and pitfalls of administration-based election laws like the Federal Election Laws and suggests a set of reforms to these laws that 1) account for and accommodate the reality of a highly decentralized and diverse system of election administration in the United States; and 2) promote the most productive blend of federal, state, and local involvement. Specifically, Part III suggests that these statutes should 1) promote federal *oversight* of the entire compliance process; 2) promote state *management* of the decentralized compliance process specific to that state; and 3) promote local *tailoring* of the statutes to local communities. The Article concludes by suggesting that the pragmatic model illustrated by election law federalism may have broader application to policy areas beyond election law.

I. THE PATHOLOGY OF MULTIPLE SOVEREIGNS IN ELECTION LAW

Every level and every branch of government plays a role in regulating elections in the United States.³² The Elections Clause of the Constitution envisions a structure for administering elections whereby states choose the “Times, Places and Manner of holding Elections.”³³ Alexander Hamilton, writing in the *Federalist*, articulated his belief that the Elections Clause places primary responsibility for elections onto the states and authorizes the federal government to regulate elections “in the last resort.”³⁴

Because state law forms the foundation of election regulation, great variety exists in how elections are administered across state lines. Voting hours differ; funding schemes differ; absentee voting rules differ; voter registration rules differ.³⁵ In addition, most states delegate the nuts and bolts of election administration to local governments.³⁶ This delegation creates

³² Daniel Tokaji and his colleagues have used the metaphor of an “ecosystem” to describe the many inputs to election administration. See STEVEN F. HUEFNER, DANIEL P. TOKAJI, EDWARD B. FOLEY & NATHAN A. CEMENSKA, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES, at v (2007), available at http://www.mcfn.org/pdfs/reports/Registration_to_Recounts.pdf; Daniel P. Tokaji, *Teaching Election Administration*, 56 ST. LOUIS U. L.J. 675, 680 (2012).

³³ See Elections Clause, U.S. CONST. art. 1, § 4.

³⁴ See THE FEDERALIST NO. 59 (Alexander Hamilton).

³⁵ See EWALD, *supra* note 23, at 3-4.

³⁶ See The Constitution Project, *Election Reform Briefing: Working Together? State and Local Election Coordination* (2002) [hereinafter *Election Reform Briefing*], available

variety not only among states, but also within states.

Against this backdrop, Congress enacted a small handful of laws—the NVRA, UOCAVA, and HAVA—that seek to standardize some aspects of the elections system across states. Those statutes hold states liable for failing to meet various election-related responsibilities. This Part first describes the statutes, their widespread noncompliance, and their place in the emerging law of election administration. It then examines litigation under the statutes and state-local conflicts that give rise to that litigation in order to illustrate the difficulties presented by enforcing the statutes in an ecosystem with multiple sovereigns³⁷ – that is, where multiple levels of government share a stake in regulation.

A. The Statutes

1. The National Voter Registration Act of 1993 (NVRA)

The NVRA, often called “motor-voter,”³⁸ was enacted in 1993 to increase the number of eligible citizens registered to vote.³⁹ The statute was a compromise between those who advocated more convenient opportunities to register to vote (generally, Democrats) and those who wanted to prevent vote fraud (generally, Republicans).⁴⁰

The NVRA places a number of voter registration responsibilities on states. The NVRA broadens voter registration opportunities by requiring states to offer voter registration at various government offices. The NVRA requires states to treat driver’s license applications as voter registration applications⁴¹ and to offer voter registration opportunities at public assistance and disability services offices.⁴² The NVRA seeks to increase the accuracy of voter rolls by requiring states to conduct a general program of and removing ineligible voters from their rolls on a regular basis.⁴³

at <http://www.policyarchive.org/handle/10207/15106>.

³⁷ I use the term “sovereigns” loosely here to mean autonomous governmental bodies. Whether states and local governments truly possess constitutional sovereignty in the elections context is a question outside the scope of this Article. *See infra* notes 318-320 and accompanying text; *see generally* Tolson, *supra* note 4 (arguing that the Elections Clause does not grant sovereignty to states in the elections context).

³⁸ Because of its voter registration requirements on motor vehicle offices. *See infra* note 41 and accompanying text.

³⁹ 52 U.S.C. § 20501(b).

⁴⁰ S. REP. No. 103-6, at 18 (1993).

⁴¹ *See* 52 U.S.C. § 20504.

⁴² *See id.* § 20506.

⁴³ *See id.* § 20507.

Remedies pursuant to the NVRA include requiring states to develop statewide voter registration procedures, institute training requirements for state and local employees, closely monitor local government compliance with the NVRA, and report compliance data to the plaintiff.⁴⁴ The NVRA makes states responsible for noncompliance whether or not states delegate voter registration responsibilities to local governments.⁴⁵ Both the Attorney General and private parties may enforce the NVRA.⁴⁶

Why the NVRA matters: Although state compliance with the NVRA has been mixed, voter registration has increased since Congress enacted the NVRA. The percentage of registered voting-aged citizens increased by 11.9% between 1992—right before the NVRA was enacted—and 2012.⁴⁷ Furthermore, robust compliance with the NVRA can have a large impact on the number of registered voters in a state. A recent report examined how compliance with section 5 of the NVRA, which requires states to offer voter registration opportunities at DMV offices, can affect registration rates. It found that in large states with low compliance numbers especially, increasing section 5 compliance could have the effect of registering literally millions of additional voters in the state.⁴⁸ In California, for example, improving NVRA compliance would result in over four million new voter registration applications.⁴⁹

2. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)

UOCAVA, as amended in 2009 by the Military and Overseas Voter Empowerment Act,⁵⁰ protects the voting rights of military and overseas

⁴⁴ See, e.g., Consent Decree at 6-16, *United States v. Rhode Island*, No. 1:11-cv-00113-S-LDA (D.R.I. Mar. 25, 2011), available at http://www.justice.gov/crt/about/vot/nvra/ri_nvra_cd.pdf.

⁴⁵ See, e.g., 52 U.S.C. § 20504(c)(1) (“*Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver’s license.*” (emphasis added)); *Id.* § 20506 (“*Each State shall designate agencies for the registration of voters in elections for Federal office.*” (emphasis added)).

⁴⁶ See *id.* § 20510.

⁴⁷ ROYCE CROCKER, CONG. RESEARCH SERV., *THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS* 22-23 (2013), available at <http://fas.org/sgp/crs/misc/R40609.pdf>.

⁴⁸ Demos, *Driving the Vote: Are States Complying with the Motor Voter Requirements of the National Voter Registration Act?* at 11-12 (2015), available at http://www.demos.org/sites/default/files/publications/Driving%20the%20Vote_0.pdf.

⁴⁹ *Id.* at 12.

⁵⁰ Military and Overseas Voters Empowerment Act, Pub. L. No. 111-84, § 575, 123 Stat. 2190, 2318 (2009).

citizens.⁵¹ UOCAVA's centerpiece requires states to transmit absentee ballots to military and overseas voters who request a ballot no fewer than forty-five days before an election.⁵² UOCAVA also seeks to make military and overseas voting easier in various other ways. It requires states to use a post card registration form sent from military and overseas voters as a registration application and an application to vote absentee.⁵³ It requires states to establish procedures that allow UOCAVA voters to request and track absentee ballots easily; that establish a plan for states to transmit ballots to UOCAVA voters; and that establish a plan for states to remain in compliance with UOCAVA for runoff elections.⁵⁴ UOCAVA also requires states to report on the number of absentee ballots transmitted and received from UOCAVA voters.⁵⁵

Remedies pursuant to UOCAVA can include requiring the state to accept ballots from military and overseas voters even after the normal deadline for accepting ballots, despite state law; requiring states to certify that all UOCAVA ballots have been transmitted by local governments; and even proposing legislation and taking administrative action to prevent noncompliance in the future.⁵⁶ Like the NVRA, UOCAVA places its responsibilities on states, regardless of which governmental body is actually responsible for transmitting absentee ballots.⁵⁷ The Attorney General enforces UOCAVA; whether UOCAVA also confers a private right of action is an open question.⁵⁸

Why UOCAVA matters: Military and overseas voters are vulnerable to election administration failure. Military voters especially, who have volunteered to serve their country, should not be disenfranchised because states and local governments are not able to transmit ballots with sufficient

⁵¹ Ira Katznelson provides a fascinating account of how federal military voting legislation first came to exist. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013). In Katznelson's account, some Southern states opposed military voting legislation in part because those laws broke down racial barriers to vote (by eliminating a poll tax for soldiers abroad, both black and white) and because they nationalized what had previously been a state responsibility. *See id.* at 195-222.

⁵² 52 U.S.C. § 20302(a)(8).

⁵³ *Id.* § 20302(a)(4).

⁵⁴ *Id.* § 20302(a)(6), (a)(7), (a)(9), (f).

⁵⁵ *Id.* § 20302(a)(11).

⁵⁶ *See, e.g.,* Consent Decree, *United States v. Illinois* at 5-8, No. 15CV2997 (N.D. Ill. Apr. 6, 2015); available at http://www.justice.gov/crt/about/vot/misc/il_uocava_cd15.pdf.

⁵⁷ *See* 52 U.S.C. § 20302(a) (noting that "[e]ach state shall" comply with UOCAVA's requirements).

⁵⁸ *See* 52 U.S.C. § 20307(a); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Statutes*, 44 *IND. L. REV.* 113, 142-46 (2010) (discussing whether UOCAVA confers a private right of action).

time for military voters to vote and return their ballots in time to be counted. The Presidential Commission on Election Administration has stated that UOCAVA has made “[g]reat strides . . . in facilitating voting by soldiers and others overseas”⁵⁹ But as described below, noncompliance persists.

3. The Help America Vote Act of 2002 (HAVA)

HAVA emerged from a national conversation that began with the difficulties of the 2000 election: hanging chads, absence of a paper trail, and unreliable and varied voting systems.⁶⁰ HAVA provides federal funding for states to update their voting machines and registration system.⁶¹

Broadly, HAVA requires three things. First, HAVA imposes a number of requirements on the voting systems (i.e., the hardware and software voters use to vote) used by states.⁶² HAVA requires voting systems to allow the voter to review, verify, and change votes before casting them;⁶³ to alert the voter (and permit correction) if he or she has voted for more than one candidate for a single office;⁶⁴ to provide a written record of the vote for the purposes of a “manual audit” (read: recount);⁶⁵ and to be accessible to persons with disabilities.⁶⁶ These provisions, in conjunction with others in the statute, had the effect of requiring states to upgrade from punch-card and lever voting systems to optical scanner and touch screen machine systems.⁶⁷ Second, HAVA implemented rules for permitting people to cast a provisional ballot if the voter’s name does not appear on the official list of

⁵⁹ The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration at 15 (2014), *available at* <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

⁶⁰ See Charles Stewart III, *What Hath HAVA Wrought? Consequences, Intended and Not, of the Post-Bush v. Gore Reforms* 4-17 (Mass. Inst. of Tech. Dep’t of Political Sci., Working Paper No. 102, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843583 (describing how problems in Florida led to passage of HAVA).

⁶¹ See 52 U.S.C. § 20901.

⁶² See *id.* § 21081.

⁶³ See *id.* § 21081(a)(1)(A)(i)-(ii).

⁶⁴ See *id.* § 21081(a)(1)(A)(iii).

⁶⁵ See *id.* § 21081(a)(1)(A)(2).

⁶⁶ See *id.* § 21081(a)(1)(A)(3).

⁶⁷ See Daniel P. Tokaji, *Hava in Court: A Summary and Analysis of Litigation*, 12 ELECTION L.J. 203, 205 (2013). Although at least one commentator believes that HAVA may discourage regular upgrades to voting systems by requiring states to buy, rather than lease, expensive voting machines. See Brandon Fail, Comment, *HAVA’s Unintended Consequences: A Lesson for Next Time*, 116 YALE L.J. 493, 494 (2006).

eligible voters.⁶⁸ This provision was intended to prevent people from being denied their vote on the basis of registration errors – a large problem in the 2000 elections.⁶⁹ Finally, to centralize voter registration rolls, HAVA requires each state to implement a statewide voter registration list, administered at the state level, to serve as the state’s single system for managing the list of registered voters in the state.⁷⁰ Congress left the specific methods of implementing these requirements to states.⁷¹

Remedies pursuant to HAVA can include requiring a state to implement a statewide plan to update its voting systems—even when that plan puts the state at odds with local governments—and comply with detailed reporting requirements to keep the plaintiff updated on its progress coming into compliance.⁷² The Attorney General has authority to enforce HAVA; some courts have held that private parties may enforce HAVA as well.⁷³

Why HAVA matters: HAVA sought to provide national standards for election administration, and it has had some successes. It reduced the number of over- and under-votes,⁷⁴ which was one of its central aims.⁷⁵ Voting machines have lost fewer votes since HAVA went into effect, and fewer voters have been turned away from the polls because of registration problems.⁷⁶ Since HAVA took effect, more polling places and voting systems are now accessible to persons with disabilities.⁷⁷ And seventy percent of local governments have upgraded to new voting systems since 2000.⁷⁸

⁶⁸ See 52 U.S.C. § 21082(a).

⁶⁹ See Tokaji, *supra* note 39, at 205.

⁷⁰ See 52 U.S.C. § 21082(a)(1).

⁷¹ See *id.* § 21085 (“The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State.”).

⁷² See, e.g., Proposed Remedial Order at 2-6, *United States v. N.Y. State Board of Elections*, No. 06-CV-0263 (GLS) (N.D.N.Y. June 2, 2006), available at http://www.wheresthepaper.org/OrderJune2_2006.pdf.

⁷³ See 52 U.S.C. § 21111; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Statutes*, 44 IND. L. REV. 113, 147-54 (2010) (discussing the mixed case law on whether HAVA provides a private right of action).

⁷⁴ An overvote occurs when a voter votes for more than the allowable number of choices in a particular race, spoiling the ballot. An undervote occurs when the voter fails to vote in a particular race.

⁷⁵ See Matthew M. Damschroder, *Of Money, Machines, and Management: Election Administration from an Administrator's Perspective*, 12 ELECTION L.J. 195, 197 (2013).

⁷⁶ See Stewart, *supra* note 60, at 43 (summarizing empirical findings about the effect of HAVA).

⁷⁷ See United States Government Accountability Office, *Statement Before the National Council on Disability, Voters with Disabilities: Challenges to Voting Accessibility* (2013) <http://www.gao.gov/assets/660/654099.pdf>.

⁷⁸ See Joshua A. Douglas, *To Hava, and Beyond!*, 12 ELECTION L.J. 233 (2013)

However, HAVA did not fully nationalize election administration. Commentators have noted that “[r]elatively autonomous county or municipal officials still manage most election procedures in a highly decentralized fashion, consistent with the American bias towards localism.”⁷⁹

4. Widespread Noncompliance

Although each of the Federal Election Statutes serves an important goal and has the potential to greatly improve key parts of the elections system, noncompliance with the statutes exists throughout the country. The remainder of this Article seeks to explain that noncompliance by examining roadblocks to enforcement; this Subsection uses the Report and Recommendations of the Presidential Commission on Elections Administration, as well as other government and private reports, to demonstrate noncompliance.

The Presidential Commission calls the NVRA “the election statute most often ignored.”⁸⁰ In the most recent report on the impact of the National Voter Registration Act from 2013-2014, produced by the U.S. Elections Assistance Commission, thirty-eight states submitted data on the sources of their new voter registration applications.⁸¹ Of those thirty-eight, twenty-two states reported receiving fewer than *three percent* of their total new voter registration applications from public assistance agencies, despite the NVRA’s requirement that state offer voter registration applications with *each* application for public assistance.⁸² All but three states reported receiving less than *one percent* of their new voter registration applications from state disability services offices.⁸³ Eleven states reported receiving fewer than 100 applications from those offices.⁸⁴

States do even worse complying with the provision of the NVRA that

(reviewing MARTHA KROPF & DAVID C. KIMBALL, *HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM* (2011)).

⁷⁹ David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 *ELECTION L.J.* 130, 130 (2013) (noting the “tremendous disparities in local election administration”).

⁸⁰ *The American Voting Experience: Report and Recommendations* at 17.

⁸¹ U.S. Elections Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2013–2014* at 79-81 (2015), *available* at <http://www.eac.gov/assets/1/Documents/2014%20EAC%20EAVS%20Report.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

requires them to offer voter registration opportunities at motor vehicles offices. A Pew Charitable Trusts report found that states were largely unaware of whether their motor vehicles offices complied with the NVRA.⁸⁵ Another report, authored by Dēmos, found that aside from a handful of model states, most states “fail to make voter registration an integral part of driver’s license services and place the burden of registering to vote or updating their voter registrations on voters.”⁸⁶

Similarly, many states struggle with UOCAVA compliance. The Presidential Commission found that UOCAVA voters had difficulties registering to vote, receiving their ballots in time to cast votes, and returning their completed ballots in time to be counted.⁸⁷ Furthermore, the Commission found inconsistency in how states implement UOCAVA.⁸⁸ A Pew Charitable Trusts report from 2009 found that twenty-five states plus the District of Columbia failed to provide sufficient time for their military and overseas voters to vote, as a matter of state law or practice.⁸⁹ One scholar has noted that “some two decades after its enactment, UOCAVA still had not solved the most critical problem facing overseas voters: the need for more time to request, receive, vote, and return an absentee ballot before the state deadlines.”⁹⁰

The Department of Justice has undertaken robust enforcement efforts to increase UOCAVA compliance. However, the Department’s large number of suits against states demonstrates ongoing, widespread noncompliance with the statute. Since 2000, the Department of Justice has brought twenty-seven UOCAVA suits against nineteen separate states or territories and has won relief in each.⁹¹ It has had to sue numerous states twice—Georgia,

⁸⁵ Pew Charitable Trusts, *Measuring Motor Voter* at 2 (2014), available at <http://www.pewtrusts.org/~media/Assets/2014/05/06/MeasuringMotorVoter.pdf>.

⁸⁶ Demos, *Driving the Vote: Are States Complying with the Motor Voter Requirements of the National Voter Registration Act?* at 2 (2015), available at http://www.demos.org/sites/default/files/publications/Driving%20the%20Vote_0.pdf.

⁸⁷ *The American Voting Experience: Report and Recommendations* at 15 (2014).

⁸⁸ *Id.*

⁸⁹ The Pew Center on the States, *No Time to Vote: Challenges Facing America’s Overseas Military Voters* at 2-3 (2009), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/election_reform/NTTVReportWebpdf.pdf.

⁹⁰ Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 843 (2013); see also R. Michael Alvarez et. al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 FORDHAM URB. L.J. 935, 941 (2007) (describing difficulties military voters have receiving and transmitting their absentee ballots in time, despite UOCAVA).

⁹¹ E.g. Consent Decree, *United States v. Illinois*, No. 15CV2997 (N.D. Ill. Apr. 6, 2015); available at http://www.justice.gov/crt/about/vot/misc/il_uocava_cd15.pdf;

Illinois, Michigan, New York, Vermont, and Wisconsin—during that time period. It has had to sue Alabama *three times*.⁹² These twenty-seven suits exclude any private, out-of-court settlements the Department has reached.⁹³ That the Department has had to sue seven states multiple times—pursuant to the same statute and within such a short time period—suggests that state law may impose structural barriers to compliance.

HAVA faces fewer compliance challenges than the NVRA and UOCAVA,⁹⁴ but persistent noncompliance exists, particularly in ensuring that voting systems are accessible to disabled persons. A 2013 report from the Governmental Accountability Office found that a significant percentage of polling places and voting systems had impediments to accessible voting.⁹⁵ The Presidential Commission similarly reported that disability rights groups noted continued inaccessibility at many polling places and poll workers who were unwilling to assist disabled persons at polling places.⁹⁶

5. The Rise of Administration-Based Election Laws

The Supreme Court’s recent disabling of section 5 of the Voting Rights Act is the latest in a long line of Supreme Court decisions striking down civil rights legislation. Since the 1990s, the Supreme Court has struck down

Settlement Agreement and Stipulated Motion for Entry of Order, *United States v. Vermont*, No. 12-cv-236 (D. Vt. Oct. 22, 2012), *available at* http://www.justice.gov/crt/about/vot/misc/vt_uocava_settlement12.pdf; Consent Decree, *United States v. Territory of the Virgin Islands*, No. 3:12-CV-00069 (D.V.I. Sept. 7, 2012), *available at* www.justice.gov/crt/about/vot/misc/vi_cd.pdf.

⁹² See United States Dep’t of Justice, Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act, http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php (listing lawsuits against Alabama (three times), California, Connecticut, Georgia (twice), Guam, Illinois (twice), Michigan (twice), New Mexico, New York (twice), North Carolina, Oklahoma, Pennsylvania, Texas, Tennessee, Vermont (twice), Virgin Islands, Virginia, West Virginia, Wisconsin (twice)). I discuss some of these lawsuits below. See *infra* Sections I.B and I.C.

⁹³ See Recent Voting Section Settlements (listing numerous other out-of-court memoranda of understanding between the federal government and various states), http://www.justice.gov/crt/about/vot/litigation/recent_settlements.php (last visited Aug. 4, 2015).

⁹⁴ Daniel Tokaji speculates that the relative dearth of lawsuits pursuant to HAVA exists because HAVA does not require as much from states and local governments as the NVRA and UOCAVA. See Tokaji, *supra* note 67, at 204-05.

⁹⁵ United States Government Accountability Office, Statement Before the National Council on Disability, *Voters with Disabilities: Challenges to Voting Accessibility* (2013) <http://www.gao.gov/assets/660/654099.pdf>.

⁹⁶ *The American Voting Experience: Report and Recommendations* at 16-17.

a series of antidiscrimination laws enacted pursuant to Congress’s authority to enforce the Equal Protection Clause: the Religious Freedom Restoration Act,⁹⁷ the Age Discrimination in Employment Act,⁹⁸ and pieces of the Americans with Disabilities Act⁹⁹ and the Violence Against Women Act.¹⁰⁰ Kenji Yoshino has argued that anxiety about excessive pluralism has motivated the Court to limit Congress’s authority to enact Equal Protection legislation that seeks to protect specific minority groups.¹⁰¹ Instead, the Court has embraced a substantive due process/equal protection synthesis—or “dignitary” claims—that continues to protect, but in a less pluralist and more universalist register.¹⁰²

Election law scholars have registered this trend as well. Sam Issacharoff, for example, has opined that recent legislative and judicial trends “all point to a pivot away from the inherited civil-rights approaches” in the context of voting rights.¹⁰³ Guy Charles and Luis Fuentes-Rohwer have written that *Shelby County* marked the “an end to the racial discrimination consensus.”¹⁰⁴

In contrast with the Court’s jurisprudence on antidiscrimination legislation, the Court has in recent years upheld legislation enacted pursuant to the Elections Clause. Elections Clause legislation tends to be race-neutral and administration-based. That is, it imposes conditions on elections, no matter which voters are affected. A recent example comes from *Arizona v. Inter Tribal Council of Arizona, Inc.*,¹⁰⁵ where the Court held that the NVRA, enacted pursuant to Congress’s Elections Clause, preempted an Arizona law requiring proof of citizenship to register to vote.¹⁰⁶ Arizona later attempted to circumvent the NVRA administratively through the EAC, but was thwarted when the Tenth Circuit upheld the EAC’s decision preventing Arizona from adding citizenship requirements to the voter

⁹⁷ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁹⁸ See *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631 (2000).

⁹⁹ See *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

¹⁰⁰ See *United States v. Morrison*, 120 S. Ct. 1740 (2000).

¹⁰¹ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 793-94 (2011)

¹⁰² *Id.*

¹⁰³ Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1407 (2015) (explaining that the pivot from traditional notions of civil rights is explained by “the combination of the diminishing explanatory force of race as the critical motivation of the new laws, the emergence of a constitutional jurisprudence on a nondiscrimination account of the right to vote, and the prospect of federal regulatory power being exercised on the basis of control over federal elections”).

¹⁰⁴ Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of A Superstatute*, 100 IOWA L. REV. 1389, 1422 (2015).

¹⁰⁵ 133 S. Ct. 2247 (2013).

¹⁰⁶ See *infra* notes 203-214 and accompanying text.

registration form.¹⁰⁷ The Supreme Court denied certiorari.¹⁰⁸

Perhaps responding to this trend, commentators have begun proposing election law reforms that are race-neutral and administration-based rather than antidiscrimination-based, like the Federal Election Statutes. As early as 2006, even before *Shelby County* was decided, Richard Pildes advocated transitioning away from the antidiscrimination model of the Voting Rights Act and toward the more universal, “right-to-vote” approach adopted by HAVA and the NVRA.¹⁰⁹ Since *Shelby County*, other election law scholars have suggested administration-based replacements for section 5. Daniel Tokaji, for example, proposed compromise legislation to both expand voter registration opportunities and require voter identification for federal elections.¹¹⁰ That proposal takes a facially race-neutral, administration-based approach to election law. Sam Issacharoff proposed a similarly administrative, race-neutral solution that would require states to disclose any voting changes, but not to preclear those changes as required under section 5.¹¹¹ The recent report of the Presidential Commission likewise issued a number of race-neutral, administration-based proposals for election reform, including standards for poll worker training and procedures for determining the location of polling places.¹¹²

While national election administration proposals that fortify the right to vote may be popular in the academy and permitted by the judiciary, political opposition may exist. During the debates over HAVA, a Republican House Report reiterated the belief that local administration of elections carried significant benefits, and that HAVA was meant to foster local administration of elections, not supplant it.¹¹³ Specifically, the report noted

¹⁰⁷ See *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1188 (10th Cir. 2014) cert. denied, 135 S. Ct. 2891 (2015).

¹⁰⁸ 135 S. Ct. 2891 (2015).

¹⁰⁹ Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 *HOW. L.J.* 741, 755-62 (2006); see also Richard H. Pildes, *We Need a Broader Approach*, <http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/we-need-a-broader-approach?pagewanted=all>.

¹¹⁰ Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 *HARV. L. & POL'Y REV.* 71, 73 (2014).

¹¹¹ Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 *HARV. L. REV.* 95, 121-22 (2013).

¹¹² See *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* at 31-54 (2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>. Although the Commission did not frame its recommendations in the form of proposed federal law, it provides examples of legislation that could easily be translated into federal law.

¹¹³ See H.R. REP. 107-329, 32.

that decentralized elections prevent widespread vote fraud, allow for tailoring to local needs and circumstances, and improve accountability for election administration.¹¹⁴

Nevertheless, judicial concern with antidiscrimination legislation has led to a surge of interest in the Federal Election Statutes.¹¹⁵ And yet, despite these efforts at enforcement, noncompliance with these statutes remains widespread.¹¹⁶ The remainder of this Part describes state and local resistance to the Federal Election Statutes and begins to provide an explanation for this persistent noncompliance.

B. Federal-State Conflict

Two conditions help explain the federal government's difficulty securing compliance with the Federal Election Statutes. First, each of the statutes makes states liable for noncompliance. Second, states, have delegated many of their election administration responsibilities to local governments. These two conditions create what I call a *liability mismatch*: the Federal Election Statutes hold states responsible for conduct states have delegated to local government. States have attempted to use this mismatch—largely unsuccessfully—to evade responsibility for compliance with the Federal Election Statutes. This Section describes the archeology of those attempts.

States have long resisted their responsibilities under the Federal Election Statutes and early cases reveal some tension between the statutes and traditional federalism doctrines. In the first round of litigation under the NVRA, for instance, Illinois challenged the constitutionality of the NVRA on the ground that it impermissibly required the state to administer a federal program.¹¹⁷ The Seventh Circuit disagreed and affirmed most of the trial court's order mandating compliance.¹¹⁸ The court took issue, however, with a provision of the trial court's order that required Illinois (and by implication, the Illinois legislature) to delegate all powers necessary to

¹¹⁴ *Id.* at 31-32.

¹¹⁵ Nonprofit groups have recently redoubled their efforts to enforce the NVRA. *See* Dēmos, *Registering Millions* (noting the importance of enforcing the NVRA), <http://www.demos.org/registering-millions-success-and-potential-national-voter-registration-act-20>; Public Agency Registration, Project Vote (noting the creation of a group devoted to enforcing the NVRA), <http://www.projectvote.org/public-agency-reg.html>.

¹¹⁶ *See supra* Subsection I.A.4.

¹¹⁷ *See* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995).

¹¹⁸ *Id.* at 796-98.

ensure compliance with the law to a state election “czar.”¹¹⁹ The court found that this requirement “failed to exhibit an adequate sensitivity to the principle of federalism” and failed to recognize “the value of decentralized government.”¹²⁰

Building on these concerns, the Ninth Circuit also raised federalism objections to NVRA. Soon after the NVRA’s enactment, California sued the United States to prevent enforcement of the Act on Tenth Amendment grounds.¹²¹ The court found that the statute fell within Congress’s Elections Clause authority.¹²² The court did recognize, however, that California’s sovereignty was a “constitutional concern,” and directed the district court “to impose no burdens on the state not authorized by the Act which would impair the State of California’s retained power to conduct its state elections as it sees fit.”¹²³

Liability mismatch arguments gained traction in the mid-2000s with *Harkless v. Brunner*¹²⁴ and *United States v. Missouri*,¹²⁵ two cases involving state noncompliance with the NVRA. In *Harkless*, a private plaintiff sued Ohio state officials for failing to provide voter registration opportunities in public assistance offices around the state, as required by Section 7 of the NVRA.¹²⁶ In *Missouri*, the United States sued Missouri for noncompliance with Section 8 of the NVRA, which regulates voter list management.¹²⁷ In both cases, the state argued that it could not be sued for violations of the NVRA because 1) the state legislature delegated state election administration responsibilities to local governments; and 2) neither state law nor the NVRA gave state officials the authority to enforce the NVRA against local governments.¹²⁸ In both cases, the district courts agreed with

¹¹⁹ *Id.* at 797-98.

¹²⁰ *Id.* at 798.

¹²¹ See *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1412-13, 1415 (9th Cir. 1995); see also *Petition for Writ of Certiorari, Wilson v. Voting Rights Coal.*, 516 U.S. 1093 (1996) (No. 95-673), 1995 WL 17048226.

¹²² *Id.* at 1415 (“Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators.”).

¹²³ *Id.* at 1415-16; see also *id.* at 1416 (“We foresee the possibility in which the district court will be asked to determine whether a certain implementation of the statute sought by the United States, which is helpful but not essential to its interests, is properly resisted by the state on substantial grounds related to its sovereignty.”).

¹²⁴ 545 F.3d 445 (6th Cir. 2008).

¹²⁵ 535 F.3d 844 (8th Cir. 2008).

¹²⁶ *Harkless*, 545 F.3d at 446-47.

¹²⁷ *Missouri*, 535 F.3d at 846.

¹²⁸ See *Harkless v. Blackwell*, 467 F. Supp. 2d 754, 762 (N.D. Ohio 2006) *rev’d sub nom.* *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008); *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2006 WL 1446356, at *6 (W.D. Mo. May 23, 2006) *rev’d*, *United States*

the states.¹²⁹ Nevertheless, the courts also found each state out of compliance with NVRA, in part because of state officials' failure to act.¹³⁰ In *Missouri*, the district court held that because the Missouri legislature delegated NVRA compliance to local governments, Missouri could only be liable if the NVRA required states to adopt laws providing for direct enforcement of the NVRA by state officials.¹³¹ That conclusion would "alter the longstanding division of authority between county and statewide officials," and the court held that it would be "radical" for the court to find that intent in the law.¹³²

The courts of appeals reversed in both cases, but on different grounds. In *Harkless*, the court rejected the state's interpretation of the NVRA that would permit the state to avoid liability by delegating its NVRA responsibilities to local governments: "if every state passed legislation delegating NVRA responsibilities to local authorities, the fifty states would be completely insulated from any enforcement burdens, even if NVRA violations occurred throughout the state."¹³³ The court held that the better reading of the statute is to require states—even ones that delegate some NVRA responsibilities—to ensure that voter registration agencies comply with the NVRA's requirements.¹³⁴

The *Missouri* court took a subtler approach. It tied the state's obligations to the NVRA's text, noting that "[s]ome of these provisions envision delegation, and do not require the states to do more than delegate."¹³⁵ The court nonetheless reversed and found that local noncompliance bore on whether Missouri failed to oversee compliance with the NVRA.¹³⁶ However, the court agreed with the district court that

v. *Missouri*, 535 F.3d 844 (8th Cir. 2008).

¹²⁹ *Harkless v. Blackwell*, 467 F. Supp. 2d at 764 ("[B]ecause Ohio has passed laws . . . that clearly impose the duties at issue here upon the local [public assistance] offices, the Secretary of State cannot be held liable for the failings of these agencies, and because Blackwell has fulfilled his responsibilities under the NVRA and Ohio law, plaintiffs have failed to state a claim against him."); *Missouri*, 2006 WL 1446356, at *7-9.

¹³⁰ See *Harkless*, 467 F. Supp. 2d at 757; *Missouri*, 2006 WL 1446356, at *4-5.

¹³¹ *Missouri*, 2006 WL 1446356, at *7 ("The only basis for finding that Missouri is responsible for the conduct of the local election authorities rests on the theory that Congress intended the states to adopt statutes that both incorporated the terms of the NVRA and provided for direct enforcement of those state statutes by statewide officials.").

¹³² *Id.*

¹³³ *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008). The court even speculated that if county elections officials were joined as defendants, they might throw responsibility for compliance back on the state. See *id.* at 452 n.3.

¹³⁴ *Id.* at 452.

¹³⁵ *Missouri*, 535 F.3d at 849.

¹³⁶ *Id.* at 849-51.

Missouri could not be required to enforce the NVRA against its local election officials.¹³⁷

Importantly, the court rejected the United States’ “policy” argument that it would be more difficult for the federal government to enforce the NVRA against local governments than it would be for the state to enforce the law.¹³⁸ The court “decline[d] to shift this cost and burden to the states without clear direction from Congress.”¹³⁹ Although the district court could not *force* Missouri to enforce the NVRA against local officials, the district court could order Missouri to employ better means of *encouraging* local governments to comply with the NVRA, or simply assume direct responsibilities for NVRA compliance itself.¹⁴⁰

The constitutional concerns noted by the Ninth and Seventh Circuits in the preliminary round of legal challenges to the NVRA—subtle as they may seem—and the murkiness of the *Missouri* decision have provided the language that states have used to resist complying with the Federal Election Statutes. These arguments play a game of liability hot potato, and they span litigation over all three of the Federal Election Statutes discussed in this paper. States have resisted their obligations in different ways, but a persistent theme sounds among their filings. The arguments are grounded in claims about state law: states claim that they are not the proper defendants in these lawsuits, or that they are powerless to comply with the statutes even if they wanted to.

New York officials, for example, have played liability hot potato a number of times. In 2003, the United States sued the New York State Office of Temporary and Disability Assistance and New York State Office for the Aging for failing to provide voter registration opportunities as required by the NVRA.¹⁴¹ The New York agencies argued that they could not be liable for violations of the NVRA because local governments—and not state officials—administered the agency offices where the violation took place.¹⁴² The court disagreed. It noted that although the NVRA does not explicitly require state agencies to ensure NVRA compliance by county or city-run district offices, “[i]t would be plainly unreasonable to permit a mandatorily designated State agency to shed its NVRA responsibilities because it has chosen to delegate the rendering of its services to local municipal

¹³⁷ *Id.* at 851.

¹³⁸ *Id.* at 851 n.3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 851.

¹⁴¹ *See* United States v. New York, 255 F. Supp. 2d 73, 75 (E.D.N.Y. 2003).

¹⁴² *Id.*

agencies.”¹⁴³

New York made a variation of this same argument to evade liability under the NVRA in a separate suit in 2009. The United States sued New York for violating the NVRA by failing to provide voter registration opportunities in disabled student services offices of state-funded colleges and locally operated community colleges and for failing to designate those offices as voter registration agencies.¹⁴⁴ Twice (once in a motion to dismiss and once in a motion for summary judgment), New York attempted to evade responsibility for the NVRA through arguments grounded in state law. First, New York argued it lacked sole responsibility for compliance and the case should be dismissed because the United States did not also sue the community colleges themselves which, pursuant to state law, were separate entities.¹⁴⁵ New York also argued that only the New York Legislature, and not New York state officials, had authority to designate voter registration agencies pursuant to state law.¹⁴⁶ The court rejected both arguments.¹⁴⁷

Alabama has also made this argument multiple times in litigation. The United States sued Alabama for failing to comply with UOCAVA in 2012. Alabama argued that it was not the correct defendant in the case because

¹⁴³ *Id.* at 79.

¹⁴⁴ *United States v. New York*, 700 F. Supp. 2d 186, 188 (N.D.N.Y. 2010).

¹⁴⁵ *See* Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendants’ Cross-Motion for Summary Judgment at 13-20, *United States v. New York*, 700 F. Supp. 2d 186, 187 (N.D.N.Y. 2010); Memorandum of Law in Support of Defendants’ Motion to Dismiss Claims Against Indispensible Parties or Add Necessary Parties and Drop Improper Parties from this Action at 17-24, *United States v. New York*, 2007 WL 951576 (N.D.N.Y. Mar. 27, 2007) (No. 5:04CV00428(NAMDEP)). New York distinguished the community colleges from the public assistance offices in the previous suit on the ground that public assistance offices are administered on a statewide basis. *See* Memorandum of Law in Support of Defendants’ Motion to Dismiss Claims Against Indispensible Parties or Add Necessary Parties and Drop Improper Parties from this Action at 5, *United States v. New York*, 2007 WL 951576 (N.D.N.Y. Mar. 27, 2007) (No. 5:04CV00428(NAMDEP)).

¹⁴⁶ *See* Memorandum of Law in Support of Defendants’ Motion to Dismiss Claims Against Indispensible Parties or Add Necessary Parties and Drop Improper Parties from this Action at 8-9, *United States v. New York*, 2007 WL 951576 (N.D.N.Y. Mar. 27, 2007) (No. 5:04CV00428(NAMDEP)) (“As much as the U.S. may prefer another arrangement whereby the Governor or the Chief Election officer of the State would have the power to unilaterally alter the system of voter registration in New York State, there is no elections czar in New York State who may unilaterally decree what state agencies will be voter registration agencies under the NVRA.”).

¹⁴⁷ *See* *United States v. New York*, 700 F. Supp. 2d 186, 200 (N.D.N.Y. 2010); *United States v. New York*, No. 5:04CV00428(NAMDEP), 2007 WL 951576, at *4-5 (N.D.N.Y. Mar. 27, 2007).

local officials—and not state officials—were responsible for transmitting absentee ballots. The state argued that Congress did not intend “to cast aside general principles of legal liability or to intrude upon the State’s sovereign prerogative to organize its internal affairs, i.e., which officials have which duties and to whom they report, as it sees fit.”¹⁴⁸ Later in the litigation, Alabama described to the court its difficulties enforcing UOCAVA given the independent role of local election officials in administering elections:

Most local election officials are cooperative and diligent. In some cases, though, local officials will not cooperate with the Secretary of State. For example, the AEM [Absentee Election Manager] of Jefferson County, Alabama, when it was clear that the county would miss the deadline, refused to allow state officials to assist in ballot transmission in 2010, even though state officials drove from Montgomery to Birmingham twice to offer their help. . . . If a local official refuses to cooperate or provide information to the Secretary of State, the Secretary has no authority to compel the action of a local official. The situation is often resolved through persuasion, but the fact remains that the Secretary cannot be in 67 counties at once, and cannot compel a local official to mail a ballot by a particular date.

The Secretary of State cannot fire an elected Probate Judge, or an [AEM]. Circuit Clerks, who are elected by voters in a county, normally serve as the AEM, but where they decline to serve or are precluded from serving, their replacement is appointed by county appointing boards. . . . While Circuit Clerks performing regular duties are paid by the State, they are compensated by the county for duties performed as AEM. . . .

So while the Defendants can inform and train local election officials – and always want to look for ways to improve in doing so – the Defendants cannot perform the duties of local election officials. Defendants cannot force them to fulfill their duties on a timely basis, or fire them if they do not. A lawsuit (such as a mandamus action) requiring a local election official to fulfill their duties in election matters will not help with UOCAVA compliance if a local official has already missed a deadline.¹⁴⁹

The court disagreed with Alabama and noted the “explicit” statutory language that “[e]ach state” shall transmit ballots to military and overseas voters in order to comply with UOCAVA.¹⁵⁰ But Alabama’s description of

¹⁴⁸ State Defendants’ Third Response to the Court’s Opinion and Order and Motion to Dissolve Injunction at 3 n.1; *see also id.* (“Accordingly, while it is undisputed that UOCAVA ballots requested in advance of January 28, 2012 were not transmitted by that same date, it does not necessarily follow that the correct defendants are before this Court such that any relief can issue.”).

¹⁴⁹ State Defendants’ Response to the United States’ Motion for Summary Judgment, Declaratory Judgment, and Permanent Injunctive Relief at 5-6, *United States v. Alabama*, 857 F. Supp. 2d 1236 (M.D. Ala. 2012) (No. 2:12-cv-00179-MHT-WC).

¹⁵⁰ *United States v. Alabama*, 857 F. Supp. 2d 1236, 1238 (M.D. Ala. 2012)

conflicts with local election officials demonstrates the kind of constraints that state election law can place on compliance with the Federal Election Statutes.

Alabama’s argument echoes a debate between the state and its counties over election administration that took place in the mid-2000s when Alabama needed to come into compliance with HAVA by updating its voting machines. In 2005, the Alabama Attorney General issued an opinion stating that the Alabama Secretary of State did not have the authority to select a particular voting system or designate a set of acceptable systems for Alabama counties in order to comply with HAVA.¹⁵¹ Nor did the Secretary of State, according to the opinion, have the authority to prevent the counties from purchasing certain systems.¹⁵² When Alabama proposed a new law that would permit the Secretary of State to select the available voting machines for the counties, county officials objected to surrendering the authority that they had long possessed.¹⁵³ Alabama did ultimately enact that legislation, and brought the state into compliance with HAVA.¹⁵⁴ The Alabama Attorney General opinion demonstrates Alabama’s genuine belief that it lacked the ability to comply with HAVA until it enacted implementing legislation. That is, a belief that HAVA itself did not give Alabama sufficient authority to comply with its terms.

California and Vermont have also expressed the belief that their state officials lack power to enforce the Federal Election Statutes against local governments. California’s NVRA Manual states that “the Secretary of State has no direct authority over state agencies designated under the NVRA.”¹⁵⁵ Nor does the Secretary of State “have direct authority over NVRA-designated local government agencies.”¹⁵⁶ The manual mentions, however, that voluntary cooperation between state and local agencies “has helped ensure statewide compliance in California.”¹⁵⁷ Vermont has similarly

(“Alabama’s contention that it is not its responsibility to ensure compliance with UOCAVA, especially where local county officials transmit ballots and administer an election, is meritless.”).

¹⁵¹ Alabama Attorney General Opinion on the Help America Vote Act of 2002, at 6, Feb. 14, 2005, <http://www.ago.state.al.us/opinions/pdf/2005-068.pdf>.

¹⁵² *Id.*

¹⁵³ Sallie Owen, *Voting Machine Proposal Opposed on Local Level*, *MOBILE REG.*, June 9, 2005, at B1.

¹⁵⁴ Sebastian Kitchen, *Governor: State in Compliance*, *PRESS-REGISTER*, Oct. 24, 2007, at B.

¹⁵⁵ National Voter Registration Act (NVRA) California NVRA Manual at 5 (2013 Revision), *available at* <https://www.sos.ca.gov/elections/nvra/laws-standards/pdf/complete.pdf>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

argued, in the context of a UOCAVA lawsuit, that Congress “seems to have overestimated . . . the ability of states to compel local authorities to” comply with UOCAVA.¹⁵⁸ Although Vermont conceded that Vermont law permits some enforcement actions against local governments, it argued that Vermont law “does not authorize the Secretary of State to compel the gathering and disclosure of this data from well-intentioned but overworked town clerks whose primary focus must be on ensuring that the elections are conducted in an orderly fashion and that each vote – absentee ballots included – is counted.”¹⁵⁹

In a Texas version of the liability hot potato game, the Secretary of State argued that she was the wrong defendant in an NVRA case because Texas delegates election enforcement authority to county registrars, making the Secretary of State “powerless” to prevent county registrars from disobeying her.¹⁶⁰ In that same case, the county registrar who was also named in the suit argued that she was obligated to enforce the laws of Texas, making her role merely “ministerial” and making her “a powerless spectator to the . . . Plaintiffs’ real dispute against the state.”¹⁶¹ The court disagreed and kept both parties in the litigation.¹⁶²

Many other states have attempted to avoid liability under the Federal Election Statutes by either blaming local governments for noncompliance or arguing that state law makes them powerless to comply.¹⁶³ South Dakota

¹⁵⁸ Memorandum in Support of Motion to Dismiss at 5 n.2, *United States v. Vermont*, 2:08-cv-217 (D. Vt. Oct. 22, 2008).

¹⁵⁹ *Id.*

¹⁶⁰ *See Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 828 (S.D. Tex. 2012) *rev’d on other grounds sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013).

¹⁶¹ *Id.* at 832.

¹⁶² *Id.* at 833 *rev’d on other grounds sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013).

¹⁶³ States are not the only entities that make strategic use of the state-local relationship. Counties also hide behind states. In *Shelby County v. Holder*, Shelby County challenged Sections 4(b) and 5 of the Voting Rights Act on the ground that they exceeded Congress’s authority to infringe upon state sovereignty. 133 S. Ct. 2612, 2622-23 (2013). Though Shelby County itself possesses no state sovereignty, *see* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 85-86 (1986) (“This Article’s basic thesis concerning the constitutional vulnerability of cities begins from the fact that cities—unlike the states or federal government—have no set place in the American constitutional structure.”), it was able to invoke the sovereign powers of the state to argue successfully that the Voting Rights Act was unconstitutional. *See* Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. (forthcoming 2015) (discussing whether local governments deserve the federalism protections of their parent states in the context of voting).

state officials unsuccessfully attempted to evade liability under both HAVA and the NVRA on the state law argument that they had delegated election administration responsibilities to local governments.¹⁶⁴ The Louisiana Secretary of State unsuccessfully argued that neither the NVRA nor state law gave him the authority to enforce the NVRA against local governments in Louisiana, and therefore he was improperly a party to the lawsuit.¹⁶⁵ Virginia state officials unsuccessfully argued that they were entitled to summary judgment because local electoral boards, and not the state, were responsible for complying with the relevant provisions of UOCAVA.¹⁶⁶

The cases described above demonstrate that many state officials feel that they do not have the authority—either state or federal in nature—to comply with the Federal Election Statutes, and that they cannot be forced, pursuant to federal law, to obtain that authority. Perhaps because the Federal Election Statutes are insensitive to state election law, states continue to make these arguments, even though they have not been successful.

C. State-Local Conflict

Delegating election administration responsibilities to local governments does not necessarily preordain noncompliance with the Federal Election Statutes. But in practice, conflict between state and local governments over election administration can frustrate the statutes' goals. States and local governments frequently come to loggerheads over election administration—and compliance with the Federal Election Statutes specifically—both inside and outside of the courtroom. This conflict has not previously been explored, but it provides crucial context for the liability mismatch identified in the previous section.

These conflicts come in all permutations. Sometimes counties advocate stricter compliance with the federal laws than states do. Soon after the NVRA was enacted, for example, the New York Motor Vehicles Commissioner “complain[ed]” to the state legislature about the cost of compliance and proposed that New York comply only with the NVRA’s bare requirements.¹⁶⁷ A County Clerk, who pointed out that full compliance

¹⁶⁴ See *Janis v. Nelson*, No. CR 095019-KES, 2009 WL 5216902, at *3-6 (D.S.D. Dec. 30, 2009).

¹⁶⁵ See *Scott v. Schedler*, 771 F.3d 831, 838-39 (5th Cir. 2014).

¹⁶⁶ Memorandum in Support of Motion for Summary Judgment at 13, *United States v. Cunningham*, No. CIV. A. 3:08CV709, 2009 WL 3350028, (E.D. Va. Oct. 15, 2009).

¹⁶⁷ *Swarts Defends Registration Under Motor Voter Law*, BUFF. NEWS, May 18, 1995, at E1.

with the NVRA was relatively cheap, disagreed.¹⁶⁸ In Illinois, the state initially set up a dual federal-state voter registration system in order to comply with the NVRA, which relates only to federal elections.¹⁶⁹ County commissioners urged state lawmakers to create a single voter registration system and allow Illinois residents to register for federal and state elections simultaneously.¹⁷⁰ In Virginia, also soon after the NVRA was enacted, county elections officials publically observed that state failure to successfully implement the NVRA resulted in a number of voters turned away at the polls.¹⁷¹ State officials conceded that a problem existed.¹⁷² In Colorado, the Secretary of State threatened to sue Pueblo County elections officials because those officials decided to send ballots to military and inactive overseas voters.¹⁷³

Often, state laws (perhaps unintentionally) make compliance with the Federal Election Statutes nearly impossible for counties. This is particularly true with respect to UOCAVA compliance. As described above, UOCAVA requires states to transmit ballots to military and overseas voters forty-five days before an election. Those deadlines run up against state-set filing deadlines and late primary or runoff dates. In Texas, for example, the filing deadline for the 2012 primary, held in March, was January 2.¹⁷⁴ The primary was originally scheduled to take place on March 6, in order to maximize the state's impact on the presidential nomination. The state ultimately moved the primary, pursuant to court order in a separate redistricting case. But had the state's preferred primary date stood, county clerks (and, by extension, the state) would have struggled to comply with UOCAVA. In an earlier election, one Texas county elections administrator had to mail 7500 emergency ballots in order to meet the forty-five day deadline because a vendor had not yet produced official ballots.¹⁷⁵ In Wisconsin, a forty-nine day gap between the 2010 primary and general election made it nearly impossible for county clerks and the state to comply

¹⁶⁸ *See id.*

¹⁶⁹ Susan Kuczka, *Lake County Official Asks Lawmakers to Tune up Motor-Voter Registration*, CHI. TRIB., Sept. 14, 1995, at 4.

¹⁷⁰ *See id.*

¹⁷¹ *See* Craig Timberg, *Registrars Fault 'Motor-Voter' Law; Many Kept from Polls, N.Va. Officials Say*, WASH. POST, Nov. 6, 1999 (“I don’t know what their commitment to voter registration is . . . Too many people, too many places, too much handling.”).

¹⁷² *See id.* (“I think it’s fair to say that statewide it’s not really a problem. But it does seem to be a problem in Northern Virginia.”).

¹⁷³ *See* Jordan Steffen, *Pueblo Clerk Backs Down on Ballots Gessler Sends a Letter Threatening a Lawsuit over Inactive Voters*, DENV. POST, Oct. 2, 2011, at B12.

¹⁷⁴ Glorinda Padilla, *Well-Intentioned Military Voting Act Is a Headache for Many*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 2011, at 9B.

¹⁷⁵ *See id.*

with UOCAVA.¹⁷⁶ New York’s and Kansas’s election schedules makes UOCAVA similarly difficult to comply with.¹⁷⁷

The complicated relationships between state and local governments that the Federal Election Statutes engage occasionally play out in litigation, as well. Just as states have attempted to toss the liability hot potato to counties, counties have attempted the same maneuver to states.

An NVRA case out of Mississippi provides a rich example of state-local conflict in litigation because it was brought against both state *and* local officials.¹⁷⁸ In *True the Vote v. Hosemann*, private plaintiffs sued state officials as well as the election commissions of a number of Mississippi counties pursuant to the NVRA’s public disclosure provision seeking voting records from the 2014 Senate election.¹⁷⁹ The plaintiffs sued both state and county officials because they alleged that the county officials “carried out a policy disregarding the plain language of the NVRA” at the Secretary of State’s direction, and that “[t]he Secretary relies on the County Defendants to carry out his responsibilities under the NVRA.”¹⁸⁰

Each party sought to avoid liability. Mississippi Secretary of State Hosemann stated as a defense in his answer that he was “not a proper party to plaintiffs’ putative causes of action asserted”¹⁸¹ Channeling *Missouri*, Hosemann argued that he had no “authority or duty to enforce NVRA’s public disclosure provision, or any state laws, against Mississippi’s 82 locally elected Circuit Clerks” and that neither the NVRA nor state law required him to “enforce the [NVRA] against local officials.”¹⁸² The Hinds County Election Commission, one of the defendants in the suit, argued the opposite: that the NVRA applies to state election

¹⁷⁶ See Jason Stein, *State Waiver for Overseas Ballots Denied; 45 Days Before Election Is Tough Timetable for Clerks*, MILWAUKEE J. SENTINEL, Aug. 28, 2010, at 1.

¹⁷⁷ See Lou Michel, *Missing Deadline for Military Mail, Election Boards Hope for the Best*, BUFF. NEWS, Oct. 19, 2010; Mary Clarkin, *Efforts to Ensure Soldiers’ Ballots Correct*, HUTCHINSON NEWS, Mar. 26, 2011.

¹⁷⁸ See *True the Vote v. Hosemann*, No. 3:14-CV-532-NFA, 2014 WL 4273332, at *8 (S.D. Miss. Aug. 29, 2014).

¹⁷⁹ *Id.* at *1.

¹⁸⁰ Plaintiffs *True the Vote, et al.*’s Brief in Support of Omnibus Response to the County Defendants’ Summary Judgment Motions at 8, *True the Vote v. Hosemann*, 2014 WL 4273332 (S.D. Miss. Aug. 29, 2014) (No. 3:14-CV-532-NFA).

¹⁸¹ Secretary of State Delbert Hosemann’s Answer and Defenses to Plaintiffs’ Complaint at 14, *True the Vote v. Hosemann*, 2014 WL 4273332 (S.D. Miss. Aug. 29, 2014) (No. 3:14-CV-532-NFA).

¹⁸² Brief of Secretary of State Delbert Hosemann in Opposition to Motion for Partial Summary Judgment at 33-34, *True the Vote v. Hosemann*, 2014 WL 4273332 (S.D. Miss. Aug. 29, 2014) (No. 3:14-CV-532-NFA) (citing *United States v. Missouri*, 535 F.3d 844, 849-51 (8th Cir. 2008)).

officials, not county officials.¹⁸³

Neither argument persuaded the court. Recognizing that “[s]tate election officials are certainly responsible for enforcing Federal laws relating to elections,” the court held that “[c]ounties also must comply with these statutes”¹⁸⁴ At the same time, the court reaffirmed the state’s responsibility: “To the extent a State delegates record-maintenance and disclosure duties to local governments, the State nevertheless remains responsible if documents are not properly disclosed under the Public Disclosure Provision.”¹⁸⁵

State-local conflict took a different form in a HAVA case against New York. Whereas Mississippi and its counties tried to escape liability by blaming each other, New York counties moved to *intervene* in the HAVA case because they did not feel that their interests were well-represented by the state. Here is Putnam County, asking to intervene:

The State has made compliance impossible by failing to certify a list of approved voting systems in sufficient time for local boards to undertake all the necessary preparations for an orderly transition to the new machines. As a result of the State’s inaction, Putnam County now stands to lose a significant amount of federal HAVA funds allocated to the Putnam County Board of Elections . . . to be used to replace lever voting machines as mandated by HAVA and state law. An equally dire prospect, the County also faces the prospect of a disorderly and unaccountable election, should it not be permitted adequate time to implement the HAVA mandates.

It is imperative that the Intervenors, along with the other counties seeking intervention in this action, be permitted to intervene in this action since these are the entities which must actually implement, at the ground level, the HAVA mandates.¹⁸⁶

Other counties made similar arguments.¹⁸⁷ Nassau County argued that New York vests responsibility for compliance with HAVA with local boards of

¹⁸³ Hinds County, Mississippi Election Commission’s Memorandum of Authorities in Support of Motion for Summary Judgment at 14-15, *True the Vote v. Hosemann*, 2014 WL 4273332 (S.D. Miss. Aug. 29, 2014) (No. 3:14-CV-532-NFA).

¹⁸⁴ *Hosemann*, 2014 WL 4273332, at *8.

¹⁸⁵ *Id.* at *9.

¹⁸⁶ Putnam County’s Memorandum of Law in Support of Intervention at 1, *United States v. New York State Board of Elections*, No. 06-CV-00263 (GLS) (N.D.N.Y. July 25, 2007).

¹⁸⁷ *See, e.g.*, Suffolk County’s Memorandum of Law in Support of Intervention at 2, *United States v. New York State Board of Elections*, No. 06-CV-00263 (GLS) (N.D.N.Y. Mar. 30, 2007). (“The unrealistic and ever-changing timelines developed by the State make compliance by the County Boards of Elections impossible.”).

elections, in addition to the state.¹⁸⁸ The Albany County Board of Elections Commissioners posted an article entitled “The County Dilemma: The Impact of the Help America Vote Act on New York State” that suggested the timetable set by the HAVA lawsuit provided an insufficient amount of time to transition to new voting machines and advocated waiting another election cycle to properly make the transition.¹⁸⁹ Conflict between New York and its counties persisted throughout the litigation.¹⁹⁰

Local governments attempt to hold onto their elections authority when that authority is questioned by states. In Ohio, for instance, the state sought to comply with HAVA’s voting system requirements by selecting the type of voting system to be used throughout the state.¹⁹¹ Multiple lawsuits, including one by a county government, were filed on the ground that county governments, and not the state, held the authority to choose voting systems.¹⁹²

It is no surprise that states and local governments struggle over power, even though that power is, in theory, created and meted out exclusively by the state.¹⁹³ These complicated struggles exist against the backdrop of federal law and complicate the implementation of federal law.

¹⁸⁸ See answer of Defendants-Intervenors Nassau county board of Elections and Nassau County Legislature at ¶ 6, *United States v. New York State Board of Elections*, No. 06-CV-00263 (GLS) (N.D.N.Y. Dec. 21, 2006).

¹⁸⁹ See James M. Clancy & John A. Graziano, *The County Dilemma: The Impact of the Help America Vote Act on New York State*, ALBANYWEBLOG.COM (Oct. 31, 2006), http://www.albanyweblog.com/2006/11-Nov/11-02-06_Ref_01.html.

¹⁹⁰ See, e.g., Letter Brief of the United States at 3-4, *United States v. New York State Board of Elections*, No. 06-CV-00263 (GLS) (N.D.N.Y. Apr. 20, 2012) (asking the court to hold the state of New York in contempt for failing to comply with the remedial order in the case).

¹⁹¹ See Matthew M. Damschroder, *Of Money, Machines, and Management: Election Administration from an Administrator's Perspective*, 12 *Election L.J.* 195, 199 & n.7 (2013).

¹⁹² See *id.*; *Franklin County Board of Elections v. J. Kenneth Blackwell*, Franklin County (OH) Court of Common Pleas, Case No. 05-CV-001545 (filed February 9, 2005); see also *Election Systems & Software Inc. v. Ohio Secretary of State J. Kenneth Blackwell*, Franklin County (OH) Court of Common Pleas, Case No. 05-CV-004855 (filed May 2, 2005).

¹⁹³ State law determines the power balance between the state and local governments. For an example of political fights about state oversight over local governments in the elections context, see Doug Chapin, *Who’s The Boss? Arkansas, Florida Debate State Power To Discipline Local Election Officials*, *Election Academy* (Aug. 25, 2013), <http://editions.lib.umn.edu/electionacademy/2013/04/25/whos-the-boss-arkansas-florida/> (describing state debates about the circumstances under which state officials should be able to discipline local government election officials that are noncompliant with state law).

II. ELECTION LAW FEDERALISM AND SOVEREIGNTY

As demonstrated above, the Federal Election Statutes implicate a wide range of federalism issues. They do so because of the unusual features inherent in the federal regulation of elections. This Part defines those features and situates them within the greater system of federal regulation.

A. Defining Election Law Federalism

The idea of federalism refers to our system of dual governance split between the federal and state governments. “The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”¹⁹⁴ Federalism can mean many things; it “has always been understood to be a multi-headed beast, with courts and scholars routinely deploying multiple and conflicting accounts of what states do.”¹⁹⁵

Here, “election law federalism” describes the complex set of relationships implicated by federal election legislation. I argue that election law federalism is defined by two distinct features—expansive federal power to regulate and widespread state prerogative to delegate—that both partly explain the widespread noncompliance with the Federal Election Statutes and raise unique federalism and policy questions for election law. The remainder of this Section develops and describes these two features.

Identifying the distinctive structure of election law federalism raises both descriptive and normative concerns. As a descriptive matter, I seek to set forth a full—and previously untold—account of the unusual set of relationships at play in enforcing and complying with federal election legislation. As a normative matter, I propose a framework for thinking about how best to understand federal-state-local relationships in administering election law. Better understanding these relationships can provide insights both into ensuring compliance with these statutes and optimally structuring Elections Clause legislation in the future.

1. Expansive Federal Power To Legislate

Congress has broad constitutional authority pursuant to the Elections Clause to enact voting legislation. The Elections Clause states that the

¹⁹⁴ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

¹⁹⁵ Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010).

“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 to the Place of Chusing Senators.”¹⁹⁶ The history of the Elections Clause as well as contemporary doctrine demonstrate that the Elections Clause gives Congress unusually far-reaching authority to enact elections legislation.

At the founding, the Elections Clause ensured that the federal government could conduct federal elections even if a state refused to do so. Writing in *The Federalist*, Hamilton stated that “every government ought to contain in itself the means of its own preservation.”¹⁹⁷ The Elections Clause was that means. Leaving the power to administer federal elections wholly to the states “would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.”¹⁹⁸

Specifically, the Clause was forged from the discussion over whether Congress should have veto power over all state laws. Commentators have characterized it as a “compromise power.”¹⁹⁹ That is, a compromise between a general veto and an extremely narrow veto to be exercised only if states “failed to call for congressional elections or passed electoral laws that otherwise subverted rights protected by the Constitution.”²⁰⁰ Instead, the framers decided on a veto over state laws concerning the important functions of representation and voting.²⁰¹ The founders thus understood that the Elections Clause could function as a congressional veto over state election regulations, to be used at Congress’s discretion.

The Supreme Court’s recent case law has reaffirmed Congress’s comprehensive authority under the Elections Clause.²⁰² The Supreme Court recently weighed in on Congress’s Elections Clause authority in an NVRA case. In *Arizona v. Inter Tribal Council of Arizona, Inc.*,²⁰³ the Court

¹⁹⁶ Elections Clause, U.S. CONST. art. 1, § 4.

¹⁹⁷ *The Federalist* No. 59, pp. 362–363 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted).

¹⁹⁸ *Id.*

¹⁹⁹ See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1223 (2012).

²⁰⁰ *Id.* at 1124-25 (citing PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788*, at 448 (2010)).

²⁰¹ *See id.* at 1223.

²⁰² See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 16 (2007) (“The Supreme Court’s recent decisions under the Elections Clause have confirmed the longstanding interpretation of the clause as a grant of essentially plenary authority.”).

²⁰³ 133 S. Ct. 2247 (2013).

considered whether the NVRA’s requirement that states “accept and use” a uniform federal voter registration form that does not require proof of citizenship preempted an Arizona law requiring evidence of citizenship to register to vote.²⁰⁴

The Court held that it did because the substantive scope of the Elections Clause is “broad.”²⁰⁵ The “[t]ime, places, and manner” of the Elections Clause are “‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections,’ including . . . regulations relating to ‘registration.’”²⁰⁶ The Elections Clause “‘invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.’”²⁰⁷ Congress’s power over the “Times, Places and Manner” of congressional elections “‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’”²⁰⁸

Most importantly for our purposes, the Court considered and rejected the idea that Elections Clause legislation must meet the “plain statement” rule set out by *Gregory v. Ashcroft*.²⁰⁹ That rule states that when Congress alters the traditional balance between state and federal governments by legislating in areas typically regulated by states, it must make its intentions clear by plain statement.²¹⁰ In *Arizona* the Court held that the assumption motivating *Gregory*—that Congress is naturally reluctant to preempt state regulation—does not hold when Congress exercises its Elections Clause authority.²¹¹ This is because *any* federal election legislation that alters the “times, places and manner” of holding congressional elections “necessarily displaces some element of a pre-existing legal regime erected by the States.”²¹² That is, because the Elections Clause confers the “power to preempt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.”²¹³ Moreover, “the States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification

²⁰⁴ *Id.* at 2251.

²⁰⁵ *Id.* at 2253, 2260.

²⁰⁶ *Id.* (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

²⁰⁷ *Id.* (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)).

²⁰⁸ *Id.* at 2253-54 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

²⁰⁹ *Id.* at 2256-57.

²¹⁰ *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

²¹¹ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2256 (2013).

²¹² *Id.* at 2257 (footnote omitted).

²¹³ *Id.*

that it ‘terminates according to federal law.’”²¹⁴

Lower courts have applied this broad understanding of Congress’s authority under the Elections Clause. In *United States v. Slone*, for example, the Sixth Circuit considered a constitutional challenge to a federal statute criminalizing vote-buying on the ground that Congress had no authority to regulate non-federal elections.²¹⁵ Relying on the broad powers conferred by the Elections Clause, the court upheld the statute.²¹⁶ In other cases challenging the constitutionality of the NVRA—some of which are described above—lower courts have held that Congress’s Elections Clause authority exceeds its Commerce Clause authority.²¹⁷ In one Seventh Circuit case, for example, the court rejected an argument that Congress could not force Illinois to administer the NVRA.²¹⁸ In Judge Posner’s words, in the context of election legislation, “Congress was given the whip hand.”²¹⁹

2. State Prerogative To Delegate

States have delegated significant election responsibilities to local governments like counties and townships.²²⁰ This delegation creates elections that Alec Ewald calls “hyperfederalized”²²¹: many key election decisions get made at the local level. The degree and kind of decentralization varies by state, but nearly all aspects of election

²¹⁴ *Id.* (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

²¹⁵ 411 F.3d 643, 648-50 (6th Cir. 2005).

²¹⁶ *Id.* (“Under the Elections Clause, Congress is authorized to protect the integrity of federal elections. . . . It is for Congress to chose the means that ‘are plainly adapted to that end.’” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819))).

²¹⁷ *See, e.g.*, *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (distinguishing Congress’s broad powers pursuant to the Elections Clause with its more limited powers pursuant to the Commerce Clause, and noting that “[t]he Elections Clause also gives a broad grant of power to Congress, allowing it to define the boundaries of state transgressions and to remedy any wrongdoing.”); *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 837 (6th Cir. 1997) (noting that unlike the Spending Clause, the Elections clause “explicitly grants Congress the authority to force states to alter their regulations regarding federal regulations, and does not condition its grant of authority on federal reimbursement”).

²¹⁸ *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995).

²¹⁹ *Id.* (distinguishing the anti-commandeering doctrine of *New York v. United States* in the context of Congress’s Elections Clause powers).

²²⁰ *See generally* HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 *ELECTION L.J.* 118, 122-23 (2007) (book review).

²²¹ ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 3 (2009).

administration are delegated to local governments by at least some set of states.²²²

Most relevant for this Article, states delegate significant absentee ballot and voter registration responsibilities to local governments. Alabama, for example, designates an “absentee election manager,” selected by the county circuit clerk, to administer the absentee ballot process.²²³ The absentee election manager accepts absentee ballot applications and transmits those ballots.²²⁴ The Alabama Secretary of State plays a role, however, by supplying the absentee ballot application form, including a special form for military and overseas voters.²²⁵ Split arrangements like this one—where the state provides some resources and the local governments administer the actual absentee ballot transmission and counting process—are common among states.²²⁶

Local governments also play a prominent role in the voter registration process. In North Carolina, for example, County Boards of Election administer the registration process.²²⁷ North Carolina itself maintains a centralized registration list, but county boards provide list maintenance.²²⁸ As it is with absentee voting, this sort of state/local division of responsibility for voter registration is common among states.²²⁹

States delegate many other responsibilities as well. Local governments play a significant role in funding elections, training poll workers, and selecting voting systems.²³⁰ As of 2002, many states provided no funding to local governments to administer elections.²³¹ In those states, local

²²² *Id.* at 3-4.

²²³ *See* ALA. CODE § 17-11-2.

²²⁴ *See id.* §§ 17-11-4 & 17-11-5.

²²⁵ *See id.* § 17-11-4.

²²⁶ *See, e.g.*, VT. STAT. ANN. tit. 17, §§ 2531, 2532, 2536, 2582, 2586 (making local governments in Vermont responsible for accepting absentee ballot applications, transmitting absentee ballots, and counting absentee ballots; the Vermont Secretary of State provides absentee ballot envelopes and forms for counting votes). Rhode Island, on the other hand, which has one of the most centralized elections programs in the country, requires local boards of elections to certify absentee ballot applications to the Secretary of State, who transmits and receives those ballots directly from voters. *See* R.I. GEN. LAWS §§ 17-20-2.1, 17-20-10, 17-20-26.

²²⁷ *See* N.C. GEN. STAT. ANN. § 163-82.1(b).

²²⁸ *See id.* § 163-82.14(a).

²²⁹ *See, e.g.*, MO. ANN. STAT. §§ 115.141, 115.158 (placing local election authorities in charge of voter registration and giving the state and local election authorities shared responsibility for maintaining the statewide voter list).

²³⁰ *See* Weinstein-Tull, *supra* note **Error! Bookmark not defined.** (describing how states delegate election responsibilities to counties generally); *Election Reform Briefing* 5-10.

²³¹ *Election Reform Briefing*, at 6.

governments funded elections entirely themselves.²³² Twenty-two states reimbursed local governments for parts of the election administration process.²³³ Only nine states paid the majority of election costs.²³⁴ With respect to poll worker training, many states provide training, but fewer than half provide mandatory training.²³⁵ Only seven states provide a poll worker certification process that requires local poll workers to be trained according to state requirements.²³⁶ The remaining states either provide optional training to local poll workers or no training at all.²³⁷

States maintain varying levels of oversight of their local governments.²³⁸ Some states appoint precinct officials themselves and either maintain control over voting rolls or closely monitor local management.²³⁹ Other states issue enforceable guidelines, rules, regulations, or instructions that require local governments to administer election activities in specific ways.²⁴⁰ Other states participate in the local decisionmaking process by installing state elections officials on local election boards.²⁴¹ Most states take a hands-off approach. Of the twenty-nine states where the Secretary of State has authority over elections, only one-third of those Secretaries have actual rulemaking authority.²⁴² In the rest of the states, that authority lies with local governments.²⁴³

B. Tension with Federalism Doctrines

The combination of these two properties—strong federal regulation and broad state delegation—puts the Federal Election Statutes in a unique position: the Elections Clause permits Congress to legislate in a way that creates tension with traditional federalism doctrines. Specifically, the

²³² *Id.*.

²³³ *Id.*

²³⁴ *Id.* The Help America Vote Act of 2002, 52 U.S.C. §§ 20901-21145, now provides some federal funding for the purchase of voting systems, but that funding is “quite limited”; states and local governments continue to bear the financial burden of funding elections. *See* EWALD, *supra* note 221, at 4.

²³⁵ *Election Reform Briefing* at 6.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Jeanne Richman & Robert Outis, *State Control of Election Administration*, in ISSUES OF ELECTORAL REFORM 117, 118 (Richard J. Carlson, ed., 1974).

²³⁹ *Id.* at 119-20.

²⁴⁰ *Id.* at 120-22.

²⁴¹ *Id.* at 122. In Kentucky, for example, the state board of elections appoints two of four officials on each local elections commission. *See* Ky. Rev. Stat. Ann. § 117.035.

²⁴² *Id.* at 7.

²⁴³ *Id.*

Federal Election Statutes appear to violate the anti-commandeering principle and the principle of state control over its subdivisions. In the context of election law, however, courts have held that the Elections Clause immunizes the statutes from these concerns. Nonetheless, I suggest that the tension between the Federal Election Statutes and these federalism principles may explain some of the widespread noncompliance with the statutes. This Section describes these federalism principles—anti-commandeering and state control over subdivisions—and explains how they are implicated by the Federal Election Statutes.

1. Anti-Commandeering

Because the Federal Election Statutes place responsibility for compliance on states and because states delegate that responsibility to local governments, bringing states into compliance with the statutes can mean asking states to take significant steps that they may believe violate the anti-commandeering principle. Specifically, to come into compliance with the statutes, states must either: 1) require local governments to carry out the objectives of the statutes, through state legislation; or 2) enforce the statutes legally against local governments. States perceive these requirements to violate the anti-commandeering doctrine.

The anti-commandeering principle, recognized by the Supreme Court in *New York v. United States*²⁴⁴ and *Printz v. United States*,²⁴⁵ states that the federal government may not “compel the States to implement, by legislation or executive action, federal regulatory programs.”²⁴⁶ In *New York*, the Court struck down a federal statute that forced states to take title to low-level radioactive waste unless the state was able to dispose of that waste—either itself or through an interstate compact—by a certain date.²⁴⁷ In *Printz*, the Court struck down a part of the Brady Act that required state and local law enforcement officers to conduct a background check on prospective handgun buyers.²⁴⁸ *New York* held that Congress cannot compel a state “to enact or enforce a federal regulatory program.”²⁴⁹ *Printz* in turn found that Congress may not circumvent that prohibition by conscripting state officers directly.²⁵⁰

²⁴⁴ 505 U.S. 144 (1992).

²⁴⁵ 521 U.S. 898 (1997).

²⁴⁶ *Id.* at 925.

²⁴⁷ *New York*, 505 U.S. at 153-54.

²⁴⁸ *Printz*, 521 U.S. at 902.

²⁴⁹ *Id.* at 935.

²⁵⁰ *Id.*

These cases are premised on the idea that although Congress may encourage states to regulate a federal priority by offering incentives, it may not force a state to regulate.²⁵¹ Congress may also give states the choice between regulating a policy area itself or allowing Congress to do so in an area where Congress is authorized to regulate.²⁵² Permitting Congress to commandeer state legislatures and officials diminishes accountability, the Court noted in *New York*, because it obscures from public view the actor that compels the regulation.²⁵³

For states—like Missouri—that have delegated election administration responsibility to local governments, the commandeering doctrine sits uneasily with the Federal Election Statutes. If local governments are the state bodies responsible for the kinds of conduct required by the Federal Election Statutes (voter registration, transmitting overseas ballots, or choosing voting equipment, for example), and if those local governments are out of compliance, a noncompliant state must take administrative or legal action to bring those local governments into compliance. A state might argue (as Missouri did) that requiring the state to take legal action amounts to conscripting state officials, in violation of the anti-commandeering doctrine articulated in *Printz*.²⁵⁴

For states that believe that state law does not permit state officials to bring local governments into compliance with the statutes—as Vermont, Alabama, and California have claimed²⁵⁵—the statutes potentially require states to enact new legislation, in tension with the anti-commandeering doctrine articulated in *New York*. Even states that neither delegate nor lack enforcement power against local governments have employed anti-commandeering arguments.²⁵⁶ For example, California argued, in a petition for certiorari that the Supreme Court denied, that the NVRA impermissibly

²⁵¹ *New York*, 505 U.S. at 167.

²⁵² *Id.* at 167-68.

²⁵³ *Id.* at 168-69.

²⁵⁴ See Appellees' Brief at 47-48, *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008) (No. 07-2322), 2007 WL 6603869 (“[E]ven if state officials could bring state criminal and other enforcement actions, the U.S.’ apparent contention that Congress, through the NVRA, requires such proceedings raises serious constitutional problems. While Congress has vast power under the Elections Clause, it may not co-opt a State’s decision to prosecute violations of state law.” (citing *New York v. United States*, 505 U.S. 144, 175, 178 (1992))).

²⁵⁵ See *supra* notes 152-159 and accompanying text.

²⁵⁶ See *Ass’n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (“Citing *New York v. United States* . . . Michigan claims that the Act is unconstitutional because it conscripts state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment.”).

commandeered the state to pass legislation that enacted federal voter registration priorities.²⁵⁷

Courts have rejected these arguments, largely by distinguishing the source of congressional power in anti-commandeering cases from that in voting cases. The anti-commandeering cases are grounded in a Commerce Clause analysis, this reasoning goes, whereas the Federal Election Statutes are enacted pursuant to Congress’s Elections Clause authority.²⁵⁸ This reasoning finds support in the Supreme Court’s recent decision in *Inter Tribal*, where the Supreme Court held that the Elections Clause permits Congress to alter state election regulations when it chooses.²⁵⁹ These cases suggest that Congress may enact election legislation that forces a state to take action it might not otherwise take, without violating the anti-commandeering doctrine.

But this reasoning misses an important difference between the Federal Election Statutes and policies held to violate the Tenth Amendment: state delegation of election administration responsibilities to local governments is a state decision, and the legal relationships between states and their local governments are a matter of state law. Under the Constitution, states are responsible for determining the “time, place, and manner” of elections. That states have chosen to delegate that responsibility to local governments should not prevent the federal government from exercising its own constitutional authority to override those regulations. That is, state delegation to local governments should not serve as a barrier to federal regulation under the Elections Clause.²⁶⁰

2. State Control over Subdivisions

Implicit in the idea that the Federal Election Statutes create a mismatch between the role states would like to play—vis-à-vis their local governments—and the role they must play to comply with the statutes is another tension with traditional federalism doctrines: that these statutes

²⁵⁷ Petition for Writ of Certiorari at 16-17, *Wilson v. Voting Rights Coal.*, 516 U.S. 1093 (1996) (No. 95-673), 1995 WL 17048226 (“If the Constitution prohibits Congress from forcing state legislatures to legislate, it follows that Congress cannot step into the shoes of the state Legislature and commandeer state agencies simply to do their bidding.”).

²⁵⁸ See, e.g., *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *Wilson v. United States*, 878 F. Supp. 1324, 1327-28 (N.D. Cal. 1995).

²⁵⁹ See *supra* notes 202–208 and accompanying text.

²⁶⁰ Although the Supremacy Clause might seem applicable here, the Supreme Court has explained that because statutes like the NVRA are enacted pursuant to the Elections Clause, which is “none other than the power to pre-empt,” Supremacy Clause doctrine is inapposite. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2250 (2013).

diminish state authority to define and direct their local governments.

The federal government has some, but not unlimited, control over how a state chooses to order its own structure of government. Consider the early case of *Coyle v. Smith*, in which the Court considered whether an Oklahoma bill moving the state capitol from Guthrie to Oklahoma City conflicted with an act of Congress permitting Oklahoma to join the union and setting Oklahoma’s capitol in Guthrie.²⁶¹ Finding that “[t]he power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, *are essentially and peculiarly state powers*,”²⁶² the Court held that Oklahoma was not admitted to the union on equal footing with her sister states, in violation of the Constitution.²⁶³ Oklahoma, “by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government.”²⁶⁴ Another example is *Highland Farms Dairy v. Agnew*, where the Court determined that a Virginia statute delegating milk pricing powers to a commission was not an unlawful delegation of state powers: “How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”²⁶⁵ There are thus some powers that relate to a state’s internal organization that a state is uniquely competent to exercise.²⁶⁶

State control over its own subdivisions was solidified into a “canon”²⁶⁷ in a series of cases beginning with *Gregory v. Ashcroft*.²⁶⁸ In *Gregory*, the Court upheld a Missouri law that imposed mandatory retirement on state judges at age 70.²⁶⁹ The Court upheld the law despite the federal Age Discrimination in Employment Act, which prohibits employers—including state employers—from discriminating on the basis of age.²⁷⁰ The Court held that in order to disrupt the traditional federal-state balance, *which includes permitting the states to structure their government as they see fit*, Congress

²⁶¹ 221 U.S. 559, 563-64 (1911).

²⁶² *Id.* at 565 (emphasis added).

²⁶³ *Id.* at 579-80.

²⁶⁴ *Id.* at 579.

²⁶⁵ See *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

²⁶⁶ For other examples, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 40-50 (1988) (arguing generally that the Guarantee Clause of the Constitution is a better justification for these state powers than the Tenth Amendment).

²⁶⁷ See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 984-90 (2007) (noting the canon and describing the doctrine of state control over its subdivisions).

²⁶⁸ 501 U.S. 452, 460.

²⁶⁹ *Gregory*, 501 U.S. at 456.

²⁷⁰ *Id.* at 467.

must make a “plain statement” of its intention to do so.²⁷¹ This is because “[t]hrough the structure of its government . . . a State defines itself as a sovereign.”²⁷² Structuring its government (here, setting a retirement age for judges) “is a decision of the most fundamental sort for a sovereign entity.”²⁷³

The Court also applied this plain statement rule to a case involving preemption that would have altered the balance of power between the state of Missouri and its subdivisions. In *Nixon v. Missouri Municipal League*, the Court considered whether the Telecommunications Act of 1996—which prevented state and local governments from prohibiting any entity from providing telecommunications services—preempted a Missouri law prohibiting all of its own subdivisions from offering telecommunications services.²⁷⁴ Preempting the state law would free local governments to offer telecommunications services. The Court held that the Telecom Act did not preempt the Missouri law because the “liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, ‘are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.’”²⁷⁵ Instead, the Court invoked its “working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in the absence of the plain statement *Gregory* requires”²⁷⁶

State power to control its own subdivisions is not plenary, however. Congress has authority to alter a state’s internal structure in a number of situations. The federal government had the authority for years, pursuant to the Voting Rights Act, to block fundamental state ordering in the form of state and local government redistricting that discriminated against minority voters.²⁷⁷ The constitution requires states to adhere to the “one person, one vote” principle, which restricts state freedom in apportioning legislative

²⁷¹ *Id.* at 461.

²⁷² *Id.* at 460.

²⁷³ *Id.*; see *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015) (“[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes.”).

²⁷⁴ *Nixon v. Missouri Mun. League*, 541 U.S. 125, 128 (2004).

²⁷⁵ *Id.* at 140 (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)).

²⁷⁶ *Id.* at 140.

²⁷⁷ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

districts.²⁷⁸ A state may not delegate legislative authority to religious organizations.²⁷⁹ The Court has upheld federal legislation that limits state freedom to organize its own government when those limits are incentivized with financial reward to the states.²⁸⁰

States that have been sued pursuant to the Federal Election Statutes have raised arguments that invoke their control over their own subdivisions. Specifically, states have argued that the statutes seriously alter the balance of power between states and their counties, and that Congress could not have intended such serious consequences, otherwise it would have said so explicitly.²⁸¹ Lower courts have rejected these arguments, noting generally that the clear statement rule does not apply to Elections Clause legislation.²⁸² In *Inter-Tribal*, the Supreme Court agreed.²⁸³

However, a difference remains between the Federal Election Statutes and the federal laws that permissibly restrict state organization of its subdivisions. To enact Spending Clause legislation, Congress must incentivize optional restrictions with funding.²⁸⁴ To enact Fourteenth and Fifteenth Amendment legislation, Congress must justify the legislation with voluminous records and evidence.²⁸⁵ To enact voting regulations, however, Congress need only pass a law; given its Elections Clause authority, it need not jump through additional hoops.²⁸⁶

²⁷⁸ See *Reynolds v. Sims*, 377 U.S. 533 (1964).

²⁷⁹ See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982).

²⁸⁰ See *Merrit*, *supra* note 156, at 46-49 (listing examples).

²⁸¹ See *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2006 WL 1446356, at *7 (W.D. Mo. May 23, 2006) *rev'd*, *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008).

²⁸² See, e.g., *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (noting that the plain statement rule does not apply to the NVRA because Congress enacted the NVRA pursuant to its Elections Clause authority).

²⁸³ See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256-57, (2013) (noting that *Gregory* and the clear statement rule does not apply to the NVRA because “[t]here is good reason for treating Elections Clause legislation differently.”).

²⁸⁴ See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding a law that withheld federal highway funds from states that did not adopt a minimum drinking age of twenty-one).

²⁸⁵ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (striking down the Religious Freedom Restoration Act in part because Congress enacted that law pursuant to its Fourteenth Amendment enforcement authority but failed to identify a pattern of discriminatory activity that justified the act).

²⁸⁶ To be clear, I do not raise this point to suggest that the standard for congressional authority under the Elections Clause ought to be something different from what it currently is. I raise this point to note that Elections Clause legislation stands in tension with the traditional federalism doctrine that, except in limited circumstances, states should maintain control over the ordering of their political subdivisions.

C. Differences with Other Public Policies

In addition to being in tension with traditional federalism doctrines, the Federal Election Statutes implicate different federalism relationships from those of other major federal policies. Those policies follow the “cooperative federalism” model, where the federal government uses its Commerce Clause and/or Spending Clause authority to enact requirements that are administered by state agencies.²⁸⁷ The federal government cajoles states into administering these requirements by using Spending Clause incentives or threats that the federal government itself will regulate private conduct if the state fails to. But in none of these situations does the federal government require states to enact its priorities without financial incentives, the possibility that the federal government will itself regulate the conduct, or significant evidence that the regulated conduct affects interstate commerce.

Consider, for example, federal environmental legislation. The Clean Air Act asks states to create “implementation plans”²⁸⁸ in order to implement federal environmental standards.²⁸⁹ Implementing these plans is optional – if states decline or fail to implement plans that meet the federal standards, the Environmental Protection Agency (EPA) will design and enforce its own implementation plan.²⁹⁰ The Clean Air Act also gives the EPA power to incentivize state compliance with the federal standards with financial and other kinds of rewards and penalties.²⁹¹ The Clean Water Act²⁹² and other pieces of environmental legislation²⁹³ operate similarly.

Health care is another area of federal public policy that implicates different federalism relationships from the Federal Election Statutes. Medicaid, long the cornerstone of federal health care policy, is a cooperative federalism program because it offers federal money to states

²⁸⁷ See Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 666 (2001) (“In reality, however, Congress continues to enact “cooperative federalism” regulatory programs that invite state agencies to implement federal law.”).

²⁸⁸ See Clean Air Act, 42 U.S.C. § 7410(a)(2) (1988 & Supp. V 1993).

²⁸⁹ See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1195-96 (1995).

²⁹⁰ See 42 U.S.C. § 7410(c).

²⁹¹ See Dwyer, *supra* note 152, at 1196-97.

²⁹² David R. Hodas, *Enforcement of Environmental Law in A Triangular Federal System: Can Three Not Be A Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1555 (1995).

²⁹³ *Id.* at 1571 (“[E]ssentially all the modern major environmental laws provide uniform, minimum national standards with the states “deputized,” to a greater or lesser degree, to do the permitting and enforcing for the federal government.”); see also Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 715-16 (2011).

that implement Medicaid programs.²⁹⁴ Like the Clean Air Act, Medicaid is voluntary; states may refuse federal money and decline to cover low-income individuals in their state.²⁹⁵ The Affordable Care Act similarly implicates different federalism relationships between the federal and state governments.²⁹⁶ In fact, the Court doubled down on the idea that the federal government cannot coerce states to implement a federal program in *National Federation of Independent Businesses v. Sebelius*²⁹⁷ when it struck down the provision of the Affordable Care Act that effectively mandated expanded Medicaid. That provision punished states that refused to expand their Medicaid programs by authorizing the Department of Health and Human Services to cut their Medicaid funding.²⁹⁸ The Court held that the statute coerced states to implement the expansion, which exceeded Congress's authority.²⁹⁹

Telecommunications policy provides another example of a federal law that creates federal-state relationships different from those created by the Federal Election Statutes. The Telecommunications Act of 1996 requires states to broker agreements between existing telecommunications providers and new entrants into the local telephone market.³⁰⁰ However, the Telecommunications Act takes commandeering concerns into account by making state agency cooperation optional.³⁰¹ The Telecommunications Act “offers states the *opportunity* to implement its essential goal of bringing competition to local telephone markets by arbitrating disputes relating to the terms under which new entrants will cooperate with incumbent

²⁹⁴ See 42 U.S.C. §1396 (2006); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 134-35 (2011).

²⁹⁵ See Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855, 860 (1990). All states participate in the program; Arizona was the last to join in 1982. See Leonard, *supra* not 157, at 135 & n.159.

²⁹⁶ See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 576-94 (2011) (noting that the Affordable Care Act contains no fewer than five different kinds of federalism relationships – none of which mirror the relationships implicated by the Federal Election Statutes).

²⁹⁷ 132 S. Ct. 2566 (2012).

²⁹⁸ *Id.* at 2607.

²⁹⁹ *Id.*

³⁰⁰ See Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 14 (1999).

³⁰¹ Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 676 (2001) (“Sensitive to the limits imposed by the Supreme Court on commandeering state agencies into a federal regulatory program, the Telecom Act, like other modern cooperative federalism programs, does not require state agencies to participate in its implementation.”).

providers.”³⁰²

The area of public policy that implicates federalism relationships most similar to Election Law Federalism is education policy. Most states have delegated significant education policymaking authority to local governments and school boards.³⁰³ Local control over public education is deeply rooted in the country’s fabric and “essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.”³⁰⁴ School districts, like county governments that administer elections, have no distinct place in the constitutional order.³⁰⁵ Despite these similarities, Congress enacts federal education legislation pursuant to its Spending Clause authority.³⁰⁶ Unlike election legislation, the federal government exerts influence over state and local education policy through the promise of funding, not the threat of litigation.

Congress can also regulate public and private conduct directly when it acts pursuant to its Commerce Clause or Fourteenth Amendment authority. For example, the Court has permitted Congress to set minimum wage laws that apply to state and local governments.³⁰⁷ Congress uses its Commerce Clause power to enact most criminal laws.³⁰⁸ And Congress enacted the Family and Medical Leave Act—which require employers (including public employers) to provide employees with family and medical leave—pursuant to its Fourteenth Amendment enforcement authority.³⁰⁹ But to enact these statutes, Congress must compile vast records demonstrating that the

³⁰² *Id.* (emphasis added).

³⁰³ Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130-31 (2006).

³⁰⁴ See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1982) (overturning a federal district court’s order imposing a multi-district busing desegregation scheme despite no evidence of a multi-district segregation problem, in part because “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools”).

³⁰⁵ See Shannon K. McGovern, *A New Model for States As Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1530 (2011). Debate exists among scholars as to just how independent school districts are from states. Compare *id.* at 1529-30 (noting that school districts have “de facto local autonomy” recognized by courts) with Heise, *supra* note 303, at 131-34 (noting a shift from local control to greater state control as states and the federal government have imposed additional requirements on schooling).

³⁰⁶ See Heise, *supra* note 303, at 135-36.

³⁰⁷ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (upholding minimum wage and overtime pay provisions of the Fair Labor Standards Act as applied to state and local government).

³⁰⁸ See Thane Rehn, Note, *Rico and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1995-99 (2008) (describing Congress’s use of the Commerce Clause to enact various kinds of criminal laws).

³⁰⁹ See *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

regulated conduct either significantly affects interstate commerce or remedies pervasive discrimination.³¹⁰

There are, of course, many other policy areas that engage with federalism,³¹¹ but the pattern is consistent: federal legislation treads lightly when it comes to requiring states to take action and administer a federal policy. To be clear, the differences between the Federal Election Statutes and these other pieces of major federal legislation do not suggest that the Federal Election Statutes are unconstitutional – that question has been answered many times by many courts. But these differences help explain why states have been so resistant to comply with the statutes and why they may be reluctant to comply with future Elections Clause legislation: the statutes implicate materially different kinds of federalism relationships from the relationships implicated by most federal policies.

D. The Character of Election Law Federalism

As we saw in the previous sections, the Federal Election Statutes do not impermissibly violate the prevailing federalism doctrines. Nevertheless, the federal-state-local relationships the statutes affect implicate state sovereignty in interesting ways.³¹² What, then, is the character of election law federalism?

Matthew Damschroder, an Ohio election administrator, wrote that HAVA’s funding structure “unsettled” the federal-state-local balance of power.³¹³ HAVA’s funding structure gave the federal government leverage over state and local governments, and state government leverage over local governments. It also moved some decisions that had traditionally been dealt

³¹⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (striking down the Religious Freedom Restoration Act in part because Congress failed to identify a pattern of discriminatory activity that justified the act); *United States v. Lopez*, 514 U.S. 549, 562-63 (1995) (striking down the Gun-Free School Zones Act in part because Congress failed to demonstrate that it substantially affected interstate commerce).

³¹¹ See, e.g., Jessica Bulman-Pozen, *Unbundling Federalism: Colorado’s Legalization of Marijuana and Federalism’s Many Forms*, 85 U. COLO. L. REV. 1067 (2014) (discussing the federalism relationships implicated by federal drug policy and state marijuana legalization); Patricia J. Zettler, *Toward Coherent Federal Oversight of Medicine*, 52 SAN DIEGO L. REV. (forthcoming 2015) (describing the federalism relationships inherent in the regulation of drugs and the practice of medicine).

³¹² See Weiser, *Constitutional Architecture*, *supra* note 22, at 677 (“Relying on federal law to justify action not authorized under state law, although not a ‘commandeering’ of state agency resources as defined in *United States v. New York*, certainly implicates the integrity of state sovereignty.”).

³¹³ Matthew M. Damschroder, *Of Money, Machines, and Management: Election Administration from an Administrator’s Perspective*, 12 ELECTION L.J. 195, 199 (2013).

with at the local level—such as selecting voting systems—to the states.³¹⁴ This unsettling “has also led to a realignment of federal, state, and local power in election administration.”³¹⁵

That realignment has not yet been fully realized. The statutes require states to take a strong oversight role in relation to their local governments’ election administration, in a number of significant areas: registration (NVRA, HAVA), voting systems (HAVA), and absentee ballots (UOCAVA). The statutes require states to play a role—that of close monitor of elections—that, considering the extent to which states have delegated their election administration responsibilities, they presumably do not want to play. The statutes thus create a *role mismatch* for states. And states have not fully accepted this realignment. As I set out in Part I, states attempt to evade their responsibility in various ways. They hide behind state law and local governments in an effort to avoid liability for noncompliance with the statutes. As a consequence, noncompliance with the statutes is widespread.

Some might argue that an alternate explanation for this noncompliance is that the statutes pose an enforcement problem, not a federalism problem. That is, stronger enforcement by the Department of Justice and private parties might reduce noncompliance. But noncompliance with these statutes implicates federalism, for two reasons. First, state arguments in response to litigation pursuant to these statutes sound in federalism. As I described above, states regularly make anti-commandeering and state sovereignty arguments when they are sued.³¹⁶ So states focus less in litigation on whether they have violated the statute and more on whether the statute *applies to them at all*. Even in 2014, over twenty years after the NVRA was enacted, states continue to make these arguments.³¹⁷ Second, widespread noncompliance persists even after many years. The Department of Justice has sued multiple states multiple times pursuant to these statutes, and still states remain noncompliant. This noncompliance persists because the statutes present unresolved federalism issues.

Others might argue that the Federal Election Statutes do not implicate federalism at all. That instead, the statutes demonstrate a form of

³¹⁴ *Id.*

³¹⁵ *Id.* at 200.

³¹⁶ See *infra* notes 124-**Error! Bookmark not defined.** and accompanying text.

³¹⁷ See Secretary of State Delbert Hosemann’s Answer and Defenses to Plaintiffs’ Complaint at 14, *True the Vote v. Hosemann*, 2014 WL 4273332 (S.D. Miss. Aug. 29, 2014) (No. 3:14-CV-532-NFA); Brief of Secretary of State Delbert Hosemann in Opposition to Motion for Partial Summary Judgment at 33-34, *True the Vote v. Hosemann*, 2014 WL 4273332 (S.D. Miss. Aug. 29, 2014) (No. 3:14-CV-532-NFA) (citing *United States v. Missouri*, 535 F.3d 844, 849-51 (8th Cir. 2008)).

managerial decentralization³¹⁸: because the statutes do not grant any significant decision-making powers to the states, and therefore confer no sovereignty, they do not implicate federalism. Franita Tolson applies this argument specifically to voting rights. She notes that the Elections Clause permits the federal government to preempt states freely, therefore stripping states of their sovereignty in the elections context.³¹⁹

I see Election Law Federalism not in these stark terms of federal versus state sovereignty, but instead as a set of relationships between federal, state, and local bodies that each possess significant functional—if not doctrinal—power. As Heather Gerken notes, with or without sovereignty, “states can use their policymaking power to challenge, thwart, even defy the national majority.”³²⁰ This is true in the elections context; it is true for local governments as well.

These sometimes contentious relationships pose unanswered doctrinal questions. One commentator observes that following the New Deal, much state power comes from federal laws that give states the opportunity to regulate and administer federal law.³²¹ Because federalism doctrine generally has focused on the limits of Congress’s authority to harness state involvement in federal law vis-à-vis the Spending Clause,³²² “our doctrines of federalism and statutory law are not tuned in to the ways in which states exercise their sovereign powers in the modern federal statutory era.”³²³ But because Congress’s Spending Clause authority does not constrain election legislation, the Federal Election Statutes exist in a similar doctrinal void. Although the Federal Election Statutes are not particularly new, a surprising dearth of case law exists to flesh out the role realignment described above. Perhaps because states are reluctant to engage in protracted litigation with the Department of Justice when they are sued pursuant to one of these statutes,³²⁴ and because it remains unclear whether UOCAVA or HAVA

³¹⁸ Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on A National Neurosis*, 41 UCLA L. Rev. 903, 910 (1994) (describing the differences between federalism and decentralization).

³¹⁹ See Tolson, *supra* note 4.

³²⁰ Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010).

³²¹ Abbe R. Gluck, *Our (National) Federalism*, 123 YALE L.J. 1996, 1997 (2014).

³²² *Id.* at 2011 (“The Court has put almost all of its energy into one particular exercise of state power within federal statutory schemes; the choice by states whether to participate in Congress’s conditional spending programs in the first place.”).

³²³ *Id.* at 2010.

³²⁴ See United States Dep’t of Justice, Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act, http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php (of the twenty-seven UOCAVA complaints that the U.S. Department of Justice filed against states since 2000,

contain private rights of action, courts have not yet had to answer a number of thorny doctrinal questions that the statutes raise.

First, can a state be required to *enforce* the Federal Election Statutes against its counties? The *Missouri* court said no: Missouri could not be required to enforce the NVRA against its local governments.³²⁵ Other courts have disagreed.³²⁶ But most courts have ignored or sidestepped the issue. They have found states noncompliant and issued orders requiring compliance, without specifying how to achieve that compliance.³²⁷ Whether the Federal Election Statutes even create a cause of action for states to sue their local governments therefore remains an open question.³²⁸

As I have previously discussed, requiring a state to use its executive powers to enforce federal law smells like commandeering.³²⁹ But the alternative is even more bizarre. If a state cannot be required to enforce the Federal Election Statutes against their local governments, how can it be held responsible for failing to comply with these statutes? Political means—i.e., convincing local governments to comply—is an unreliable method. Another method might be to require states to simply take control of the election administration responsibility in question. Under UOCAVA, for example, this might mean a state taking control over transmitting absentee ballots to military and overseas voters. Even that option could require the state to enact new laws and might be infeasible as a practical or political matter. Furthermore, the commandeering character of the enforcement requirement is borne of the state’s decision to delegate its constitutionally mandated requirement to administer elections. And the federal government cannot be required to enact law that accounts for the quirks of each state’s election system. The Supreme Court has said as much, in a number of contexts.³³⁰

only four were contested and resolved by judgment of the court; the rest were resolved by entry of a consent decree settlement). States may feel that the optics of fighting the Department of Justice on a voting rights issue does not favor them, making settlement a more attractive option.

³²⁵ See *United States v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008).

³²⁶ See, e.g., *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008).

³²⁷ See, e.g., *United States v. State of New York*, No. 1:10-CV-1214 GLS/RFT, 2012 WL 254263, at *3-5 (N.D.N.Y. Jan. 27, 2012) (setting forth a specific timeline for compliance, including compliance by local governments, but declining to state how the state defendant should force local governments to comply).

³²⁸ Recent Supreme Court case law provides some reason to be skeptical that this Court would find such an implied cause of action. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87, (2001) (declining to find an implied cause of action in Title VI of the Civil Rights Act).

³²⁹ See *supra* Section II.B.1.

³³⁰ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 345, 81 (1960) (rejecting the idea that states can evade the Constitution by cloaking their action “in the garb of the

Second, even if a state is responsible for enforcing the Federal Election Statutes against its local governments, what empowers it to do so? As a number of states have pointed out in litigation, the Federal Election Statutes do not provide a cause of action for states to sue their local governments.³³¹ UOCAVA, for example, gives a cause of action only to the Attorney General.³³² The NVRA provides a cause of action to the Attorney General or any “person who is aggrieved” by a violation of the NVRA.³³³ None of the statutes provide a cause of action for state officials to bring the state’s own subdivisions into compliance.³³⁴

Scholars have wrestled with how federal law can interact with state law without fully preempting it. Whether federal law can enlarge state power has been acknowledged as an open question but not resolved by the Supreme Court.³³⁵ According to one theory, a cooperative federalism regulatory program may be able to justify or empower state agency implementation of a federal law in a manner not specifically authorized under existing state law.³³⁶ Others have suggested that federal law can free state officials and local government from the shackles of state law.³³⁷

realignment of political subdivisions”).

³³¹ See, e.g., *United States v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008) (“The plain language of the NVRA provides a right of enforcement to only two categories of plaintiffs—the United States and ‘[a] person who is aggrieved by a violation of [the NVRA].’” (quoting 42 U.S.C. § 1973gg–9(a) and (b))).

³³² See 52 U.S.C. § 20307(a).

³³³ See 52 U.S.C. § 20510(a)-(b).

³³⁴ One statutory option that might make a cause of action available to states is the All Writs Act. 28 U.S.C. § 1651. The All Writs Act empowers federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* It is a rarely-used statute, but it has been successfully used in HAVA litigation to force a New York county to accept delivery of HAVA-compliance voting machines. See Letter Brief of the United States at 4-6, *United States v. New York State Board of Elections*, No. 06-CV-00263 (GLS) (N.D.N.Y. Apr. 20, 2012) (successfully arguing that New York was capable of asking the court to use its power under the All Writs Act to force Nassau County into compliance with HAVA and the court’s remedial order in the case).

³³⁵ See *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 n.7 (2011) (raising the question but declining to address it).

³³⁶ See Weiser, *Constitutional Architecture*, *supra* note X at 674; Gluck, *Our [National] Federalism*, *supra* note 22, at 2037 (“Can Congress, Through National Federalism Statutes, Give State Actors Powers They Do Not Have Under State Law?”).

³³⁷ See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1207-08 (1999); Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977, 980 (2011); Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State*

Similarly here, do the Federal Election Statutes empower state officials to enforce the statutes against their counties, either by conferring federal power upon them to do so, or by liberating state officials from the constraints of state law?

Ultimately, given Congress’s broad powers under the Elections Clause, and the Elections Clause’s insulation from traditional federalism doctrines, we should understand the Federal Election Statutes as requiring a role realignment *and* providing the tools necessary for that realignment: a requirement that states enforce the Statutes against their subdivisions and an implicit cause of action making that enforcement possible. The alternative is a bizarre reading whereby states may evade federal law by reorganizing their internal structures.

Even better, however, would be for the statutes to acknowledge the role realignment they create and explicitly provide the tools to make that realignment effective. I discuss how election legislation can do that in the next Part.

III. LEGISLATING AN ELECTION SYSTEM WITH MULTIPLE SOVEREIGNS

All three levels of government—federal, state, and local—have a stake in administering elections. And unlike many of the public policies described above, where the federal government must thread the needle between encouraging state compliance and avoiding judicial interference, the federal government need not thread that needle in the elections context. Instead, I argue that the most effective enforcement of the Federal Election Statutes depends on finding the best blend of federal, state, and local involvement in enforcing the statutes.³³⁸ In this Part, I propose such a blend and consider how it might apply to voting challenges of the present and future.

A. Balancing Federal, State, and Local Involvement

The Federal Election Statutes provide a model for strengthening the right to vote by placing administration-based obligations on states. Regulating election law in that way has the benefit of requiring the federal government to enforce the laws only against the fifty states (and the District

Implementation of Federal Inspired Regulatory Programs and Standards, 46 WM. & MARY L. REV. 1343, 1354-63 (2005).

³³⁸ See EWALD, *supra* note 23, at 3 & n.11 (noting that most election policies implicate a blend of federal, state, and local participation, but also observing that it is “surprisingly difficult to specify exactly which level of government bears legal and practical authority for varying aspects of election management.”).

of Columbia), rather than against the thousands of local governments that play a role in election administration.

But as described above, statutes that take this form suffer from compliance and enforcement problems, in part because they run up against traditional federalism norms. The statutes require role realignment for states, but they do not explicitly set out how that realignment should occur.

Election laws that take the form of the Federal Election Statutes can avoid these problems and address the realities of a highly decentralized elections system by explicitly stating the roles of each of the governmental actors in the system. These statutes should 1) promote federal *oversight* of the entire compliance process; 2) promote state *management* of the decentralized compliance process specific to that state; and 3) promote local *tailoring* of the statutes to local communities.

1. Promoting Federal Oversight

Federal election laws can promote federal oversight by providing more comprehensive and reliable tools for the federal government to evaluate noncompliance. The Attorney General has statutorily mandated power to enforce the Federal Election Statutes.³³⁹ The statutes permit some private enforcement as well: the NVRA permits private parties to sue for violations of the statutes;³⁴⁰ whether HAVA and UOCAVA provide private rights of action is less clear.³⁴¹ However, the statutes provide few formal mechanisms for evaluating compliance. Data on statewide compliance with the Voting Rights Act is infrequent and inconsistent.³⁴²

For example, the Elections Assistance Commission (EAC) surveys states every two years on their compliance with the NVRA.³⁴³ The EAC data may be used to gauge NVRA compliance, but it is unreliable and incomplete. In the most recent EAC NVRA report, compliance numbers are

³³⁹ See 52 U.S.C. § 21111 (HAVA); 52 U.S.C. § 20307(a) (UOCAVA); 52 U.S.C. § 20510(a) (NVRA).

³⁴⁰ See 52 U.S.C. § 20510(b).

³⁴¹ See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Statutes*, 44 IND. L. REV. 113, 142-46 (2010) (discussing UOCAVA); *id.* at 147-54 (discussing HAVA). Scholars have called for more generous rights of action for those statutes. See *id.*

³⁴² See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 146-49 (2009) (warning about the dangers of federal oversight of election regulations because of weak federal administrative enforcement mechanisms).

³⁴³ See United States Elections Assistance Commission, NVRA Studies, <http://www.eac.gov/registration-data/>.

missing from over twenty states.³⁴⁴ Heather Gerken similarly estimated that in the mid-2000s, only sixty percent of states submitted more than half of the information EAC requested of them.³⁴⁵ Without reliable data on compliance, the federal government (and private parties seeking compliance) must conduct burdensome investigations into compliance at the local level based on citizen complaints. A lack of reliable compliance data therefore eliminates the efficiency benefits of placing the burden of compliance onto states, rather than local governments, because it forces the federal government to investigate local noncompliance anyway.

Because of inconsistent and unreliable compliance reporting, states themselves do not even know whether they are complying with the statutes. Some states require compliance reporting from local voter registration agencies,³⁴⁶ but others have stated in litigation that they do not have the authority to force their local governments to report on compliance.³⁴⁷ A Pew Charitable Trusts report on the NVRA's motor vehicle requirements³⁴⁸ found that "almost none" of the states covered by the law could "document the degree to which their motor vehicle agencies are offering citizens the opportunity to register to vote or update their registrations."³⁴⁹ California, for example, requires its county elections offices to report compliance data on whether DMVs are offering voter registration opportunities. However, the California Secretary of State's office reports that many county databases do not record the information necessary to monitor compliance. As a result, the compliance data California is able to report is necessarily inaccurate.³⁵⁰

Congress should place strict reporting requirements on both state and local levels of government. Doing so would accomplish at least two goals.

³⁴⁴ See United States Elections Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2013–2014* at 79-81 (2015), available at <http://www.eac.gov/assets/1/Documents/2014%20EAC%20EAVS%20Report.pdf>. In 2011-2012, data was missing from over half of the states. See United States Elections Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011–2012* at 46-47 (2013), available at http://www.eac.gov/assets/1/Documents/EAC_NVRA%20Report_lowres.pdf.

³⁴⁵ See GERKEN, *supra* note 25, at 44-49 (describing the poor response rate to the EAC's surveys and the minimal availability of election administration data more broadly).

³⁴⁶ California is one such state. See Cal. Gov't Code § 12172.5.

³⁴⁷ See Memorandum in Support of Motion to Dismiss at 5 n.2, *United States v. Vermont*, 2:08-cv-217 (D. Vt. Oct. 22, 2008).

³⁴⁸ For example, that motor vehicle offices treat driver's license applications as voter registration applications. See 52 U.S.C. § 20504.

³⁴⁹ Pew Charitable Trusts, *Measuring Motor Voter* at 2 (2014), available at <http://www.pewtrusts.org/~media/Assets/2014/05/06/MeasuringMotorVoter.pdf>.

³⁵⁰ *Id.* at 2-3.

First, it would prevent states from fully abdicating their role as actors responsible for complying with the statutes. Forcing states to collect comprehensive compliance data from their local governments will force states to at least confront and acknowledge evidence of noncompliance. Publicizing elections data can motivate states and local governments to improve their election administration, even without the threat of lawsuit.³⁵¹ Second, requiring states to produce compliance data would give the federal government (and private parties seeking compliance) both the tools to determine whether litigation is necessary and reliable evidence of noncompliance. Since reliable compliance data would also be admissible in court, it could decrease litigation time and costs.

2. Promoting State Management

Congress can promote state management by empowering states to take a more active hand in administering elections. As described above, most states do not actually administer elections. Instead, states delegate much of their constitutional role as elections administrator to local governments. Congress should account for and accommodate the reality of the highly decentralized and diverse system of election administration while continuing to hold states ultimately liable for compliance with the statutes.³⁵²

Congress can encourage state management in three ways. First, Congress can include, in future election legislation, language that state officials are ultimately liable for noncompliance notwithstanding any delegation under state law to local governments. This language, although perhaps unnecessary as a legal matter, would avoid confusion and litigation over the question of which governmental body is ultimately responsible for compliance.

The Food Stamp and Medicaid Acts provide helpful models. The Food Stamp Act accounts for a decentralized system of public assistance administration by including, in its definitions, an expansive definition of “state agency.” It defines “state agency” as “the agency of State

³⁵¹ See GERKEN, *supra* note 25, at 67-92 (describing political and policy reasons why collecting and publicizing better election data could be an effective tool for improving election administration).

³⁵² A number of scholars advocate for federal law that accounts for decentralization and argue that accommodating states in that way both respects state sovereignty and can lead to greater compliance with the federal law. See Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 *YALE L. & POL'Y REV.* 321 (2012); Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 *URB. LAW.* 977, 980 (2011).

government, *including the local offices thereof*, which has the responsibility for the administration of the federally aided public assistance programs within such State”³⁵³ Furthermore, “in those States where such assistance programs are operated on a decentralized basis, the term [state agency] shall include the counterpart local agencies administering such programs”³⁵⁴ Medicaid does even more by requiring that states that delegate administration responsibility to local governments closely monitor that delegation.³⁵⁵ Medicaid regulations permit the state agency responsible for administering Medicaid to delegate eligibility determinations to local government agencies.³⁵⁶ However, should the state delegate, it must also create “methods to keep itself . . . informed of the adherence of local agencies to the State plan provisions” and “[t]ake corrective action to ensure their adherence.”³⁵⁷

Second, Congress should create a federal cause of action available to states to sue their subdivisions in order to bring them into compliance with federal law, in case state law does not provide such a mechanism.³⁵⁸ As discussed above, whether the Federal Election Statutes actually provide an implicit cause of action to states remains an open question.³⁵⁹ But strengthening state management of local governments is doubly important after *Shelby County*. *Shelby County* significantly weakened federal oversight of local governments by disabling section 5 of the Voting Rights Act. With section 5 gone, the federal government now has an interest in strengthening the state-local relationship so that *some* centralized body has oversight of local governments. A federal cause of action that would give states leverage over their local governments could serve to centralize the elections system and avoid the kind of local misconduct that justified section 5 in the first place.³⁶⁰

Finally, Congress should impose sanctions for noncompliance. As they

³⁵³ 7 U.S.C. § 2012(s) (emphasis added).

³⁵⁴ *Id.*

³⁵⁵ See generally *Shakhnes v. Berlin*, 689 F.3d 244, 247-48 (2d Cir. 2012) (describing how Medicaid allocates responsibility between federal, state, and local governments).

³⁵⁶ See 42 C.F.R. § 431.10(c)-(d).

³⁵⁷ 42 C.F.R. § 435.903.

³⁵⁸ Although outside the contexts of elections and state-local relationships, Margaret Lemos has written about the benefits of state actors enforcing federal laws where those laws provide causes of action. See Lemos, *supra* note 293.

³⁵⁹ See *supra* Section II.D.

³⁶⁰ In theory, a party could move to join a local government in a lawsuit against a state for violating a Federal Election Statute, thereby bringing the offending local government under the jurisdiction of the court. However, the Department of Justice has resisted that solution, arguing instead that joinder is unnecessary. See generally Letter Brief, *United States v. N.Y. State Board of Elections*, 2008 WL 5707384 (2d Cir. 2008).

currently stand, the Federal Election Statutes permit the Attorney General to seek declaratory and injunctive relief,³⁶¹ but they impose no punishments on states or local governments, monetary or otherwise, for noncompliance. Without monetary relief, the Federal Election Statutes have little bite.

My proposed blend of federal, state, and local involvement in enforcing the Federal Election Statutes falls heaviest on states. This imbalance is as it should be. States are constitutionally responsible for administering elections; federal election law should operate to encourage and empower that responsibility.

3. Promoting Local Tailoring

Federal election law can more successfully engage citizens in the voting process by promoting local tailoring.³⁶² One difficulty regulating elections at the federal level is that election jurisdictions differ significantly.³⁶³ Whereas some jurisdictions are miniscule—a small county in Montana might have a population of about a thousand people (and even fewer people of voting age)³⁶⁴—a large metropolitan area will serve millions—Los Angeles County, for example, houses ten million people.³⁶⁵ These differences give rise to what the Presidential Commission on Election Administration refers to as a “one size does not fit all” problem.³⁶⁶ For this

³⁶¹ See 52 U.S.C. § 21111 (HAVA); 52 U.S.C. § 20307(a) (UOCAVA); 52 U.S.C. § 20510(a) (NVRA).

³⁶² Much of the academic literature on local governments has focused on the potential of local governments to reflect and accommodate the diversity of their residents more so than states and the federal governments. See, e.g., Richard Briffault, “*What About the ‘Ism’?*” *Normative and Formal Concerns in Contemporary Federalism*, 47 *Vand. L. Rev.* 1303, 1348 (1994) (contrasting the comparative advantages of state and local governments); see also Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 10 (2010) (Arguing that decentralization can promote minority rights by giving communities that may not own a national or statewide majority of the electorate a voice in the jurisdiction where they do comprise a majority of the electorate.).

³⁶³ See David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 *ELECTION L.J.* 130, 130 (2013) (noting the “tremendous disparities in local election administration”).

³⁶⁴ Montana County Population Projections – County Comparisons, 1990-2060, Apr. 2013, http://ceic.mt.gov/Documents/PopulationProjections/EMRI/StateTotals/eREMI_MT_CountyComparisons_TotalPopulation_April2013.pdf (Carter County, Montana, had 1335 residents in 2010).

³⁶⁵ United States Census Bureau, Los Angeles County, California, <http://quickfacts.census.gov/qfd/states/06/06037.html> (Los Angeles County had a population of 9,818,610 in 2010).

³⁶⁶ See *The American Voting Experience: Report and Recommendations of the*

reason, local governments can tailor some parts of the elections process to the needs of their communities.

For example, election legislation can encourage modest local tailoring by permitting states some flexibility in how they enforce the statutes. The NVRA, for example, requires states to designate, as voter registration agencies, not only public assistance and state disability offices, but “other offices within the State,” which may include libraries, schools, or fishing and hunting license bureaus.³⁶⁷ Local governments are perfectly situated to determine which local offices are best suited to house additional voter registration opportunities.

Or consider a new federal law that imposes poll worker training requirements. The law could permit local governments to create training materials appropriate for the jurisdiction, with state oversight. Similarly, a federal law that mandates maximum polling place waiting times could empower local governments to decide—preliminary and again with state oversight—how to allocate poll workers and voting systems in order to best meet the needs of their communities. Election legislation can include small provisions like these that permit states and local governments to tailor the election administration process to specific communities.

B. Election Law Federalism Today and Tomorrow

Although this Article has focused on three particular statutes—the NVRA, HAVA, and UOCAVA—the idea of election law federalism has a broader application within election law. As described above,³⁶⁸ Congress may be forced to turn to race-neutral election administration legislation in order to fortify the right to vote as the Supreme Court becomes more hostile to antidiscrimination legislation. Any federal law that regulates a feature of election administration that states delegate to local governments—which includes most of the elections process—implicates the promise and pitfalls of election law federalism.

Consider, for example, the report of the Presidential Commission, which issued a number of administration-based proposals for election reform. The

Presidential Commission on Election Administration at 9 (2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> (“Given the complexity and variation in local election administration, the argument goes, no set of practices can be considered “best” for every jurisdiction. Some reforms that work well in certain contexts will be unnecessary or fail in others. There is certainly merit to this position; no one can doubt the limits of nationwide reforms of the American electoral system when local institutions, rules, and cultures differ considerably.”).

³⁶⁷ 52 U.S.C. § 20506(a)(3).

³⁶⁸ See *supra* Subsection I.A.5.

Commission suggested standards for poll worker training and procedures for determining the location of polling places.³⁶⁹ Although the Commission did not frame its recommendations in the form of proposed federal law, it provides examples of legislation that could easily be translated into federal law.

Or consider two election laws that Hillary Rodham Clinton proposed during her campaign for president in 2015. First, Clinton proposed that all adults be automatically registered to vote unless they opt-out.³⁷⁰ Second, she proposed that all states provide twenty days of early voting before elections.³⁷¹

These policies implicate the lessons of election law federalism. In each of the proposals described above, the federal government would impose requirements on states for administration responsibilities: poll worker training, voter registration, early voting. As discussed above, these responsibilities are largely administered by local governments.³⁷² The same liability/role mismatch could plague these policies and potentially pose compliance challenges. The suggestions above—including strict reporting requirements, creation of a federal cause of action for states to use against local governments, sanctions, opportunities for local tailoring, etc.—would increase the effectiveness of the laws.

Election law federalism bears not only on contemporary issues in election law, but on future issues as well. Voting is on its way to becoming a predominantly remote activity. In California, for instance, absentee ballots comprised 4.7 percent of the ballots cast in 1978. In 2002, 26 percent of ballots were cast absentee. In 2012, it was *65 percent*.³⁷³ Colorado, Oregon, and Washington conduct elections entirely by mail.³⁷⁴ As described above, many states have delegated absentee ballot transmittal to local governments. Federal legislation that regulates absentee ballots—for example, a federal law that requires states to transmit absentee ballots a certain amount of time

³⁶⁹ See The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration at 31-54 (2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

³⁷⁰ See *Revitalizing Our Democracy*, Hillaryclinton.com, <https://www.hillaryclinton.com/the-four-fights/revitalizing-our-democracy/>.

³⁷¹ *Id.*

³⁷² See *supra* Subsection II.A.2.

³⁷³ John Wildermuth, *Increase in Early Voting Alters Election Landscape*, <http://www.sfgate.com/politics/article/Increase-in-early-voting-alters-election-landscape-5452706.php>.

³⁷⁴ See *Absentee and Early Voting*, National Conference of State Legislatures (Feb. 10, 2015), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

before an election, or a law that standardizes the absentee ballot and envelope format—might be administered by local governments. As with the proposals above, these statutes would face the challenges and opportunities inherent in election law federalism.

CONCLUSION: BEYOND ELECTION LAW

Elections are our chaotic symphonies of democracy. They draw from the law of all levels of government. Sometimes those laws are at odds, and federal-state-local discord can result in noncompliance with federal law. Federal election legislation like the NVRA, UOCAVA, and HAVA, which all seek to standardize aspects of the elections process, suffers from noncompliance in part because the statutes ask states to assume administrative responsibilities that states have delegated to local governments. These statutes do not violate federalism principles, but they run in tension with those principles, which causes difficulty and delay during enforcement litigation. We must fully understand these challenges as we turn to other election administration-based statutes to fortify and federalize the right to vote. These statutes are no substitute for antidiscrimination laws like the Voting Rights Act, but as the Supreme Court (and possibly Congress itself) becomes more hostile to race-based antidiscrimination legislation, these statutes offer a way forward that may be more politically palatable and legally secure.

This Article has suggested a new way of thinking about federal election legislation that seeks to regulate and standardize the electoral process. It has argued that federal election legislation should account for the multiple sovereigns and complicated legal relationships that affect the elections process. Legislation can accomplish those ends by providing the federal government with stronger oversight tools; by empowering states to manage their local governments; and by allowing local governments to modestly tailor the administration of the law to their jurisdictions.

Election law can teach us a broader lesson about federal, state, and local cooperation and conflict. Although election law is largely *sui generis* as both a policy and a constitutional matter, it is not the only area of federal law that suffers from enforcement challenges borne from state delegation to local government. Consider public assistance administration, which states often delegate to their local governments.³⁷⁵ In 1992, public assistance

³⁷⁵ See *Robertson v. Jackson*, 972 F.2d 529, 530 (4th Cir. 1992). For a fascinating historical account of local government as a roadblock to effective federal enforcement of the Social Security Act, see Karen M. Tani, *Welfare and Rights Before the Movement: Rights As A Language of the State*, 122 YALE L.J. 314, 346-355 (2012).

recipients in Virginia sued the Commissioner of the Virginia Department of Social Services for violations of the Food Stamp Act. The Commissioner argued that he could not be held responsible for any noncompliance caused by local public assistance agencies. Although the Court was “not unsympathetic to the Commissioner’s concern that his power is limited under state laws governing the state social service system,” it held that “under federal law, the Commissioner is . . . fully responsible for ensuring compliance.”³⁷⁶

These legal relationships raise complicated questions about the practical—if not doctrinal—limits of federal power in the face of state-local cooperation that I will address in future research. Election law federalism provides a model and a starting point for a broader understanding of federal power in a world of multiple sovereigns.

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³⁷⁶ *Id.* at 535. Incarceration provides another example. In California, state prisons house detainees in county jails for a variety of reasons, including for in-house drug treatment and parole-related prisoner transitions. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063-64 (9th Cir. 2010). A class of detainees sued the Governor of California for violating their rights under the Americans with Disabilities Act and a number of other federal laws. The Governor disclaimed responsibility for ensuring that county jails complied with those statutes. The Governor made anti-commandeering arguments, which the Ninth Circuit rejected. *Id.* at 1062, 1068-69, 1074 (addressing anti-commandeering arguments and concluding that “defendants cannot shirk their obligations to plaintiffs under federal law by housing them in facilities operated by the third-party counties”). Just three years later, California made the same argument: that it could not be held responsible for county jail conditions as applied to state prisoners who were transferred to county jails because of overcrowding. California argued that to hold it responsible “would interfere with [its] prerogative to structure its internal affairs.” *See Armstrong v. Brown*, 732 F.3d 955, 957-60 (9th Cir. 2013). Again, the Ninth Circuit disagreed. *Id.* at 962-63. The repeated nature of these arguments, and the federalist nature of their contents, recall arguments made by the state defendants in the Federal Election Statutes cases.