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**Does Having an Affirmative Right to Vote  
Matter? Comparing Elector Qualification  
Laws in the European Union and the United  
States**

**Tom Westphal**

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# European Union Law Working Papers

**Editors: Siegfried Fina and Roland Vogl**

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Stanford-Vienna Transatlantic Technology Law Forum  
<http://tlf.stanford.edu>

Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610

University of Vienna School of Law  
Department of Business Law  
Schottenbastei 10-16  
1010 Vienna, Austria

## **About the Author**

Tom Westphal studies election law, voting rights, and comparative election administration at Stanford Law School. He has served as an accredited observer in Ukraine, Tajikistan, and elections around the United States. Prior to coming to Stanford, Tom served for eight years in the U.S. Army.

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## **Abstract**

The right to vote is foundational for democratic societies, forming the basis for individual citizens to participate in the political life of their community. Yet how this right is expressed, in legal terms, varies between democratic countries. In the United States, the Constitution does not explicitly grant a right to vote for U.S. citizens, instead cataloging prohibited infringements on this right (i.e., the Fifteenth Amendment's ban on racial discrimination in voting). By contrast, the European Union's founding treaties do contain an affirmative right to vote, guaranteeing the citizens of E.U. Member States the right to participate in elections for the European Parliament. This right is subject to E.U. Member States' elector qualification laws, which define who is allowed to participate in E.U. elections in a similar manner to the way U.S. States determine who can vote in U.S. federal elections. The E.U. may therefore serve as an interesting basis of comparison to the United States, perhaps offering insight into whether an affirmative right to vote results in less restrictive elector qualification laws. This paper offers a comparative analysis of elector qualifications for European parliamentary and U.S. congressional elections, ultimately showing that despite the U.S. Constitution's lack of an affirmative right to vote, electoral qualifications in the United States and E.U. Member States are broadly similar. Though an affirmative right to vote may affect the U.S. electoral system in other ways, this paper casts some doubt on proponents' claims that it would significantly expand the franchise by invalidating restrictive elector qualification laws.

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The right to vote is the “essence of a democratic society,”<sup>1</sup> forming the basis for individual citizens to participate in the political life of their community. Yet how this right is expressed, in legal terms, varies between democratic countries. In the United States, the Constitution does not explicitly grant a right to vote for U.S. citizens. Instead, each provision either delegates authority to U.S. States or explains reasons that governments cannot deny the right to vote, including prohibitions on sex and racial discrimination.<sup>2</sup> These prohibitions on certain government actions, or “negative” rights, stop short of specifically granting the right to vote to individuals in the United States.<sup>3</sup> This has been confirmed by the U.S. Supreme Court, which has read these provisions to mean that “the [U.S.] Constitution ‘does not confer the right

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<sup>1</sup> Reynolds v. Sims, 377 U.S. 533, 555 (1964).

<sup>2</sup> U.S. CONST. amends. XV, IXX.

<sup>3</sup> Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2014).

of suffrage upon any one,”<sup>4</sup> and “the right to vote, per se, is not a constitutionally protected right.”<sup>5</sup>

Some advocates fear the U.S. Constitution’s lack of an affirmative right to vote does not adequately protect individual voting rights from government regulation. Among these regulations are statutes passed by U.S. States defining who is allowed to participate in federal elections, known as *elector qualifications*. Elector qualifications restrict the franchise to certain members of a given democratic society, sometimes excluding otherwise qualified individuals on the basis of specific requirements or characteristics.<sup>6</sup> Proponents believe that an affirmative right to vote would lead courts to invalidate overly restrictive elector qualifications, expanding who is allowed to vote in American elections.<sup>7</sup> This has led to frequent—yet so far unsuccessful—calls for constitutional amendments to include an affirmative grant of the right to vote.<sup>8</sup>

Evaluating the validity of such claims is difficult. While one might conjecture and extrapolate from current legal foundations, how such a right would actually affect American constitutional and statutory frameworks for voting is difficult to predict. Would voting in the United States really be substantially different if the U.S. Constitution had an affirmative right to vote?

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<sup>4</sup> *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (internal citations omitted) (quoting *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874)).

<sup>5</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

<sup>6</sup> See *infra* Part I.B.

<sup>7</sup> ADVANCEMENT PROJECT, IN PURSUIT OF AN AFFIRMATIVE RIGHT TO VOTE: STRATEGIC REPORT at 14 (2008), available at [http://b3cdn.net/advancement/ae94ee5ad8686f5760\\_27m6vr0j7.pdf](http://b3cdn.net/advancement/ae94ee5ad8686f5760_27m6vr0j7.pdf); Jamie B. Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L. J. 559, 565-66 (2004); see also Heather K. Gerken, *The Right to Vote: is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11, 11 (2014) (noting proponents assert that such “a constitutional amendment would produce any number of progressive goodies, including an end to partisan gerrymandering, strict policing of burdens placed on the right to vote, and an expansion of the franchise.”).

<sup>8</sup> See, e.g., H.R.J. Res. 28, 108th Cong. (2003); H.R.J. Res. 44, 113th Cong. (2013), <https://www.govinfo.gov/content/pkg/BILLS-113hjres44ih/pdf/BILLS-113hjres44ih.pdf>.

The electoral framework of the European Union (E.U.) may provide a small window into this intriguing question. The E.U.'s founding treaties do contain an affirmative right to vote, guaranteeing the citizens of E.U. Member States the right to participate in elections for the European Parliament.<sup>9</sup> This right is subject to E.U. Member States' elector qualification laws, which define who is allowed to participate in E.U. elections in a similar manner to the way U.S. States determine who can vote in U.S. federal elections. The E.U. may therefore serve as an interesting basis of comparison to the United States, perhaps offering insight into whether an affirmative right to vote results in less restrictive elector qualification laws.

This short paper is the first to compare elector qualifications for European parliamentary and U.S. congressional elections. It proceeds in four parts. Part I will define elector qualifications and provide a typology to organize different categories of those qualifications. It also establishes the bases for this paper's comparative approach. Parts II and III will analyze the legal framework for U.S. congressional and European parliamentary elections, focusing on elector qualification laws of U.S. States and E.U. Member States, respectively. Part IV will compare the outcomes of those analyses. Ultimately, this paper shows despite the U.S. Constitution's lack of an affirmative right to vote, electoral qualifications in the United States and E.U. Member States are broadly similar. Though an affirmative right to vote may affect the U.S. electoral system in other ways, this paper casts some doubt on proponents' claims that it would significantly expand the franchise by invalidating restrictive elector qualification laws.

## I. ESTABLISHING A COMPARATIVE FRAMEWORK

This Part outlines the comparative framework used in this paper. First, it defines elector qualifications, and establishes a novel typology that can be used to systemically compare elector

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<sup>9</sup> Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101-106 (2014).

qualifications between two systems. Next, it provides a brief overview of the legal frameworks of the United States and the European Union, explaining why these two systems are well suited for comparison. It also describes the U.S. House of Representatives and the European Parliament.

#### A. ELECTOR QUALIFICATIONS DEFINED

An elector is a person eligible to vote in a given election.<sup>10</sup> *Elector qualifications* are legal boundaries that define who is allowed to participate in elections. These boundaries are “very justly regarded as a fundamental article of republican government,” defining who is and is not allowed a voice in democratic political processes.<sup>11</sup> Elector qualification laws are enshrined in national constitutions and statutes, and can be divided into several categories. This sub-Part offers a typology of different types of elector qualifications.<sup>12</sup> This typology organizes similar types of elector qualifications into four main categories. These categories are not legal terms of art, but may be helpful to clarify the different provisions in our later discussion.

First, *immutable characteristics* are elector qualifications based on innate individual qualities, such as race, sex, or age. In modern times, explicitly disenfranchising citizens based on race or sex is increasingly rare, but all democratic countries require voters to attain some minimum age before voting.<sup>13</sup> Second, many jurisdictions around the world require electors to fulfill *residency requirements*. Such requirements often mandate that voters are citizens of the country they vote in, and have lived there for some minimum amount of time. Third, *morality*

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<sup>10</sup> *Elector*, MERRIAM-WEBSTER ONLINE (accessed Apr. 2, 2020), <https://www.merriam-webster.com/dictionary/elector>.

<sup>11</sup> FEDERALIST PAPERS NO. 52.

<sup>12</sup> This typology is loosely derived from that offered by Richard Katz, but this article reframes Katz’s framework into a typology with greater specificity. See RICHARD KATZ, DEMOCRACY & ELECTIONS at 216-232 (1997) (identifying three major types of voter restrictions: “those based on community membership and having a personal stake in the election, those based on competence, and those based on autonomy”).

<sup>13</sup> LOUIS MASSICOTTE ET. AL, ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES at 17 (2004).



*requirements* can disenfranchise electors who have committed certain crimes or otherwise violated the purported moral standards of the community. Finally, *voter competency requirements* are designed to ensure voters possess some minimum knowledge or capability to cast their vote in a responsible manner. Examples of such requirements could include literacy tests, language proficiency requirements, minimum education requirements, or disenfranchising voters with mental disabilities.<sup>14</sup> Together, these four categories—(1) immutable characteristics; (2) residency requirements; (3) morality requirements; and (4) voter competency requirements—can be used to comprehensively catalog a country’s elector qualifications.

Not considered in this paper are *administrative requirements*. In addition to the meeting the types of qualifications listed above, electors must often fulfill various administrative requirements to be eligible vote in a particular election—for example, filling out and returning a particular form, registering to vote in advance of Election Day, or requiring voters to bring certain documentation with them to the polling place on Election Day. Though these requirements are important because they can effectively disenfranchise otherwise qualified citizens, they are extremely detailed and could easily occupy an article entirely of their own. As such, they are beyond the scope of this paper, but could be an interesting area for future research.

## B. COMPARING THE UNITED STATES AND THE EUROPEAN UNION

The above typology of elector qualifications can be used to systematically compare qualifications between two systems of governance. Next, this paper explains why democratic institutions within the United States and European Union are well suited for such a comparison.

The United States is a federal nation-state, currently comprised of fifty subordinate sovereign states. In this paper, I refer to these as “U.S. States” in an attempt to mitigate the

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<sup>14</sup> *Id.* at 17, 27.

inevitable confusion with the European nation-states that comprise the E.U. The U.S. Constitution establishes a federalist structure wherein both the national government (also often referred to as the “federal” government) and state governments both “exercise power and authority over the same people and the same territory.”<sup>15</sup> The federal government and the U.S. State governments share certain powers, like taxation authorities, but other powers are given explicitly to one government or the other.<sup>16</sup> The U.S. Constitution and federal law (in areas where the national government is allowed to act) is the “supreme law of the land.” overriding inconsistent U.S. State constitutions and laws.<sup>17</sup> But powers not explicitly given to the national government in the U.S. Constitution are “reserved to the states respectively, or to the people.”<sup>18</sup>

The E.U. is a supranational organization formed through binding, multilateral treaties between twenty-seven individual sovereign countries across Europe (“Member States”).<sup>19</sup> Such a structure defies traditional categorizations, being neither a typical international organization nor a nation-state. The E.U. can only act in areas where its Member States have explicitly given it authority to act.<sup>20</sup> These authorities, often referred to as “competencies,” can be exclusive to the E.U. or shared with Member States, and define the limits of E.U. power.<sup>21</sup> But when justly

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<sup>15</sup> KENNETH JANDA ET. AL, *THE CHALLENGE OF DEMOCRACY* 61-65 (5th ed. 2004) [hereinafter JANDA] (describing America’s federal structure).

<sup>16</sup> *Id.*; see also FEDERALIST PAPERS NO. 10 (“The federal Constitution forms a happy combination . . . the great and aggregate interests being referred to the national, and the local and particular to state governments.”).

<sup>17</sup> U.S. CONST. Art. VI (“This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitutions or laws of any State to the contrary notwithstanding.”).

<sup>18</sup> *Id.* amend. X.

<sup>19</sup> DIETER GRIMM, *THE CONSTITUTION OF EUROPEAN DEMOCRACY* at 5 (2016) (describing the European Union as a “a single, supranational entity somewhere between an international organization and a federal state.”); See EUROPEAN UNION, Official Website, *Countries* (accessed March 11, 2020), [https://europa.eu/european-union/about-eu/countries\\_en](https://europa.eu/european-union/about-eu/countries_en). The United Kingdom was the 28<sup>th</sup> country, but withdrew from the E.U. on January 31, 2020. *Id.* Note that not all E.U. countries participate in all aspects of European Union activities. For example, only 19 of the 27 E.U. countries use the Euro as the official currency. *Id.* The European Union’s website lists non-Member States under two other statuses: (1) “candidate countries,” which are “in the process of ‘transposing’ (or integrating) EU legislation into national law; and (2) “potential candidates,” which “do not yet fulfill the requirements for EU membership.” *Id.*

<sup>20</sup> KAREN DAVIES, *UNDERSTANDING EUROPEAN UNION LAW* at 26-27 (5th ed., 2013).

<sup>21</sup> *Id.*

exercised, E.U. actions override inconsistent national law, including Member State constitutions.<sup>22</sup>

The E.U.'s unique structure—derived from its binding multilateral treaties—differentiate it from federal nation-states like America. But despite this, the E.U. shares key similarities the United States that make it an attractive basis for comparative legal research. Both entities are composed of sovereign states—be they E.U. Member States or U.S. State governments—that enjoy wide-ranging authority.<sup>23</sup> Both the E.U. and the U.S. have foundational documents that divide authority between them and their subordinate governments. And both E.U. Member State and U.S. State law are subordinate to E.U. and U.S. law respectively.<sup>24</sup> The E.U.'s institutional framework therefore offers an interesting basis of comparison to U.S. constitutional practices.

Within these systems, the U.S. Congress and the European Parliament are the most analogous institutions and therefore suitable for comparison. Both are the highest legislative bodies of their respective systems of government, designed to represent the interests of the “people” in the democratic process.<sup>25</sup> In both institutions, representation is divided among the subordinate sovereign entities (States in the U.S. context, Member States in the E.U. context). And in each system, these subordinate sovereigns determine the elector qualifications for these legislative representatives, subject only to the restrictions of U.S. constitutional and E.U. treaty law.

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<sup>22</sup> See Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 114.

<sup>23</sup> Ernest A. Young, *The European Union: A Comparative Perspective* in OXFORD PRINCIPLES OF EU LAW (Takis Tridimas ed., forthcoming), available at [https://scholarship.law.duke.edu/faculty\\_scholarship/3585/](https://scholarship.law.duke.edu/faculty_scholarship/3585/).

<sup>24</sup> See U.S. CONST. Art. VI; Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 114 (holding that E.U. law overrides inconsistent national law from E.U. Member States, including Member State constitutions).

<sup>25</sup> KAREN DAVIES, UNDERSTANDING EUROPEAN UNION LAW at 31 (5th ed., 2013); FEDERALIST PAPERS NO. 52 (describing the U.S. House of Representatives as having “a common interest with the people” and having “an intimate sympathy with[] the people”).

Comparing elector qualifications between U.S. States and E.U. Member States can therefore serve as an interesting comparative test of the theory that an affirmative right to vote in national-level constitutions (or their binding multilateral treaty equivalent) leads to less restricted elector qualifications. This paper proceeds to do so, using the typology established above to examine elector qualifications first in the United States and next in the European Union.

## II. U.S. STATE ELECTOR QUALIFICATIONS FOR NATIONAL LEGISLATURE

Responsibilities for administering and regulating U.S. elections are divided between federal, state, and local governments.<sup>26</sup> In keeping with its federal structure,<sup>27</sup> the U.S. Constitution “contemplates both state and federal roles” in the electoral process.<sup>28</sup> Outside of limited constitutional congressional regulation of federal elections, U.S. State governments have the primary responsibility for administering elections, and have considerable latitude for setting elector qualifications. This Part will analyze the structure of U.S. congressional elections, paying special attention to deviations in elector qualifications between U.S. States.

### A. STRUCTURE OF U.S. CONGRESSIONAL ELECTIONS

The U.S. Constitution provides for a bicameral legislature in which the upper house (the U.S. Senate) would consist of two elected delegates per state and the lower house (the U.S. House of Representatives) would be elected by the people and allocated on the basis of population.<sup>29</sup> These two legislative houses differ in method of apportionment and the length of

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<sup>26</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-470, ELECTIONS: CONGRESSIONAL AUTHORITY 3 (Mar. 13, 2001).

<sup>27</sup> KENNETH JANDA ET. AL, THE CHALLENGE OF DEMOCRACY 61-65 (5th ed. 2004) (describing America's federal structure); *see also* FEDERALIST PAPERS NO. 10 (“The federal Constitution forms a happy combination . . . the great and aggregate interests being referred to the national, and the local and particular to state governments.”).

<sup>28</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-470, ELECTIONS: CONGRESSIONAL AUTHORITY 3 (Mar. 13, 2001).

<sup>29</sup> U.S. CONST. Art. I, § 1; ROBERT V. REMINI, THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES at 7 (2006).

the term of office, but elections for membership in both houses are regulated by identical constitutional and statutory frameworks.<sup>30</sup>

There is no affirmative right to vote for federal legislators in the U.S. Constitution.<sup>31</sup> Instead, U.S. State law determines elector qualifications for federal congressional elections, subject to several federal constitutional and statutory caveats.<sup>32</sup> First, the U.S. Constitution requires that voters in U.S. congressional elections have the same “qualifications requisite of the most numerous branch of the state legislature.”<sup>33</sup> Second, states are allowed to regulate the “times, places[,] and manner of holding elections for Senators and Representatives,”<sup>34</sup> but state regulations for these federal elections are subject to Congress’ “essentially plenary authority” to

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<sup>30</sup> U.S. Senators are elected every six years, with a third of the seats being up for election every two years. U.S. CONST. Art. I, § 3. There are one hundred U.S. Senators—two for each U.S. State. *Id.* Both of a state’s senators represent entire states, as opposed to representing individual districts within the state. *Id.* The U.S. Senate was initially elected by state legislatures until the passage of the 17<sup>th</sup> Amendment. *See* U.S. CONST. amend. XVII. By Contrast, U.S. Representatives are elected every two years. U.S. CONST. Art. I, § 2. There are four hundred and thirty-five seats in the U.S. House of Representatives. *See* 2 U.S.C. § 2(a). These seats are allocated between the states based on population, and reallocated every ten years based on the results of the U.S. Census. *Id.* Every state is entitled to at least one Representative. U.S. CONST. Art. I, § 2. Though historically some states chose to elect their Representatives through multi-member districts, federal law now mandates the use of single-member districts. *See* 2 U.S.C. § 2(c). Within each state, these districts are redrawn every ten years according to the census results, and must be drawn to be exactly equipopulous. U.S. CONST. Art. I, § 2; *see also* *Karcher v. Daggett*, 462 U.S. 725 (1983) (mandating congressional districts be exactly equipopulous). But U.S. States can use different statistics as the basis for equipopulous districts, including the total population, registered voters, or eligible voters. *See* *Evanwel v. Abbot* 578 U.S. \_\_\_ (2016); *Burns v. Richardson*, 384 U.S. 73 (1966).

<sup>31</sup> Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 471 (2017) (“Perhaps surprisingly, the Constitution does not grant anyone an affirmative right to vote.”); Janai S. Nelson, *Fair Measure of the Right to Vote: A Comparative Perspective on Voting Rights Enforcement in a Maturing Democracy*, 18 CARDOZO J. INT’L & COMP. L. 425, 432 no. 24 (2010) (“The U.S. Constitution does not contain a positive right to vote in its text . . . .”); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n. 78 (1973) (“The right to vote, per se, is not a constitutionally protected right.”); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *Minor v. Happersett*, 88 U.S. (21. Wall) 162, 178 (1874)) (“the [U.S.] Constitution ‘does not confer the right of suffrage upon any one’”).

<sup>32</sup> Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101-106 (2014). All U.S. State constitutions contain an affirmative right to vote. *Id.* Arizona’s constitutional guarantee of voting rights differs from other states, but Douglas concludes it nonetheless provides an affirmative right to vote. *Id.*

<sup>33</sup> U.S. CONST. Art. I, § 2 (establishing this requirement for U.S. Representatives); *Id.* amend. XVII (establishing this requirement for U.S. Senators). Note that while it is unclear if U.S. states are constitutionally required to have an elected legislature, all of them do. Forty-nine states have bicameral legislatures modelled roughly along the same lines as the national legislature, and one state (Nebraska) has a unicameral legislature. *See* NEBRASKA LEGISLATURE, *History of the Nebraska Unicameral Legislature*, [https://nebraskalegislature.gov/about/history\\_unicameral.php](https://nebraskalegislature.gov/about/history_unicameral.php) (last accessed Mar. 17, 2020).

<sup>34</sup> U.S. CONST. Art. I, § 4.

alter such regulations.<sup>35</sup> Third, the Constitution authorizes the disenfranchisement of people convicted of certain crimes,<sup>36</sup> and federal statute restricts voting in federal elections to U.S. citizens.<sup>37</sup> Finally, states cannot violate explicit constitutional commandments related to voting, which prohibit discrimination based on race<sup>38</sup> or sex,<sup>39</sup> and require a minimum voting age of no older than eighteen years old.<sup>40</sup> These limited commandments apply to both state and federal elections.

Beyond the limited provisions listed above, the federal government has largely steered clear of establishing elector qualification requirements for federal legislative office. Most federal election legislation—including the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), the National Voter Registration Act (NVRA), and the Help American Vote Act (HAVA)—are restricted to regulating election administration, rather than elector qualifications.<sup>41</sup> These federal acts have erected “a complex superstructure of federal regulation” atop state election administration practices, but do not impact elector qualification laws.<sup>42</sup>

Federal elector qualifications for congressional elections apply uniformly across all states, and thus form the baseline for our analysis of state-to-state variations. Applying the information above to Part I.A’s typology of elector qualifications yields the following result:

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<sup>35</sup> Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 16 (2007).

<sup>36</sup> U.S. CONST. amend. XIV, § 4; *see also* Richardson v. Ramirez, 418 U.S. 24 (1974).

<sup>37</sup> *See* 18 U.S.C. § 611(a).

<sup>38</sup> U.S. CONST. amend. XV.

<sup>39</sup> U.S. CONST. amend. XIX.

<sup>40</sup> U.S. CONST. amend. XXVI.

<sup>41</sup> *See* 52 U.S.C. §§ 20301-20311 (UOCAVA), 20501-20511 (NVRA), 20901-21145 (HAVA).

<sup>42</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5 (2013) (referring to the National Voter Registration Act, but broadly descriptive of other federal voting-related statutes).

Federal Elector Qualification Requirements for Elections of U.S. Representatives		
	<u>Type of Elector Qualification</u>	<u>Federal Requirements</u>
Eligibility Requirements		States cannot deny the right to vote on account of race, sex, or age (beyond 18 yr. minimum)
	<i>Immutable Characteristics</i>	
	<i>Residency</i>	Must be a U.S. Citizen
	<i>Morality Requirements</i>	States may disenfranchise people convicted of a crime, but it is not federally required
	<i>Voter Competency</i>	None

As a result of this constitutional and statutory framework, U.S. States have significant latitude to craft elector qualifications for U.S. congressional elections, provided that they are the same qualifications as electors for the “most numerous branch of the state legislator.”<sup>43</sup> This latitude has produced wide variation between states, albeit such variations are limited to certain types of election qualifications. These dynamics are further explored in the sub-part below.

B. VARIATIONS IN ELECTOR QUALIFICATIONS BETWEEN U.S. STATES FOR U.S. CONGRESSIONAL ELECTIONS

Building from the baseline federal elector qualifications, U.S. states can impose additional eligibility requirements. While each state has the authority to impose its own unique requirements, state elector qualification laws have generally followed certain trends. This sub-part will explore those trends, organizing the discussion according to Part I’s elector qualification typology for clarity.

First: *immutable characteristics*. In recent history, U.S. states have not deviated from federally-imposed immutable elector qualifications,<sup>44</sup> and no states explicitly bar participation by

<sup>43</sup> U.S. CONST. Art. I, § 2.

<sup>44</sup> Many U.S. States historically discriminated against voters of color, and devised elaborate practices to circumvent constitutional bans on racial discrimination. Such practices continued for a substantial period after the passage of the 15<sup>th</sup> Amendment. For a sampling of these practices, see, for example, *Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating a Texas state statute banning African Americans from participating in party primaries for congressional

racial groups or sex.<sup>45</sup> States have, however, made slight deviations in allowing voters under the age of 18 to vote in federal elections: thirteen states allow 17-year-olds to vote in federal congressional primary elections, with the caveat that the voter must turn 18 prior to the general election.<sup>46</sup> Otherwise, elector qualifications based on immutable characteristics do not vary from state-to-state.

State law varies slightly more when it comes to elector *residency requirements*. Federal law mandates that all federal congressional electors be U.S. citizens,<sup>47</sup> but states have latitude to set other parameters for elector residency requirements.<sup>48</sup> Every state has such requirements, but they vary in two respects: (1) duration and (2) residency location. For duration, most states require voters to be in residence for at least thirty days prior to voting in an election there, though

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elections); *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down Texas scheme to delegate discriminatory policy to a state executive party committee); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down a Texas statute vesting a party convention with the power to set elector qualifications to circumvent earlier Court rulings); *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating a Texas political party's scheme to hold a 'pre-primary' wherein participation was restricted to white voters). States were also reluctant to enfranchise women, though some did so prior to the 19<sup>th</sup> Amendment's passage. Compare ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* at 6 (2000) (noting women were allowed to vote in some Massachusetts towns and New York counties in pre-Revolutionary America, limited women's suffrage in Kentucky beginning in 1838, and western states' enfranchisement of women in the late 1800s) with *Minor v. Happersett*, 88 U.S. 162 (1875) (upholding the constitutionality of women's disenfranchisement).

<sup>45</sup> Note that this is a distinct claim from asserting states adopt procedural requirements that have the effect of disproportionately excluding voters from particular racial groups. See, e.g., BRENNAN CENTER FOR JUSTICE, *Vote Suppression*, <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression> (last accessed Mar. 18, 2020); Scott Lemieux, *Republicans Keep Trying to Block Black Votes. That's Why Fair Judges are Crucial*, *THE GUARDIAN* (Aug. 1, 2016 15:43 EDT),

<https://www.theguardian.com/commentisfree/2016/aug/01/republicans-block-black-votes-fair-judges-crucial>.

<sup>46</sup> USA.GOV, *Voter Registration Age Requirements by State*, <https://www.usa.gov/voter-registration-age-requirements> (last accessed Mar. 17, 2020). In some states, municipalities allow sixteen- and seventeen-year olds to vote for certain local positions, but these provisions do not extend to federal elections. See, e.g., Caroline Cournoyer, *Takoma Park, Md., Gives 16-Year-Olds the Right to Vote* (Oct. 2013),

<https://www.governing.com/topics/politics/gov-takoma-gives-teens-voting-rights.html>. For additional background on age requirements in U.S. elections, see Maggie Astor, *16-Year-Olds Want a Vote. Fifty Years Ago, so did 18-Year Olds*, *N.Y. TIMES* (May 19, 2019), <https://www.nytimes.com/2019/05/19/us/politics/voting-age.html>.

<sup>47</sup> In some states, municipalities allow non-citizens to vote for certain local positions. See, e.g., Cindy Carcamo, *San Francisco will Allow Noncitizens to Vote in a Local Election, Creating a New Immigration Flashpoint*, *L.A. TIMES* (Oct. 26, 2018), <https://www.latimes.com/local/california/la-me-san-francisco-election-immigration-20181026-story.html>.

<sup>48</sup> *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding residency requirements to be constitutional, but striking down a state residency law requiring voters to live in the state for more than a year to be eligible to vote).



some states require slightly shorter periods.<sup>49</sup> No state has a minimum residency period of longer than thirty days.<sup>50</sup> For location, many states require that during this residency period, voters reside in the specific precinct that they vote from, while a minority of states simply require voters to reside anywhere within state boundaries.<sup>51</sup>

*Morality requirements* for electors in congressional elections vary widely between U.S. states. Excepting Maine and Vermont, all states have some form of criminal disenfranchisement.<sup>52</sup> About two-thirds of these states automatically restore voting rights of a person with a felony conviction, with the remaining states requiring some sort of formal administrative procedure.<sup>53</sup> A handful of states impose very specific penalties for particular crimes: Ohio, for example, permanently disenfranchises electors twice convicted of violating Ohio's elections law, and Nebraska disenfranchises electors convicted of treason.<sup>54</sup>

Finally, most U.S. States have added some type of *voter competency* elector qualifications. Historically, states often required voters to pass literacy tests, but this has fallen out of practice and no state currently requires voters to be literate.<sup>55</sup> Now, the most common type of voter competency requirement among U.S. States is related to mental disability. A majority of

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<sup>49</sup> See, e.g., ARK. CODE ANN. § 7-5-201 (requiring at least 30 days residency); OHIO REV. CODE § 3503.01 (requiring at least 30 days residency); N.D. CENT. CODE § 16.1-01-04 (requiring at least 30 days residency).

<sup>50</sup> Such a residency period would likely be unconstitutional. See *Dunn*, 405 U.S. 330.

<sup>51</sup> Compare N.Y. ELEC. LAW § 5-102 (requiring electors to be “a resident of this state and of the county, city or village for a minimum of thirty days next preceding such election.”) with COLO. REV. STAT. § 1-2-101 (requiring electors to reside within the state for at least 22 days prior to an election).

<sup>52</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, *Felon Voting Rights* (Oct. 14, 2019), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>. Convicted felons that are otherwise qualified to vote are never disenfranchised in Maine and Vermont, even while they are serving their sentences. *Id.*

<sup>53</sup> U.S. ELECTION ASSISTANCE COMMISSION, *Election Administration and Voting Survey: 2018 Comprehensive Report* at 117, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf) (last accessed Mar. 17, 2020).

<sup>54</sup> BRENNAN CENTER, *Criminal Disenfranchisement Laws Across the United States* (Mar. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states>.

<sup>55</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* at 66, 128, 141-46, 362-67 (2000); see also *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (upholding the constitutionality of voter literacy tests). It would be remiss not to note that literacy tests were often historically used as a tool to disenfranchise minority voters.

states (though not all) have laws that prohibit people with certain mental disabilities from voting.<sup>56</sup> These statutes typically require voters to be adjudicated mentally incompetent through some type of formal administrative procedure.<sup>57</sup>

The above information is collected in the following table:

<b>Variations in Congressional Elector Qualifications Between U.S. States</b>		
	<b><u>Type of Elector Qualification</u></b>	<b><u>Variations</u></b>
<b>Eligibility Requirements</b>	<i>Immutable Characteristics</i>	Slight deviations in allowable voting age in congressional primaries, but all U.S. States require electors to be 18 yrs. old by Election Day.
	<i>Residency</i>	Variations in duration & location of allowable residency requirements. No durational requirements exceeding 30 days.
	<i>Morality Requirements</i>	Substantial variations in criminal disenfranchisement. Some U.S. states allow electors in prison to vote; others disenfranchise felons for life.
	<i>Voter Competency</i>	Variations in disenfranchisement of people with mental disabilities. Some U.S. States do not have mental incompetency laws.

This analysis shows each state imposes its own unique requirements, elector qualification laws have generally followed certain trends across all U.S. States. These trends are remarkable for both what states choose to do and what they choose not to do. States typically only impose elector qualifications related to minimum age, residency, criminal disenfranchisement, and disenfranchisement of people with mental disabilities. No state has chosen to extend the voting age significantly below 18 years old, abolish residency requirements, or impose unique morality

<sup>56</sup> Kimberly Leonard, *Keeping the 'Mentally Incompetent' from Voting*, THE ATLANTIC (Oct. 17, 2012), <https://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/>; see, e.g., N.Y. ELEC. LAW § 5-106.

<sup>57</sup> Kimberly Leonard, *Keeping the 'Mentally Incompetent' from Voting*, THE ATLANTIC (Oct. 17, 2012), <https://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/>.

and/or voter competency requirements. Therefore, adding an affirmative constitutional right to vote could only potentially impact a relatively limited range of elector qualification restrictions.

### III. ELECTOR QUALIFICATIONS IN EUROPEAN PARLIAMENT ELECTIONS

E.U. treaties explicitly require that it functions on the basis of representative democracy.<sup>58</sup> To affect this provision, these treaties establish the European Parliament.<sup>59</sup> The European Parliament is the only institution within the European Union framework that is directly elected, representing the direct interests of E.U. citizens rather than the interests of member state governments or institutional interests of the European Union.<sup>60</sup> Though E.U. treaties provide all E.U. citizens an affirmative right to vote in European parliamentary elections, this right is subject to limited infringement and regulation by E.U. Member States. This Part analyzes the legal structure of European parliamentary elections, examining variations in elector qualifications between E.U. Member States.

#### A. THE LEGAL FRAMEWORK OF EUROPEAN PARLIAMENTARY ELECTIONS

The European Parliament plays a central role in E.U. policymaking. As the only directly elected institution within the E.U., the Parliament represents over 445 million citizens.<sup>61</sup> Since the first direct elections took place in 1979,<sup>62</sup> the European Parliament has steadily increased in influence and importance.<sup>63</sup> The last elections, held in May 2019, were the largest transnational elections in the world.<sup>64</sup>

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<sup>58</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 10, Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter TEU].

<sup>59</sup> *Id.*

<sup>60</sup> KAREN DAVIES, UNDERSTANDING EUROPEAN UNION LAW at 31 (5th ed., 2013).

<sup>61</sup> EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON, *US & EU Branches of Government* (last accessed Jan. 12, 2020), <http://www.europarl.europa.eu/unitedstates/en/eu-us-relations/us-and-eu-branches-of-government>.

<sup>62</sup> KAREN DAVIES, UNDERSTANDING EUROPEAN UNION LAW at 12 (5th ed., 2013).

<sup>63</sup> George Ross, *The European Union and the Future of European Politics* in EUROPEAN POLITICS IN TRANSITION AT 85 (Mark Kesselman & Joe Krieger eds., 5th ed., 2006) (“The most striking aspect of the European Parliament’s history is its steady acquisition of power . . .”).

<sup>64</sup> EUROPEAN PARLIAMENT, *European Elections: Your Chance to have Your Say* (last accessed Mar. 19, 2020), <https://europarl.europa.eu/at-your-service/en/be-heard/elections>.

The European Parliament has seven hundred and five seats.<sup>65</sup> These seats are allocated among the E.U. Member States proportionately by population, with no Member State allowed to have more than ninety-six seats or less than six seats.<sup>66</sup> European parliamentarians are generally elected from multi-member districts and must be elected “on the basis of proportional representation.”<sup>67</sup> Member States are allowed to establish constituencies and/or electoral subdivisions, as long as they do not generally affect “the proportional nature of the voting system.”<sup>68</sup>

E.U. treaties mandate that “[e]very citizen of the [European] Union residing in a Member State of which he is not a national shall have the right to vote . . . in elections to European Parliament in the Member States in which he resides, under the same conditions as nationals of that State.”<sup>69</sup> A parallel provision of the European Charter of Human Rights, another primary source of E.U. law, creates an affirmative right for every E.U. citizen to vote in European Parliament elections.<sup>70</sup>

European Parliament and the Council of the European Union are empowered to adopt “detailed arrangements” to conduct European parliamentary elections.<sup>71</sup> Under these arrangements, Member States cannot require more extensive residency requirements for the

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<sup>65</sup> TEU art. 14. Note that TFEU Protocol No. 36 temporarily increased in the number of parliamentary seats to 754, but this expired in 2014. *See* TFEU Prot. No. 36, art. 2. Following the exit of the United Kingdom, the U.K.’s European parliamentary seats were partially redistributed to other Member States and partially reserved for “potential EU enlargement and/or for the possible future creation of a transnational constituency.” *See* EUROPEAN PARLIAMENTARY RES. SERV., *The European Parliament After Brexit* (Jan. 2020), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/642259/EPRS\\_ATA\(2020\)642259\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/642259/EPRS_ATA(2020)642259_EN.pdf).

<sup>66</sup> TEU art. 14.

<sup>67</sup> Council Decision 2002/772 art. 1, 2002 O.J. (L 283) 1 (EC).

<sup>68</sup> *Id.* art. 2.

<sup>69</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 22(1), July 6, 2016 O.J. (C 202) 56 [hereinafter TFEU].

<sup>70</sup> Charter of Fundamental Rights of the European Union art. 39, Oct. 10, 2012 O.J. (C 326) 391 [hereinafter CFREU].

<sup>71</sup> TFEU arts. 22, 223.

citizens of other Member States than they do for their own nationals.<sup>72</sup> Additionally, Member State citizens disenfranchised by their national laws cannot vote in other E.U. Member States.<sup>73</sup> But beyond these arrangements, Member States are free to apply their national laws.<sup>74</sup> Member States can infringe or limit the affirmative right to vote in European Parliament elections, but such limitations “may be made only if they are necessary and genuinely meet objectives of general interest recognized by the [European] Union.”<sup>75</sup>

E.U. elector qualifications for European Parliament elections apply uniformly across all Member States, and thus form the baseline for our analysis. Applying the information above to Part I’s typology of elector qualifications yields the following result:

<b>E.U. Elector Qualification Requirements for E.U. Parliamentarians</b>		
	<b><u>Type of Elector Qualification</u></b>	<b><u>E.U. Requirements</u></b>
<b>Eligibility Requirements</b>	<i>Immutable Characteristics</i>	Universal suffrage; silent on minimum voting age.
	<i>Residency</i>	E.U. citizens from other Member States must be allowed to vote; cannot require different residency periods for non-Member State citizens of other E.U. countries
	<i>Morality Requirements</i>	Franchise-restricting laws of an E.U. citizens' home state must be respected by other E.U. Member States
	<i>Voter Competency</i>	Franchise-restricting laws of an E.U. citizens' home state must be respected by other E.U. Member States

<sup>72</sup> Council Directive 93/109 art. 5, 1993 O.J. (L 329) 34 (EC) (“If, in order to vote or to stand as candidates, nationals of the Member State or residence must have spent a certain minimum period as a resident in the electoral territory of that State, Community voters and Community nationals entitled to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States. This provision shall apply without prejudice to any specific conditions as to length of residence in a given constituency or locality.”).

<sup>73</sup> *Id.* art. 6.

<sup>74</sup> Council Decision 2002/772 preamble, 2002 O.J. (L 283) 1 (EC) (“... Member States [are] free to apply their national provisions in respect of aspects not governed by this Decision”).

<sup>75</sup> CFREU art. 52(1).

Under this treaty framework, E.U. Member States retain significant latitude to craft elector qualifications for European parliamentary elections. This latitude has produced wide variation between Member States, as will be further explored in the sub-part below.

## B. VARIATIONS IN EUROPEAN PARLIAMENTARY ELECTOR QUALIFICATIONS BETWEEN MEMBER STATES

E.U. Member States have broad authority to add elector qualifications to the E.U. treaty requirements. While this could theoretically result in wildly divergent and unique requirements, in practice Member States generally impose only a limited number of types of elector qualifications. This sub-part will explore those qualifications, organizing the discussion according to Part I's typology for clarity.

First, E.U. Member States tend to impose limited elector qualifications related to *immutable characteristics*. All Member States have minimum voting ages. No E.U. Member State has a minimum voting age higher than 18 years old, but several extend voting to younger citizens. Most E.U. Member States set the threshold at 18 years old, but there are outliers: Austria and Malta, for example, both have minimum voting ages of 16,<sup>76</sup> while Greece sets the minimum voting age at 17.<sup>77</sup> A less common elector qualification is disenfranchisement based on hereditary nobility—Spain for example, disenfranchises certain members of the Spanish royal family.<sup>78</sup>

Member State law varies more substantially when it comes to *residency requirements*. All Member States require electors to be E.U. citizens. Such requirements range from a few

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<sup>76</sup> See Tony Paterson, *Austria Opens the Polls to 16-Year-Olds*, THE INDEPENDENT (Sept. 26, 2008), <https://www.independent.co.uk/news/world/europe/austria-opens-the-polls-to-16-year-olds-943706.html>; Ivan Martin, *Vote 16: the First of Many Youth Reforms*, TIMES OF MALTA (Mar. 7, 2018), <https://timesofmalta.com/articles/view/vote-16-the-first-of-many-youth-reforms.672538>.

<sup>77</sup> See *Greece Lower's Voting Age to 17*, GREEK CITY TIMES (July 22, 2016), <https://greekcitytimes.com/2016/07/22/greece-lowers-voting-age-to-17/>.

<sup>78</sup> L.O.R.E.G., B.O.E. no. 147, June 20, 1985, art. 6 (Spain), <https://www.boe.es/eli/es/lo/1985/06/19/5/con>.

weeks to a few months—in Italy, for example, the residency period is 19 days prior to election day, while in Germany voters must have been in residency for at least three months.<sup>79</sup> Other countries, like Latvia, do not have a residency period, and allow citizens of other Member States resident in Latvia to vote without specifying a minimum waiting period.<sup>80</sup>

*Morality requirements* are widespread throughout the E.U., but vary in severity. The European Court of Justice has recently upheld the permissibility of banning E.U. citizens convicted of serious crimes for voting in European parliamentary elections.<sup>81</sup> Bulgaria, Estonia, and Hungary all impose blanket bans on prisoner voting.<sup>82</sup> Such bans are lifted after a prisoner's sentence is served. Other states, like the Czech Republic, Denmark, and Sweden, are at the opposite end of the spectrum, with no prisoner disenfranchisement laws and allowing prisoners to vote for the duration of their sentence.<sup>83</sup> Still others, like France, fall somewhere in between, with disenfranchisement as an additional criminal penalty applied in specific cases.<sup>84</sup>

Finally, E.U. Member States typically have some limited *voter competency* requirements related to mental disability. Most Member States allow for the possibility of disenfranchisement

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<sup>79</sup> Gesetz über die Wahl der Abgeordneten des Europäischen Parlaments aus der Bundesrepublik Deutschland [EuWG] [Elections to the European Parliament in Germany], June 16, 1978 at § 6 (Ger.); Federal Elections Act, July 23, 1993 at § 12 (last amended June 18, 2019) (Ger.).

<sup>80</sup> Eiropas Parlamenta Velesanu Likums [Elections to the European Parliament Law], LV 22 2970, Mar. 11, 2004, at § 4 (Latvia), <http://www.legislationline.org/documents/action/popup/id/3767>.

<sup>81</sup> Case C-650/13, Thierry Delvigne v. Commune de Lesparre-Medoc ad Prefet de la Gironde, 2015 E.C.R. I-648; see also Alan Travis, *Voting Ban on Prisoners Convicted of Serious Crimes is Lawful*, E.U. Court Rules, THE GUARDIAN (Oct. 6, 2015 4:12 EDT), <https://www.theguardian.com/politics/2015/oct/06/uk-ban-on-prisoner-voting-is-lawful-eus-highest-court-rules>.

<sup>82</sup> See European Parliament Act, RT I 2003, Jan. 23, 2003, at § 4 (Estonia); see also Alan Travis, *Voting Ban on Prisoners Convicted of Serious Crimes is Lawful*, E.U. Court Rules, THE GUARDIAN (Oct. 6, 2015 4:12 EDT), <https://www.theguardian.com/politics/2015/oct/06/uk-ban-on-prisoner-voting-is-lawful-eus-highest-court-rules>.

<sup>83</sup> *Prisoner Votes by European Country*, BBC NEWS (Nov. 22, 2012), <https://www.bbc.com/news/uk-20447504>.

<sup>84</sup> *Id.*

through a legal process.<sup>85</sup> A minority of states—including Ireland, Sweden, and Italy—do not restrict voting rights of citizens with mental disabilities.<sup>86</sup>

The following table summarizes this analysis:

<b>Variations in E.U. Parliamentary Elector Qualifications Between E.U. Member States</b>		
	<b>Type of Elector Qualification</b>	<b>Variations</b>
<b>Eligibility Requirements</b>	<i>Immutable Characteristics</i>	Variations in minimum voting age from 16-18 years old
	<i>Residency</i>	Variations in duration of allowable residency requirements, up to three months. Some Member States do not have explicit residency periods.
	<i>Morality Requirements</i>	Substantial variations in criminal disenfranchisement. Some Member States allow electors in prison to vote; others disenfranchise criminals for the duration of their sentence.
	<i>Voter Competency</i>	Variations in disenfranchisement of people with mental disabilities. Some Member States do not have mental incompetency laws.

#### IV. U.S. & E.U. ELECTOR QUALIFICATIONS COMPARED

The above examination of elector qualifications provides the raw materials for a comparative analysis. This Part compares elector qualifications for the U.S. Congress and the European Parliament, attempting to glean insights into the value of an affirmative right to vote. For clarity and consistency, this comparison will once again be structured according to Part I’s typology. This comparison reveals remarkable similarities in elector qualification laws between

<sup>85</sup> See, e.g., THE NETHERLANDS CONST. art. 54, ¶ 2 (“The following persons shall not be entitled to vote: . . . anyone who has been deemed legally incompetent by a final and conclusive judgement of a court because of mental disorder.”); ESTONIA CONST. art. 57 (“An Estonian citizen who has been divested of his or her legal capacity by a court does not have a right to vote.”).

<sup>86</sup> LOUIS MASSICOTTE ET. AL, ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES at 27 (2004).



these two systems, perhaps calling into question how much impact adding an affirmative right to vote in the U.S. Constitution would have.

There are very few differences between U.S. and E.U. elector qualification laws involving immutable characteristics. Beyond the outlier of some E.U. Member States disenfranchising nobility, the only elector qualifications based on immutable characteristics in either system are those establishing a minimum voting age. E.U. Member State laws establish a range of minimum voting ages between 16 and 18 years old. The U.S. Constitution establishes a minimum voting age of 18, and U.S. States have largely chosen not to extend voting to younger citizens. Likewise, elector qualifications based on residency do not vary substantially between the U.S. and the E.U. Both systems require voters to be citizens. The duration of residency requirements varies slightly more in the E.U. system—ranging from zero days to up to three months—than in does in the U.S. system, which disallows residency requirements exceeding thirty days. Morality requirements are also remarkably similar. Both systems allow criminal disenfranchisement, demonstrating that the E.U.’s affirmative suffrage guarantee has not abolished such practices. Voter competency requirements follow a similar pattern, with E.U. Member States and U.S. States both offering laws ranging in severity that disenfranchise people with mental disabilities. Neither E.U. nor U.S. laws implement other competency requirements, such as literacy, minimum education standards, or language requirements.

This suggests a perhaps surprising conclusion: that despite opposing textual bases for the right to vote in their highest legal documents, E.U. and U.S. elector qualification laws exhibit remarkable similarities. This is true for both what laws are implemented and what laws are not implemented, across all types of elector qualification laws.

This conclusion challenges the notion that adding an affirmative right to vote to the U.S. Constitution would change elector qualification laws for congressional elections. The E.U.'s affirmative suffrage rights have not outlawed practices—including criminal disenfranchisement and the disenfranchisement of people with mental disabilities—that American advocates of a positive right to vote have often cited.

However, important potential effects of an affirmative constitutional right to vote remain to be explored. This paper does not examine how explicit guarantees of universal suffrage impact administrative requirements or other barriers to suffrage. It is possible that such a provision would make burdensome administrative requirements for voter registration, for example, or invalidate onerous voter identification laws. It is possible that the U.S. Constitution's lack of an affirmative suffrage right grants U.S. States wider legal latitude to restrict the franchise than their European counterparts, but U.S. States simply choose not to. Such potential effects and alternative explanations should be carefully examined before drawing further conclusions.

## CONCLUSION

This paper uncovers remarkable similarities between elector qualification laws in the European Union and the United States. These similarities challenge the notion that adding an affirmative right to vote to the U.S. Constitution would result in a substantial expansion of the franchise. While more study is needed in this area, this paper's findings can inform further research and add to our understanding of the real-world impact of affirmative suffrage rights.