Biden's Voting Rights Ambitions: An Effort Doomed to Fail?

by Davide Zecca

Abstract: Le ambizioni di Biden in materia di diritto di voto: uno sforzo destinato a fallire? – The article gives an account of the relevant Presidential actions and the mostly inconclusive Congressional efforts carried out during the first two years of the Biden Presidency to prevent the spread of voter suppression policies and the insurgence of election subversion strategies. The analysis is supplemented by references to the shortcomings of US voting rights legislation following the narrow reading of the applicable constitutional and statutory provisions by the Roberts Court over the past 15 years. The text also includes a few additional remarks on the current election law cases pending before the US Supreme Court, which could bring about seismic shifts in the regulatory regime for the upcoming electoral cycles.

Keywords: Voting Rights Act; Electoral Count Act; election subversion; disenfranchisement; election litigation.

1. The troublesome 2020 Presidential Elections: a driver of Biden's election law policy

Before Joseph R. Biden was even sworn in as the 46th President of the United States, his Presidency had already been marred by the fierce controversy over the actual result of the elections held on November 3rd, 2020. The runner-up, former President Donald J. Trump, did not concede to the President-elect until after the shocking assault on Capitol Hill on January 6th, 2021. The considerable number of lawsuits filed before and after the elections, which went as far as to question the legitimacy of the incoming President, proves the saliency of the issue of voting rights regulation under the Biden administration.

On the one hand, the election cycle of 2020 has kept state and federal courts busy for months with extraordinary changes to voting procedures connected to the Covid-19 pandemic. The necessity to prevent the spread of the disease and the social distancing policies that were still in place have favoured a spike in the requests for absentee or early balloting, presenting judges with several cases concerning the admissibility of ballots marked by Election Day but received by electoral offices after polls had closed.[1] Thus,

[1] B.E. Griffith, L.E. Ward, *Voting in a Pandemic: The Effects of COVID-19 on America's Elections*, in 66 *S.D. L. Rev.* 3, 401 (2021).

DPCE online
ISSN: 2037-6677

a primary concern critical to the Biden voting rights agenda revolves around the uncertainty over the validity of many of the votes cast by absentee voters, together with increasingly tighter regulations concerning ballot access. The latter have become more and more frequent over the last decade following the decision handed down in 2013 by the US Supreme Court in *Shelby County v. Holder*, which struck down the coverage formula enshrined in §4(b) of the *Voting Rights Act* (VRA), thereby making the preclearance mechanism provided for by §5 inoperative.[2] While voters may still rely on §2 of the VRA to challenge voting practices that have discriminatory effects,[3] the effectiveness of the provision is currently threatened by a lawsuit pending before the US Supreme Court in the October 2022 term.[4]

Moreover, the beginning of the decade marked a compulsory date for states to adjust their congressional electoral maps according to the data obtained from the 2020 population census.[5] This means that the 2022 mid-term elections have taken place with updated apportionment plans that could suffer from the distortions associated with partisan gerrymandering by incumbent governing parties. While the Supreme Court has refused as late as 2019 to consider these issues as justiciable controversies,[6] state courts have been tackling the issue fairly frequently.[7] However, the Court is poised to adjudicate later this term on a case involving the applicability of the so-called 'independent state legislature' doctrine. According to the latter, state legislatures' power in drawing district lines would be unchecked even by state judiciary bodies, in accordance with a very narrow interpretation of the Congressional Elections clause.[8] The provision actually grants Congress the possibility of stepping in by enacting federal legislation pre-empting contrary provisions of state law.[9] Federal

[2] 570 U.S. 529 (2013).
[3] D.E. Ho, *Voting Rights Litigation after Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, in 17 *N.Y.U. J. Legis. & Pub. Pol'y* 3, 675 (2014).
[4] *Merrill v. Milligan*, 21-1086, see A. Howe, *When are majority-Black voting districts required? In Alabama case, the justices will review that question*, *SCOTUSblog* (Oct. 2, 2022, 2:50 PM), https://www.scotusblog.com/2022/10/when-are-majority-black-voting-districts-required-in-alabama-case-the-justices-will-review-that-question/ (last visited Dec. 13, 2022).
[5] Art. I, §2, cl. 3, U.S. Constitution "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct ...".
[6] *Rucho v. Common Cause*, 139 S. Ct. 2484.
[7] S.S.-H. Wang, R.F. Ober Jr., B. Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, in 22 *U. Pa. J. Const. L.* 1, 203 (2019).
[8] Art. I, §4, cl. 1, U.S. Constitution "The 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 Places of chusing Senators".
[9] *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013). G.A.T. Floyd, *Federalism, Elections, Preemption, and Supremacy: The Aftermath of* Inter Tribal Council,

regulatory measures availing of the power granted by this provision or relying on the enforcement powers ascribed to Congress in the XV Amendment would thus be able to limit the effects of partisan reapportionment policies, ensuring that incumbents do not unfairly alter the political processes underlying the election of representatives to the House or state legislatures.[10]

Lastly, the events of January 6th and the never-ending narrative that the election was stolen from Trump by a concerted hoax that allowed for large-scale voting frauds have made it mandatory to discuss the best way to ensure that the operations of vote counting and the certification of the ballots cast for each candidate to an elective office (especially in the case of Presidential elections) can be carried out without intimidation or coercion and that Congress' discretion in accepting or rejecting the slates of Presidential electors for the Electoral College is restrained, so that the certification of the electoral result by state authorities is immune from any malicious external attempts to alter it.

In accordance with President Biden's remarks in Atlanta in January 2022,[11] which will be analyzed more thoroughly later, the article will thus discuss the voting rights policy of the Biden administration and the 117th Congress in a two-prong approach. Firstly, due account will be given to the initiatives aimed at preventing the occurrence of voter suppression, be it concerning the actual possibility of casting a ballot (voting denial) or the curtailment of the influence of racial or political groups to influence public decision-making processes and the make-up of elected assemblies (voting dilution). Secondly, the text will turn to the issue of election subversion, with a particular focus on the concerted efforts undertaken to ensure that the certification of votes for the Electoral College and the vote-counting process held in Congress are not vulnerable to undue interferences.

In this regard, this article will try to articulate President Biden's own efforts for the full protection and enjoyment of the right to vote while acknowledging the limited scope of these actions. Moreover, it will discuss the proposals sponsored by the Democratic majority to update the *Voting Rights Act*[12] and to limit discriminatory practices in place at state level through pieces of federal legislation (par. 2). Then, the article will consider the bipartisan debate over the reform of the *Electoral Count Act*,[13] which has recently shown its apparent deficiencies, engendering a shared commitment to update this text in a context of a highly conflictual relationship between the competing political parties, where the refusal to recognize the legitimacy of the other party is a birthmark of party loyalty

in 33 *Miss. C. L. Rev.* 2, 235 (2014); F. Tolson, *The Spectrum of Congressional Authority over Elections*, in 99 *B.U. L. Rev.* 2, 317 (2019), 367 ff.

[10] A. Kouroutakis, *Legitimate and Illegitimate Political Self-entrenchment and Its Impact on Political Equality*, in 15 *Vienna J. on Int'l Const. L.* 1, 1 (2021).

[11] *Remarks by President Biden on Protecting the Right to Vote*, Atlanta University Center Consortium, Atlanta, Georgia, January 11, 2022.

[12] *An Act to enforce the fifteenth amendment of the Constitution of the United States, and for other purposes*, Pub. L. 89-110, 79 Stat. 437 (1965).

[13] *An act to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon*, Pub. L. 49–90, 24 Stat. 373 (1887).

DPCE online
ISSN: 2037-6677

(par. 3). Building on the considerations developed in the previous two paragraphs, the article will then put forward some observations regarding the (un)feasibility of the adoption of federal voting rights policies nowadays, arguing that sensible voting regulations are almost impossible to pass in a very polarized political environment, frustrating any ambition to tackle some of the most pressing issues with regard to accessing ballots and the actual exercise of the right to vote (par. 4).

2. Voter suppression: a difficult beast to tame?

2.1 The limits of executive actions

Despite a unified government, the very tight Senate majority in favour of the Democratic party has made it very hard for the Biden administration to pursue a successful reform strategy for federal legislation concerning voting denial and dilution. More specifically, the renowned filibustering dilatory technique still applies to ordinary Senate bills, requiring a majority of sixty senators to pass a cloture motion and bring a bill to the floor of the Senate for a vote.[14] In this regard, due account will be given first to the Presidential actions that have been more relevant in this domain. Then, an assessment of the unsuccessful attempts to pass more sweeping bills reforming election legislation is provided.

The first action undertaken in the field of voting rights by the Biden administration was the adoption of an executive order aimed at promoting access to voting.[15] After reiterating the saliency of the right to vote in the United States, the text acknowledges the disparate impact of current voting procedures and the requirements for access to polls upon minorities. By committing to expand access to voter registration and ensuring the spread of reliable election information, the executive order invites federal agencies to take appropriate steps to promote voter registration and participation. These strategies include disseminating relevant information concerning voter registration and other electoral procedures, designing agencies' websites to make voter registration systems easily accessible and the solicitation of - and assistance in - voter registration. The Presidential order also amends another existing executive order adopted to implement the *National Voter Registration Act of 1993*[16] while also providing specific guidelines to modernize the Vote.gov website to make it more and more accessible.

The second part of the order is instead devoted to expanding access to voting for the benefit of disadvantaged classes of citizens (employees, people with disabilities, military personnel on active duty, overseas citizens, and persons in federal custody). The text directs the federal

[14] Rule XXII (2) of the U.S. Senate (Precedence of motions).
[15] Executive Order 14019 of March 7, 2021 - *Promoting Access to Voting*, 86 CFR 45.
[16] Executive Order 12926 of September 12, 1994 - *Implementation of the National Voter Registration Act of 1993*, 59 FR 47227. The *National Voter Registration Act* (Pub. L. 103-31; 107 Stat. 77) was enacted in the exercise of Congressional powers under the Congressional Elections clause.

government to act as a role model for employers by ensuring that they give voters time off to go to the polls or avail of early balloting and cast their votes for all kinds of elections while also supporting federal workers willing to participate in election procedures as poll workers or observers. The order vests the National Institute of Standards and Technology with the task of ensuring easy access for people with disabilities to the Federal Voting Registration Form and laying down recommendations related to barriers to accessing ballots for people with disabilities within nine months from the entry into force of the order.[17] Specific directions are also dictated to provide overseas citizens or military personnel in general with the possibility of having regular procedures available for voter registration and ensuring adequate management of those ballots which are mailed in. The executive order also mandates that detailed information on voter registration and election procedures be given to persons in federal custody or those leaving custody so that they are well aware of the potential restrictions on their right to vote.[18] Lastly, the Presidential order promotes establishing an ad hoc steering group specifically devoted to studying the issues related to Native Americans' access to and participation in voting.

The executive order signed by President Biden addresses a number of voting rights issues, ranging from spreading electoral disinformation, which has become particularly relevant since the 2016 election,[19] to the access to vote for many classes of citizens, which usually record below-average registration and turnout rates.[20] While some of the directions provided by the executive order may have immediate effects on citizens' access to ballots, such as the favourable policies enabling federal workers to take time off from work on Election Day or to cast early ballots, others require implementation through federal legislation and also involve the determination of voters' qualifications by state legislation. For example, state policies on felons' disenfranchisement have been a source of political controversy for a long time, swinging between lenient approaches restoring voting rights to felons after they have served their sentences or more punitive policies that prevent the enfranchisement of former felons.[21]

[17] K.T.B. Fort, *Voting Able: Accessible In-Person Voting for Persons with Disabilities*, in *LSU Journal for Social Justice & Policy* 1, 117 (2022).
[18] M. Birringer, *The Right to Vote: Felony Disenfranchisement and Making Restoration a Reality*, in 27 *Pub. Int. L. Rep.* 1, 42 (2021).
[19] R. Faris, H. Roberts, B. Etling, N. Bourassa, E. Zuckerman, Y. Benkler, *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, Berkman Klein Center Research Publication 2017-6 (August 2017), https://ssrn.com/abstract=3019414 (last visited Dec. 13, 2022).
[20] B.L. Fraga, *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America*, Cambridge, 2018.
[21] 11 US States provide for the permanent disenfranchisement of some felons, whereas the restoration follows the completion of the sentence (including prison, parole and probation) in 14 States and the release from prison in other 11 states. While the disenfranchisement of felons is sometimes enshrined in state constitutions (Iowa, Kentucky, Virginia), these texts grant governors the authority to restore voting rights. Executive actions have been taken in all three states in the past few years to restore voting rights to otherwise disenfranchised felons, see *Can People Convicted of a Felony Vote? Felony Voting Laws by State*, Brennan Centre for Justice,

DPCE online
ISSN: 2037-6677

There have also been instances in which felons' disenfranchisement policies have been put on the ballot, and citizens have voted to roll back on previously existing limitations to former prisoners' voting rights. For example, the citizens of Florida voted in favour of a constitutional amendment restoring voting rights to almost 1.5 million people in 2018.[22]

2.2 The stalemate of Congress' law-making process

Turning to the actions undertaken by the 117th Congress concerning voting rights, Democratic Congresswomen and Congressmen have sponsored bills to address some of the shortcomings of the current election legislation framework described in the introductory paragraph. The first of such legislative initiatives has an iconic name and is known as the *For the People Act*. It was presented as a signature move by the Democratic congressional delegation since it was introduced in the House the day after Congress had reconvened following recess.[23] The proposal consisted of a sweeping text that encompassed provisions dedicated to promoting effective voter registration for all qualified citizens and enhancing efforts to guarantee that voters with a disability can cast their ballots and ensure the availability of early and mail-in voting (Division A – Voting – Title I – Election Access). The draft bill also reaffirmed Congress' commitment to revising the *Voting Rights Act*, to protect Native Americans' right to vote, to recognize the statehood of the District of Columbia and to reconsider the issue of voting rights of residents in the US territories of American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands (Title II – Election Integrity – Subtitles A-D).

One of the landmark accomplishments that the sponsors of the *For the People Act* intended to achieve was to pass a *Redistricting Reform Act* to impose mandatory terms and conditions on states for the apportionment of districts for the House of Representatives. Building on the authority granted to Congress by the Congressional Elections clause and the Enforcement clause of the XIV Amendment,[24] the drafters were willing to strip state legislatures of apportionment powers, vesting them in independent redistricting commissions to be nominated by the legislature of each state in compliance with strict independence requirements. The text laid down a very detailed regulatory framework for the functioning of the redistricting process carried out by the commissions, including the submission of preliminary draft plans to the general public for comments and the criteria dictated for creating each of the single-member districts.

https://www.brennancenter.org/our-work/research-reports/can-people-convicted-felony-vote-felony-voting-laws-state (last visited Dec. 13, 2022).

[22] The scope of the amendment has since been restricted through the implementation of new limitations by Florida Republican-held legislature, see R. DuBose, *Voter Suppression: A Recent Phenomenon or an American Legacy?*, in 50 *U. Balt. L. Rev.* 2, 245 (2021), 250.

[23] H.R.1 - *A bill to expand Americans' access to the ballot box, reduce the influence of big money in politics, strengthen ethics rules for public servants, and implement other anti-corruption measures for the purpose of fortifying our democracy, and for other purposes.*

[24] XIV Amendment, §5, U.S. Constitution "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article".

The latter include obligations to comply with the US Constitution and the *Voting Rights Act*, ensure equal opportunities to participate in the political process and elect a candidate of choice for racial, ethnic and language minorities, respect the integrity of communities of interest, neighbourhoods and political subdivisions while avoiding unduly favouring any political party. If a plan was not enacted according to the abovementioned procedure, the *For the People Act* explicitly encompassed a subsidiary method devolving apportionment duties to a three-judge court, bound by the same criteria applicable to the determinations of the independent redistricting commission (Subtitle E).

Such a sweeping reform bill would have certainly marked a momentous change in ordinary redistricting procedures by making up for the refusal of the Supreme Court to adjudicate on the constitutionality of partisan gerrymandering[25] and curtailing the levers at the disposal of incumbents in drawing district lines that maximize their entrenchment. The Democratic congressional delegation pushed for this bill to be passed relying on the alleged anti-democratic nature of gerrymandering and the inability of federal and state courts to effectively halt such practice, as increasingly discussed by constitutional scholarship over the last few years.[26] The issue is currently in the spotlight because of the *Moore v. Harper* case pending before the US Supreme Court, which will adjudicate on the admissibility of the highly contested 'independent state legislature' in the coming months, potentially preventing any future congressional attempt to vest redistricting duties in bodies other than state elected assemblies.[27]

The draft bill also encompassed provisions dedicated to ensuring the innovation and security of voting systems (Title III – Election Security), preventing foreign interference in US elections and strengthening oversight over online political advertising, including a prohibition on the use of deepfakes, while also proposing several amendments to electoral campaign legislation aimed at remedying what was perceived as the undesirable consequences of the Supreme Court decision in *Citizens United*[28] (Division B – Campaign Finance).

[25] *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The issue had already been brought, albeit inconclusively, before the Supreme Court in *Davis v. Bandemer*, 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[26] R.G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, in 13 *U. Pa. J. Const. L.* 1, 1 (2010); M.T. Morley, *The New Elections Clause*, in 91 *Notre Dame L. Rev. Online* 2, 79 (2016); M.T. Morley, *The Independent State Legislature Doctrine*, in 90 *Fordham L. Rev.* 2, 501 (2021).

[27] *Moore v. Harper*, 21-1271, see A. Howe, *In high-stakes election case, justices will decide validity of "independent state legislature" theory*, *SCOTUSblog* (Dec. 6, 2022, 10:20 AM), https://www.scotusblog.com/2022/12/in-high-stakes-election-case-justices-will-decide-validity-of-independent-state-legislature-theory/ (last visited Dec. 13, 2022). Notably, embracing the independent state legislature theory would mark a relevant departure from a previous Court's finding in favour of the delegation of redistricting functions by a state legislature to an independent commission, see *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

[28] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

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ISSN: 2037-6677

The last section of the *For the People Act* (Division C – Ethics) was instead aimed at establishing specific procedures for registering foreign agents and lobbyists while also imposing specific ethical duties on federal judges and citizens elected to federal offices or employed by the federal government, including a detailed regulation of potential conflicts of interests.

The timing of the bill's introduction in the House and the very broad spectrum of topics addressed by this draft legislation allude to the pivotal significance of this initiative for the Biden administration and the Democratic Party. However, after being passed in the House with a narrow majority (220-210 votes) in early March 2021, the draft bill has since stalled in the Senate, unable to overcome the filibustering of Republican senators. Nevertheless, the text has been the topic of intense negotiation among the majority of Democratic senators and the more moderate members of the party's caucus (for example, West Virginia Senator Joseph "Joe" Manchin III) in order to strike down a compromise that could garner further support in the Senate. The outcome has been the so-called *Freedom to Vote Act*, sponsored by Minnesota Senator and former Presidential candidate Amy Klobuchar.[29]

Among the most relevant changes to the *For the People Act*, the *Freedom to Vote Act* does not require election officials to accept votes cast by citizens without any form of ID, subject to signing a sworn statement concerning their identity. However, it expands the types of IDs accepted to prove voters' identity. While the revised bill does not encompass the mandatory establishment of independent redistricting commissions, it retains a general prohibition on partisan gerrymandering and provides for remedial intervention from courts in cases of alleged violations of the provisions of the bill itself or the *Voting Rights Act*.[30] However, despite the relevant concessions, the Democratic party has been unable to find enough support to pass a cloture motion to end Republican filibustering over the advancement of the *Freedom to Vote Act* and put it to a vote on the Senate floor. Discussions over the feasibility of an amendment to Senate rules concerning filibustering have been held in the Democratic caucus. However, they have been inconclusive because at least a few Democratic senators oppose it.

Another key concern for the Democratic congressional majority has been to update the *Voting Rights Act* to remedy the shortcomings that have emerged since the Court's decision in *Shelby County*. Thus, the *John R. Lewis Voting Rights Advancement Act of 2021* (referred to as the *Voting Rights Advancement Act*) was aimed at thoroughly revisiting the *Voting Rights Act* according to multiple perspectives.[31] First, the draft bill explicitly

[29] S.2747 - *A bill to expand Americans' access to the ballot box and reduce the influence of big money in politics, and for other purposes*, introduced in the Senate on September 14, 2021.
[30] *Key Differences Between the For the People Act and the Freedom to Vote Act*, Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/key-differences-between-people-act-and-freedom-vote-act (last visited Dec. 13, 2022).
[31] H.R.4 - *An Act to amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes*, introduced in the House of Representatives on August 17, 2021.

supplemented the prohibition of voting practices that have discriminatory effects, encompassed in §2, with a prohibition on voting practices and regulatory measures that have discriminatory purposes. Then, the bill qualified the totality of circumstances test in §2(b) as expressly dictated for voting dilution practices, by codifying the three-factors test established by the Supreme Court in *Thornburg v. Gingles*.[32] This standard of scrutiny was combined with an analysis accounting for any historical discriminatory voting pattern within the political subdivision, the existence of racially polarized voting, a resort to voting practices and procedures that enhance the opportunity for minority discrimination, denial of access to slating procedures for minority candidates, discrimination in access to education, employment or health, the spread of racial electoral appeals and the rates of the election of minority candidates in the jurisdiction. Elected officials' lack of responsiveness to the specific needs of the protected class and the tenuous nature of the policy underlying the adoption of the voting procedure may also be considered in the totality of circumstances test. The text also permitted the class of citizens entitled to specific protection to be composed of a coalition of different racial or language minority groups. This latter specification is particularly relevant since it would reverse the judicial interpretation of §2 of the VRA laid down by the Supreme Court in *Bartlett v. Strickland*, where it was held that the *Gingles* framework requirements are met only for actual majority-minority districts and not for 'crossover districts'.[33]

The explicit recognition in federal legislation of the totality of circumstances test, as elaborated in *Gingles*, would be a remarkable accomplishment as it would protect this standard of scrutiny for voting dilution claims, which would otherwise be more vulnerable to judicial overruling, as the granting of *certiorari* by the Supreme Court to a challenge to an Alabama redistricting plan in the spring of 2022 has made apparent.[34] In this case, state legislators appealed a district court ruling invalidating the enacted apportionment plan after it failed to create a

[32] 478 U.S. 30 (1986). The Court held that voting dilution claims according to §2(b) of the VRA need to demonstrate that the members of the protected class are sufficiently numerous and geographically compact to constitute a majority in a single-member district, that the electoral behaviour of that community identifies it as a voting bloc and that the other residents reliably vote in a way that defeats the minority's preferred candidate.

[33] 556 U.S. 1 (2009). C.C. Romeo, *Election Law - Section 2 of the Voting Rights Act - Officials Not Required to Create Crossover Districts to Allow Minority Voters to Join with Majority Voters to Elect Preferred Candidates* - Bartlett v. Strickland, *129 S. Ct. 1231 (2009)*, in 40 *Cumb. L. Rev.* 3, 977 (2009); A. Rublin, *The Incompatability of Competitive Majority-Minority Districts and* Thornburg v. Gingles, in 29 *Buff. Pub. Int. L.J.*, 111 (2010-2011), 131.

[34] *Merrill v. Milligan*, 21-1086, see E. Chemerinsky, *Making it Harder to Challenge Election Districting*, in 1 *Fordham Voting Rts. & Democracy F.* 1, 13 (2022); A. Howe, *In 5-4 vote, justices reinstate Alabama voting map despite lower court's ruling that it dilutes Black votes*, *SCOTUSblog* (Feb. 7, 2022, 8:43 PM), https://www.scotusblog.com/2022/02/in-5-4-vote-justices-reinstate-alabama-voting-map-despite-lower-courts-ruling-that-it-dilutes-black-votes/ (last visited Dec. 13, 2022).

DPCE online
ISSN: 2037-6677

further majority-minority district,[35] alleging a violation of the XIV Amendment's Equal Protection clause by §2 of the VRA, as interpreted in *Gingles*.[36]

The *Voting Rights Advancement Act* would also extend the scope of application of §2 of the VRA, which has historically only been applied to voting dilution claims, to other forms of abridgement or denial of the right to vote when the procedures or qualifications prescribed by law end up imposing greater burdens on the exercise of the right to vote and the burden is, at least to some extent, connected to historical or social conditions that discriminate against members of a specific minority. Explicitly providing that such practices must be a but-for cause of the discriminatory result or perpetuate other pre-existing burdens, the draft bill mentions a number of determinant factors in the totality of circumstances test for measures that affect access to the polls. This list includes historical patterns of discrimination, racially polarized voting, the use of voter-ID requirements that go beyond those mandated by federal law and adversely impact minority communities and other factors also dictated for the assessment of voting dilution claims whilst still acknowledging the possibility that such procedures are dictated in pursuance of a valid and substantial state interest.

By extending the scope of application of §2 of the VRA to state legislation and practices that hinder access to ballots, the sponsors of the bill appear to have been concerned with the Roberts Supreme Court's low score in the field of voting rights protection;[37] in this regard, in 2008 the Justices validated an ID-law passed by Indiana with a plurality opinion that did not conclusively settle the underlying issue.[38] More recently, the Court has dictated a multiple-factors test for the scrutiny of measures that affect access to the polls under §2 of the VRA, eventually upholding restrictive legislation passed by Arizona for out-of-precinct voting and for assistance to voters in casting absentee ballots.[39] The disregard of the *Gingles* framework by the majority opinion of Justice Alito, on the assumption that it only applied to voting dilution claims, has led the Court to lay down a new set of exemplificatory factors to support a claim that §2 of the VRA has been violated. These grounds include the size of the burden imposed, the degree of analogy or difference with voting practices in place in 1982 when §2 was last amended, the size of the disparity between different minority groups, the existence of alternative voting opportunities and the strength of the state interest pursued.

The combination of this narrow reading of §2 of the VRA with the neutralization of the preclearance mechanism since *Shelby County* has paved

[35] *Evan Milligan v. John Merrill*, No. 2:21-cv-1530 (N.D. Ala.), January 24, 2022.
[36] P.A. Riley Jr., *"Unpacking" the Problem: The Need to Broaden the Scope of Vote Dilution Claims under Section 2 of the VRA*, in 55 *Colum. J.L. & Soc. Probs.* 2, 279 (2022), 301.
[37] R.L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, in 68 *Stanford Law Review* 6, 1597 (2016).
[38] *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). R.W. Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right*, in 16 *N.Y.U. J. Legis. & Pub. Pol'y* 2, 515 (2013).
[39] *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).

the way for several legislative restrictions to voting rights that adversely impact minority groups, which Congress has tried to remedy through the *Voting Rights Advancement Act* and the other legislative initiatives that are discussed in this paragraph.[40] The resort to federal legislation in response to a judicial interpretation of the *Voting Rights Act* that curtailed the statutory guarantees would not be unprecedented. Indeed, the text of §2 of the VRA that is currently applicable was enacted in 1982 when Congress reacted to the Supreme Court's narrow reading of the provision in *Mobile v. Bolden*.[41]

The draft bill also intended to expand the scope of application of the non-retrogression principle, derived from §5 of the VRA,[42] to claims lodged under §2. The *Voting Rights Advancement Act* tackles one of the thorniest issues that have undermined the VRA's functioning following *Shelby County*. More specifically, the legislative proposal intended to amend §4(b) by updating the coverage formula struck down by the Supreme Court for violating the principle of 'equal sovereignty'. Namely, the preclearance mechanism would apply to states where at least 15 voting rights violations had occurred in the last 25 years (10 or more if the state itself committed one and three or more if the state administered the electoral procedure). Specific political subdivisions would be subjected to preclearance in cases where three or more voting rights violations had been committed in the last 25 years. The draft bill explicitly listed the instances qualifying as relevant voting rights violations whilst also providing for appropriate exemptions to specific political subdivisions, when applicable.

Therefore, the aim of the bill was to reinstate the preclearance mechanism that was rendered inoperative by the Supreme Court's decision in *Shelby County*, where the coverage formula was not deemed to be sufficiently up to date to justify such an intrusive intervention by federal legislation into state sovereign powers. Thus, by adopting a new coverage formula, Congress intended to resurrect the preclearance mechanism that had been dormant for almost a decade, to the detriment of many voters residing in jurisdictions that had little intention of ensuring the full enfranchisement of all qualified citizens. It is interesting to note that in *Shelby County*, the Supreme Court neither invoked the Congressional Elections clause nor the Enforcement clause of the XV Amendment and only relied on the principle of equal sovereignty, which had apparently never been used in election law litigation.[43]

[40] K. Barnes, *On the Road Again: How Brnovich Steers States toward Increased Voter Restrictions*, in 81 *Md. L. Rev.* 4, 1265 (2022).
[41] 446 U.S. 55 (1980). *Voting Rights Act Amendments of 1982* (*An Act to amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes*), Pub. L. 97-205, 96 Stat. 131.
[42] *Beer v. United States*, 425 U.S. 130 (1973). S. Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, in 104 *Colum. L. Rev.* 6, 1710 (2004).
[43] The theory, already evoked in *NAMUDNO v. Holder*, 557 U.S. 193 (2009) and fully embraced by the Court's conservative majority in *Shelby County*, had apparently being applied only to the circumstance of access of new states to the Union, to ensure their equal footing with respect to the states already belonging to the Union, see *Coyle v. Smith*, 221 U. S. 580 (1911); it is telling that the Supreme Court had already rejected challenges alleging the unconstitutionality of the *Voting Rights Act* for the violation of

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After the House passed the *Voting Rights Advancement Act* in August 2021 with a narrow majority (219-212), the bill was introduced in the Senate, where Democratic senators failed to pass a cloture motion. Thus, they could not bring the draft legislation to the Senate floor for a vote.

Congressional attempts to amend the *Voting Rights Act* to ensure more efficient voting registration procedures, protect electoral integrity and regulate campaign financing and political conflicts of interest were combined in an amendment passed by the House of Representatives to a legislative bill originally devoted to the regulation of specific issues concerning NASA.[44] The Democratic majority's attempt to defeat the Republican filibustering through a procedural manoeuvre did not succeed.

It is worth noting that, following the inconclusive actions of Congress in tackling the pressing needs of voting rights and election legislation, President Biden delivered a very critical and polarising speech in Atlanta on January 11th, 2022.[45] In acknowledging the surge in election litigation and voting restriction laws passed in some states (Georgia included), Biden has spoken openly of a Jim Crow 2.0, focusing on voter suppression and election subversion as two prongs of the same threat. In highlighting the saliency of these issues for the survival of American democracy, the President has urged Congress to pass the *Freedom to Vote Act* and the *Voting Rights Advancement Act*. He has emphasised the bipartisan nature of the previous reauthorizations of the *Voting Rights Act* and opened up the possibility, if necessary, of amending the rules regulating filibustering for voting rights bills. Biden's remarks have apparently failed to persuade at least a few Republican senators of the convenience of lifting the filibustering barriers and allowing one of the multiple voting rights bills to advance to a floor vote. Filibustering reform alike has not proven feasible with the current Senate composition since some Democratic senators have refused to back any such initiative, halting any possibility of changing the Senate's procedural rules.

The results of the 2022 mid-term elections appear to have put a stop to any prospective federal voting rights legislation for the next two years, especially in light of the fact that Republicans have clinched a majority in the House of Representatives. Yet, as demonstrated in the following paragraph, bipartisan initiatives have eventually proven successful in updating the very dated *Electoral Count Act*.

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this principle right after it entered into force, see *South Carolina v. Katzenbach*, 383 U.S. 324 (1966). The reliance over the equal sovereignty principle by the majority opinion penned down by Chief Justice Roberts in *Shelby County* has since been the object of intense debate in constitutional scholarship, see A.B. Molitor, *Understanding Equal Sovereignty*, in 81 *U. Chi. L. Rev.* 4, 1839 (2014); D. Kow, *An "Equal Sovereignty" Principle Born in Northwest Austin, Texas, Raised in Shelby County, Alabama*, in 16 *Berkeley J. Afr.-Am. L. & Pol'y*, 2, 346 (2015); S. Davis, *Equal Sovereignty as a Right Against a Remedy*, in 76 *La. L. Rev.* 1, 83 (2015-2016); T.B. Colby, *In Defense of the Equal Sovereignty Principle*, in 65 *Duke L.J.* 6, 1087 (2015-2016).

[44] H.R.5746 - *Freedom to Vote: John R. Lewis Act* (*An Act to amend title 51, United States Code, to extend the authority of the National Aeronautics and Space Administration to enter into leases of nonexcess property of the Administration*).

[45] *Remarks by President Biden on Protecting the Right to Vote*, Atlanta University Center Consortium, Atlanta, Georgia, January 11, 2022.

3. Never again: the winding road to reform the *Electoral Count Act* following the events of January 6th

Following the federal Congress' inconclusive efforts to pass legislation to remedy voter suppression by the states, especially for Congressional elections, the legislative focus in the last quarter of the 117th Congress's term has shifted towards an attempt to neutralize election subversion. More specifically, the consensus of many among the Democratic delegation in Congress coalesced around the convenience of amending the *Electoral Count Act*. The intended goal is to ensure that the pressures exerted by former President Trump and his acolytes in the transition period before President Biden took office were neutralized and no longer depended on the integrity and loyalty to the Constitution of the officials tasked with the certification and counting of electoral votes. In this regard, it is worth noting that one of the issues that instigated the January 6th assault on the Capitol and fuelled the theory that elections were stolen from the actual winner, the then incumbent President Donald Trump, concerned the powers of Congress in certifying the results of the Presidential elections.

The Constitution does not dictate much in this regard, vesting the power to open the certificates sent by each state and count the electoral votes cast by the delegates elected to the Electoral College in the President of the Senate, i.e. the incumbent Vice-President of the United States.[46] The need for establishing a more thorough regulation of the process for counting electoral votes for the Presidency became apparent following the controversial 1876 Presidential elections and the ensuing dispute that eventually led to the *Hayes Compromise*. The issue revolved around the votes cast to the Electoral College by the delegates from Florida, Louisiana, South Carolina and one delegate from Oregon. Those accounted for 20 votes, which would have given Republican candidate Rutherford B. Hayes a narrow lead over Democratic party candidate Samuel J. Tilden (who led the count 184-165). Presented with competing slates of electors, the President of the Senate, the then Acting Vice-President[47] and Republican senator Thomas W. Ferry, managed to strike a deal with the

[46] Art. II, §1, cl. 3, U.S. Constitution "… The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted …", as amended by the XII Amendment (passed by Congress December 9, 1803, and ratified June 15, 1804), following the electoral tie between Thomas Jefferson and Aaron Burr, see T. Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*, Westport (CT), 1993.

[47] Despite the absence of constitutionally mandated mechanisms for Vice-Presidential succession in the text of the US Constitution, the expression "Acting Vice-President" was routinely used by Congressmen and media at the time to refer to the President pro tempore of the Senate, which is the senator presiding Senate sessions whenever the Vice President of the U.S. does not attend the sessions, see R.E. II Brownell, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 Fordham L. Rev. 3, 1027 (2017), 1058, note 175; the vacancy of the office of Vice-President has occurred several times over the US history (J.D. Feerick, *From Failing Hands. The Story of Presidential Succession*, New York (N.Y.), 1965) and could not be filled before a new administration was sworn in until the ratification of the Twenty-Fifth Amendment in 1965.

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Democratic Congressional minority in order to establish a commission composed of five senators, five representatives, and five Supreme Court justices (ideally made up of 14 members equally divided along partisan lines and an independent Supreme Court Justice) tasked with deciding which votes to count.[48] After the commission narrowly held to award the votes to Hayes (8-7), the Democrats leveraged their Congressional majority to threaten to block the actual counting by resorting to filibustering. The deadlock was eventually resolved with the abovementioned compromise that, while handing the Presidency to Hayes, conceded the removal of the federal troops still stationed in the Confederate states following the end of the Civil War.[49] By restoring their control over governmental institutions, the Southern states progressively disregarded the substantial content of the XIV and XV Amendments, inaugurating the infamous era of Jim Crow laws.[50]

It is against this backdrop that, after being persuaded that a more detailed regulation of the powers of states and Congress in counting Presidential electoral votes was needed, Congress eventually passed ad hoc legislation following repeated attempts that proved inconclusive.[51] The *Electoral Count Act* of 1887 has since represented the only piece of federal legislation entrusted with safeguarding a pivotal moment in the electoral cycle.[52] The *Electoral Count Act* of 1887 was not the first attempt to crystallize the powers of Congress to count or discard objected votes, as the so-called 22nd Joint Rule already provided that votes against which an objection had been raised could be counted only upon favourable deliberations of both Houses of Congress.[53] This joint rule established a substantial one-house veto that could thwart the acceptance of electoral votes. The rule, however, was not renewed by the Senate in 1876 and, in any case, qualified only as an internal rule of Congress and was never incorporated into federal legislation.

The *Electoral Count Act* recognizes that the executive of each state has the authority to certify the votes cast and the votes that Congress is bound to count, setting specific deadlines for that determination and the valid transmission of the certificates to the US Secretary of State (§§2-3). The legislation provides that the President of the Senate reads the certificates of the electoral votes aloud to the incoming Congress, which meets jointly. Objections to each certificate may be made in writing, identifying the ground for the objection and provided that the objection is signed by at least one senator and one Representative. The Act forbids the rejection of

[48] *Act Creating an Electoral Commission*, January 29, 1877.
[49] W.H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876*, New York (N.Y.), 2004.
[50] A. Derfner, *Racial Discrimination and the Right to Vote*, in 26 *Vand. L. Rev.* 3, 523 (1973), 535 ff.
[51] S.A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, in 56 *Fla. L. Rev.* 4, 541 (2004), 549.
[52] *An act to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon*, February 3, 1887, Pub. L. 49-90, 24 Stat. 373.
[53] S.A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, in 56 *Fla. L. Rev.* 4, 541 (2004), 552-554.

votes when only a single return in their regard has been received, except in cases where the two houses of Congress each determine separately that the votes have not been regularly given by the properly appointed electors.

The statute also provides for cases where more than one return for electoral votes is received. The votes valid for the count are those of the electors officially certified by the state executive authority in accordance with the framework set out by the *Electoral Count Act*. In case of competing slates of electors that are received from different state authorities, the decision over which votes to count depends on the concurrence of separate determinations by the Senate and the House, deferring to the certification of the executive of the state in case of disagreement between the two branches of the federal legislature. The scrutiny over every exception suspends the counting process until a conclusive decision is made (§4).

The Act also provides for strict regulation of the timing of the process, preventing dilatory techniques and the resort to filibustering, both for the joint session and the separate sessions for the decision about objections to votes (§6). The legislation also prohibits the dissolution of the meeting until the vote count has been completed and the result has been declared (§7).

Congress' intention when passing the *Electoral Count Act* appeared to be primarily that of granting enough time to states to settle any possible dispute related to the certification of Presidential electors, which were generally appointed based on the state-wide result of elections. More specifically, Congress divested the power to reject votes duly and timely certified by a state but strongly encouraged states to enact legislation enabling an expedited judicial review of controversies concerning the appointment of electoral delegates. The requirement imposed upon states is that the courts competent to adjudicate on these disputes cannot be established *ex post facto*, i.e. they shall be clearly identifiable before Election Day. The judicial review process must be concluded no later than six days before the day chosen for electors balloting. Otherwise, Congress would not be bound by the determination made ('safe harbor' provision).[54] In any case, the claim that electoral votes have – or do not have – §2 status is not conclusive regarding their acceptance as valid votes, which is ultimately governed by §4.

Congress seems to have established a presumption of regularity for single returns of electoral votes. In contrast, no presumption of regularity appears to exist for multiple returns of electoral votes. In the latter case, Congress' interests did not lie in the identification of the true return of electoral votes but rather in the one that was the result of the state's final determination, reserving the decision over which slate of electors to accept when there was no conclusive or regular final determination by the state under §2 to Congress itself. The only exception to the abovementioned

[54] The existence of a safe harbor provision played a significant role in the unfolding of the litigation over the actual winner of the state-wide vote in Florida in the 2000 Presidential elections, which ultimately led to the controversial decision of the Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000), that ordered Florida to stop the recount of ballots, see E. Schickler, T. Bimes, R. Mickey, *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, in 16 *J.L. & Pol.* 4, 717 (2000).

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mechanism is if there is a disagreement between the Senate and the House regarding identifying the authority tasked with the decision and respecting the requirements for the final determination laid down in §2. In that case, the decision over the slate of electors to submit for ballot counting falls upon the state governor. Therefore, it appears that once a slate of electors has been certified by the state's executive authority, only a concurrent vote of the two Houses could discard it for not being the true state electoral return.

Summing up the above framework, the rules adopted under the *Electoral Count Act* seem to address the three following scenarios: 1) if the Senate and the House concur in counting a vote, that vote shall be validly counted; 2) if the Senate and the House concur in rejecting the validity of a vote, that vote shall be discarded; 3) if the Senate and the House disagree, the return to be counted shall be the one certified by the state executive authority under the provisions of the statute.[55]

Another problem that the *Electoral Count Act* wished to address was the appropriate restriction of the discretionary power of the President of the Senate in the vote-counting process. More specifically, the issue related to the determinations adopted by the President of the Senate concerning the objection to electoral votes received by the states, which could be superseded by a concurring decision of the House and Congress. Indeed, the *Electoral Count Act* vests the power to accept, challenge or discard electoral votes in Congress, granting significant procedural powers to the presiding officer, the President of the Senate, who has no substantial voice in the determinations of the two Houses as to the validity or invalidity of Presidential electoral votes.

To properly address legislative reform initiatives proposed to amend the *Electoral Count Act*, it is convenient to summarize how the vote-counting operations unfolded on January 6th and 7th, 2021. Notably, after the incumbent Vice-President and presiding officer Mike Pence had explicitly denied that he had any unilateral authority over the handling of the process, the counting procedure was first suspended to allow each House to vote on an objection raised on the electoral votes from Arizona (carried by Biden with a +0.3% margin and equal to less than 11,000 votes). During the discussion over the votes from Arizona, the Capitol was stormed by protesters, and operations could only resume after order was restored to Capitol Hill. After the objection was discarded by both the Senate (6-93) and the House (131-303), the counting resumed. Objections raised by Republican representatives to the certification of votes from Georgia (+0.23% margin and less than 12,000 votes), Michigan and Nevada were not admitted because no Republican senator signed the objections. The votes from Pennsylvania were instead the object of a valid objection triggering a debate and a vote from both Houses, which rejected the objection during the night between January 6th and 7th (7-92 in the Senate and 138-282 in the House). An objection to the certification of votes from Wisconsin (+0.63% margin and 20,000 votes) was equally discarded without being put to the vote because not one single senator signed it.

[55] S.A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, in 56 *Fla. L. Rev.* 4, 541 (2004), 645.

The events of January 6th and 7th, 2021, have definitely shaped the proposals introduced in Congress at the beginning of autumn 2022. The first was the so-called *Presidential Election Reform Act*,[56] which was swiftly passed in the House with a wider, but still limited, majority on September 21st, 2022 (229-203). The main contents of this bill were concerned with the possibility of extending the time frame for the casting of ballots for Presidential elections, the repeal of the provision concerning the safe harbor rule from federal legislation, the establishment of specific deadlines for the certification by governors and the casting of ballots by Presidential electors, together with a set of procedural innovations concerning the certification and counting of the votes by Congress.

The sponsors of this bill were primarily concerned with allowing for the extension of the time to vote for Presidential elections in case catastrophic events occurred in the state's territory. This applies to situations where a substantial ratio of the electorate is prevented from casting their ballots. More specifically, the sum of the number of excluded voters and of the ballots cast but that cannot be counted due to the natural disaster must be sufficient for a candidate to win at least a Presidential elector (§4). Actions pursuant to this provision, filed no later than the day following Election Day, would be adjudicated by a three-judge court, with the possibility of direct appeal to the Supreme Court. The maximum extension the judge could grant was five days after Election Day. Catastrophic events justifying the extension of the date to cast ballots include major natural disasters, acts of terrorism, widespread power outages or other analogue events.[57]

The second significant innovation of the *Presidential Election Reform Act* would be the full repeal of the safe harbor rule,[58] combined with the obligation for governors to certify the appointment of electors by December 14th. The negligence of governors or the alleged certification of incorrect electoral votes would be a justiciable cause of action in court for Presidential candidates, and the competent federal court finding in favour of the appellant would have to impose the appropriate remedies on the governor or another state official so that the certificates of votes issued are compliant with the law (§§6-7). Respectively, the meeting of electors would be held on December 23rd or, if it is not a weekday, on the closest date between the day before or after (§8).

The other relevant provisions of the bill concern the counting of votes by Congress (§10). Besides directing Congress to jointly convene for counting electoral votes on January 6th and mandating that the meeting must not be interrupted until the count has been completed, the draft

[56] H.R.8873 - *Presidential Election Reform Act (An Act to amend title 3, United States Code, to reform the process for the counting of electoral votes, and for other purposes)*.
[57] The issue is discussed at length by A. Craig, *Lofgren, Cheney Introduce Bill to Reform the Electoral Count Act*, *Cato Institute*, September 20, 2022, https://www.cato.org/blog/lofgren-cheney-introduce-bill-reform-electoral-count-act (last visited Dec. 13, 2022).
[58] On the desirability of the repeal of the provision, see A. Craig, *ECA Reform Should Scrap the Failed "Safe Harbor" Provision*, *Cato Institute*, June 10, 2022, https://www.cato.org/blog/eca-reform-should-scrap-failed-safe-harbor-provision (last visited Dec. 13, 2022).

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legislation explicitly qualifies the role of the presiding officer as a ministerial one, clearly divesting him or her of any authority to resolve disputes concerning the electors chosen by a state. It is telling that one of the breakthrough changes brought about by this legislation would be a considerable increase in the threshold to raise a valid objection to be debated before the House and the Senate. Whereas the original legal framework only required the signature of a single representative and a single senator, the revised text would require the signatures of one-third of the House of Representatives and one-third of the members of the Senate. Indeed, this would represent a formidable barrier to objections to the acceptance of slates of electors. Concerns about the easily accessible threshold to object to votes certified by a state, which may be considered a legitimate reason for preoccupation over the smooth running of the procedure of vote counting in Congress, may appear a little misplaced. As illustrated above, even in the context of a very controversial election cycle, such as that of 2020, objections were validly raised regarding the votes of only two states. Both were easily defeated, especially in the Senate.

In pursuance of the same ideal that the vote counting procedure shall proceed expeditiously, the bill provides for very limited possibilities to propose and adopt motions of recess, which may only extend recess to 10 o'clock on the following day and are completely barred if the session has not yet concluded after three days. These procedural arrangements are coupled with an enhanced rationalisation of the time allocated to debate motions or objections, which also depends on the duration of the joint session of Congress.

Regarding the possibility of raising objections to certified votes, the bill would restrict the admissible grounds to five causes of action: 1) the electoral votes are associated with a legal entity that is not a state (except the District of Columbia); 2) the state has submitted more votes than those constitutionally granted to it, which shall therefore not be counted; 3) the state electors are constitutionally ineligible for having been impeached or disqualified from office for rebellion; 4) one or more votes by state electors have been cast for a Presidential candidate that is constitutionally ineligible for having been impeached, for failing to meet the subjective requirements for election, for having been disqualified from office for rebellion or for being barred by the term limits provided for under the XXII Amendment; and 5) existence of procedural violations in the casting of electoral votes. In case objections are approved, and electoral votes are rejected, the total number of Presidential electors is reduced proportionately if the objection pertains to 1), 2), or 3) above. In contrast, it is not altered when the objection approved relates to the situations provided for in 4) and 5). The bill also encompasses judicial remedies for competent public officials' negligence in tabulating electoral results certified by state authorities (§11), together with a severability clause to protect the Act against the disappearance of all its effects in case one or more provisions were declared unconstitutional (§12).

While the bill was still before the Senate, a more promising legislative initiative was put forward by several sponsors, including sixteen Republican senators. Taking this into account, since it was introduced in the Senate, the *Electoral Count Reform and Presidential Transition*

Improvement Act of 2022[59] looked more promising than the competing bill passed by the House in September. Although the Senate bill was placed on the Senate's General Calendar in mid-October, it was only passed during the lame-duck session in the last few days before Congress went into recess and as a part of a broader spending bill.[60]

By comparing this bill with the one mentioned above, it is convenient to point out that it fails to provide for any extension of the date to cast a ballot beyond Election Day, discarding the concerns that involved the exception concerning catastrophic events in the House bill. Moreover, the text approved does not dispose of the safe harbor provision, which is retained and complemented by the express identification of the executive authority of each state as the governor, unless it was possible to refer to state legislation already in force before Election Day that vests the duties of certification of the votes in another state institution (§104).

The text also encompasses specific directions as to the balloting of electors, which must be scheduled for the first Tuesday (no longer Monday) after the second Wednesday of December (i.e. not before December 14th and not after December 20th), granting state authorities a sufficiently wide time frame to sort out all election-related issues that may arise in the aftermath of Election Day (§106).

Regarding the concerns associated with the vote-counting process by Congress, the provisions of the reform bill mirror, to some extent, the text of the House bill. For example, by precisely circumscribing the role of the President of the Senate in the counting process and excluding any recognition attributed to them for any discretionary power. In addition, the threshold to object would also be raised in comparison to the current threshold, which is very low, albeit only to one-fifth of the members of each House, instead of the very high threshold of one-third provided for by the House bill. Moreover, the text proposes only two possible grounds for objecting to the acceptance of votes duly certified by a state authority. Firstly, the votes are either not lawfully certified or, secondly, they were not lawfully given. Specific rules are also dictated for tabulation operations, providing that only the votes of electors appointed and duly certified may be counted and, if regularly given, cannot be rejected, except for a concurring vote of the two Houses. Measures rationalizing the debate over the joint session of Congress (§110) and a severability clause (§111) are also encompassed in the text of the Senate bill.

The second part of the legislative reform passed within the appropriations bill is more concerned with the so-called 'transition period' and, if passed, would be known as the *Presidential Transition Improvement Act*. While indeed relevant for a transition of powers that is correctly carried out, the provisions of the second part of the text, which mainly revolve around the rules of concession to identify an apparent successful

[59] S.4573 - *Electoral Count Reform and Presidential Transition Improvement Act of 2022* (*An act to amend title 3, United States Code, to reform the Electoral Count Act, and to amend the Presidential Transition Act of 1963 to provide clear guidelines for when and to whom resources are provided by the Administrator of General Services for use in connection with the preparations for the assumption of official duties as President or Vice President*).
[60] Division P, *Consolidated Appropriations Act, 2023*, Pub. L. 117–328, 136 Stat. 4459 (2022).

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candidate for the purpose of the application of the transitional period framework, will not be explored in depth in this article, as they do not directly pertain to either voter suppression or voter subversion.

Based on the executive actions, the legislative proposals and reforms that have been addressed in the second and third paragraphs, the last paragraph will try to elaborate on some of the most pressing needs in US election law and adjudication, highlighting the risks underlying voter suppression and election subversion, especially regarding a precautionary intent over the management of the 2024 Presidential elections.

4. High expectations result in big disappointments: the miserable destiny of election law reform in the age of political polarization

A comprehensive assessment of the policy measures promoted in the first two years of the Biden administration necessarily has to account for a variety of factors that exceed a mere acknowledgment of the favourable circumstances of unified government and properly contextualize the legislative initiatives in the nuanced system of checks and balances that is a genetic feature of the US system of government. In this regard, it is relevant to consider how these mechanisms of control over the tyranny of the majority operate on several levels, both within the legislative process, as exemplified by the traditional filibustering rules that have so far resisted efforts to modify procedural rules in parallel to what was done regarding judicial nominations,[61] and outside the political process, i.e. through judicial review of legislation.

Voting rights and election legislation have been the focus of fierce controversy for decades and touch upon the very essence of a political community, displaying the different degrees of commitment to realize political equality by incumbents, who may also give in to the temptations of entrenching themselves - or the social or political group they belong to - in power. Moreover, the regulatory framework of elections under the Constitution appears, at least *prima facie*, to defer to the states' determinations concerning voting qualifications and election procedures. However, this deference might be mitigated by the pre-emption of federal legislation over state legislation in accordance with the Congressional Elections clause and by the limits to discrimination in access to ballots and effective participation in political processes pursuant to the Equal Protection clause of the XIV Amendment and the XV Amendment.

Constitutional guarantees for political equality and access to ballots are insufficient, however, if they are not entrenched by adequate mechanisms provided for in federal legislation. Over the decades, Congress has thus adopted remedial legislation to tackle perceived shortcomings in the regulation of elections by states. By relying on the Congressional Elections clause, Congress first adopted the *Apportionment Act of 1842*,[62] providing for the election of representatives to the House through multiple

[61] G.J. Wawro, E. Schickler, *Reid's Rules: Filibusters, the Nuclear Option, and Path Dependence in the US Senate*, in 43 *Legis. Stud. Q.* 4, 619 (2018).
[62] Act of June 25, 1842, ch. 47, 5 Stat. 491.

districts instead of at large, complemented by the *Apportionment Act of 1911*,[63] establishing the number of members of the House of Representatives at 435. Further relevant pieces of federal legislation in this regard are those concerning campaign financing[64] and voter registration[65] that have all been passed throughout the twentieth and beginning of the twenty-first century. The enforcement clause of the XV Amendment was dormant until the landmark approval of the *Voting Rights Act of 1965*, which has since been renewed several times (the last time being in 2006), always backed by broad and bipartisan Congressional majorities.[66]

Yet, the increasing polarization poisoning the American political debate, which turns any attempt by an elected official to negotiate with the opposing party in order to strike a reasonable compromise over subject matters that are allegedly not particularly divisive into radioactive material, casts serious doubts over the feasibility of similar bipartisan interventions of Congress to ensure that all American citizens enjoy their right to vote to the fullest extent, without being invidiously discriminated against by state authorities. In this regard, the Supreme Court's approach to election litigation appears ill-suited to slowing down this widespread trend, particularly in light of the incumbent Justices' apparent preference for an interpretation of statutory and constitutional provisions mostly imbalanced towards the protection of the prerogatives of the states *vis-à-vis* the interests of the federation.[67] These underlying risks might materialize with tragic consequences in the current Supreme Court term, as the Justices could potentially deliver a death blow to the already feeble barriers against partisan gerrymandering erected by state constitutions and courts (*Moore v. Harper*)[68] and simultaneously weaken the protection against racial gerrymandering pursuant to §2 of the VRA, by dismantling the obligation to create majority-minority districts consolidated within the *Gingles* framework (*Merrill v. Milligan*).[69]

[63] Act of Aug. 8, 1911, 37 Stat. 13.
[64] *Tillman Act* (Act of January 26, 1907, ch. 420, 34 Stat. 864); *Federal Corrupt Practices Act* (Act of June 25, 1910, ch. 392, 36 Stat. 822); *Federal Elections Campaign Act*, Pub. L. 92-225, 86 Stat. 3 (1972); *Bipartisan Campaign Reform Act*, Pub. L. 107-155, 116 Stat. 81 (2002).
[65] *National Voter Registration Act of 1993*, Pub. L. 103-31, 107 Stat. 77; *Help America Vote Act of 2002*, Pub. L. 107-252, 116 Stat. 1666.
[66] The *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* passed the House 390-33 and was adopted unanimously by the Senate (98-0).
[67] C.M. Lamb, J.R. Neiheisel, *Constitutional Landmarks. Supreme Court Decisions on Separation of Powers, Federalism, and Economic Rights*, Cham, 2021, 184-185.
[68] A. Howe, *Court seems unwilling to embrace broad version of "independent state legislature" theory*, *SCOTUSblog* (Dec. 7, 2022, 5:22 PM), https://www.scotusblog.com/2022/12/court-seems-unwilling-to-embrace-broad-version-of-independent-state-legislature-theory/ (last visited Dec. 13, 2022).
[69] A. Howe, *Conservative justices seem poised to uphold Alabama's redistricting plan in Voting Rights Act challenge*, *SCOTUSblog* (Oct. 4, 2022, 5:19 PM), https://www.scotusblog.com/2022/10/conservative-justices-seem-poised-to-uphold-alabamas-redistricting-plan-in-voting-rights-act-challenge/ (last visited Dec. 13, 2022).

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Facing these potentially deadly threats, Congress seems insufficiently equipped to ensure a full enfranchisement of the citizenry, casting worrisome shadows over the future expiration date of the last reauthorization of the *Voting Rights Act* (2031). If no good news seems to be on the horizon for voting rights advocates in the next couple of years, the limited consensus reached over the amendments to the *Electoral Count Act* (provided for in the omnibus spending bill passed in the last few days of December 2022) to prevent unlawful election subversion may be a good indicator to "build back better" and adopt a more cooperative attitude across the aisles of Capitol Hill, even though legislative protections against voter suppression appear ill-fated for the foreseeable future.

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