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Divided Suffrage.

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The biggest constitutional mistake? As the recent wave of constitution-making in Eastern Europe suggests, future Solons and Lycurguses aren't likely to be very interested in quibbling over the details of a Bill of Rights. Instead, the critical question is how to structure democratic elections. And on this point, the most misguided provision in the U.S. Constitution is not the Electoral College, which remains theoretically mystifying but hasn't bothered anyone for more than a century. Far worse are sections 2 and 4 of Article I, and (if I'm allowed more than one villain) section 2 of the Fourteenth Amendment, which divide responsibility for defining the nature and scope of suffrage between Congress and the states. This unfortunate compromise, more than any other, is responsible for all the most traumatic electoral crises since Reconstruction.

"To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention," Madison explained apologetically in Federalist 52. Allowing the states to restrict the suffrage in different ways was the only politically feasible compromise, because "it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution."

But of course, abridging federal constitutional rights is precisely what the states proceeded to do in their decisions restricting the suffrage in the nineteenth century and manipulating electoral districts in the twentieth. Maybe there was some logic for allowing states to exclude broad classes of voters in 1789, when only propertied, educated citizens were thought capable of casting informed votes; but in an age when uniform as well as universal suffrage has been embraced as a national ideal, it makes little sense to tolerate a patchwork of inconsistent and parochial state restrictions.

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More fundamentally, the constitutional tragedy of the post-Reconstruction era—the subversion of African American suffrage by the states—could have been avoided if the Reconstruction Republicans had granted Congress plenary control over the franchise, as Senator Jacob Howard and Congressman George Boutwell proposed. Imagine how the racial politics of the next century might have been transformed if the Committee on Reconstruction had endorsed Boutwell's draft of the Fourteenth Amendment ("Congress shall have the power to abolish any distinction in the exercise of the elective franchise in any State, which by law, regulation or usage may exist therein"), or Howard's draft ("Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States in each State the same political and elective rights and privileges. . . .").[1] Instead, by refusing to displace the states' control over the franchise, and by compounding the error with section 2 of the Fourteenth Amendment, the Reconstruction Congress paved the way for the nullification of the Fifteenth Amendment in the 1890s, as defiant states restricted black suffrage with literacy tests, grandfather clauses, dual registration requirements, and so forth.

Similarly, the great redistricting crises of the twentieth century—malapportionment, partisan gerrymandering, and the confusion over race-conscious districting—might have been avoided or moderated if States had been stripped of their powers to draw congressional districts. The pressures on redistricting were not apparent until the rapid population growth after 1850, when the contrast between city and country became increasingly dramatic. But gross malapportionment might have been less likely to persist for more than a century if landed interests hadn't been free to lobby self-interested state legislators, with the results that Hamilton predicted in Federalist 60. And, the implementation of the Voting Rights Act might have been less tortured if self-interested state legislators hadn't been free to balance the irreconcilable goals of incumbency protection and proportionate racial representation with the inflexible requirements of population based districting.

The solution for future constitution makers? Giving Congress exclusive control over the franchise wouldn't entirely solve the problem, since the siren calls of self-dealing and incumbency protection would still be hard to resist. What's needed is to tie

1. Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 54-55 (Colum. U. Press, 1914).

Ulysses to the mast with some kind of pre-commitment strategy. Perhaps the solution would be to delegate power over suffrage and districting to an administrative body that is less vulnerable to partisan interests. One model is the independent commission responsible for making recommendations to Congress about military base closings, whose recommendations must be accepted or rejected as a package. Another is the Federal Reapportionment Act of 1929, which charged the President with reporting to Congress the state-by-state results of the decennial census, together with strictly a numerical apportionment of representatives, and delegated responsibility for certifying the apportionment to the clerk of the House of Representatives.[2]

Should the national election laws be constitutionalized? "It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been applicable to every probable change in the situation of the country," Hamilton said in Federalist 59. But why not? Today, many countries have inserted election laws into their constitutions, including Australia, Belgium, Canada, Greece, India, Ireland, Italy, Mexico, the Netherlands, Portugal, Sweden, and Switzerland.[3] The best argument against constitutionalizing the national election laws is that the national legislature should be free to experiment with proportional and mixed representation systems; and experimentation is more difficult once the laws are entrenched. So perhaps the institutional arrangements for adopting and amending election laws, but not the laws themselves, should be specified in the Constitution. Blue Ribbon commissions, fast track legislation—there are plenty of possibilities. Just make sure to exclude the states as ruthlessly as possible.

2. See, e.g., Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex. L. Rev. 1643, 1665 (1993).

3. Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. Chi. L. Rev. 595, 622 & n. 51 (1991).