

2016

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Recommended Citation

Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 Brook. L. Rev. (2016).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol81/iss2/1>

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Unconstitutional but Entrenched

PUTTING UOCAVA AND VOTING RIGHTS FOR PERMANENT EXPATRIATES ON A SOUND CONSTITUTIONAL FOOTING

Brian C. Kalt[†]

INTRODUCTION

Eligible voters who have left the United States permanently have the right to vote in federal elections as though they still live at their last stateside address. They need not be residents of their former states, be eligible to vote in state or local elections, or pay any state or local taxes. Federal law—the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)¹—forces states to let these former residents vote for the President, the Senate, and the House this way.

There are several constitutional problems with all of this. Congress heard about many of these problems in the hearings and debates that led to the passage of OCVRA (UOCAVA's predecessor, which first enfranchised permanent expatriates this way) in 1975.² While supporting other parts of OCVRA, the Department of Justice and some members of Congress presented an aggressive constitutional case against forcing states to let permanent expatriates vote.³ OCVRA's proponents responded with constitutional arguments of their own,⁴ but the bill's passage

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¹ Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 52 U.S.C.A. §§ 20301-20310 (West 2015)).

² Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976).

³ See *infra* Section II.A.2.

⁴ See *infra* Section II.A.1.

seems to have rested on something else: a view that Congress should leave the resolution of such constitutional questions solely to the courts, especially given that litigation over the enfranchisement of permanent expatriates seemed inevitable.⁵

Nearly 40 years have passed without any such litigation. When UOCAVA replaced OCVRA in 1986, no one in Congress revoiced the constitutional objections. Millions of votes have been cast under OCVRA and UOCAVA in federal elections, including many by the subset of voters—permanent expatriates—whose inclusion in the law is so constitutionally problematic. There seems to be little prospect of anyone going to court now to challenge a law under which so many people have been enjoying the right to vote for so long. Politically, if not legally, UOCAVA is entrenched.

Nevertheless, the law's constitutional problems remain.⁶ First, UOCAVA flouts the Constitution's clear standards for voter eligibility in congressional elections. Second, UOCAVA is not an appropriate use of Congress's Fourteenth Amendment enforcement power, especially in light of recent Supreme Court rulings. Third, it causes problems with proper congressional apportionment. Fourth, UOCAVA sits in uneasy proximity to the continued disenfranchisement of U.S. citizens who live in Washington, D.C., and the territories. Indeed, citizens who move from a state to one of these places lose their right to vote in federal elections (other than for President in D.C.).⁷ If U.S.

⁵ See *infra* notes 47-51 and accompanying text.

⁶ The first and most comprehensive constitutional attack came soon after OCVRA passed, in a law review article by a staff assistant to Representative Charles Wiggins, the primary congressional opponent of the law. See generally David L. Shurtz, Comment, *Eliminating State Bona Fide Residence Requirements: The Constitutional Question*, 1 INT'L SCH. L. REV. 131 (1976). Alan Gura's attack on the law's constitutionality is also fairly broad and presses many of the same points as Part II of this article. See generally Alan Gura, *Ex-Patriates and Patriots: A Constitutional Examination of the Uniformed and Overseas Citizens Absentee Voting Act*, 6 TEX. REV. L. & POL. 179 (2001). Among others questioning UOCAVA's constitutionality are *Romeu v. Cohen*, 265 F.3d 118, 134 n.7 (2d Cir. 2001) (Walker, J., concurring) (stating that UOCAVA "appears constitutionally infirm"); *District of Columbia House Voting Rights Act of 2007: Hearing on H.R. 1433 Before the H. Comm. on the Judiciary*, 110th Cong. 64 (2007) [hereinafter *Hearing on D.C. House Voting Rights Act*] (statement of Jonathan Turley, Professor of Law, George Washington University Law School) ("UOCAVA has never been reviewed by the Supreme Court and some legitimate questions still remain about its constitutionality."); ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 177 & 257 n.44 (2006) (saying that UOCAVA's constitutionality is "doubtful"); Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 242 (2001) (stating that UOCAVA is "of dubious constitutionality").

⁷ See U.S. CONST. amend. XXIII, § 1. Residents of Washington, D.C., do get to vote for a nonvoting delegate to the House of Representatives, as do residents of American Samoa (who are U.S. nationals, but not U.S. citizens), Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. See Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward A*

citizens who leave the country permanently have voting rights that are so sacrosanct, it is odd that these other U.S. citizens, living on U.S. soil, do not.⁸

OCVRA and UOCAVA's constitutional problems are not mere technicalities, and they should be fixed rather than ignored. This need for reform is particularly important because of the constitutional principles that UOCAVA breaches: limited federal power, federalism, and equality. But citizens' ability to vote is important, too. OCVRA enfranchised permanent expatriates as part of a larger, decades-long struggle to strengthen the core of American constitutional democracy—the spirit that animated OCVRA was a worthy and legitimate one. The proper response to UOCAVA's constitutional problems, and the one that this article ultimately seeks, is not to disenfranchise permanent expatriates, but rather to find a better, more constitutionally suitable way to enfranchise them.

Only Congress can put permanent expatriates' voting rights on a sound constitutional footing, doing justice both to these citizens and to the Constitution. Part I of this article provides some history and context on overseas voting. Part II argues that UOCAVA's enfranchisement of permanent expatriates⁹ is unconstitutional. Part III explores the reasons why that legal argument has never seen the inside of a courtroom—mainly that private plaintiffs have justiciability problems, and state plaintiffs are hemmed in by the political unpopularity of litigating to disenfranchise these voters. This absence of litigation has implications for lawmakers confronted with constitutionally questionable legislation in the future who might otherwise assume they can simply leave it to the courts to settle constitutional questions.

Mindful of how entrenched UOCAVA is, Part IV concludes by considering some suggestions for reformulating UOCAVA to avoid constitutional problems while duly respecting permanent expatriates' voting rights. Although there are multiple options that would be effective if enacted, UOCAVA's entrenchment means that none of them would be easy to pass. The most

Conversational Understanding of American Democracy, 94 NW. L. REV. 503, 531 & nn.115, 118 (2000). Citizens who move to the Northern Mariana Islands do actually get to vote like those who leave the United States entirely. See *infra* note 243.

⁸ This is the only aspect of UOCAVA's constitutionality that has been litigated, though not in a way that validated UOCAVA's enfranchisement of permanent expatriates. See *infra* Section II.B.4.

⁹ UOCAVA also assists voters who are overseas only temporarily but maintain a bona fide stateside residence, making it easier for them to vote absentee; this article does not question the constitutionality of that part of the law.

plausible solution uses the opportunity for constitutional reform created by the National Popular Vote Interstate Compact (NPVIC). As its name suggests, the NPVIC would use a national popular vote to determine presidential elections, a prospect that could spur a useful dialogue about expanding “national” to include *all* citizens—not just permanent expatriates, but also residents of U.S. territories—without relying on UOCAVA’s awkward and unconstitutional structure.

I. THE CONTEXT OF FEDERAL OVERSEAS-VOTING LEGISLATION

A. *The Demographics of Overseas Voters*

Millions of American citizens live abroad, though no one knows their precise number.¹⁰ However many millions there are, though, only a few hundred thousand of them vote.¹¹ The decennial census does not attempt to count most of those without a current stateside address, and such people usually are not included in the state population figures that are used for apportioning seats in the U.S. House and votes in the Electoral College.¹²

The federal government does keep track of the overseas population of military personnel and federal employees and their dependents (a group that this article will refer to as “public expatriates”). The 2010 Census counted over a million Americans working abroad for the military or the federal government or living with a family member who did.¹³ They are included in the census, and thus in congressional apportionment,¹⁴ even though many of them do not know when they will return to the United States or where they will live once they do. But the number of

¹⁰ See FORS MARSH GROUP LLC, A MODEL FOR DEVELOPING ESTIMATES OF U.S. CITIZENS ABROAD 63 (2013), https://www.fvap.gov/uploads/FVAP/Reports/OCE_Technical_Report.pdf [<http://perma.cc/BV8J-W74Z>] (using statistical model to estimate 2.6 million to 7.8 million American citizens living abroad, with mean estimate of 4.3 million); AMANDA KLEKOWSKI VON KOPPFELFELS, MIGRANTS OR EXPATRIATES?: AMERICANS IN EUROPE 183 (2014) (noting estimates ranging from 2.2 million to 7.6 million).

¹¹ Just over 600,000 ballots were cast by military and overseas voters in 2012. See U.S. ELECTION ASSISTANCE COMM’N, UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: SURVEY FINDINGS, JULY 2013, at 21 (2013), http://www.eac.gov/assets/1/Documents/508compliant_Main_91_p.pdf [<http://perma.cc/NSH8-BVLH>]. Only about 46% of these ballots were cast by nonmilitary expatriates, and the military-voter numbers are not broken down between those stationed overseas versus domestically. See *id.*

¹² See KAREN CROOK & SHIRLEY DRUETTO, 2010 CENSUS FEDERALLY AFFILIATED OVERSEAS COUNT OPERATION ASSESSMENT REPORT 1, 5 (2012), https://www.census.gov/2010census/pdf/2010_Census_Federally_Affiliated_Overseas_Count_Operation_Assessment.pdf [<http://perma.cc/66UA-WV5Q>]; KLEKOWSKI VON KOPPFELFELS, *supra* note 10, at 251 (discussing census’s treatment of expatriates).

¹³ See CROOK & DRUETTO, *supra* note 12, at 33.

¹⁴ See KLEKOWSKI VON KOPPFELFELS, *supra* note 10, at 251-52.

expatriates who are not connected with the military or federal government (“private expatriates”) is probably larger.¹⁵ The Census Bureau has experimented with ways of counting private expatriates, without much success.¹⁶

A fundamental problem with counting overseas citizens is that there are many ways to classify them. Someone could qualify as being overseas on the census’s counting day by virtue of having short-term employment in another country or a foreign vacation home, all while strongly maintaining a domicile in the states and paying both local and federal taxes. A more restrictive classification might include only those whose formal domicile is abroad and who pay only federal taxes;¹⁷ such citizens might intend to return to the United States but not know precisely where they will reside.¹⁸ More restrictive still would be including only those citizens with a foreign domicile who intend never to return to the United States. The total number of “overseas citizens” varies greatly depending on the scope of the definition.

This article is not concerned with citizens who maintain a domicile stateside and use UOCAVA simply to vote absentee. UOCAVA’s constitutional problems arise from the latter two, more restrictive categories of U.S. citizens: voting-age Americans who are domiciled overseas indefinitely or permanently and have the right to vote in federal elections only because UOCAVA forces states to treat them as though they lived at their last U.S. address.¹⁹ Such citizens are what this article means by “permanent expatriates.” They are only a subset of the millions of U.S. citizens overseas, though again, how large a subset is not precisely known.

Voting from overseas is more logistically complex than voting in person domestically. Even after the passage of

¹⁵ See *id.* at 183 (indicating a total expatriate population of well over two million).

¹⁶ See *id.* at 253.

¹⁷ Unusually in the world, American federal income taxation is based on citizenship rather than residence. Americans overseas are thus subject to federal income tax or (in the case of those with no tax liability, often because of credit for foreign taxes paid) are at least required to file an annual return with the IRS. See *id.* at 261-64.

¹⁸ See *Voting Rights for U.S. Citizens Residing Abroad: Hearings on H.R. 3211 Before Subcomm. on Elections of the H. Comm. on H. Admin.*, 94th Cong. 186 (1975) [hereinafter *House Hearings*] (comments of Sargent Shriver, Chairman, Ambassadors Comm. for Voting by Americans Overseas) (noting existence of such people).

¹⁹ See *id.* at 257 (testimony of Mary C. Lawton, Deputy Assistant Att’y Gen.) (conceding constitutionality of absentee-ballot provisions while challenging constitutionality of provisions requiring relaxed residency standards); H.R. REP. NO. 94-649, at 15 n.5 (1975) (minority views) (noting lack of constitutional objections by OCVR’s opponents with regard to general provisions on absentee voting).

OCVRA and UOCAVA, many overseas voters—particularly those not affiliated with the federal government—have tried to vote but failed, and many do not even try.²⁰ Congress has paid a lot of attention to these difficulties and passed multiple pieces of legislation in its attempts to make it easier for these overseas citizens to vote successfully.²¹ Perhaps more significantly, the Internet holds tremendous potential for further improving overseas voting and makes it easy to imagine a day when interested voters overseas will be able to vote as easily as interested voters at home.²² Increasing the number of overseas voters through the use of advanced technology would increase the practical impact of the issues identified by this article and would make UOCAVA's constitutional deficiencies harder to ignore.

B. The History of Federal Overseas Voting Law

Overseas voting has deep roots. Individual states instituted absentee voting for soldiers in the field during the Civil War, and even more states did so during World War I.²³ When this proved fairly workable, civilian absentee voting followed by analogy.²⁴

The federal government first stepped in during World War II. In 1942, Congress passed a law that guaranteed soldiers a vote in federal elections during wartime—even if they were overseas, had not yet registered, and had not paid their poll tax—so long as they were otherwise qualified to vote in their state.²⁵ The law's mandatory nature was of questionable constitutionality (the

²⁰ See FED. VOTING ASSISTANCE PROGRAM, THE FEDERAL VOTING ASSISTANCE PROGRAM: FOURTEENTH REPORT 11 (1993), <http://www.fvap.gov/uploads/FVAP/Reports/14threport.pdf> [<http://perma.cc/L953-3K77>].

²¹ The two main updates since OCVRA and UOCAVA have been the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, and the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, §§ 575-589, 123 Stat. 2190, 2318-35 (2009). For a list of others and a summary of these laws' provisions, see KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 2-6 (2015). Because of the difficulty in calculating the denominator—the voting-age overseas population—it is difficult to come up with any sort of precise participation figures. See FED. VOTING ASSISTANCE PROGRAM, 2012 POST-ELECTION REPORT TO CONGRESS 15, 60 (2013), <http://www.fvap.gov/uploads/FVAP/Reports/2012report.pdf> [<http://perma.cc/AZ74-GQCS>].

²² The MOVE Act requires states to establish procedures for electronic transmission of ballots, which is likely more reliable and definitely faster than mailing them from overseas. See 52 U.S.C.A. § 20302(a)(6) (West 2015). Actual online voting is still in the future. See COLEMAN, *supra* note 21, at 10 (describing initial efforts).

²³ See ALEXANDER KEYSSAR, THE RIGHT TO VOTE 104, 150 (2000).

²⁴ See *id.* at 151.

²⁵ Act of Sept. 16, 1942, Pub. L. No. 77-712, 56 Stat. 753.

major concern was federalism), but its validity was never tested. The states never actually obeyed the law; it was softened in 1944 to make it optional for the states, and it expired with the end of the war in 1945.²⁶

In 1955, Congress expanded the law to apply in peacetime, to cover “civilian service” employees (like the Red Cross, merchant marines, and nonmilitary federal employees), and to include spouses and dependents.²⁷ The law still only protected residents who were qualified to vote but were unable to do so because they were not physically present; it expanded access but not eligibility.

Significantly, the 1955 law also only *suggested* that states enfranchise these voters and did not *require* it as the 1942 law had.²⁸ As a House committee report put it, the old law’s compulsory character raised constitutional questions that had not been resolved; by making the law optional, this problem would go away as the states regained “their historic privilege of determining certain voting qualifications.”²⁹ In 1955, Congress still took these constitutional issues seriously.

Despite the law’s optional character, every state soon provided a way for overseas soldiers to vote, and most states adopted the federal suggestion to include other public expatriates, such as soldiers’ dependents and federal employees and their dependents.³⁰ Most states, however, did not take it upon themselves to extend the courtesy to private expatriates.³¹ In response, Congress expanded the law again in 1968, suggesting to states that they cover those in the private sector who were

²⁶ See Act of Apr. 1, 1944, Pub. L. No. 78-277, 58 Stat. 136 (changing the 1942 law’s mandatory procedures and forms to be merely recommendatory); R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem* 19-20 (Caltech/MIT Voting Tech. Project, Working Paper No. 53, 2007), http://www.vote.caltech.edu/sites/default/files/vtp_wp53.pdf [<http://perma.cc/6L6P-VDQX>] (detailing the 1944 law’s sensitivity to states’ rights); DEPT OF DEFENSE, THE FEDERAL VOTING ASSISTANCE PROGRAM: ELEVENTH REPORT 2 (1977), <http://www.fvap.gov/uploads/FVAP/Reports/11threport.pdf> [<http://perma.cc/LZ94-ZNY6>] (describing law’s lack of impact or effect). The law passed three weeks before the 1942 election, so it was too late to have any effect. Cf. H.R. REP. NO. 84-60, at 2 (1955) (“The constitutionality of this fiat was never tested . . .”).

²⁷ Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584.

²⁸ *Id.* § 101, 69 Stat. at 584 (“The Congress hereby expresses itself as favoring, and recommends that . . .”).

²⁹ H.R. REP. NO. 84-60, at 2; see Am. Political Sci. Ass’n Special Comm. On Serv. Voting, *Findings and Recommendations of the Special Committee on Service Voting*, 46 AM. POL. SCI. REV. 512, 522 (1952) (expressing concern about constitutional issues).

³⁰ See H.R. REP. NO. 90-1385, at 2 (1968) (“Each State, Commonwealth, and Territory now provides for absentee voting by military personnel. . . . Over one-half of the States have met all of the recommendations of the Congress in the 1955 statute.”).

³¹ See *id.* at 2-3 (noting state practices in response to the 1955 law).

overseas temporarily.³² Most states followed along in some manner, but there remained a large discrepancy between the treatment of governmental and nongovernmental workers.³³

At this point, there was little potential for constitutional controversy because Congress had stayed sensitive to the states' "historic privilege." But in 1975, Congress passed the Overseas Citizens Voting Rights Act (OCVRA),³⁴ granting "[e]ach citizen residing outside of the United States" the right to vote in federal elections as if he still lived at his last American address, even if "his intent to return to such State or district may be uncertain."³⁵ The new statute thus explicitly included permanent expatriates and required (as opposed to suggested) that states allow them to vote in federal elections.³⁶

OCVRA altered the landscape dramatically. Prior to its enactment, Congress only sought to help residents vote³⁷ when they were otherwise qualified but happened to be absent. OCVRA did expand such absentee voting significantly,³⁸ but it went far beyond this and actually changed the state-mandated qualifications for voting. Now, a nonresident of a state who was *not* otherwise qualified to vote could vote anyway because Congress forced the states to include anyone who "*could have* met all qualifications" had he or she not moved away.³⁹ In effect, Congress was making states treat these nonresidents as if they were still partial citizens.⁴⁰ This was just about federal voting; Congress steered clear of granting a right to vote in state and local elections, in contrast to previous legislation, which did not make this distinction.⁴¹

³² Act of June 18, 1968, Pub. L. No. 90-343, 82 Stat. 180.

³³ See *House Hearings, supra* note 18, at 276-80 (statement of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting) (providing raw data on state treatment of public and private expatriates in 1975); H.R. REP. NO. 94-649, at 3 (1975) (noting limited compliance with the 1968 law's recommendations).

³⁴ Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976).

³⁵ *Id.* §§ 3-4, 89 Stat. at 1142-43.

³⁶ *Id.* § 4, 89 Stat. at 1143 (requiring that "[e]ach State shall provide"). Congress made it a felony for a state official to violate these new voting rights. See *id.* § 5, 89 Stat. at 1143.

³⁷ This article refers to voting without much discussion of registration, but it is worth mentioning that the right to register from abroad is separate from the right to vote from abroad, and OCVRA specifically protects both. Cf. H.R. REP. NO. 90-1385, at 2-3 (1968) (noting how strict state registration requirements effectively disenfranchised expatriates in many states).

³⁸ Overseas Citizens Voting Rights Act § 4, 89 Stat. at 1143.

³⁹ *Id.* § 3, 89 Stat. at 1142 (emphasis added).

⁴⁰ See *infra* note 90 and accompanying text (discussing notion of "partial citizens").

⁴¹ Compare Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, § 101, 69 Stat. 584, 584 (covering "any primary, special, or general election held in [the

The problems with this approach did not go unnoticed. While sympathetic to the goal of enfranchisement, the Department of Justice and several members of Congress opposed the bill on constitutional grounds.⁴² The leading opponent, Representative (later Judge) Charles Wiggins, tried unsuccessfully to limit the bill to presidential elections.⁴³ Wiggins also tried to amend the bill in committee to include only those people still domiciled in a state, but that failed as well, by a 12 to 7 vote.⁴⁴ The House Committee reviewing OCVRA approved it 14 to 5, with the minority objecting mainly on constitutional grounds.⁴⁵

The law's proponents made their own constitutional arguments,⁴⁶ but support for the law was rooted primarily in a widespread sentiment that constitutional disputes should be left to the courts to resolve—and that litigation was inevitable. As a key subcommittee chairman put it, “Would it not be better to pass the bill, if we think it is needed and desirable legislation, and let the question of its constitutionality rest where it properly does under our scheme of government here, in the hands of the Supreme Court?”⁴⁷ Wiggins's reply (“We do have a duty, obviously.”) was unavailing.⁴⁸ A motion to table Wiggins's attempt to limit OCVRA to presidential elections passed by a single vote moments after one subcommittee member announced his opposition to the motion because, as he put it, “I am not worried about the constitutionality because

voter's] election district or precinct”), with Overseas Citizens Voting Rights Act § 3, 89 Stat. at 1142 (covering “any Federal election”).

⁴² As Rep. Wiggins put it, “As a matter of policy I think we all support the maximum participation in the franchise but as a matter of constitutional law we may not be able to extend that franchise to U.S. citizens who are not residents of any State.” 121 CONG. REC. 39,733 (1975) (statement of Rep. Wiggins); see *House Hearings, supra* note 18, at 253-64 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.); *Voting By U.S. Citizens Residing Abroad: Hearings on S. 2102 and S. 2384 Before Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin.*, 93rd Cong. 58-65 (1973) [hereinafter *Senate Hearings*] (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.); H.R. REP. NO. 94-649, at 13-19 (1975) (reporting dissenting views of Rep. Wiggins and three colleagues).

⁴³ See *Pending Business, H. Comm. on H. Admin.*, 94th Cong. 19, 34 (Oct. 30, 1975) (recording proposal and defeat of Wiggins amendment).

⁴⁴ *Pending Business, H. Comm. on H. Admin.*, 94th Cong. 11-12, 21 (Nov. 4, 1975).

⁴⁵ H.R. REP. NO. 94-649, at 13-19 (reporting minority views, including the sentiment that “Congress may not, consistent with the Constitution, extend the right to vote in all federal elections to U.S. citizens *who are not residents of any state*” (citation omitted)); *Pending Business, supra* note 44, at 39 (reporting final committee vote).

⁴⁶ See H.R. REP. NO. 94-649, at 5-7; S. REP. NO. 94-121, at 5-7 (1975).

⁴⁷ *Transcript of the Subcomm. on Elections of the H. Comm. on H. Admin., considering S. 95*, 94th Cong. 55-56 (Oct. 8, 1975) [hereinafter *Transcript on S. 95*] (comments of Rep. Dent).

⁴⁸ *Id.* at 56.

the courts can decide.”⁴⁹ OCVRA’s legislative history contains many other similar expressions of this willingness to defer to the seemingly inevitable process of judicial review.⁵⁰ Given the then-recent experience of the Voting Rights Act Amendments of 1970—enacted in June, challenged immediately in the Supreme Court in *Oregon v. Mitchell*,⁵¹ and partially upheld in December 1970—this expectation of swift, certain court review was understandable.

But despite the expectation that someone would quickly pick up these constitutional objections and file a lawsuit challenging the enfranchisement of permanent expatriates, no one ever has. OCVRA was updated by UOCAVA in 1986, but UOCAVA left these crucial features intact without any discussion of the constitutional problems.⁵² Subsequent updates to the law have done the same.⁵³

A major element of UOCAVA’s constitutional problem is its mandatory character, which conflicts with constitutional principles of federalism. Nevertheless, many states have been

⁴⁹ *Id.* at 66-67 (comments of Rep. Burton and discussion following).

⁵⁰ *See, e.g., House Hearings, supra* note 18, at 262 (testimony of Mary C. Lawton, Deputy Assistant Att’y Gen.) (opposing OCVRA and calling it “a beautiful basis for litigation”); *id.* at 258 (comments of Rep. Dent) (responding to disagreement over constitutionality of OCVRA by saying that Congress “will *have to* leave it to the Supreme Court to determine if we have overstepped” (emphasis added)); *Senate Hearings, supra* note 42, at 59, 68 (comments of Sen. Pell) (suggesting President should sign the bill despite thinking it is unconstitutional, because “that should be settled in the courts quickly”); *Transcript on S. 95, supra* note 47, at 59 (comments of Rep. Mathis) (showing agreement in subcommittee of proponents and opponents that OCVRA “is going to be tested in the courts”); 121 CONG. REC. 39,735 (1975) (statement of Rep. Danielson) (saying that despite his agreement with the constitutional objections, he supported the bill and would leave it to the courts); *id.* at 39,734 (statement of Rep. Rhodes) (stating that constitutional concerns will “undoubtedly be taken care of in the courts”); *id.* (statement of Rep. Hays) (stating in floor debate that the bill should pass and that doubts about constitutionality—to which he admitted himself—should be left to the courts); *see also* Gura, *supra* note 6, at 191 (noting some of these quotations and discussing this congressional lack of interest in taking constitutionality seriously); *cf.* Am. Political Sci. Ass’n, *supra* note 29, at 522 (recommending proceeding with constitutionally questionable overseas-voting legislation in the 1950s, given the likelihood of swift and decisive judicial review). One reason for this sentiment was that Congress had often pushed the bounds of what previous case law had suggested was appropriate and then eventually prevailed in court. The argument for caution therefore sounded to OCVRA’s proponents like similar arguments against previous successful legislation. *See, e.g., Senate Hearings, supra* note 42, at 88 (statement of J. Kevin Murphy, Chairman, Bipartisan Comm. on Absentee Voting); *Transcript on S. 95, supra* note 47, at 65-66 (comments of Rep. Dent).

⁵¹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁵² *See* Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986); *see also* H.R. REP. NO. 99-765 (1986) (containing no discussion of constitutionality).

⁵³ *See supra* note 21.

more than receptive to the federal mandate and have enfranchised people that even UOCAVA does not require them to include. Several states allow at least some permanent expatriates to vote in state and local elections.⁵⁴ Most states allow people who were born abroad (and thus have no “last U.S. address”) to vote wherever their parents can, though some states only extend that right for federal elections.⁵⁵

The willingness of such states to go above and beyond UOCAVA’s requirements means that UOCAVA is not as unconstitutional as it could be; the states’ actions might mitigate the constitutional problems that stem from the statute’s coercive nature. That said, it is impossible to know what any of these states would have done, or would do in the future, if Congress had adopted an approach different from UOCAVA’s. In any event, there is still plenty of unconstitutionality to go around, as the next part of this article will address.

II. WHY UOCAVA IS UNCONSTITUTIONAL

UOCAVA’s enfranchisement of permanent expatriates is unconstitutional. Policy arguments (for example, that it is a good thing that permanent expatriates get to vote—and it is) are a

⁵⁴ For state-by-state information, see *Voting Assistance Guide (VAG)*, FED. VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/vao/vag> [<http://perma.cc/68Y9-2VP8>] (last visited Feb. 29, 2016) (state-by-state information on file with author). Each state’s link indicates whether overseas voters can use the Federal Write-In Absentee Ballot (FWAB), a special UOCAVA ballot, to vote in state and local elections. Some explicitly preclude it (Arizona, Connecticut, Illinois, Kansas, Louisiana, New Hampshire, New Jersey, South Dakota, and Wyoming). Some allow only public expatriates to do so (Maryland, Minnesota, New York, and Wisconsin) or only voters in certain elections (Iowa and Texas). The others indicate that the FWAB can be used for state and local elections, but without specifying whether only those who maintain a domicile in the state—thereby potentially exposing themselves to state-tax liability—can do so. See *id.* (“If you claim a particular State as your residence and have other ties with that State in addition to voting, then you may be liable for State and local taxation, depending upon that particular State law. Consult your legal counsel for specific questions or situations.”). Those states that allow general participation in state elections without restriction might be exhibiting sensitivity to the constitutional symmetry requirements that UOCAVA ignores rather than a desire to expand the franchise. See *infra* Section II.B.1.

⁵⁵ States only began allowing citizens born outside the United States to vote in the late 1990s, after encouragement from the federal government. See FED. VOTING ASSISTANCE PROGRAM, *THE FEDERAL VOTING ASSISTANCE PROGRAM: THE SIXTEENTH REPORT* 3 (2001), <http://www.fvap.gov/uploads/FVAP/Reports/16threport.pdf> [<http://perma.cc/VXG6-NVRS>] (describing changes in state laws resulting from federal initiatives); *Never Resided in the U.S.?*, FED. VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/citizen-voter/reside> [<http://perma.cc/44BS-U85H>] (last visited Feb. 29, 2016) (providing current list of such states and specifying federal-only rights for some); see also UNIF. MILITARY & OVERSEAS VOTERS ACT § 2(1)(E) (2010) (providing for enfranchisement of such people).

matter for another day.⁵⁶ That does not mean, however, that the constitutional arguments are arguments only for courts and not legislators. In the absence of litigation, members of Congress should remember the example of 1955, respect their oaths to support the Constitution, and take action to put overseas-voting rights on a sturdier constitutional footing.⁵⁷

The Constitution requires that voters in congressional elections be part of the populace of the states where they vote—and it assumes that the states, not Congress, define their electorates. The Constitution accords similar power to the states to define their electorates for presidential elections. UOCAVA rests on Congress's assumption that it could override these provisions by using its Fourteenth Amendment Section 5 power to protect the rights of citizens to vote and travel and the right of private citizens to be treated the same as public employees. Supreme Court case law, however, reveals that this assumption is fatally flawed, especially in light of the lack of federal voting rights for U.S. citizens who live in D.C. and the territories.

A. *Arguments from 1975*

When UOCAVA's predecessor, OCVRA, was considered in 1975, Congress was not willing to have a real constitutional debate—that is, a debate in which members would determine whether they thought the legislation was constitutional and, if it wasn't, would vote against it.⁵⁸ Nevertheless, the legislative process still did an impressive job of identifying and presenting key constitutional points and counterpoints. In other words, the constitutional arguments all made it into the record but were not taken very seriously beyond that.

1. The Case for OCVRA

To properly situate the argument that it was unconstitutional for OCVRA to enfranchise permanent expatriates, it is first necessary to understand why the Act's main proponents thought that it *was* constitutional.⁵⁹ Members of Congress who supported OCVRA were confident that enacting the

⁵⁶ Alan Gura, UOCAVA's foremost recent critic, has grounded his attack in policy grounds as well as legal ones. See Gura, *supra* note 6.

⁵⁷ See *supra* notes 28-29 and accompanying text.

⁵⁸ See Gura, *supra* note 6, at 191.

⁵⁹ The principal expressions of the argument in favor of OCVRA's constitutionality are at H.R. REP. NO. 94-649, at 5-7 (1975) and S. REP. NO. 94-121, at 5-7 (1975).

statute fell within their power under Section 5 of the Fourteenth Amendment. The source of their confidence was two Supreme Court decisions upholding previous congressional expansions of voting rights: *Katzenbach v. Morgan*,⁶⁰ and *Oregon v. Mitchell*.⁶¹

Morgan dealt with a challenge to the Voting Rights Act of 1965. The Act provided that if someone had obtained a sixth-grade education in Puerto Rico, no state could deny that person the right to vote on grounds of English illiteracy; yet New York required voters to be able to read and write in English.⁶² This squarely presented the question of the extent of the states' power to determine voter eligibility versus the federal government's power to enforce Fourteenth Amendment rights (here, equal protection). The Court summed up the two authorities' relative powers as follows:

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution.⁶³

That part of the landscape, at least, was not in dispute. The question was whether banning literacy tests was within Congress's power under the Fourteenth Amendment, Section 5 of which gives Congress the power to pass "appropriate legislation" to enforce Fourteenth Amendment rights.

The sticking point in *Morgan* was that in an earlier decision, the Supreme Court had ruled that literacy tests did not, on their face, violate the Fourteenth Amendment.⁶⁴ But the *Morgan* Court ruled that it did not matter whether the Court itself thought that New York's literacy test violated the Fourteenth Amendment.⁶⁵ Rather, the key question was a more deferential one: whether the Court could "perceive a basis upon

⁶⁰ *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁶¹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁶² *Morgan*, 384 U.S. at 643-44.

⁶³ *Id.* at 647 (citations omitted).

⁶⁴ *See Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

⁶⁵ *Morgan*, 384 U.S. at 649 (denying that the Court's task entailed determining whether New York's English literacy requirement violates the Equal Protection Clause). The *Morgan* Court could have ruled that the previous case, being a facial challenge, did not preclude a conclusion that New York's law violated the Equal Protection Clause *as applied* to literate-in-Spanish Puerto Ricans. Instead, however, the Court went further.

which Congress might predicate a judgment” that literacy tests like New York’s violated the Fourteenth Amendment.⁶⁶

By extending this deference to Congress, the Court was freeing Congress to look beyond the case law. Congress could use its legislative tools to seek out and redress what *it* reasonably considered to be Fourteenth Amendment violations—and in the process, trump the states’ power to define voter qualifications. (The Court later dialed back this deference.⁶⁷)

When Congress enacted the Voting Rights Act Amendments in June 1970, it capitalized on its newfound power to preempt state voter-eligibility standards.⁶⁸ The new federal law lowered the voting age to 18 for both federal and state elections. It also expanded the ban on literacy tests, again for both federal and state elections. Finally, it forbade states from imposing lengthy residency requirements for voting—but only for presidential elections. Voters who moved would be eligible to vote for President as long as they arrived in their new state at least 30 days prior to the election; fewer than 30 days and their previous state of residence would have to let them vote there.⁶⁹

By December, in *Oregon v. Mitchell*, the Supreme Court had approved all of these parts of the Voting Rights Act Amendments except for the lower voting age in state elections.⁷⁰ *Mitchell* thus reinforced Congress’s sense that it

⁶⁶ *Id.* at 656. To be more precise, the question was whether it was

“appropriate legislation” to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether [it] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is “plainly adapted to that end” and whether it is not prohibited by but is consistent with “the letter and spirit of the constitution.”

Id. at 651.

⁶⁷ See *infra* Section II.B.2.

⁶⁸ As Archibald Cox explained *Morgan*’s impact to a Senate committee considering the 1970 Amendments, “Congress, as well as the Court and perhaps even more than the Court, has the power to determine what the equal protection clause requires in a given situation.” *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 331-33 (1970) [hereinafter *Hearings on Voting Rights Act of 1965 Amendments*] (statement of Archibald Cox, Professor of Law, Harvard Law School). Interestingly, Cox also concluded that “requiring more than bona fide residence is an invidious classification,” suggesting that Congress could slap down other eligibility requirements but not bona fide residence. *Id.* at 332.

⁶⁹ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 52 U.S.C.).

⁷⁰ *Oregon v. Mitchell*, 400 U.S. 112 (1970). This spurred Congress to quickly pass the Twenty-Sixth Amendment in March 1971, and the states to set a new speed record by ratifying the amendment by July 1. See *infra* note 193 and accompanying text.

had considerable power to tinker with state voter-eligibility laws, especially in federal elections.

The Court's treatment of residency requirements in *Mitchell* was particularly heartening to advocates of strong congressional action to extend overseas-voting rights. Not only had the Court allowed Congress to overwrite states' residency requirements with a federal standard, it had approved Congress's decision to let some people (those moving within 30 days of the election) vote in places where they no longer resided. Although *Mitchell* produced five separate opinions, none with majority support, the Court clearly took seriously the twin rights of citizens to "travel" (that is, to live in whichever state they wanted) and vote.

Emboldened by the decisions in *Morgan* and *Mitchell*—and not accounting for how much further OCVRA would go than the Voting Rights Act Amendments of 1970—OCVRA's proponents confidently asserted that Congress had the power to prescribe uniform federal standards for overseas citizens' eligibility to participate in federal elections.⁷¹ Congress's power to vindicate overseas citizens' Fourteenth Amendment travel and voting rights, they said, was sufficient to allow it to legislate in what had previously been the states' domain.⁷² These proponents of OCVRA also contended that, while states could legitimately limit participation in state and local elections to bona fide residents, permanent expatriates have a legitimate interest in the doings of the federal government, and their interest could not be vindicated if they were subject to residence requirements when voting in federal elections.⁷³

⁷¹ See, e.g., *Senate Hearings*, *supra* note 42, at 45-46 (statement of Sen. Goldwater) (declaring, based on *Mitchell*, that Congress had authority to pass OCVRA, without noting differences between OCVRA and law approved in *Mitchell*); *id.* at 8, 11 (statement of Nathan Lewin, former Assistant Solicitor General and former Deputy Assistant Att'y Gen.) (characterizing the pro-OCVRA view of federal power as post-*Mitchell* and post-*Morgan*); *id.* at 6 (statement of Sen. Mathias) ("[W]e have a very clear mandate in the Constitution to make proper regulations for election of Federal officials."); H.R. REP. NO. 94-649, at 5-7 (1975) (providing committee's argument that OCVRA "would be upheld if subjected to constitutional challenge in the U.S. Supreme Court"); S. REP. NO. 94-121, at 5-7 (1975) (same).

⁷² See, e.g., *Senate Hearings*, *supra* note 42, at 8-9 (statement of Nathan Lewin, former Assistant Solicitor General and former Deputy Assistant Att'y Gen.); H.R. REP. NO. 94-649, at 5-7; S. REP. NO. 94-121, at 5-7.

⁷³ See, e.g., *Senate Hearings*, *supra* note 42, at 56 (memorandum of law from Sen. Goldwater) (noting expatriates' interest in federal affairs); *id.* at 8 (statement of Nathan Lewin, former Assistant Solicitor General and former Deputy Assistant Att'y Gen.) (distinguishing the legitimacy of the application of residency requirements to federal versus state elections); H.R. REP. NO. 94-649, at 7; S. REP. NO. 94-121, at 6-7; see also S. REP. NO. 90-1025, at 6 (1968) (individual views of Sen. Curtis) (advocating, in consideration of 1968 overseas-voting law, separate treatment for federal versus

In addition, proponents decried the unequal treatment that private citizens abroad received compared to public expatriates. In part because previous federal legislation had encouraged them to do so, states had a relaxed attitude toward the residency status of public expatriates and allowed these expatriates to maintain residency without knowing when or where they would return to the United States.⁷⁴ OCVRA's proponents saw this as a violation of the private expatriates' Fourteenth Amendment equal protection rights and thus as more fodder for preemptive federal action.⁷⁵

2. The Case Against OCVRA

The main sections of OCVRA (standardizing overseas absentee registration and voting procedures and access to them) spurred no constitutional concerns and no significant opposition. Making it easier for qualified, interested voters to participate in elections was obviously appealing.⁷⁶ More problematic was the idea that Congress had the power to supersede residency requirements and thereby force states to allow people who were unquestionably nonresidents to vote there. Part of the problem was that permanent expatriates, particularly those who were motivated by tax avoidance, were a less sympathetic group than people with temporary postings overseas.⁷⁷ But the principal reason for the opposition was the constitutional problems that this aspect of OCVRA represented.

The opponents—principally Representative Wiggins and the Office of Legal Policy in the Department of Justice—asserted three main constitutional arguments against OCVRA's

local elections); Kenneth M. Davidson, *Voting Rights of Americans Abroad*, 18 BUFF. L. REV. 469, 483 (1969) (arguing that residence requirements are relevant only for state elections, given expatriates' ongoing interest in federal matters).

⁷⁴ See *supra* text accompanying notes 27-30.

⁷⁵ See *Senate Hearings, supra* note 42, at 84 (statement of J. Kevin Murphy, Chairman, Bipartisan Comm. on Absentee Voting) (setting out equal protection argument); *House Hearings, supra* note 18, at 272 (statement of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting) (complaining of discrimination against private expatriates); H.R. REP. NO. 94-649, at 3; S. REP. NO. 94-121, at 3.

⁷⁶ See, e.g., *Senate Hearings, supra* note 42, at 59 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.); 121 CONG. REC. 39,733 (1975) (statement of Rep. Wiggins).

⁷⁷ *House Hearings, supra* note 18, at 18 (comments of Rep. Boggs) (expressing opposition to boosting voting rights for those who severed their state and local ties to avoid taxes); *Senate Hearings, supra* note 42, at 59 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (noting relative lack of sympathy for permanent expatriates); cf. 121 CONG. REC. 39,734 (1975) (statement of Rep. Hays) (dismissing those "who ha[ve] gone to live abroad permanently" as unworthy of discussion given that they probably will not "even bother to send for a ballot").

enfranchisement of permanent expatriates: voting in congressional elections is limited to people of the states, neither the rights to vote and travel nor equal protection trumped that fact, and *Mitchell* did not say otherwise.

a. People of the States

The first and foremost constitutional problem with OCVRA's enfranchisement of nonresidents comes from Article I, Section 2, Clause 1: "The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States . . .*"⁷⁸ The Seventeenth Amendment offers a parallel standard for elections to the U.S. Senate: "The Senate of the United States shall be composed of two Senators from *each State*, elected *by the people thereof . . .*"⁷⁹ In other words, if someone wants to vote in a congressional election, that person must be part of a state's populace. People who have left the states with no intention to return do not qualify, so by enfranchising them, OCVRA violated this basic aspect of Congress's constitutional composition.⁸⁰

There are plenty of places where the text of the Constitution is hopelessly vague (e.g., "necessary and proper" and "due process"), but the "People of the States" Clauses are not among them. These clauses thus constitute, as UOCAVA critic Alan Gura would later put it, "the greatest obstacle to the Act's constitutionality."⁸¹ Although the clauses' meaning has not been litigated in the context of OCVRA and UOCAVA, the clauses account for the lack of any voting representatives in Congress for D.C. and the territories, the citizens of which do not live in

⁷⁸ U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

⁷⁹ *Id.* amend. XVII (emphasis added).

⁸⁰ *House Hearings*, *supra* note 18, at 257 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.); H.R. REP. NO. 94-649, at 14-15 (minority views); *Transcript on S. 95*, *supra* note 47, at 49-53 (comments of Rep. Wiggins); Shurtz, *supra* note 6, at 136-39. It is worth noting that UOCAVA could be read as merely changing the burden of proof and not actually enfranchising permanent expatriates. Because it states that people get to vote at their former residences even if their "intent to return [there] may be uncertain," perhaps UOCAVA only means to enfranchise people who intend to return to the United States someday, and simply puts the burden on the state to prove with sufficient certainty that they will never come back. If that were the case (and assuming for the sake of argument that the right to travel requires that expatriates who intend to return be allowed to vote), UOCAVA would be more likely to be congruent and proportional. But that is not how UOCAVA has been interpreted or applied. People with no intention of ever returning to the United States, let alone to their old districts, are given the power to vote in their old home's district anyway. It is not that temporary expatriates no longer have to prove that they are coming back, it is that permanent expatriates no longer have to worry that they are never coming back.

⁸¹ Gura, *supra* note 6, at 200.

states.⁸² Congress knew when it passed OCVRA that residents of D.C. and the territories could not vote in congressional elections.⁸³ But if people who live in the United States (just not in states) have no inalienable constitutional right to vote in congressional elections, then *a fortiori* people who do not live in the United States at all (let alone in a state) have no inalienable constitutional right to vote in congressional elections.

To the extent that they engaged the issue, OCVRA's proponents had two main counterarguments. One was that the People of the States Clauses were inapplicable. The other was that Congress could declare that these permanent expatriates were citizens of their (former) states.⁸⁴

The first argument—that Congress may simply ignore these constitutional provisions—is not really an argument. Nevertheless, it was made. In its report on OCVRA, the Committee on House Administration rejected the “people of the states” objection.

[T]he Committee is persuaded that the Constitutional provisions regarding election of Senators and Representatives discussed above are not sufficient to prevent Congress from protecting a person who exercises his Constitutional right to enjoy freedom of movement to and from the United States, when Congress may protect this right from other less fundamental disabilities. As Justice Stewart said in *Oregon v. Mitchell*, 400 U.S. at 292, “The power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution.”⁸⁵

In other words, the committee felt that the rights to travel abroad and vote were so weighty (so “unconditional”) that Congress had the power to simply stand atop the Constitution's requirements for voting and extend the franchise further.

The committee's purported support for this argument—that Congress can protect the right to travel abroad from less

⁸² See *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.), *aff'd sub nom.* *Alexander v. Mineta*, 531 U.S. 940 (2000); *Hearing on D.C. House Voting Rights Act*, *supra* note 6, at 6 (statement of Rep. Smith) (“Since D.C. is not a State, it cannot have a voting Member in the House. That is not even a tough law school exam question.”).

⁸³ See, e.g., *Senate Hearings*, *supra* note 42, at 58, 90 (comments by Sen. Pell) (noting that OCVRA did not extend voting rights to U.S. citizens in the territories).

⁸⁴ A third response was based on the theory of federal power over congressional elections espoused by Justice Black in *Oregon v. Mitchell* and dismissed below. See *infra* notes 161-165 and accompanying text; see, e.g., *Senate Hearings*, *supra* note 42, at 58, 90; Transcript of Executive Meeting, S. Comm. on Rules & Admin., considering S. 2102, 93rd Cong. 32-33 (June 4, 1974) (comments of James H. Duffy, Chief Counsel, Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin.).

⁸⁵ H.R. REP. NO. 94-649, at 7.

fundamental disabilities—is a non sequitur. Indeed, it is unclear what the committee even meant. The phrasing was lifted from Justice Stewart’s concurring/dissenting opinion in *Mitchell* that the committee quoted in the next sentence. In it, Justice Stewart wrote approvingly of the constitutionality of the federal statute that struck down states’ excessive length-of-residency requirements for voting in presidential elections. He wrote the following passage, which the committee report copied for its defense of OCVRA:

Although the matter is not entirely free from doubt, I am persuaded that the constitutional provisions discussed above [concerning qualifications for voting in congressional and presidential elections] are not sufficient to prevent Congress from protecting a person who exercises his constitutional right to enter and abide in any State in the Union from losing his opportunity to vote, when Congress may protect the right of interstate travel from other less fundamental disabilities. The power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution.⁸⁶

It is unclear what Justice Stewart meant when *he* said that Congress could protect the right to travel from “other less fundamental disabilities.”⁸⁷ Moreover, the context in *Mitchell* differed from OCVRA’s in many important ways. Justice Stewart was writing about allowing interstate travelers to vote in their former homes for a 30-day transition period in presidential elections, whereas OCVRA went much further and gave permanent expatriates the permanent right to vote in their former homes in presidential and congressional elections. Despite these dissimilarities, the House committee did remarkably little paraphrasing here—a notable exception being its excision of Justice Stewart’s caveat about the existence of doubt.

While the extent of Congress’s power to enforce the right to travel is certainly relevant in any constitutional analysis of OCVRA,⁸⁸ it was quite a stretch to conclude that Congress’s power extended so far that it could simply ignore constitutional bedrock

⁸⁶ *Oregon v. Mitchell*, 400 U.S. 112, 292 (1970) (opinion of Stewart, J.).

⁸⁷ The only such congressional action that Justice Stewart mentioned came up when he cited *United States v. Guest*, 383 U.S. 745 (1966), in the middle of a string citation earlier in his opinion. *Mitchell*, 400 U.S. at 285 (opinion of Stewart, J.). In *Guest*, the Supreme Court considered an indictment charging the defendants with, among other offenses, conspiring through violent intimidation “to injure, oppress, threaten, and intimidate” black citizens exercising their right to interstate (not international) travel. *Guest*, 383 U.S. at 747 & n.1. Perhaps one can debate whether murderous segregationists disable the right to travel more or less fundamentally than states imposing residency requirements, but in neither case does it justify the committee’s conclusion.

⁸⁸ See *infra* notes 115-125 and accompanying text.

such as the Constitution's establishment of state-based representation in Congress. Though there may be space at the margins for minor modifications to state-based representation, that is a far cry from saying that the constitutional provision of state-based representation can simply be disregarded whenever it impinges on congressional power or constitutional rights.⁸⁹ If the Constitution says in one place that Congress can do *X*, and in another that Congress cannot do *Y*, and *X* and *Y* overlap, then there may be legitimate questions of balancing and line drawing. But the People of the States Clauses do not limit congressional power in that manner. Rather, they speak at a much more fundamental level to what Congress actually is—how it is constituted and which people its members represent. For Congress to assert that its powers are so vast that it need not pay any heed to such clauses is rather unseemly.

The second argument that the People of the States Clauses presented no constitutional problem contended that Congress could simply make permanent expatriates “people of [their former] states” by decree. As the House committee put it,

The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.⁹⁰

In other words, the committee believed that OCVRA could alter the bounds of state citizenship and define nonresidents as “partial citizens” for the limited purpose of federal voting. As citizens of the old state, these people would thus be “people of the state.” This view at least acknowledges the People of the States Clauses. It also draws some support, albeit superficial, from the Supreme Court's decision in *Mitchell*.⁹¹ But it stretches the definition of citizenship—and federal power to define it—too far.

⁸⁹ If this were not the case, then the analogous fact that Article I, Section 3 mandates that Wyoming and 66-times-larger California both have two U.S. senators would have been struck down a long time ago as a violation of equal protection, contrary to *Reynolds v. Sims*, 377 U.S. 533 (1964). See STATE RANKINGS 2014: A STATISTICAL VIEW OF AMERICA 450 (Kathleen O'Leary Morgan & Scott Morgan eds., 2014) (listing state populations).

⁹⁰ H.R. REP. NO. 94-649, at 7; see also *House Hearings*, *supra* note 18, at 87 (comments of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting) (expressing idea that OCVRA would provide “a fraction domicile” that existed “solely for voting purposes”).

⁹¹ *Mitchell* approved the practice of letting people who move within 30 days of a presidential election vote in their former states, despite no longer being full citizens there. *Mitchell*, 400 U.S. at 118-19.

Consider the other aspects of state citizenship, which Congress left out of permanent expatriates' partial citizenship.⁹² These semicitizens cannot serve on juries. They do not pay state or local taxes (Congress made sure of that).⁹³ They cannot run for office. In sum, they are not part of the local civil society, other than indirectly through their ability to vote.⁹⁴

There are, of course, other citizens with limited rights of civic participation, most notably children, felons, and the mentally incompetent. But their status is different than that of permanent expatriates. Children, felons, and the mentally incompetent are citizens who do not qualify for one or more of the aspects of full civic participation. For them, citizenship is a necessary but not sufficient condition for full participation. If they can do some things but not others (say, vote but not serve on a jury⁹⁵), it is not because they are partial citizens but because they are full citizens with restricted rights.

Permanent expatriates under OCVRA, by contrast, represent the opposite. Congress did not purport to make permanent expatriates full citizens and then leave it to the states to exclude them from jury duty. These expatriates were citizens only because of—and only to the extent of—their congressionally granted right to vote. For them, citizenship is a sufficient condition for participation. Congress's innovation is thus nothing more than a bootstrap. By deeming as citizens those who it wanted to be eligible to vote, but deeming them to be citizens only for voting purposes, Congress stripped the notion of citizenship of any meaning. It is as if Congress, in an effort to extend the franchise but not any other rights of adulthood to 16-year-olds, declared that legally, 16-year-olds were 18-year-olds, but only for the purpose of voting. This

⁹² Cf. 121 CONG. REC. 39,733 (1975) (statement of Rep. Wiggins) (“A person is a citizen of a State, according to the 14th amendment, if he resides therein. Such status extends to a person residing in such States a whole panoply of rights and responsibilities.”).

⁹³ See Overseas Citizens Voting Rights Act of 1975 Amendment, Pub. L. No. 95-593, § 5, 92 Stat. 2535, 2537 (1978) (clarifying that the exercise of federal voting rights under OCVRA cannot be used to establish liability for state taxes); 121 CONG. REC. 1259 (1975) (statement of Rep. Frenzel) (announcing that OCVRA was not supposed to “affect in any way a citizen’s determination of residence for the purpose of any tax”).

⁹⁴ In the analogous case of diversity jurisdiction, U.S. citizens who are domiciled abroad are not considered citizens of any state. Diversity jurisdiction opens federal courts to lawsuits between “citizens of different states” and between the citizens of a state and “foreign states, citizens or subjects.” Because U.S. citizens domiciled abroad are not citizens of a state, they are not subject to the federal courts’ diversity jurisdiction either as plaintiffs or defendants. 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3621 (3d ed. 2009).

⁹⁵ See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 188-89 (2003) (noting commonness of this particular juxtaposition).

would be troublesome enough for any state to do itself, but for Congress to impose this formula on the states was an even greater constitutional transgression.

b. Section 5 of the Fourteenth Amendment

Congress cannot simply ignore the People of the States Clauses or bootstrap a solution to them. OCVRA's proponents were right, though, that Congress does have substantial power under Section 5 of the Fourteenth Amendment to protect citizens' rights. This power exists notwithstanding the Constitution initially assigning to the states the power to determine voter qualifications in congressional elections; it is why a pure federalism argument against OCVRA is unavailing.⁹⁶

There is no question that when OCVRA enfranchised permanent expatriates, it enhanced their right to vote, their right to live where they pleased, and their right to equal protection. But Congress's power is not defined this way. Section 5 gives Congress the power to respond to violations of Fourteenth Amendment rights, not the power to legislate generally in whatever ways might promote Fourteenth Amendment values. The question is thus whether a state's decision to exclude certain nonresidents from voting in federal elections would violate those citizens' equal protection rights or their rights to vote or travel.

The version of OCVRA that first passed the Senate asserted as much. It contained the following findings of constitutional violations related to the status quo regarding overseas voting:

The Congress . . . finds that the foregoing conditions—

- (1) deny or abridge the inherent constitutional right of citizens to vote in Federal elections;
- (2) deny or abridge the inherent constitutional right of citizens to enjoy their free movement to and from the United States;
- (3) deny or abridge the privileges and immunities guaranteed under the Constitution to citizens of the United States and to the citizens of each State;

⁹⁶ Cf. H.R. REP. NO. 94-649, at 13 (1975) (minority views) (describing OCVRA as "a quantum jump in the exercise of federal power"); Gura, *supra* note 6, at 202-04 (making federalism/commandeering argument against UOCAVA, but neglecting to consider Section 5).

...⁹⁷

(5) have the effect of denying to citizens the equality of civil rights and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment to the Constitution; and

(6) do not bear a reasonable relationship to any compelling State interest in the conduct of Federal elections.⁹⁸

These six findings (which were largely copied from the findings in the Voting Rights Act Amendments of 1970 that were approved in *Oregon v. Mitchell*⁹⁹) were apparently placed in the bill to make it easier for a reviewing court to find that Congress had acted properly.¹⁰⁰ In the House, though, OCVRA opponent Charles Wiggins successfully pushed to remove the findings from the bill.¹⁰¹ But findings or no findings, OCVRA's proponents made it clear that they thought that the states' treatment of overseas voters violated the Constitution.¹⁰²

The proponents were on stronger ground to the extent that they were concerned about some states' extremely conservative standards for absentee voting for bona fide state residents who were temporarily abroad; there is little question that Congress can dictate the procedure and mechanics of congressional elections.¹⁰³ But even the proponents themselves recognized that their case was much weaker when it came to enfranchising permanent expatriates.¹⁰⁴

⁹⁷ The fourth finding, about "denying citizens the right to vote in Federal elections because of the method in which they may vote," was not controversial and did not feature significantly in debate over the bill. S. 95, 94th Cong. § 2(b) (as passed by the Senate, May 15, 1975); see *supra* note 19 and accompanying text.

⁹⁸ S. 95, 94th Cong. § 2(b) (as passed by the Senate, May 15, 1975).

⁹⁹ See *Oregon v. Mitchell*, 400 U.S. 112, 313 (1970) (opinion of Harlan, J.) (quoting Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 201, 84 Stat. 314, 316).

¹⁰⁰ See *House Hearings*, *supra* note 18, at 92-94 (comments of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting).

¹⁰¹ See *id.* at 16, 92-94 (comments of Rep. Wiggins) (suggesting removal of findings); *Pending Business*, *supra* note 43, at 14 (comments of Rep. Wiggins) (noting removal of findings by subcommittee).

¹⁰² The constitutional arguments in the main House report, H.R. REP. NO. 94-649, at 5-7 (1975), essentially tracked the findings in the Senate bill.

¹⁰³ See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (recognizing Congress's comprehensive authority to regulate congressional election procedures); see also *supra* note 19 and accompanying text (discussing OCVRA opponents' lack of objections to this part of the law).

¹⁰⁴ The most striking such statement came from Senator Goldwater, who was one of the prime movers behind the expansion of voting rights abroad. *Senate Hearings*, *supra* note 42, at 48 ("Where I am uncertain about bumping into the Constitution is compelling a State to allow persons to vote who never intend to return.").

i. The Right to Vote

The Senate's first finding, regarding the "inherent constitutional right of citizens to vote in Federal elections," was a considerable overstatement.¹⁰⁵ While OCVRA's proponents were able to point in Supreme Court opinions to plenty of dicta that spoke of this right to vote in general terms,¹⁰⁶ they missed the point that the Constitution makes voting in congressional elections a matter of place, not just a matter of citizenship.¹⁰⁷ The right to vote in federal elections is undoubtedly a sort of privilege of national citizenship,¹⁰⁸ but voting in a *particular* state is not.¹⁰⁹ Representative Wiggins argued that if Congress had the power to pass OCVRA under these terms, it would also have the power to force California to let Floridians vote there—something that Congress should not be able to do either as a matter of policy or constitutional law.¹¹⁰ Article I and the Seventeenth Amendment make federal voting a matter of state residence.¹¹¹

Moreover, if the right to vote in federal elections were so inherent, that right would be violated when U.S. citizens living in D.C. or the territories are precluded from voting in congressional elections. While some proponents of OCVRA did acknowledge—and express an interest in enfranchising—U.S. citizens in D.C. and the territories, they did not contend that the status quo in D.C. and the territories was unconstitutional.¹¹² Indeed, if it were, the problem would have been solvable through litigation rather

¹⁰⁵ See *House Hearings*, *supra* note 18, at 256, 259 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (criticizing notion of an "inherent constitutional right to vote in Federal elections"); see also *Senate Hearings*, *supra* note 42, at 2 (statement of Sen. Pell) ("Essentially, these bills state that citizens, wherever situated have an inherent constitutional right to vote, and that such a right should not be denied simply because those citizens cannot claim a residence in any State.").

¹⁰⁶ See, e.g., *Senate Hearings*, *supra* note 42, at 52 (memorandum of law from Sen. Goldwater) (citing deceptively broad-sounding Supreme Court language about the right to vote, from cases holding that § 1983 applied to voting rights).

¹⁰⁷ See *id.* at 62 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.); H.R. REP. NO. 94-649, at 15 (minority views).

¹⁰⁸ See H.R. REP. NO. 94-649, at 15 (minority views) (conceding this point). This right is obviously weak enough that U.S. citizens living in the territories do not enjoy it. But in the states, the Constitution guarantees a republican form of government, see U.S. CONST. art. IV, § 4, and extends this broad franchise to federal elections, see *id.* art. I, § 2, cl. 1; *id.* amend. XVII.

¹⁰⁹ See H.R. REP. NO. 94-649, at 15 (minority views); Shurtz, *supra* note 6, at 143.

¹¹⁰ H.R. REP. NO. 94-649, at 13-14 (minority views).

¹¹¹ See *supra* Section II.A.2.a; *infra* text accompanying notes 150-152; cf. U.S. CONST. amend. XIV, § 2 (penalizing states for disenfranchising their "inhabitants").

¹¹² See, e.g., *Senate Hearings*, *supra* note 42, at 58, 90 (comments of Sen. Pell). *But see id.* at 5 (statement of Sen. Mathias) (expressing desire to vindicate the constitutional right to vote of "every American citizen" through OCVRA—with no apparent consciousness of the similar, unaddressed plight of those in D.C. and the territories).

than legislation.¹¹³ In fact, though, such litigation has been unsuccessful because courts have recognized that the voters' need in congressional elections to be "people of the states" trumps any inherent right of citizens to vote.¹¹⁴

ii. The Right to Travel

Moving on to the Senate's second finding, excluding permanent expatriates also does not violate any "inherent constitutional right of citizens to enjoy their free movement to and from the United States."¹¹⁵ The right to travel protected by OCVRA is different in many ways from the right to travel protected by earlier doctrine. Most of the legal authority regarding the right to travel deals with the right to move interstate *within* the United States.¹¹⁶ To the extent that the law recognizes a right to leave the United States entirely, it sees that right as being significantly weaker; OCVRA's proponents incorrectly viewed the two rights as equal.¹¹⁷ Also, the right to travel within the United States was generally couched as preventing states from discriminating

¹¹³ See *House Hearings*, *supra* note 18, at 93 (comments of Rep. Wiggins) ("If it is a denial, all we need is a lawsuit which will declare whether he has a constitutional right or not.").

¹¹⁴ See, e.g., *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.), *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000) (rejecting attempt by D.C. residents to establish congressional voting rights).

¹¹⁵ The travel argument is presented in more detail in *Senate Hearings*, *supra* note 42, at 9, 53 (memorandum of law from Sen. Goldwater).

¹¹⁶ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (noting three components of right to travel, including "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State").

¹¹⁷ In the House report accompanying OCVRA, the committee wrote that American citizens have "the same right to international travel and settlement as . . . [they have] to interstate travel and settlement." H.R. REP. NO. 94-649, at 5 (1975); see also *House Hearings*, *supra* note 18, at 88-89 (comments of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting); *Senate Hearings*, *supra* note 42, at 10 (statement of Nathan Lewin, former Assistant Solicitor General and former Deputy Assistant Att'y Gen.). This was not true then. See *Shapiro v. Thompson*, 394 U.S. 618, 642-43, 643 n.1 (1969) (Stewart, J., concurring) (contrasting the powerful right to interstate travel with "mere conditional libert[ies]" like international travel that are "subject to regulation and control under conventional due process or equal protection standards"); *Senate Hearings*, *supra* note 42, at 63 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (citing authority for notion that right to travel abroad "is seemingly not as absolute as the right of interstate travel"). It certainly is not true now. See *Califano v. Aznavorian*, 439 U.S. 170, 176-77 (1978) (quoting *Shapiro*, *supra*, and stating that the "Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel," namely that the former is "virtually unqualified," while the latter is not); *Haig v. Agee*, 453 U.S. 280, 306 (1981) ("The Court has made it plain that the freedom to travel outside the United States must be distinguished from the right to travel within the United States." (emphasis omitted)).

against new arrivals, not as preventing the migrants' former states from recognizing their departures.¹¹⁸

Viewed in this light, OCVRA's opponents' argument is persuasive: it is an expatriate's own decision to change his formal domicile, not the decision to travel, that cost him the ability to vote before OCVRA.¹¹⁹ Overseas voters complained that maintaining their stateside domicile subjected them to state and local taxation,¹²⁰ OCVRA and subsequent amendments eliminated that burden.¹²¹ But the right to travel does not give citizens an unconditional right to emigrate without cost or consequence.¹²²

Even when courts have held that the right to travel restricts state action, they have reaffirmed the states' ability to impose bona fide residency requirements. The most striking example is *Dunn v. Blumstein*, in which the Supreme Court struck down a Tennessee statute that required citizens to live in the state for a year in order to be eligible to vote.¹²³ The Court applied strict scrutiny to this requirement because it impinged on citizens' right to travel interstate.¹²⁴ In doing so, however, the Court took great pains to insulate bona fide residency requirements from such strictness.

We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.¹²⁵

¹¹⁸ See Shurtz, *supra* note 6, at 144; 16A C.J.S. *Constitutional Law* § 690 (2015).

¹¹⁹ See H.R. REP. NO. 94-649, at 16 (minority views) (making this argument).

¹²⁰ See *Representation of the District of Columbia in the Congress: Hearings on H.J. Res. 280 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 109 (1975) [hereinafter *Hearings on Representation of the District of Columbia*] (comments of Rep. Drinan); *House Hearings, supra* note 18, at 105 (comments of William C. Whyte, Vice President, United States Steel Corp.).

¹²¹ See *supra* note 93 and accompanying text.

¹²² Some proponents of OCVRA went even further and contended that requiring expatriates to maintain a domicile—and thus the expense of a home—in the United States in order to vote amounted to an illegal poll tax. See, e.g., *Senate Hearings, supra* note 42, at 67 (testimony of Sargent Shriver, Chairman, Ambassadors Comm. for Voting by Americans Overseas). This is incorrect. See Gura, *supra* note 6, at 191 (dismantling this argument).

¹²³ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

¹²⁴ *Id.* at 341-43.

¹²⁵ *Id.* at 343-44 (citations and footnotes omitted); see also *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68-69 (1978) (citing long line of cases that “have uniformly recognized that a government unit may legitimately restrict the right to participate in its

In sum, whatever else the right to travel interstate may do, the right to travel abroad cannot trump bona fide residency requirements and cannot rewrite the People of the States Clauses.

The Senate's third finding, regarding privileges and immunities, was added without any clear notion of what it was supposed to mean. Perhaps it was included because Justice Douglas had relied on the Privileges or Immunities Clause in his *Oregon v. Mitchell* opinion, and the Senate wanted to court Justice Douglas's vote (and anyone else's who might agree with him) and had nothing to lose by including this finding.¹²⁶ But regardless of whether the proper place to situate the rights to vote and travel is the Privileges or Immunities Clause or the Due Process Clause (mentioned in the Senate's fifth finding), the same problems described above remain.

iii. Equal Protection

In addition to due process, the Senate's fifth finding mentioned equal protection. This was the strongest argument supporting Congress's power to pass OCVRA, even if it was not always the main argument pressed by proponents.¹²⁷ The primary contention here was that private citizens abroad were subject to restrictive state registration and voting standards, while states gave considerably more leeway to members of the military, other federal employees, and their dependents.¹²⁸

political processes to those who reside within its borders"); *Hardy v. Lomenzo*, 349 F. Supp. 617, 620-21 (1972) (deciding, in pre-OCVRA case, that a New Yorker who relocated to New Zealand had no right to vote absentee, because the Constitution does not preclude states from enforcing bona fide residence requirements); *supra* note 68 (noting Archibald Cox's implication that bona fide residence requirements are acceptable).

¹²⁶ *Oregon v. Mitchell*, 400 U.S. 112, 149-50 (1970) (opinion of Douglas, J.); *cf. House Hearings*, *supra* note 18, at 256 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (discussing privileges and immunities finding).

¹²⁷ *See, e.g., House Hearings*, *supra* note 18, at 272 (statement of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting); *Senate Hearings*, *supra* note 42, at 84 (statement of J. Kevin Murphy, Chairman, Bipartisan Comm. on Absentee Voting); *id.* at 12-13 (statement of Nathan Lewin, former Assistant Solicitor General and former Deputy Assistant Att'y Gen.); 121 CONG. REC. 1259 (1975) (statement of Rep. Frenzel); *see also House Hearings*, *supra*, at 259 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (conceding that differential treatment of public and private expatriates is "probably an equal protection problem"). Credit for the equal protection argument should extend to Davidson, *supra* note 73.

¹²⁸ *See Senate Hearings*, *supra* note 42, at 55 (memorandum of law from Sen. Goldwater); H.R. REP. NO. 94-649, at 2-3 (1975). A separate equal protection argument was based on the fact that wealthy people living abroad were able to afford the expense of maintaining a stateside domicile—both the expense of owning and maintaining property and the expense of paying state and local taxes on it—while middle-class people were not. *Senate Hearings*, *supra* note 42, at 47 (statement of Sen. Goldwater). This was not really pressed as an equal protection violation per se, probably because

OCVRA's proponents correctly noted that this was discrimination and that it was intentional. (Of course, the roots of this preferential treatment were in previous federal legislation, which had encouraged states to treat federal employees this way, but Congress had since updated its recommendations to include private citizens abroad, and many states had just declined to follow along.¹²⁹) The rights to vote and travel are inherently limited by the People of the States Clauses and the states' corresponding power to enact bona fide residence requirements,¹³⁰ but the right of private expatriates to be treated the same as public expatriates is not. To the extent that a state lets public expatriates vote, private expatriates can claim an entitlement to equal treatment.

Representative Wiggins argued that the Equal Protection Clause was inapplicable because on its face it only restricts a state from "deny[ing] to any person *within its jurisdiction* the equal protection of the laws."¹³¹ Wiggins argued that someone who is, by definition, both a nonresident of the state and physically located outside of its borders is not within the state's jurisdiction and so is not protected by the Equal Protection Clause.¹³² This reasoning is questionable. The Supreme Court has interpreted the phrase "within its jurisdiction" as applying the Fourteenth Amendment "to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws."¹³³ While someone lacking minimum contacts with a state would seem unlikely to meet even this liberal standard,¹³⁴ a former resident who is trying to vote in a state and is being turned away is seemingly one upon whom the state is "imposing the obligations of its laws" (here, its residency requirement for voting). Moreover, to the extent that the state is allowing some expatriates to vote—

this was a matter of disparate impact rather than overt discrimination, and because wealth is not a suspect classification for equal protection purposes.

¹²⁹ See *supra* text accompanying notes 27-33.

¹³⁰ See *Senate Hearings, supra* note 42, at 64 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (noting states' clear constitutional authority to maintain bona fide residence requirements); *supra* text accompanying notes 123-125.

¹³¹ U.S. CONST. amend. XIV, § 1 (emphasis added).

¹³² H.R. REP. NO. 94-649, at 15 (minority views). Note that even under this view, states would be unable to discriminate in voting among those outside the jurisdiction on the basis of race (see U.S. CONST. amend XV) or sex (see *id.* amend XIX), or to do anything else that would not pass rational basis scrutiny.

¹³³ *Plyler v. Doe*, 457 U.S. 202, 214 (1982).

¹³⁴ See *Duffy ex rel. Duffy v. Meconi*, 395 F. Supp. 2d 132, 138 (D. Del. 2005) ("[I]n cases where a person has minimum contacts, a state must not deny equal protection of its laws to that person . . . even if he is not physically within the state's territorial jurisdiction.").

thus bringing them within its jurisdiction—it would seem that others who are similarly situated but are not allowed to vote should be able to challenge that unequal treatment.¹³⁵

But concluding that the Equal Protection Clause applies is just the start; applying the clause is complicated. OCVRA's opponents can argue for mere rational basis review (because private citizens are not a suspect class), but OCVRA's proponents can claim that strict scrutiny applies (because voting is a fundamental right). It is not clear how the Supreme Court would have answered these questions in 1975, but more recent case law has constructed a test requiring that in “evaluating a constitutional challenge to an election regulation [a court must] weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”¹³⁶

It is unfortunately unclear how the Court would handle states' differential treatment of public and private expatriates. For one thing, it is uncertain just what justifications the states would proffer for the differential treatment. Perhaps federal employees are easier to track,¹³⁷ or perhaps there is a greater public interest in and sympathy for accommodating their deployments overseas.¹³⁸ In the related context of the census, courts have approved the inclusion of overseas federal employees even while private citizens are entirely excluded.¹³⁹

¹³⁵ See *id.* at 137-38.

¹³⁶ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). Three other Justices, led by Scalia, rejected the Court's formulation in favor of a more categorical approach. See *id.* at 204-05 (Scalia, J., concurring) (“[S]trict scrutiny is appropriate only if the burden is severe.’ Thus, the first step is to decide whether a challenged law severely burdens the right to vote.” (alteration in original) (citations omitted) (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005))). But two other Justices, while dissenting on the merits, agreed more with the majority's approach. See *id.* at 209 (Souter, J., dissenting) (“[A] State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed.” (citation omitted)); *cf.* *Igartua De La Rosa v. United States*, 32 F.3d 8, 10-11 (1st Cir. 1994) (using rational basis standard in case challenging nonapplication of UOCAVA to people moving to Puerto Rico, because no fundamental rights were infringed nor suspect classes affected).

¹³⁷ See *Utah v. Evans*, 143 F. Supp. 2d 1290, 1301 (D. Utah 2001) (using this to justify the census counting certain overseas public employees but not their private counterparts).

¹³⁸ This sentiment seems to have animated the preferential treatment given to military personnel in the law that preceded OCVRA. See, e.g., S. REP. NO. 84-580, at 3 (1955); *cf.* *Evans*, 143 F. Supp. 2d at 1300-01. But see *Davidson*, *supra* note 73, at 482 (rejecting attempts to differentiate public and private expatriates).

¹³⁹ See *Franklin v. Massachusetts*, 505 U.S. 788, 792-93 (1992) (challenging 1990 Census); *Evans*, 143 F. Supp. 2d at 1293 (challenging 2000 Census); *cf.* *House*

Most significantly for the purposes of this article, the category of public expatriates serving the country is distinguishable from the category of private, permanent expatriates who have left the United States with no intention of ever returning.

It is also unclear how the Court would view the infringement of the right to vote in this situation. As discussed, permanent expatriates do not have any constitutional right to vote in the states where they no longer live; no right, no infringement.¹⁴⁰ If the infringement is instead understood as violating permanent expatriates' right to equal treatment, though, it becomes more important that private employment is not a suspect classification. The states would still need an adequate reason for this discrimination to pass rational basis review—and again, it is uncertain just what their reasons might be—but the bar would be low.

By contrast, consider the very different result when there really is a right to vote being violated. In *Carrington v. Rash*, the Supreme Court struck down a Texas law that barred people who moved to Texas in the course of their military duty from ever voting in Texas as long as they remained in the military.¹⁴¹ Discriminating between “qualified voters within the state” on the basis of their occupation was simply not permissible, the Court said.¹⁴² But the key language here is “within the state,” and the case the Court quoted for that phrase put it even more starkly.

*Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. . . . [T]here is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.*¹⁴³

In other words, even the argument for private expatriates' equality is greatly weakened by the fact that they are not residents of their former states.

This suggests a narrower approach that might have worked better for OCVRA's proponents. If OCVRA had framed

Hearings, *supra* note 18, at 261 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (noting complications OCVRA presents for the census).

¹⁴⁰ See *supra* text accompanying notes 105-114.

¹⁴¹ *Carrington v. Rash*, 380 U.S. 89 (1965).

¹⁴² *Id.* at 96 (quoting *Gray v. Sanders*, 372 U.S. 368, 380 (1963)).

¹⁴³ *Gray*, 372 U.S. at 379-80 (emphasis added).

the issue as making it easier for private expatriates to prove—on equal terms with public expatriates—that they retained their stateside domiciles, it would have been much easier for Congress to rely on authority like *Carrington* to establish a claim for authority under Section 5 of the Fourteenth Amendment. OCVRA’s opponents did not dispute that *bona fide residents* were entitled to equal treatment when they were abroad regardless of whether they were publicly or privately employed.¹⁴⁴ But by granting voting rights outright to nonresidents qua nonresidents, Congress undermined itself.

None of this is to say that OCVRA (and by extension, UOCAVA) would necessarily lose the equal protection argument. It might be that even nonresidents who are not members of a suspect class might have enough of a right to equal treatment here to trump whatever justifications a state could offer. But even if that is so, it is unclear that OCVRA’s remedy—enfranchising them—is an appropriate one. Given all the other problems with letting nonresidents vote, a better remedy might have been to disenfranchise all permanent expatriates, including the public ones, or to disenfranchise only the most detached—but on equal terms for public and private expatriates. Perhaps that would have been a tough sell politically, but legally, that is beside the point.

iv. Residency Requirements

The Senate’s final finding was that residence requirements did not “bear a reasonable relationship to any compelling State interest in the conduct of Federal elections,” which was its relaxed version of the test needed at the time to determine that an infringement of a fundamental right was justified.¹⁴⁵ OCVRA’s proponents noted that while residence requirements might make sense for determining eligibility to vote in state and local elections, federal elections were more about national issues.¹⁴⁶ The proponents took pains to have the record reflect that there were hundreds of thousands of overseas citizens who were well informed and interested in the

¹⁴⁴ See Shurtz, *supra* note 6, at 145.

¹⁴⁵ Cf. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (requiring—more strictly—that infringements be “necessary to promote a compelling governmental interest” (emphasis added))).

¹⁴⁶ See, e.g., *House Hearings*, *supra* note 18, at 17 (comments of Sen. Mathias) (contrasting expatriates’ interest in national versus local issues and conceding their disconnection with the latter).

doings of the federal government.¹⁴⁷ Given this national scope, having eligibility turn on one's local address did not seem "compelling" to the proponents.

This factor does not really add to the legal argument, though. If one believes (as one should) that the Constitution requires states to choose their representatives and senators by a vote of eligible "people of the state," then it is not only a compelling state interest but also a constitutional necessity for the state to have some sort of residence requirement. Even if it would be theoretically acceptable for the state to define former residents as current "people of the state," it is hard to argue that the Constitution *requires* anything of the sort.¹⁴⁸ Conversely, the Supreme Court has recognized that even when nonresidents have a direct interest in the workings of an area's government, that is not sufficient to give them a right to vote there.¹⁴⁹

Even those who do not credit the People of the States Clauses with this much potency must confront the fact that a state and its people have an interest in effective representation *of themselves* in Congress. Here too, voting is a matter not just of citizenship but also of place. This junction is summed up perfectly by the Supreme Court's declaration that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction*."¹⁵⁰ Members of the House and Senate represent constituencies, which is a term for both the land in a state or district and the people in it.¹⁵¹ When someone who no longer lives in a

¹⁴⁷ See H.R. REP. NO. 94-649, at 2 (1975); *Senate Hearings*, *supra* note 42, at 78 (testimony of Eugene L. Stockwell, Associate General Secretary, National Council of Churches); *id.* at 69-70 (testimony of Sargent Shriver, Chairman, Ambassadors Comm. for Voting by Americans Overseas).

¹⁴⁸ *Cf. Senate Hearings*, *supra* note 42, at 64 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (rejecting notion that abolition of residency requirements is "plainly adapted" (in the words of the test used at the time) to securing Fourteenth Amendment rights).

¹⁴⁹ See *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70 (1978) ("The line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellants' case, like their homes, falls on the farther side.").

¹⁵⁰ *Dunn*, 405 U.S. at 336 (emphasis added). The *Dunn* Court also noted that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the *basic conception of a political community*, and therefore could withstand close constitutional scrutiny." *Id.* at 343-44 (emphasis added); see also *Senate Hearings*, *supra* note 42, at 65 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.); Gura, *supra* note 6, at 192.

¹⁵¹ See *Senate Hearings*, *supra* note 42, at 63 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (noting that legislators "represent local and State interests"); *House Hearings*, *supra* note 18, at 90 (comments of Rep. Wiggins) ("There is nothing to support that a Member of Congress is a national legislator either, he is a

constituency gets to vote there, it subverts the jurisdiction's democratic geography and clouds the question of whom the elected member represents.¹⁵² Anyone who votes in the district obviously has a claim on the member's attention—that is the whole point of democratic elections—but for people outside the constituency and beyond the state's jurisdiction to get that sort of attention is constitutionally uncomfortable. The state's interest in preventing that certainly seems compelling.

To be sure, nonresident citizens do retain an interest in the operation of the federal government, and a distinct one at that. This is particularly so given that, almost alone in the world, the United States requires its expatriates to pay taxes on their foreign income.¹⁵³ One might say, then, that an appropriate corollary of the founding era's slogan of “no taxation without representation” is “with taxation comes representation.”¹⁵⁴ But there is no such clause in the Constitution. Even if there were, ceasing to tax these people would solve the problem just as well as giving them the vote does. More to the point, it would do so without contravening the People of the States Clauses, which definitely are in the Constitution and are entitled to acknowledgment and respect.

c. *Oregon v. Mitchell*

Despite all of these constitutional objections, OCVRA's proponents had a potent weapon in reserve: *Oregon v. Mitchell*.¹⁵⁵ Not only did *Mitchell* offer several bases for Congress's power to protect the rights to vote and travel, it also specifically approved forcing states to let former residents vote in them.

But OCVRA's opponents had strong, convincing responses. To start, *Mitchell* saw the Court fracture and issue five opinions, none of which commanded majority support.¹⁵⁶ The result in *Mitchell* was the law of the land, but none of the reasoning contained in it was. Of course, OCVRA only would have needed five Justices' votes to be upheld, regardless of

representative of a district and a State.”). *But see* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (“Legislators represent people, not trees or acres.”).

¹⁵² See Shurtz, *supra* note 6, at 153-54.

¹⁵³ See *supra* note 17.

¹⁵⁴ See H.R. REP. NO. 94-649, at 11 (1975) (supplemental views of Rep. Frenzel) (“These people pay U.S. taxes, are U.S. citizens and should be allowed to vote in U.S. elections.”).

¹⁵⁵ See *supra* Section II.A.1.

¹⁵⁶ See *House Hearings*, *supra* note 18, at 254-55 (testimony of Mary C. Lawton, Deputy Assistant Att’y Gen.) (noting fractured nature of *Mitchell*).

whether those five agreed on a rationale. But peel away just one of the votes from *Mitchell* for being inapplicable to overseas voting, and the case would not save OCVRA at all.

Mitchell reviewed several parts of the Voting Rights Act Amendments of 1970. The ones relevant here are the lowering of the voting age to 18 and the restrictions on length-of-residency requirements in presidential elections. The voting-age provision had the complete support of only four Justices (Douglas in one opinion, and Brennan, White, and Marshall in another), who believed that it violated equal protection for states to bar 18- to 20-year-olds from voting in federal or state elections.¹⁵⁷ More precisely, they believed that Congress could reasonably conclude this by using the deferential approach to Fourteenth Amendment Section 5 power seen in *Katzenbach v. Morgan*.¹⁵⁸

Justice Black voted to uphold the voting-age provision only as applied to federal elections.¹⁵⁹ He did not use the Fourteenth Amendment.¹⁶⁰ Instead, he noted that while the Constitution gave the states the power to regulate the “Times, Places and Manner of holding Elections for Senators and Representatives,” it also provided that “Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”¹⁶¹ Significantly, Justice Black believed that the Elections Clause empowered Congress to set voter-qualification standards, presumably as part of the “manner” of holding elections.¹⁶²

It is easy to see how those members of Congress who cared might have thought that this lineup of votes boded well for OCVRA’s enfranchisement of permanent expatriates. As in *Mitchell*, OCVRA’s defenders could ignore the four dissenters and simply cobble together five votes from those Justices who (1) deferred to Congress’s sense that Fourteenth Amendment rights were at stake or (2) thought Congress had a general power to prescribe voter qualifications in congressional elections. But Justice Black, the crucial fifth vote, had died in 1971. Commanding only one vote, Justice Black’s reasoning did not

¹⁵⁷ *Oregon v. Mitchell*, 400 U.S. 112, 135-44 (1970) (opinion of Douglas, J.); *id.* at 239-81 (opinion of Brennan, J.).

¹⁵⁸ *Id.* at 141 (opinion of Douglas, J.) (applying *Morgan* and its broad approach to Section 5); *id.* at 248 (opinion of Brennan, J.) (asking, per *Morgan*, whether Congress made a reasonable determination that a factual basis existed to find a Fourteenth Amendment violation); *see supra* text accompanying notes 65-67.

¹⁵⁹ *Mitchell*, 400 U.S. at 119-31 (opinion of Black, J.).

¹⁶⁰ *Id.* at 126-30 (opinion of Black, J.).

¹⁶¹ U.S. CONST. art. I, § 4; *Mitchell*, 400 U.S. at 119-24 (opinion of Black, J.).

¹⁶² *Mitchell*, 400 U.S. at 119-24 (opinion of Black, J.).

represent any sort of binding precedent. There was little prospect of anyone else agreeing with his broad reading of Congress's "manner" power.¹⁶³

In declining to endorse Justice Black's views, moreover, the other eight Justices were on solid ground. By conflating voter qualifications with the "manner" in which an election was held, Justice Black's Elections Clause approach ignored Article I, Section 2, Clause 1, which is explicitly devoted to voter qualifications.¹⁶⁴ The Supreme Court recently reiterated that Justice Black's approach is disfavored, stating that "the Elections Clause [only] empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them," and noting how a majority in *Mitchell* specifically rejected Justice Black's expansive vision of the Elections Clause.¹⁶⁵ It is therefore hard to see how *Mitchell's* approval of lowering the voting age legitimizes OCVRA in any way.

In the other relevant portion of *Mitchell*, the Court upheld the portion of the Voting Rights Act Amendments of 1970 that barred states from imposing durational residency requirements of longer than 30 days in presidential elections and gave voters who had been in their new states for fewer than 30 days a right to vote in presidential elections in their old states. In some ways, this was even more helpful for OCVRA's proponents. Eight Justices voted to uphold this part of the statute (albeit in four distinct opinions).¹⁶⁶ Moreover, this dealt with residency requirements—including forcing states to let former residents vote in them—and thus spoke more directly to the issues at hand with OCVRA.

Nevertheless, OCVRA was, again, distinguishable enough that the proponents' confident use of *Mitchell* was misguided. One difference was that this part of the Voting Rights Act Amendments of 1970 only applied to presidential elections.¹⁶⁷ While the various opinions in *Mitchell* signaled that the Amendments would have been constitutional if they had applied to congressional elections as well, those signals were dicta—some

¹⁶³ See Shurtz, *supra* note 6, at 147-48.

¹⁶⁴ Criticisms of Justice Black appear in *House Hearings*, *supra* note 18, at 255 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.), *Senate Hearings*, *supra* note 42, at 62 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.), and H.R. REP. NO. 94-649, at 19 (1975) (minority views); *infra* Section II.B.1.

¹⁶⁵ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2257-58, 2258 n.8 (2013).

¹⁶⁶ *Mitchell*, 400 U.S. at 118-19 (opinion of Black, J.) (summarizing votes on this question).

¹⁶⁷ See Shurtz, *supra* note 6, at 149.

of them quite subtle—and did not confront the People of the States Clauses.¹⁶⁸ Indeed, the Amendments' failure to reach beyond presidential elections reflected their sponsors' specific desire to leave states in control of congressional elections.¹⁶⁹

A more important difference is that *Mitchell* dealt with the right to travel within the United States rather than with the (more limited) right to live abroad. Only the former right has the specific protection of Article IV of the Constitution, which precludes states from treating their citizens (i.e., residents) differently for being new arrivals from another state.¹⁷⁰ Additionally, Supreme Court case law has placed limits on the right to move abroad that it has not placed on the right to move between states.¹⁷¹

An even greater reason that this aspect of *Mitchell*'s holding could not justify OCVRA was that the Court only approved an administrative fix at the margins of residency requirements, while OCVRA essentially gutted residency requirements.¹⁷² The Voting Rights Act Amendments of 1970 declared that people could vote for President in their former state of residence for only 30 days; people who had been gone longer than that could vote—could only vote—in their new states. The law's main thrust was the latter part, preventing new states from requiring more than 30 days of residence. Congress decided that states did not need longer than that to process their new arrivals as voters.¹⁷³ Some processing time

¹⁶⁸ See *Mitchell*, 400 U.S. at 134 (opinion of Black, J.) (approving regulation of presidential elections because of Congress's general power "to regulate federal elections"); *id.* at 149 (opinion of Douglas, J.) (speaking in terms of "[t]he right to vote for national officers," which seemingly includes Congress); *id.* at 287 (opinion of Stewart, J.) (stating gratuitously that the reasons that justify the statute apply to "any federal election, whether congressional or presidential"); *id.* at 237-38 (opinion of Brennan, J.) (speaking of the right of interstate migration in the context of "federal elections"); *Senate Hearings, supra* note 42, at 237 & n.2 (statement of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting) (noting supportive dicta in each majority opinion); see also H.R. REP. NO. 94-649, at 7; S. REP. NO. 94-121, at 7 (1975).

¹⁶⁹ See *Hearings on Voting Rights Act of 1965 Amendments, supra* note 68, at 288 (comments of Sen. Goldwater) (noting that the Voting Rights Act Amendments of 1970, for which he was advocating, covered only presidential elections because "the States must retain" control over determining eligibility for congressional elections).

¹⁷⁰ U.S. CONST. art. IV, § 2, cl. 1.

¹⁷¹ See *supra* note 117 and accompanying text.

¹⁷² See *House Hearings, supra* note 18, at 256 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (distinguishing Voting Rights Act Amendments' 30-day applicability from OCVRA's much further reach); H.R. REP. NO. 94-649, at 17-18 (minority views) (distinguishing *Mitchell* as concerning only durational residency requirements); Shurtz, *supra* note 6, at 150.

¹⁷³ Given Americans' tremendous mobility, durational residency requirements had a substantial disenfranchising effect; one commentator conservatively estimates

was required, though, and it was only fair to say that until you had been processed in your new state, you were still a voter in your old one. OCVRA, by contrast, gave permanent expatriates the right to vote in their former states forever, not just for the brief time it took to be processed in a new location. The limited actions approved in *Mitchell* do not amount to any sort of declaration by the Court that Congress has a general power either to force states to let former residents vote there or to gut state residency requirements.

d. The Original Case Against OCVRA in Sum

OCVRA's constitutional critics had a strong case in 1975 that OCVRA ran afoul of the People of the States Clauses. OCVRA's proponents responded that those clauses mattered less than U.S. citizens' inherent rights to vote in federal elections and live wherever they choose. But the right to vote is not a right to vote in a particular place; the right to live abroad is relatively weak and not guaranteed by the Constitution to be costless; and the Supreme Court has taken pains to say that it is never a constitutional violation for states to limit voting to their bona fide residents. Properly understood, these constitutional principles need not entail—and cannot justify—violating the People of the States Clauses.

The strongest argument for OCVRA was that it rectified unequal treatment between the public and private sector. But even if that constituted an equal protection violation (an uncertain proposition at best), it did not mean that enfranchising all of the private expatriates was the appropriate remedy. Requiring all voters to be bona fide residents would have provided just as much equality with none of the attendant unconstitutionality.

B. Arguments Since 1975

There are other significant arguments that OCVRA's critics either did not make or did not press to the same degree. Some of this reflects changes in Supreme Court jurisprudence in the intervening 40 years. At any rate, a full consideration of the constitutional case against UOCAVA requires contemplating these other arguments.

them to have affected 5%-10% of the nation's adult population. KEYSSAR, *supra* note 23, at 151.

1. The Symmetry Requirement of the Elector Qualification Clauses

While OCVRA's critics expressed deep concern that it violated the People of the States Clauses, they made only passing reference to the problems it might create with the neighboring Qualifications Clauses.¹⁷⁴ Being a "person of the state" is a necessary but not sufficient basis for voting in congressional elections; Article I, Section 2, Clause 1 and the Seventeenth Amendment also require that "the electors in each state" for U.S. House and Senate elections "shall have the qualifications requisite for electors of the most numerous branch of the state legislature[s]."¹⁷⁵ In other words, these clauses state plainly that in order to vote in congressional elections, one must be qualified to vote in state-house elections. OCVRA violates this symmetry requirement.

The Constitution leaves it largely to the states to define the electorate for state house.¹⁷⁶ The limits on state discretion here are mainly structural. The Guaranty Clause requires that the states have a republican form of government, which suggests that the franchise must be relatively broad, and the Fourteenth Amendment penalizes states that deny their inhabitants the franchise.¹⁷⁷ States also cannot define their electorates in a way that violates constitutional standards, such as those that protect voting rights by race, sex, and age.¹⁷⁸ Congress has the power to legislate to enforce those voting rights, as well as to enforce due process and equal protection rights more generally.¹⁷⁹ But Congress's power here is not specific to federal elections; the

¹⁷⁴ See, e.g., *Transcript on S. 95*, *supra* note 47, at 53-55 (comments of Rep. Wiggins) (dismissing symmetry issue despite overall deep constitutional concerns about OCVRA).

¹⁷⁵ U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. The quoted language appears in both clauses, differing only in capitalization, and in the final "s," which appears only in the Seventeenth Amendment.

¹⁷⁶ See, e.g., *Baker v. Carr*, 369 U.S. 186, 243-44 (1962) (Douglas, J., concurring).

¹⁷⁷ U.S. CONST. art. IV, § 4; U.S. CONST. amend. XIV, § 2 (penalizing states that deny the vote to adult, male, nonrebel, noncriminal inhabitants). Robert W. Bennett has offered two possible definitions of the Guaranty Clause: "a government answerable ultimately to the people, rather than a monarchy or an aristocracy," or, more narrowly, "popular government in which policy choices are made by a representative assembly." Robert W. Bennett, *Originalism: Lessons from Things That Go Without Saying*, 45 SAN DIEGO L. REV. 645, 657 (2008). I am relying on the former definition; Bennett favors the second and uses it to raise questions about the constitutionality of direct democracy. See *id.*

¹⁷⁸ See U.S. CONST. amend. XV (protecting voting rights by race); *id.* amend. XIX (protecting voting rights by sex); *id.* amend. XXVI (extending voting rights to 18-year-olds).

¹⁷⁹ See *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, § 2; *id.* amend. XXVI, § 2.

Qualifications Clauses' symmetry requirement is just the mechanism for enforcing these rights in federal elections.

As previously noted,¹⁸⁰ the Supreme Court recognized this structure in *Katzenbach v. Morgan*, years before OCVRA introduced the current problems into federal law: "States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators . . ." ¹⁸¹ Congress can step in to enforce other constitutional requirements that the states might violate, but even then the Qualifications Clauses' symmetry requirement remains—plain as day.

UOCAVA (and before it, OCVRA) violates the symmetry requirement because in each state's congressional elections it generates nonresident voters who are not qualified to vote for state house. As a matter of textual interpretation, this is another seemingly easy call. UOCAVA violates the symmetry requirement as clearly as any law could.¹⁸²

To defend this conduct, proponents offered the same response that they had for the People of the States Clauses: in the name of vindicating voting and travel rights, Congress had the power simply to ignore the Qualifications Clauses. Recall the House Committee Report's language to this effect, stating that these constitutional provisions "are not sufficient to prevent Congress from protecting a person who exercises . . . [the right to travel] when Congress may protect this right from other less fundamental disabilities," and noting Justice Stewart's statement in his *Oregon v. Mitchell* concurrence/dissent that the federal power to vindicate rights supersedes the states' power to define the franchise.¹⁸³ As with the People of the States Clauses, however, there was no basis for Congress to conclude that it could simply ignore this part of the constitutional structure.¹⁸⁴

To be fair to the committee, Justice Stewart did denigrate the symmetry requirement in his opinion. He started out by

¹⁸⁰ See *supra* text accompanying note 63.

¹⁸¹ *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (citations omitted); see also *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884) ("[The states] define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State.").

¹⁸² See Shurtz, *supra* note 6, at 133; Gura, *supra* note 6, at 187 n.38.

¹⁸³ H.R. REP. NO. 94-649, at 7 (1975); see *supra* text accompanying note 85.

¹⁸⁴ See *supra* text accompanying notes 85-89.

paying it lip service¹⁸⁵ but concluded that the statutory provision he was discussing (the abolition of residency requirements longer than 30 days) could apply to congressional elections without applying to state-house elections.¹⁸⁶ Though he did not really explain why, Justice Stewart apparently believed that the pursuit of an appropriate objective—in the case of *Mitchell*, vindicating the right to interstate travel—could trump the symmetry requirement.¹⁸⁷ But Justice Stewart's opinion was the only one of the five in *Mitchell* that discussed the symmetry requirement in the context of the 30-day cap—no surprise, since the cap did not even apply to congressional elections, just to presidential ones. The cap thus did not implicate the symmetry requirement, and Justice Stewart's statement was entirely gratuitous.¹⁸⁸

More problematic is that the committee reporting on OCVRA, following Justice Stewart, viewed the right to travel and the symmetry requirement as somehow being at odds with each other. Rather than say that the symmetry requirement could be ignored so that it would not defeat the right to travel abroad, the committee could have and should have respected both the requirement and the right.¹⁸⁹ Doing so would have meant using federal law to force states to let nonresidents vote in federal *and* state elections. The committee was unwilling to push the right to travel that far, but the symmetry requirement meant that they had to do either that or nothing.

Ironically, the committee ignored another part of *Mitchell* that directly implicated—and seemingly undermined—the symmetry requirement. As discussed, the Voting Rights Act Amendments of 1970 required states to allow 18-year-olds to vote in both federal and state elections.¹⁹⁰ The change was effective

¹⁸⁵ *Oregon v. Mitchell*, 400 U.S. 112, 288-89 (1970) (opinion of Stewart, J.) (contending that “a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment,” and that Congress lacks the power to do so, as well (citations omitted)).

¹⁸⁶ *Id.* at 292 (opinion of Stewart, J.).

¹⁸⁷ *Id.* (concluding that the statute was not actually setting qualifications, but rather was an attempt to protect the right to travel).

¹⁸⁸ *Id.* at 287 (opinion of Stewart, J.) (“I have concluded that, while § 202 applies only to presidential elections, nothing in the Constitution prevents Congress from protecting those who have moved from one State to another from disenfranchisement in any federal election, whether congressional or presidential.”).

¹⁸⁹ *Cf. id.* at 128 (opinion of Black, J.) (“[T]here are at least three limitations upon Congress’ power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution.”).

¹⁹⁰ *See supra* Section II.A.2.c.

January 1, 1971.¹⁹¹ The *Mitchell* Court approved the federal extension just before that but struck down the state extension, thus decoupling the congressional electorate from the state-house electorate.¹⁹² Although symmetry was restored before the next Election Day via the swift passage and ratification of the Twenty-Sixth Amendment,¹⁹³ *Mitchell's* holding nevertheless represented an apparent strike against the symmetry requirement.

Even if it was aware of that precedent, though, the committee was right to ignore it. Four Justices had voted to approve the statute's application to both state and federal elections. Four Justices had voted to reject its application to both. Justice Black was the only one who thought that it could apply to federal but not state elections. For good measure, neither he nor the other Justices bothered to discuss symmetry at all. Although this fractured vote yielded a final result that violated the symmetry requirement, it also represented an eight-to-one vote consistent with symmetry.¹⁹⁴

More than a decade after OCVRA's enactment, the Supreme Court addressed the symmetry requirement for the first time and did so in a way that appears at first glance to give some cover to UOCAVA. In *Tashjian v. Republican Party of Connecticut*, the Court approved of a state having open primaries for congressional elections but not for state offices,

¹⁹¹ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 305, 84 Stat. 314, 319.

¹⁹² *Mitchell*, 400 U.S. at 117-18 (opinion of Black, J.).

¹⁹³ *Mitchell* was decided on December 21, 1970. *Id.* at 112. Congress passed the amendment, which guaranteed 18-year-olds the right to vote in state elections too, in March 1971. The ratification was completed on July 1, 1971, the speediest ever ratification of a federal constitutional amendment. See DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 368 (1996). There were two special elections to the 92nd Congress between the Voting Rights Act Amendments of 1970's effective date (January 1, 1971) and the Amendment's ratification on July 1, 1971. See *92nd United States Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/92nd_United_States_Congress [<http://perma.cc/C2TL-VUH3>] (last visited Feb. 29, 2016) (listing special House elections). Maryland had a special election in its First District on May 25, but Maryland had already amended its state law to lower the voting age to 18 for state elections as well, so there was no symmetry violation. 1971 Md. Laws 757. South Carolina had a special election in its First District on April 27, and 18-year-olds presumably voted, but South Carolina had not yet amended its eligibility requirements for state elections. There were no state-house elections held in South Carolina between April 27 and July 1, though, so by a liberal measure, there was no symmetry violation there either. See Email from Marion Chandler, Archivist, S.C. Dep't of Archives and History, to Barbara Bean, Reference Librarian (Mar. 3, 2014, 15:16 EST) (on file with author).

¹⁹⁴ See Shurtz, *supra* note 6, at 134 (making this point).

even though that meant defining the (primary) electorate differently for state versus federal elections.¹⁹⁵

In so holding, the Court said that the Qualifications Clauses do not require actual symmetry and instead function as a floor. Writing for a five-Justice majority, Justice Marshall relied on a contratextual version of the Framers' purpose in drafting Article I, Section 2.¹⁹⁶ As he interpreted the history, the Framers were concerned that any national standard for suffrage—whether written into the Constitution or entrusted to Congress to legislate—might have been too restrictive and thus distasteful to the states with more liberal voter-eligibility laws.¹⁹⁷ Since those states would not want to disenfranchise part of their electorates, the Framers needed to allow state-by-state determinations of qualifications but ensure that the federal electorate was at least as broad as the state electorate.

Because their purpose was thus to protect suffrage rather than restrict it, Justice Marshall said, the Qualifications Clauses' purpose is satisfied if all state-house voters can also vote in congressional elections.¹⁹⁸ Once that condition is met, adding more people to the congressional electorate is no problem. This is what the Court had done in *Mitchell*—allowing 18-year-olds to vote in federal, but not state elections—and Justice Marshall cited the case as precedent for his theory.¹⁹⁹ This surely gives some ammunition to those who would defend UOCAVA from the charge of unconstitutional antisymmetry. UOCAVA seemingly passes the *Tashjian* test because it only adds to the federal electorate, and it does nothing to bar any state-house voters from participating in congressional elections.

There is ample ammunition on the other side, though. First, consider the dissent in *Tashjian* by Justice Stevens, joined by an unlikely bedfellow, Justice Scalia. Justice Stevens began by scoffing at the way the majority rewrote the Qualifications Clauses' clear "shall have" language to read "need not have."²⁰⁰ Whatever the Framers' intentions here,

¹⁹⁵ *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986). Because of Connecticut's setup, independent voters would be able to vote in congressional primaries but not state-house primaries.

¹⁹⁶ *Id.* at 227-28.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* at 229; *see also* James L. Craig, Jr., *A Shared Sovereignty Solution to the Conundrum of District of Columbia Congressional Representation*, 57 *HOW. L.J.* 235, 262 n.89 (2013); Davidson, *supra* note 73, at 485-86.

¹⁹⁹ *Tashjian*, 479 U.S. at 229.

²⁰⁰ *Id.* at 231 (Stevens, J., dissenting).

their text was clear and unambiguous in requiring symmetry rather than a floor. Justice Stevens continued by providing a compelling challenge to the majority's view of the Framers' purpose.²⁰¹ Finally, he refuted Justice Marshall's conclusion that *Mitchell* was a precedent for his asymmetric view of the Qualifications Clauses (though, like Justice Marshall, he ignored two other asymmetric precedents).²⁰²

Justice Stevens's dissent, while strong, had only two votes behind it. Nevertheless, UOCAVA is problematic even if

²⁰¹ The majority noted that in adopting the final language of the Qualifications Clause, the Framers were rejecting a proposal for a national standard for eligibility to vote in congressional elections, worrying that it might be distastefully restrictive to some states. Justice Stevens pointed out, however, that the symmetry requirement was in place in the draft that the Convention was considering before the unsuccessful proposal for a national standard was made. The desire for a broader electorate explained the rejection of the proposal, but it did not account for the presence of the symmetry requirement in the first place. *Id.* at 227-33 (Stevens, J., dissenting).

²⁰² Justice Stevens noted the point made above: eight Justices in *Mitchell* voted consistently with symmetry and only one voted against it. *Id.* at 233 (Stevens, J., dissenting); see *supra* text accompanying notes 190-194. Thus *Mitchell* does not really provide an argument, let alone a precedent, against the symmetry requirement. It is interesting that, especially given the weakness of the *Mitchell* precedent here, neither Justice Marshall nor Justice Stevens cited the two other relevant precedents on asymmetry. One concerned literacy tests. The Civil Rights Act of 1964 placed certain sorts of limits on literacy tests—mainly requiring that they be applied fairly—but only in federal elections. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241. This arguable asymmetry was partially cured by the Voting Rights Act of 1965 (which suspended the use of literacy tests in all elections in places that had abused them) and completely cured by its amendments in 1970 (which banned all literacy tests, period, for five years) and 1975 (which made the ban permanent). See Shurtz, *supra* note 6, at 133 n.18 (describing this legislative sequence). The second precedent concerned poll taxes. Ratified in 1964, the Twenty-Fourth Amendment ended the use of poll taxes as a condition of voting, but only in federal elections. U.S. CONST. amend. XXIV, § 1. This set up an apparent violation of the symmetry requirement in the five states (Alabama, Arkansas, Mississippi, Texas, and Virginia) that continued to require poll taxes in state elections, because nonpayers could vote in federal elections without being qualified to vote for state house. See DEANNE DURRETT, RIGHT TO VOTE 23 (2005) (listing the five states). But the amendment, as such, could be read as amending the symmetry requirement as far as poll taxes were concerned. Indeed, a major reason that proponents had gone the amendment route rather than passing a statute to ban poll taxes in federal elections was *precisely* that such a statute was vulnerable to being struck down for violating the symmetry requirement. See *Abolition of Poll Tax in Federal Elections: Hearings on H.J. Res. 404 et al. Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 12, 25 (1962) (statement of Sen. Holland) (explaining rationale for using amendment process); *Poll Tax: Hearings on H.R. 29 Before the S. Comm. on Rules and Admin.*, 80th Cong. 100 (1948) (statement of John M. Daniel, Att'y Gen. of South Carolina) (referring to objection to federal legislation on banning poll taxes in federal elections as violating symmetry requirement). In any case, the issue became moot when, in 1966, the Supreme Court restored symmetry by banning poll taxes in state elections as well. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). Perhaps the reason that neither the literacy test asymmetry nor the poll tax asymmetry was mentioned in *Tashjian* was that neither had been approved by any court. In any case, their windows of asymmetry were both swiftly closed, in contrast to OCVRA/UOCAVA's, which has now been open for nearly 40 years.

one accepts the majority's reasoning. To be sure, *Tashjian* does reject the simple, textual version of symmetry. But it does not necessarily replace it with an equally simple floor. Regardless of whether the Framers thought that they were requiring formal symmetry or more generally protecting a broader franchise, the mechanism that they chose was federalism. Whether one focuses on their text or their intent, the one thing that the Framers were clearly doing with the Qualifications Clauses was stopping the Convention or Congress from instituting a uniform national standard for federal voter eligibility.²⁰³ The problem with UOCAVA, then, is that even though it broadens the franchise, it does so by imposing just such a uniform national standard on the states—precisely what the Framers meant to avoid. This was no problem in *Tashjian* because the violation of symmetry in that case was perpetrated by the State of Connecticut, not by Congress.²⁰⁴ UOCAVA, by contrast, violates not only the symmetry required by the Qualifications Clauses' text but also the federalist approach embodied in the structure of the Qualifications Clauses.

Admittedly, both the past practice of asymmetry and the judicial treatment of the Qualifications Clauses cloud the simple textual argument that UOCAVA unconstitutionally decouples the state and federal electorates. But past asymmetries were all short lived and unapproved by courts.²⁰⁵ There is plenty of room to distinguish the two judicial precedents (*Mitchell* and *Tashjian*).²⁰⁶ The best reading of the clauses precludes Congress from running roughshod over both the plain text and federalist structure of the Qualifications Clauses.

²⁰³ As James Madison put it, "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." THE FEDERALIST NO. 52, at 256 (James Madison) (Terence Ball ed., 2003).

²⁰⁴ See also *U.S. Term Limits v. Thornton*, 514 U.S. 779, 865 (1995) (Thomas, J., dissenting) (discussing *Tashjian* floor theory in the context of state action).

²⁰⁵ See *supra* note 202.

²⁰⁶ There is at least one lower-court precedent on the side of symmetry. In *Adams v. Clinton*, a three-judge district court rejected a claim that residents of D.C. had a right to vote in federal elections as residents of Maryland, in part because they do not have the right to vote in elections for Maryland's state house as would be required by the Qualifications Clauses. *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C.), *aff'd sub nom.* *Alexander v. Mineta*, 531 U.S. 940 (2000).

2. Section 5 of the Fourteenth Amendment and Recent Case Law

OCVRA's proponents thought that Congress could pass the legislation using its power to enforce the Fourteenth Amendment.²⁰⁷ Their conception of Congress's Section 5 power was based on the Supreme Court's decision in *Katzenbach v. Morgan*, which freed Congress from being tightly limited by the courts' conception of what constituted a Fourteenth Amendment violation.²⁰⁸

But starting in 1997 with *City of Boerne v. Flores*,²⁰⁹ the Supreme Court has taken a more restrictive view of Congress's Section 5 power.²¹⁰ The Court has required that Section 5 legislation respond to things that the Court agrees are actually Fourteenth Amendment violations, not just things that it can "perceive a basis upon which Congress might predicate a judgment" of a violation.²¹¹ Moreover, the Court has required that in addressing violations, the legislation cannot sweep in too much other, nonviolative state action.²¹² The Court has also required a showing that in passing the legislation, "Congress had evidence of a pattern of constitutional violations on the part of the States."²¹³ Taken together, these requirements form the so-called "congruent and proportional" test.

²⁰⁷ See *supra* Section II.A.1.

²⁰⁸ See *supra* text accompanying notes 62-67.

²⁰⁹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²¹⁰ This line of cases has been somewhat inconsistent and reflects deep divisions on the Court. The Court began with a series of cases in which its conservative wing imposed a stricter version of the test. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). Then, however, Justice O'Connor joined the liberal wing of the Court on this issue and provided a less restrictive approach. It is possible to reconcile both lines of cases by noting that in the cases taking the less restrictive approach, the Court found that a fundamental right was implicated. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (access to the courts); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (freedom from sex discrimination). The only Justice who never dissented in any of these cases was Justice O'Connor, but these cases are all still good law, so the search for a fundamental rights "hook" appears to have some salience. See, e.g., *Coleman v. Ct. of App. of Md.*, 132 S. Ct. 1327 (2012) (applying the congruent and proportional test in a way that turned on whether sex discrimination was implicated). Thus, in arguing about the likely results of a challenge to UOCAVA's enfranchisement of permanent expatriates, it seems reasonable to note conservatively that fundamental rights (to vote and travel) are implicated and for this article to therefore use the less restrictive approach.

²¹¹ See *Hibbs*, 538 U.S. at 728 (citing *Boerne* for the notion that "it falls to this Court, not Congress, to define the substance" of Fourteenth Amendment violations in Section 5 cases); *supra* note 66 and accompanying text (discussing former "perceive a basis" standard).

²¹² See, e.g., *Hibbs*, 538 U.S. at 738.

²¹³ *Id.* at 729.

As discussed, it would have been difficult for OCVRA's or UOCAVA's enfranchisement of permanent expatriates to pass constitutional muster even under the more deferential *Morgan* approach.²¹⁴ Under the post-*Boerne* "congruent and proportional" approach, though, it would be considerably harder, because the argument that bona fide residency requirements violate the Fourteenth Amendment now faces a higher bar.²¹⁵ Put another way, it seems unlikely that permanent expatriates could have ever prevailed in a lawsuit accusing their former states of violating the Fourteenth Amendment by refusing to let them continue voting in federal elections there. The Supreme Court has defended states' bona fide residence requirements too many times to conclude that the Court does not really mean it.²¹⁶ Indeed, the Court has not only approved the states' use of residence requirements, it has recognized those requirements as being at the heart of eligibility.²¹⁷ Coupled with the limits on the rights to vote and travel abroad,²¹⁸ the notion of a bona fide residence requirement being a violation of the Constitution seems like a stretch too far. Without a constitutional violation, Section 5 does not permit Congress to enfranchise permanent expatriates.

The same is true for the (relatively stronger) equal protection claims. Recall that before OCVRA, the states were very liberal in construing the residence status of federal employees and their dependents, but fewer states were similarly generous to private expatriates.²¹⁹ One could argue that the Fourteenth Amendment requires states to treat public and private expatriates the same in this regard. As already discussed, though, this equal protection argument suffers from some fundamental weaknesses, especially with regard to the overbreadth of the remedy that OCVRA perpetrated.²²⁰ Indeed, the congruent and proportional test would be even more sensitive to this overbreadth.

Finally, even if Fourteenth Amendment violations could be established by *others*—say, bona fide residents who were not adequately accommodated by their states' absentee registration

²¹⁴ See *supra* Section II.A.2.b.

²¹⁵ Cf. KENNETH R. THOMAS, CONG. RESEARCH SERV., RL30747, CONGRESSIONAL AUTHORITY TO STANDARDIZE NATIONAL ELECTION PROCEDURES 7 (2003) (noting apparent reduction wrought by *Boerne* of congressional authority to regulate procedures, as opposed to voter qualifications, in federal elections).

²¹⁶ See *supra* notes 123-125 and accompanying text.

²¹⁷ See *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68-69 (1978).

²¹⁸ See *supra* Section II.A.2.b.

²¹⁹ See *supra* text accompanying notes 32-33.

²²⁰ See *supra* Section II.A.2.b.iii.

and voting procedures—it would not be a congruent and proportional response to that constitutional violation to sweep permanent expatriates in with those bona fide residents. The congruent and proportional test is designed to align Congress’s use of its Section 5 power with the redress of actual constitutional violations. Congress need not protect permanent expatriates in order to protect their temporary-expatriate counterparts,²²¹ and so here too OCVRA and UOCAVA are even more poorly poised to pass constitutional muster than they were 40 years ago.

3. Apportionment and Dilution

UOCAVA’s enfranchisement of permanent expatriates is also constitutionally awkward because of how it interacts with representation in the House of Representatives. It affects both seat apportionment between the states and the drawing of district lines within each state. This argument was not part of the debate over OCVRA, but it deserves consideration.

Every 10 years, based on the decennial census’s count of residents “in each state,” seats in the House of Representatives (and, by extension, electoral votes) are reapportioned among all the states.²²² Each state’s count includes nonresident federal employees living overseas and their dependents and is based on the “home of record” recorded in each federal employee’s individual personnel file.²²³ The home of record is distinct from a legal residence and from the employee’s last residence before going overseas.²²⁴ The census does not, however, count private expatriates; other than federal employees, only those who are

²²¹ See *supra* text accompanying note 144. One might argue that enfranchising permanent expatriates is less important than enfranchising those on the margins—people who are not permanently gone but would have a hard time proving that fact. OCVRA’s proponents were concerned that forcing such people to swear that they intended to return to a particular place would force them to choose between disenfranchisement and perjury. See, e.g., *House Hearings, supra* note 18, at 186 (comments of Sargent Shriver, Chairman, Ambassadors Comm. for Voting by Americans Overseas); *id.* at 13 (statement of Sen. Mathias); H.R. REP. NO. 94-649, at 2 (1975). Although UOCAVA has not been cast in such limited terms, perhaps a court could save it from being struck down via a narrowing construction that merely shifts the burden to the state to prove that a person was *not* coming back. See *supra* note 80 (contemplating this reading).

²²² U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XIV, § 2.

²²³ See KLEKOWSKI VON KOPPENFELS, *supra* note 10, at 251-52.

²²⁴ See Mark Steber, *HOR vs. SLR: What’s the Difference?*, MILITARY.COM, <http://www.military.com/money/personal-finance/taxes/home-of-legal-record-for-taxes.html> [<http://perma.cc/55S6-S96Q>] (last visited Feb. 29, 2016) (explaining “home of record” in military context).

physically present on counting day are included.²²⁵ Legal challenges to both the inclusion of the public expatriates and to the differential treatment of the private expatriates have been unsuccessful.²²⁶

At the margins, changes like these can make the difference between a state keeping, losing, or gaining a seat in the House. In recent history, four censuses have counted overseas federal employees and their dependents at their homes of record, and in three of those instances it made a difference in apportionment.²²⁷ What makes this so objectionable is, first, that these public expatriates' "home of record" might not be the same as their voting residence. In other words, representation is calculated based on people who are counted as part of one state even if they are voting in another state—and living in neither. Second, private expatriates do not get counted anywhere, but they do vote. Thus, representation is calculated without regard to millions of people who are voting and who are distributed unevenly between the states. It is hard to say, given that the census does not count them, but it seems likely that including private expatriates in the population counts of the states in which they vote would often make a difference in apportionment.²²⁸

To be fair to UOCAVA, there are already multiple disconnections between congressional apportionment and states' populations. First, apportionment is based on the state's entire

²²⁵ See *supra* note 12 and accompanying text.

²²⁶ See *supra* note 139.

²²⁷ See *Franklin v. Massachusetts*, 505 U.S. 788, 792-93 (1992) (describing census practices). In 2010, based on data at *Detailed Tables: Apportionment Population and Number of Representatives, by State: 2010 Census in Microsoft Excel Format*, U.S. CENSUS BUREAU, <https://www.census.gov/population/apportionment/files/Apportionment%20Population%202010.xls> [<http://perma.cc/QBY2-H5YT>] (last visited Feb. 29, 2016) and *Detailed Tables: Overseas Population of the 50 States and the District of Columbia: 2010 Census in Microsoft Excel Format*, U.S. CENSUS BUREAU, <https://www.census.gov/population/apportionment/files/Overseas%20Population%202010.xls> [<http://perma.cc/V8U6-CA9F>] (last visited Feb. 29, 2016), including the overseas federal employees and dependents made no difference. In 2000, it gave North Carolina a seat at the expense of Utah. See *Utah v. Evans*, 143 F. Supp. 2d 1290, 1293 (D. Utah 2001). In 1990, it gave Washington State a seat at the expense of Massachusetts. See *Franklin*, 505 U.S. at 790-91. In 1970, it gave Oklahoma a seat at the expense of Connecticut, a fact that occasioned no litigation but that is derivable from data found at U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION viii (1972).

²²⁸ See *House Hearings*, *supra* note 18, at 273 (statement of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting) (showing estimated numbers of how many overseas citizens would vote in each state under OCVRA, with New York and California having larger shares of the total (19.4% and 15.2%) than their shares of the total votes in the 1972 presidential election (9.21% and 10.76%)). Since the census does count public expatriates, analogous figures on how unevenly they are distributed between the states are illustrative. Nationally, 0.34% of the 50-state population came from public expatriates, ranging from 0.18% in New Jersey to 1.57% in Alaska. See *supra* note 227 (citing 2010 Census data that can be used to divide each state's public-expatriate population by its total population).

population, not the number of voters.²²⁹ The proportion of nonvoters (noncitizens, children, disenfranchised felons, and the mentally incompetent) varies from state to state, and apportionment is much different than it would be if it were based on the number of potential voters.²³⁰ Second, the census is a decennial snapshot. By the time of the first congressional election under the new apportionment scheme, more than two-and-a-half years have already passed, and tens of millions of people have since moved between states.²³¹ Third, the census counts some people in the state of their temporary residence instead of their state of domicile (where they vote).²³² Still, it is even odder to base a state's apportionment in part on people who, at the time of the census, do not live in that or any other state and who may vote in another state.²³³ It is also odd to leave people out of a state's count when they do vote in that state.

This oddness carries over into districting within states. When a state divides itself into congressional districts of equal population, at least some expatriates are not included as part of their districts' respective populations.²³⁴ The result is that after states painstakingly draw district lines, being careful to keep their respective populations as close to each other as the Constitution requires, UOCAVA sprinkles millions more people unevenly onto their maps.²³⁵ In districts with higher proportions of expatriate voters assigned to them, the voters who actually

²²⁹ U.S. CONST. amend. XIV.

²³⁰ See Bennett, *supra* note 7 (presenting this fact and exploring some of its interesting implications).

²³¹ See *U.S. Mover Rate Remains Stable At About 12 Percent Since 2008*, *Census Bureau Reports*, POL. & GOV'T BUS., Apr. 2, 2015, at 69, 2015 WLNR 8966080 (reporting that roughly one in nine Americans moves every year).

²³² *Residence Rule and Residence Situations for the 2010 Census*, U.S. CENSUS BUREAU, https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html [<http://perma.cc/7S3E-NBW4>] (last visited Feb. 29, 2016) ("Usual residence is defined as the place where a person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence.").

²³³ See Bennett, *supra* note 7, at 508 n.22.

²³⁴ See *House Hearings*, *supra* note 18, at 91 (comments of Rep. Burton).

²³⁵ See *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("[A]s nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."); *Karcher v. Daggett*, 462 U.S. 725 (1983) (declaring unconstitutional a congressional districting plan in which the average district differed from the ideal by 726 people); see also *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3 (2012) (approving a plan in which the variation was only slightly smaller than the largest in *Karcher*, because the variation was justified by the state's interest in minimizing disruption and having districts follow county lines as much as possible). The districting problem was noted at the time OCVRA was being considered. See *House Hearings*, *supra* note 18, at 91 (comments of Rep. Burton); see also *id.* (comments of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting).

live there see the power of their votes diluted relative to resident-voters in other districts.²³⁶

Even aside from the uneven distribution of expatriate voters among districts, all resident-voters see their votes diluted.²³⁷ This is not “dilution” in the technical sense that the Voting Rights Act sets forth,²³⁸ but rather is dilution in the ordinary sense of diminished power. Residents of a congressional district have the power to hold their representatives accountable for standing up for the interests of that district. That power is compromised when the representative is also answerable to other people²³⁹—people who do not live in the district and whose very right to vote is premised on the fact that, as expatriates, they have interests *distinct* from people living in the district.²⁴⁰

One might argue that it is unlikely that any district will contain so many expatriates that this dilution will amount to much.²⁴¹ This *de minimis* argument is self-defeating, though. Either permanent expatriates have significant voting power that ensures that their distinct interests are taken into account (in which case the resident-voters’ ability to command the attention of their representatives is diluted), or the permanent expatriates do not register in their representatives’ consciousness (in which case the entire enterprise of awkwardly placing the expatriates in that district to vote, as opposed to offering them other forms of representation,²⁴² is pointless).

²³⁶ Cf. Bennett, *supra* note 7, at 510-12 (contemplating implications of uneven distribution between districts of citizens who are unable to vote).

²³⁷ See *Senate Hearings*, *supra* note 42, at 65 (testimony of Mary C. Lawton, Deputy Assistant Att’y Gen.).

²³⁸ Cf. Gura, *supra* note 6, at 195 (noting UOCAVA case in which overseas voters could have diluted the resident Hispanic vote).

²³⁹ *Id.* at 194 (“[T]here is something odd about how a neighborhood can be transformed over a period of decades, yet a long-gone voter, having once resided on a street that may no longer exist, may continue to influence its political representation.”).

²⁴⁰ See *Senate Hearings*, *supra* note 42, at 63 (testimony of Mary C. Lawton, Deputy Assistant Att’y Gen.) (noting that legislators represent local and state interests); *House Hearings*, *supra* note 18, at 103 (comments of Rep. Wiggins) (“What public interest is served by giving to a person who abandons a domicile in California, has no intent to return to California, has no connection with that State whatsoever, other than the fact that he left California, what public interest is served by permitting that person to participate along with those who do remain in the localities of their representatives?”); H.R. REP. NO. 94-649, at 2 (1975) (noting expatriates’ distinct interests); S. REP. NO. 94-121, at 2 (1975) (same).

²⁴¹ See *House Hearings*, *supra* note 18, at 17 (comments of Rep. Dent).

²⁴² See *infra* Sections IV.B-C.

4. D.C. and the Territories

Constitutional law obviously does not operate in a vacuum. All of the legal arguments presented against UOCAVA in this article so far are susceptible to three powerful, practical political points: millions of people have used UOCAVA to vote; their doing so has not caused the Republic to crumble; and it is highly undesirable to strip a group of law-abiding citizens of their right to vote. There is one other legal argument, however, that draws much of its power from similar practical political points. UOCAVA is unconstitutional because it enfranchises some U.S. citizens who don't live in a state while leaving out millions of others.

By its terms, UOCAVA gives those who leave a state the right to continue voting in federal elections there as though they had never left. But this only applies to people who leave the United States entirely.²⁴³ If they move to another state, they can obviously vote there. If, however, they move to a part of the United States that is not a state,²⁴⁴ they have no right under UOCAVA to vote in their former state. If I were to move from East Lansing, Michigan, to North Korea—with no intention to return—I would retain the right to vote for President, for Michigan's two U.S. senators, and for the U.S. representative for Michigan's Eighth District. If instead, I moved from East Lansing to Puerto Rico, I would not be able to vote for President, Senate, or House.²⁴⁵

The unfairness of the latter situation has been litigated—without success—on multiple occasions as to presidential voting²⁴⁶ and once with regard to congressional voting.²⁴⁷ In each case, the court has rejected the claim that UOCAVA requires that citizens in the territories get the same right to vote as permanent

²⁴³ See 52 U.S.C.A. § 20310(5), (8) (West 2015) (defining “overseas voters” as being outside the United States, and defining the United States as “the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa”). Notably, this excludes the Northern Mariana Islands.

²⁴⁴ Each of these areas—Washington, D.C., Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands—have a majority-minority population, making the racial implications here unavoidable.

²⁴⁵ See Gura, *supra* note 6, at 188-89.

²⁴⁶ See, e.g., *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (Puerto Rico); *Igartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (Puerto Rico); *Att’y Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (Guam); see also Gura, *supra* note 6, at 195-97. It is unclear why these plaintiffs only sought to vote in presidential elections and not in congressional elections.

²⁴⁷ *Howard v. State Admin. Bd. of Election Laws*, 976 F. Supp. 350 (D. Md. 1996) (rejecting attempt by former Maryland resident to vote there, per UOCAVA, after moving to D.C.), *aff’d*, 122 F.3d 1061 (4th Cir. 1997).

expatriates. In doing so, however, these courts have laid bare the inherent contradictions at the heart of UOCAVA.

The First Circuit, in *Igartua De La Rosa v. United States*, rejected a challenge to UOCAVA by people who had moved from states to Puerto Rico and then sought to vote for President in their former states.²⁴⁸ The court rejected the premise that UOCAVA discriminates between people who move out of the United States and people who move to Puerto Rico. Rather, the court said, UOCAVA distinguishes between people who remain in the United States and those who leave it.²⁴⁹ People who remain in the United States are thus not given any special rights by UOCAVA but instead are able to vote in federal elections wherever in the United States they happen to live.²⁵⁰ In the case of Puerto Rico, that means voting for a nonvoting representative in the U.S. House (and not paying federal taxes) rather than voting for a real representative, two senators, and President. To the extent that those voting rights are substandard, the court attributed that to Puerto Rico's status as a nonstate, something for which UOCAVA is not responsible.²⁵¹ If I moved to Florida, I would be treated to the same federal voting rights as other Floridians. And if I moved to Puerto Rico, I would be treated to the same raw deal as other Puerto Ricans.

While it is true that UOCAVA could not, by statute, make Puerto Rico a state, UOCAVA's application in the territories exposes some of its fundamental flaws. The plaintiffs in *Igartua* were seeking to be enfranchised, but the problem with UOCAVA is primarily the converse: whom it enfranchises, not whom it leaves out. What the Puerto Rican plaintiffs showed was that the premises underlying UOCAVA's enfranchisement of permanent expatriates crumble when confronted with the treatment of U.S. citizens in Puerto Rico and the other territories.

²⁴⁸ *Igartua*, 32 F.3d at 9.

²⁴⁹ *Id.* at 10. The court declared that this is not a suspect classification, and because UOCAVA does not restrict voting rights but instead limits states' ability to restrict them (albeit not as much as the plaintiffs might have liked), it does not infringe on the fundamental right to vote. *Id.*

²⁵⁰ *Id.* at 10-11, 11 n.3.

²⁵¹ *Id.* at 9-11. In 2000, the district court in Puerto Rico ruled that U.S. citizens in Puerto Rico had a constitutional right to vote for President. *Igartua De La Rosa v. United States*, 113 F. Supp. 2d 228 (D.P.R. 2000). This was swiftly overturned by the First Circuit in *Igartua De La Rosa v. United States*, 229 F.3d 80 (2000), though an impassioned concurrence "serve[d] notice upon the political branches of government that it is incumbent upon them, in the first instance, to take appropriate steps to correct what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry." *Id.* at 90 (Torruella, J., concurring).

Congress rooted its authority to pass OCVRA in the claim that it was unconstitutional for states to deny the right to vote in federal elections to their former residents who had moved overseas permanently.²⁵² But if those U.S. citizens' rights to vote and live where they please are both so hallowed that the citizens cannot be forced to choose one over the other, why would the same conclusion not apply to people who move to Puerto Rico?²⁵³ Indeed, given that the right to travel *within* the United States is more potent than the right to travel outside of it, why would people who move to Puerto Rico not have a *greater* protection against being forced to choose between these two rights?²⁵⁴

Congress's notion in passing OCVRA was that expatriate citizens have a constitutional right to vote, and they retain an interest in the policies and practices of the federal government. Once again, though, there are millions of U.S. citizens in Puerto Rico living under the same Constitution. They too have an interest in the workings of the federal government (indeed, a greater interest, given that they live in the United States).²⁵⁵

The reason that none of this mattered to the *Igartua* court was that only states (and D.C.) participate in presidential elections.²⁵⁶ Similarly, only states participate in congressional elections (here excluding D.C. along with the territories). This has been the case for as long as the United States has contained territories. But again, if Puerto Ricans lose any claim to vote because they are not residents of a state, why would the same not be the case for permanent expatriates?²⁵⁷

The relevant lesson from *Igartua* is not that it is unconstitutional for UOCAVA to fail to enfranchise people who move to the territories; the court specifically rejected that notion. Rather, it is that if Congress's justification for passing OCVRA were correct, then citizens of Puerto Rico would have a right to vote for President and Congress. Presuming that the First Circuit is correct that citizens of Puerto Rico do not have such rights—that there is no constitutional violation here—then it follows

²⁵² See *supra* Section II.A.1.

²⁵³ Gura, *supra* note 6, at 196.

²⁵⁴ See Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 334 (1995).

²⁵⁵ See Gura, *supra* note 6, at 196.

²⁵⁶ *Igartua*, 32 F.3d at 9-10.

²⁵⁷ Gura, *supra* note 6, at 196.

logically that Congress lacked the authority to enfranchise permanent expatriates under OCVRA and UOCAVA.²⁵⁸

This point is made even more clearly in the Second Circuit case of *Romeu v. Cohen*. The facts were similar to those in *Igartua*; a citizen of New York moved to Puerto Rico and attempted to vote in a presidential election via New York.²⁵⁹ The Second Circuit, like the First, rejected the claim that UOCAVA needed to treat expatriates and territorial residents equally and concluded that the source of Romeu's grievance was Puerto Rico's status as a territory rather than anything UOCAVA had done. The same, the court said, was true of all expatriates before UOCAVA (or more precisely, before OCVRA).²⁶⁰ But that's just it: OCVRA was not responding to a constitutional violation. As the court put it,

New York's failure to offer Romeu the opportunity to continue to vote in its elections after his taking up residence in Puerto Rico no more violated his right to travel than did New York's failure under the pre-UOCAVA law to offer continued voting rights to its citizens who moved to France.²⁶¹

In other words, if residents of the territories can be deprived of the right to vote—and the courts have made clear that they can—then the principal basis for Congress's power to pass OCVRA and UOCAVA crumbles. Indeed, Judge Walker, concurring in the judgment, concluded in a footnote that “UOCAVA's directive to the states to extend the franchise in federal elections to nonresident U.S. citizens living overseas appears constitutionally infirm.”²⁶² Although mere dicta, and despite being limited to presidential elections, Judge Walker's footnote got it right, and his favorable statement stands as the only expression of judicial opinion on the issues in this article.

²⁵⁸ To be sure, this still leaves the equal protection argument supporting Congress's authority to pass OCVRA. *See supra* text accompanying notes 127-144.

²⁵⁹ *Romeu v. Cohen*, 265 F.3d 118, 120-22 (2d Cir. 2001).

²⁶⁰ *Id.* at 126.

²⁶¹ *Id.*

²⁶² *Id.* at 134 n.7 (Walker, J., concurring) (citation omitted). Judge Leval, in an opinion he wrote on his own behalf and appended to his opinion for the court, argued that if UOCAVA is valid Congress could use the same power to legislate presidential voting rights for residents of the territories. Leval suggested that each state could take a pro rata share of the territorial votes. *Id.* at 129-30 (Leval, J., concurring). Judge Walker disagreed at length with Leval's argument; his footnote was written to point out that the same reasons that Leval's proposal would exceed Congress's authority applied to UOCAVA as well. *See id.* at 131-36, 134 n.7 (Walker, J., concurring).

5. The Supplemental Case Against OCVRA and UOCAVA in Sum

The constitutional case against OCVRA and UOCAVA has only gotten stronger since 1975. When one considers the way that UOCAVA violates the symmetry requirement, runs afoul of the Supreme Court's congruent and proportional requirement, muddles congressional apportionment, and—worst of all—lays bare the absurd third-class treatment of U.S. citizens living in the territories, it is even clearer that UOCAVA's enfranchisement of permanent expatriates is unconstitutional.

C. *Presidential Elections*

So far, this part of the article has relied on constitutional provisions that apply to congressional elections; presidential voting is somewhat divergent. Even critics of OCVRA's constitutionality seemed more comfortable with the idea of expatriates voting only for President.²⁶³ The distinct issues surrounding presidential voting thus merit some independent attention.²⁶⁴

Presidential voting is not subject to the same restrictions on the electorate as congressional voting. It is constitutionally problematic to have a state's nonresidents vote in congressional elections and for them to not qualify to vote for state house, and these problems exist regardless of whether a state freely chooses to do so or is forced by Congress. With presidential voting, however, the states have much more leeway to select their electorate, and it is probably constitutional for them to let former residents who cannot vote elsewhere participate in their presidential elections. Indeed, many states allow certain nonresidents to vote in presidential elections even beyond what UOCAVA requires.²⁶⁵ As a matter of policy, moreover, it is less problematic for nonresidents to vote for a national officer like the President than for someone representing only a particular place as representatives and senators do.²⁶⁶ Ultimately, then, the biggest issue is one of federalism; it is constitutionally problematic for Congress to force states to let nonresidents vote in presidential elections.

²⁶³ See *supra* text accompanying note 43.

²⁶⁴ See Charles E. Wiggins, *Overseas Citizens and the Right to Vote: An Introduction*, 1 INT'L SCH. L. REV. 128, 129 n.7 (1976).

²⁶⁵ See *supra* note 54 and accompanying text.

²⁶⁶ See *House Hearings*, *supra* note 18, at 260 (statement of Mary C. Lawton, Deputy Assistant Att'y Gen.).

The Electoral College chooses the President. Its members are selected by “[e]ach state . . . in such Manner as the Legislature thereof may direct.”²⁶⁷ The strength of the states’ power is manifest in the counterintuitive notion that citizens do not actually have a right to vote for President unless their state has chosen to use popular voting.²⁶⁸ Of course, every state currently uses popular voting and is subject to the constitutional rules against discrimination,²⁶⁹ but states can and do choose different rules at the margins for things like letting felons vote or defining residency.²⁷⁰

The Constitution gives the federal government a role in presidential elections, but that role is a limited one.²⁷¹ Congress can select Election Day and the day that the Electoral College convenes.²⁷² Congress counts the electoral votes and, if and only if no one wins a majority of them, the House chooses the President.²⁷³ Congress can also legislate to enforce the Constitution’s antidiscrimination provisions and other rights against the states.²⁷⁴ But everything else is left to the states—the Supreme Court has interpreted the phrase “in such Manner as the Legislature [of each state] may direct” as weighing very heavily on the state side of the federalism balance.²⁷⁵

UOCAVA would only be constitutional if it could fit into one of these specific congressional bases of power. The only potential one has already been discussed: Congress’s power under

²⁶⁷ U.S. CONST. art. II, § 1, cl. 2.

²⁶⁸ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”); *Senate Hearings*, *supra* note 42, at 62 (statement of Mary C. Lawton, Deputy Assistant Att’y Gen.). But see Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 535 (2001) (rejecting *Bush v. Gore* on this point, scathingly, as “wrong” and “oblivious[] to the values of democracy”).

²⁶⁹ See U.S. CONST. amend. XIV, § 1; *id.* amends. XV, XIX, XXIV, XXVI; *cf. id.* amend. XIV, § 2 (penalizing states that restrict voter eligibility).

²⁷⁰ See John M. Greabe, *A Federal Baseline for the Right to Vote*, 112 COLUM. L. REV. SIDEBAR 62, 63 (2012).

²⁷¹ See Gura, *supra* note 6, at 202.

²⁷² See U.S. CONST. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”). States can and have chosen different days on which to select their electors (most recently by allowing early voting), but this is only because Congress has not required otherwise; Congress has preemptive power over Election Day but not exclusive power.

²⁷³ See *id.* amend. XII. The Senate is charged with choosing the Vice President if no candidate for that office wins a majority. *Id.*

²⁷⁴ See *supra* note 179 and accompanying text.

²⁷⁵ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)).

Section 5 of the Fourteenth Amendment. The right to travel does not justify federal action here any more than it did for congressional voting.²⁷⁶ The right to vote is not precisely the same for presidential and congressional voting, but in neither instance does it justify UOCAVA. For presidential voting, as noted above, there is not really a right to vote in the first place,²⁷⁷ but to the extent that states choose to allocate their electoral votes by popular vote, they have to be fair about determining who participates and who does not. Congress would have to argue that once a state gives citizens a right to participate in presidential elections, it cannot constitutionally strip them of their vote when they permanently relocate overseas. But why not? The Supreme Court's language about states being allowed to impose bona fide residency requirements applies with the same force here as it does to congressional elections.²⁷⁸ Moreover, if the right to vote for President is somehow permanent once it is granted, then the cases brought by people seeking to vote for President after moving to the territories should not have all failed.²⁷⁹

The version of Congress's Section 5 authority articulated (although not clearly) in *Oregon v. Mitchell* would be no more availing for presidential voting than it was for congressional voting.²⁸⁰ Once again, *Mitchell* dealt with the right to travel within the United States—the constitutional right of new arrivals in a state to be treated the same as older residents—rather than the more limited right to live abroad that is an issue with UOCAVA. And here too, *Mitchell* only approved an administrative fix at the margins of residency requirements, while UOCAVA essentially guts residency requirements.

This leaves one last argument. When states (as they did before OCVRA) allowed public expatriates—but not private expatriates—to vote for President, they violated the private expatriates' equal protection rights and opened the door for Congress to respond. As with congressional elections, this is probably the strongest argument supporting federal action. Once again, however, there are good arguments that there is no equal protection violation and that, even if there is, UOCAVA is probably not a congruent and proportional remedy.²⁸¹ Congress could tread more lightly on the delicate federalist structure by

²⁷⁶ See *supra* text accompanying notes 115-125.

²⁷⁷ See *supra* text accompanying note 268.

²⁷⁸ See *supra* text accompanying notes 123-125.

²⁷⁹ See *supra* Section II.B.4.

²⁸⁰ See *supra* Section II.A.2.c.

²⁸¹ See *supra* Section II.A.2.b.iii.

simply requiring states to treat equally all former residents who are not elsewhere voting for President—letting either all or none of them vote (or perhaps making other distinctions, but not ones based on the identity of one’s employer).²⁸²

It is unconstitutional for UOCAVA to force states to let permanent expatriates vote in presidential and congressional elections. The constitutional case against UOCAVA is overwhelming; nevertheless, UOCAVA’s enfranchisement of permanent expatriates remains in force. The next part of this article considers why.

III. WHY UOCAVA PERSISTS

Given the constitutional questions surrounding OCVRA and UOCAVA, one would think that the legislation would have been challenged in court. For nearly 40 years, however, no such case has been brought. This is principally because there is a limited number of plaintiffs with the ability to sue, and because those plaintiffs would find it difficult as a political matter to fight for the disenfranchisement of millions of voters. With the passage of time, the chances—both of a challenge and of a court responding favorably to one—have only dimmed as these millions of voters have grown accustomed to their right to vote.

A. *Who Would Sue?*

Any lawsuit first requires a plaintiff motivated to file it and with standing to sue. For UOCAVA, those two requirements seem to be a big part of the reason why there has been no litigation.

1. Individuals

Someone who has had his or her right to vote stripped by a law could easily challenge that law; both the motivation and the standing to sue are obvious. A law that grants someone the right to vote, by contrast, offers no such obvious voter-plaintiffs. Those who benefit from the law would certainly not want to challenge it. Those who wish to benefit from it but are shut out—residents of the territories—have attempted to challenge their exclusion from UOCAVA’s coverage but have not challenged anyone else’s inclusion.²⁸³

²⁸² See *supra* text accompanying notes 127-144.

²⁸³ See *supra* Section II.B.4.

Resident-voters would have a hard time establishing standing. Among the requirements of standing is a showing that the plaintiff has suffered an injury because of the contested conduct.²⁸⁴ It would be challenging for a resident-voter to establish such an injury from UOCAVA's enfranchisement of permanent expatriates. The fact that the enfranchisement is unconstitutional is not good enough; anyone could make that claim, and such generalized grievances do not qualify as injuries for standing purposes.²⁸⁵

The best hope for an individual voter to establish standing to challenge UOCAVA's enfranchisement of permanent expatriates would be for those living in a district to complain that the enfranchisement improperly dilutes their legitimate votes.²⁸⁶ To take a much simpler and more extreme hypothetical as an analogy, if the State of Michigan decided that its U.S. senators were going to be elected jointly by the people of Michigan and Ontario, it would seem likely that I, a citizen of Michigan, would have a good argument that my own vote had been illegitimately diluted. But UOCAVA's effects are two or three orders of magnitude less dramatic than in this hypothetical.²⁸⁷ Moreover, the standards for a citizen to establish standing for such a dilution claim are unclear.

Candidates wishing to sue might need to file lawsuits after an election for the claims to be ripe. But after the election, the candidate-plaintiff would have a hard time establishing an injury unless he or she could show that UOCAVA swung the election result. To be sure, there have been multiple elections in which the margin of victory was a mere fraction of the number of UOCAVA votes, so overseas voters may have swung the election.²⁸⁸

²⁸⁴ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

²⁸⁵ See *id.* at 575.

²⁸⁶ See *supra* text accompanying notes 237-241 (discussing sense in which dilution is used in this article).

²⁸⁷ In the 2012 presidential election, Michigan saw only 12,916 UOCAVA ballots, and only some of those were from permanent expatriates. See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 11, at 17. Ontarians cast over 4.8 million ballots in the 2014 Canadian general election. See Diana Mehta, *Ontario Reverses 20-Year Decline in Voter Turnout*, TORONTO STAR, June 14, 2014, at A14.

²⁸⁸ See KLEKOWSKI VON KOPPFELDS, *supra* note 10, at 218 (listing two such senatorial elections in 2008: Minnesota with a margin of 312 and 12,091 UOCAVA votes, and Alaska with a margin of 3,953 and 12,103 UOCAVA votes). This is harder to show for House elections given that UOCAVA records are generally kept by county rather than by congressional district. Still, it seems likely that numerous House elections would have seen a number of UOCAVA votes many times the margin of victory. The closest House elections in recent years have been: 2014, Arizona's Second District (161 votes, 0.1%); 2012, North Carolina's Seventh District (654 votes, 0.2%); 2010, and Illinois's Eighth District (290 votes, 0.1%). See *United States House of Representatives Elections, 2014*, BALLOTEDIA, http://ballotpedia.org/United_States_House_of_Representatives_elections,_

Overseas voters definitely swung the 2000 presidential election; George W. Bush could not have won without Florida, and he could not have won Florida without his advantage among overseas voters—especially those in the military.²⁸⁹ That highlights a weakness in this argument, though: most UOCAVA voters are affiliated with the military.²⁹⁰ The bulk of these votes, in other words, are votes that the states would have counted even without OCVRA and UOCAVA's mandate.²⁹¹ Thus it is one thing to say that UOCAVA ballots swung the election; it is quite another to say that UOCAVA itself swung the election. This presents a formidable barrier to any candidate who might wish to challenge UOCAVA in court.

There are also political considerations. There were plenty of lawsuits in Florida concerning the 2000 presidential election, including one regarding the proper standards for counting overseas ballots.²⁹² But it would have been uncomfortable to reverse the election result on the basis of a constitutional objection that (1) was made after the fact and (2) required disenfranchising so many voters, including so many in the military. Al Gore—who as a losing candidate had a much stronger case for standing than any individual voter would have had—recognized one particular aspect of this when he later explained why he did not want to win the election by getting questionable overseas military ballots thrown out: “I would be hounded by Republicans and the press every day of my presidency and it wouldn't be worth having.”²⁹³

2014 [<http://perma.cc/79Y6-SDKT>] (last visited Feb. 29, 2016); *United States House of Representatives Elections, 2012*, BALLOTPEDIA, http://ballotpedia.org/United_States_House_of_Representatives_elections_2012 [<http://perma.cc/B8R9-LCXG>] (last visited Feb. 29, 2016); *United States House of Representatives Elections in Illinois, 2010*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_House_of_Representatives_elections_in_Illinois_2010 [<http://perma.cc/9FKU-348M>] (last visited Feb. 29, 2016); cf. S. REP. NO. 90-1025, at 6 (1968) (individual views of Sen. Curtis) (noting, in report on bill expanding overseas voting, “the many extremely close elections that can be decided by the mail vote”).

²⁸⁹ See David Barstow & Don Van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at 1. Al Gore's supporters also briefly entertained the notion that a wave of UOCAVA votes from Israel would put Gore over the top in Florida. See Gura, *supra* note 6, at 181-84.

²⁹⁰ See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 11, at 8.

²⁹¹ See *supra* text accompanying note 30 (noting states' pre-OCVRA practice of allowing absent military and other public employees, and their dependents, to vote).

²⁹² See *Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1314-17 (N.D. Fla. 2000).

²⁹³ Barstow & Van Natta, *supra* note 289. History does not record whether Gore still felt that way eight years later. Cf. Diane H. Mazur, *The Bullying of America: A Cautionary Tale About Military Voting and Civil-Military Relations*, 4 ELECTION L.J. 105, 105 (2005) (describing how “accusations of disloyalty to the military were used to bully county election officials into disregarding election rules and accepting non-complying ballots”).

Thus, properly timing a lawsuit to challenge UOCAVA would be difficult. Filed before an actual election, it might be hard for a candidate-plaintiff to establish standing and ripeness.²⁹⁴ Filed after an election, it would require the unlikely showing that UOCAVA affected the result, and it then would require the heavy-handed remedy of reversing that result by throwing out votes already cast and counted.

2. States

States would face a much simpler path toward establishing standing in a challenge to UOCAVA. They would not face the same challenges as voters and candidates of establishing standing and proper timing. Because the law regulates states directly and requires them to do a myriad of things to facilitate overseas-voter registration and voting, states would have the ability to challenge the law at almost any time.²⁹⁵

When OCVRA was enacted in 1975, it was widely assumed that state plaintiffs would immediately challenge it, just as they had done to the Voting Rights Act Amendments of 1970 in *Oregon v. Mitchell*.²⁹⁶ It is not immediately obvious why no state officials lived up to this expectation. Perhaps they, like Congress, assumed that after the Supreme Court decided *Mitchell*, the Court was likely to read congressional power broadly. Challenging OCVRA might therefore have seemed like a waste of limited resources. Still, it is somewhat surprising that there would have been unanimity on this point; one might have expected at least one state to want to challenge the law.

The states' reluctance to challenge OCVRA (and later, UOCAVA) is even more surprising when one considers the cases in which the federal government has sued states for violating UOCAVA.²⁹⁷ These cases provide an opening for states to defend themselves by challenging the constitutionality of the statute itself.

And yet it has not happened. One possible reason is that, historically, once voting rights are granted, they tend to remain.

²⁹⁴ Cf. *Somers v. S.C. State Election Comm'n*, 871 F. Supp. 2d 490, 498 (D.S.C. 2012) (finding no standing for candidate challenging state's implementation of UOCAVA).

²⁹⁵ States might also, as a general matter, face a lower bar for establishing standing. See *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007).

²⁹⁶ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

²⁹⁷ See, e.g., *United States v. Georgia*, 952 F. Supp. 2d 1318 (N.D. Ga. 2013); *United States v. Alabama*, 857 F. Supp. 2d 1236 (M.D. Ala. 2012); *United States v. New York*, No. 1:10-CV-1214, 2012 WL 254263 (N.D.N.Y. Jan. 27, 2012); *United States v. Cunningham*, No. 3:08CV709, 2009 WL 3350028 (E.D. Va. Oct. 15, 2009).

There are exceptions,²⁹⁸ but as a general matter, once people are enfranchised, they have a voice that they can raise to stay enfranchised. It was difficult for permanent expatriates to get representation, but once they did, they constituted a large force that would, presumably, fight to keep that representation. Of course, domestic voters vastly outnumber permanent-expatriate voters, but as a matter of general policy—setting aside the constitutional issues, that is—domestic voters have not shown a substantial sentiment against letting their permanent-expatriate associates participate. It is the way of politics that nothing happens simply because it is a good idea. Rather, things happen because politically powerful constituencies demand that they happen. With no one at the state level flexing any political muscle against UOCAVA, states simply lack the incentive to litigate against the statute.

The structure and history of OCVRA's extension of voting rights also likely promotes the states' reluctance to litigate. Before OCVRA, every state already allowed members of the military and other federal employees stationed overseas to vote based on their prior residence in the state. Military voters are a sympathetic group.²⁹⁹ OCVRA forced states to treat private expatriates the same as public ones; conversely, many of the constitutional arguments against OCVRA and UOCAVA apply with equal force to both groups. By tying the two groups' voting rights together, OCVRA made it difficult for a state to litigate in favor of disenfranchising only one of them. The equal protection argument for UOCAVA (the notion that Congress can force states to treat the two categories of permanent expatriates equally) is the toughest one for opponents to win.³⁰⁰ One potent argument for opponents was that while OCVRA required states to allow both groups of permanent expatriates to vote, that remedy was too strong because Congress could obtain equality by allowing neither group to vote. To make that argument, though, states would essentially need to argue in favor of disenfranchising some military voters, and it is unlikely that any state would want to do that.

²⁹⁸ The most notable is the disenfranchisement of black men in the South after Reconstruction. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 36 (2001) (discussing the ratchet effect of enfranchisement and the exception represented by Reconstruction). Another example is the termination of voting rights for noncitizen immigrants in the surprising number of states that had enfranchised them. See generally Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

²⁹⁹ See *supra* text accompanying notes 292-293.

³⁰⁰ See *supra* Section II.A.2.b.iii.

The military's politically exalted position also helps to explain why states have not used UOCAVA's unconstitutionality as a defense when the federal government sues them for violating it. The federal cases have generally concerned states' proper processing of overseas ballots, especially military ballots.³⁰¹ If states cannot defend their processing and instead challenge the federal government's underlying authority, it would again entail arguing for the disenfranchisement of military voters. If states were to argue in the litigation that they want to let overseas military voters participate, just not to have the federal government force them to do so, then they would still face the (politically damaging) argument that they were not adequately facilitating military participation. Arguing that UOCAVA is invalid would not help the states' litigating position as much as it might seem.

The final reason why the failure to challenge UOCAVA is not surprising is that so much time has passed without any litigation. Despite the core point of constitutionalism that statutes must always bow to the superior authority of the Constitution, the practical reality is that the Constitution is less potent when pitted against a lengthy, unbroken practice. Moreover, the longer that people have voted, the more an affront it is to seek to disenfranchise them. If permanent expatriates have been voting for 40 years and the Republic has survived, doomsday scenarios about their enfranchisement become that much less compelling.

In a more mundane sense, if states have been able to stomach 40 years of nonresidents voting in their federal elections, it is hard to see what would make states sue now. Indeed, many states have apparently warmed to the practice and gone above and beyond it.³⁰² This liberal expansion might even suggest that if UOCAVA is ever struck down, some states would not disenfranchise everyone that they could. But unless there is a lawsuit in the future, we will never know.

3. The Future

Neither individuals nor states have challenged OCVRA or UOCAVA, and until the current landscape changes dramatically, they never will. But dramatic changes are not impossible. The overseas population could increase to the point where the effect of its votes is no longer so negligible. Relatedly, voting technology could improve and make it easier for overseas voters to

³⁰¹ See *supra* note 297.

³⁰² See *supra* notes 54-55 and accompanying text.

participate; this could both raise their numbers and reduce the need for (and states' tolerance of) intrusive federal regulation. Constitutional reform could be another source of change. If the nation switches its mode of electing presidents to a national popular vote, there might not be any need to force states to let their former residents vote for President.³⁰³

Finally, UOCAVA could become more vulnerable to legal challenges if the political landscape changes. Currently, the population of overseas voters seems to include plenty of both Republicans and Democrats, although no one knows for sure.³⁰⁴ If this balance changed dramatically—say, because of a sizable reduction in the nation's overseas military presence³⁰⁵—one side or the other might perceive a political advantage in “clarifying” the constitutional issues here. All of that said, UOCAVA seems safe from litigation for the time being.

B. *Implications*

Many commentators argue that when considering legislation, Congress should take constitutional arguments more seriously instead of focusing solely on policy and politics while leaving the Constitution to the courts.³⁰⁶ Unfortunately, constitutional objections to a legislative proposal are generally viewed as an obstruction—an obstacle that the legislation's proponents must overcome rather than a valid area for them to consider and debate.³⁰⁷

Thus, it is interesting to juxtapose the unlikelihood that permanent expatriates' enfranchisement will be litigated with Congress's assumption when it passed OCVRA that litigation was

³⁰³ See *infra* Section IV.C.

³⁰⁴ See KLEKOWSKI VON KOPPFELDS, *supra* note 10, at 195.

³⁰⁵ See *id.* (noting conventional wisdom that the military favors Republicans).

³⁰⁶ See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657-58 (2000) (describing academic consensus that nonjudicial branches have a duty to interpret the Constitution); see also *Senate Hearings*, *supra* note 42, at 59 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.). Because the problem here is not structural barriers to standing so much as it is the lack of a political will to sue, this article will not offer many general suggestions about how courts might want to treat legal challenges to statutes like UOCAVA differently. One general point seems evident, though: courts should consider the reasons for the lack of litigation before attributing any significance to the decades-long practice of overseas voting that UOCAVA represents.

³⁰⁷ For an example of this sentiment in the OCVRA debate, see *Transcript on S. 95*, *supra* note 47, at 65 (comments of Rep. Dent) (stating that “if we were to defeat in committee every bill that someone questions our right on the basis of the Constitution, there would not be too darned many bills passed”).

inevitable.³⁰⁸ If Congress had known in 1975 what is now apparent about the lack of litigation, one wonders what the effect would have been. Some proponents might have been untroubled, reasoning that it was a point in the law's favor that no one would be interested in challenging it. Others might have dialed back their deference and been less willing to vote for the law without a legitimate constitutional discussion in Congress. The law's opponents certainly would have fought harder, knowing that this was their last chance to stand up for the Constitution. Perhaps, then, there would have been a more earnest and complete debate of the constitutional issues. Maybe OCVRA's proponents would have carried the day, maybe the opponents would have won, or maybe a scaled-back version of OCVRA would have passed. Congress could have limited the law to presidential voting,³⁰⁹ to requiring equal treatment between private and public expatriates, to enfranchising only those who might have had an intention to return to the states someday,³¹⁰ or to some other creative accommodation.

More generally, the combination of the grave constitutional concerns surrounding OCVRA and UOCAVA with the continuing lack of litigation—UOCAVA's status as "unconstitutional but entrenched"—suggests that those who oppose proposed legislation on constitutional grounds should not give up so easily. Their opponents' argument—that the courts will sort out constitutional issues, so Congress need not—is unfortunately a popular one, but it should not be allowed to carry the day.

IV. POTENTIAL SOLUTIONS TO UOCAVA'S CONSTITUTIONAL PROBLEMS

UOCAVA's enfranchisement of permanent expatriates is unconstitutional, but it is firmly entrenched. Joining those who tried to prevent OCVRA's enactment, this article supports the inclusion of permanent expatriates in American civic life as a matter of policy but calls for more respect for the proper constitutional bounds. This part offers several solutions—some simple, others more ambitious—that would alleviate the

³⁰⁸ See *supra* text accompanying notes 46-51.

³⁰⁹ See *supra* text accompanying note 43.

³¹⁰ See *supra* note 104 (noting constitutional doubts from an OCVRA proponent about extending voting rights to permanent expatriates). Even the broadest reading of the previous voting-rights expansion, the Voting Rights Act Amendments of 1970, required an intention to return. See *Senate Hearings, supra* note 42, at 175 (pamphlet from Chamber of Commerce) (characterizing Senator Goldwater's view of the 1970 law).

constitutional problems while still promoting permanent expatriates' civic participation. The simplest solution would be to give states a choice to allow former residents to vote, though this would not solve all of UOCAVA's constitutional problems. A more complicated solution would be to route permanent expatriates' votes through Washington, D.C., rather than their former states, though this suffers from several limitations. The best solution would be to harness the movement for a national popular vote for President and use that as an opening to provide meaningful voting rights not just for permanent expatriates but also for citizens of U.S. territories. In the end, a constitutional amendment is probably the optimal approach, however remote a possibility it may be.

A. *The Persuasion Solution*

One solution would be to replace UOCAVA's requirements regarding permanent expatriates with suggestions; Congress could allow states to choose whether to allow permanent expatriates to vote as though they still lived at their last stateside address. This is similar to what Congress did for 20 years before OCVRA was enacted, specifically because of congressional sensitivity to constitutional constraints.³¹¹

There is good reason to believe that the states would be receptive to this solution. The law that OCVRA replaced did not force states to do anything vis-à-vis voting rights for their former residents. It merely encouraged states to allow certain people to participate. States responded positively to this encouragement as far as public expatriates were concerned, and while the states responded less positively with regard to private expatriates, they would almost certainly be more receptive today.³¹² Moreover, for the same reasons that states have not challenged UOCAVA in court, they would likely want to maintain the status quo and avoid widespread disenfranchisement.

If Congress were worried about any states refusing, it could back up the suggestions with some inducements. States could be required to have broad participation if, for instance, they want to be eligible for federal grants under the Help

³¹¹ See *supra* text accompanying notes 27-36.

³¹² See *supra* text accompanying notes 30-33. The states have been letting these private expatriates participate for almost 40 years now without much of a fuss, and most states have chosen to go above and beyond UOCAVA's requirements—to some extent after being encouraged to do so by the federal government. See *supra* note 55.

America Vote Act.³¹³ By relying on its powers under the Spending Clause, instead of Section 5 of the Fourteenth Amendment, Congress could avoid much of UOCAVA's current constitutional infirmity.

Giving the states a choice in the matter would not take care of all the constitutional problems, though. For congressional elections, there are still the issues of the People of the States Clauses and the symmetry requirement. But if states themselves are *voluntarily* including permanent expatriates who used to live there, it makes it somewhat easier to argue that those expatriates are "people of the state."³¹⁴ That being said, it is still something of a stretch to say that a nonresident is a person of the state.³¹⁵ Relatedly, it would still be odd for a state to allow people to vote who are not included in the state's congressional-apportionment population.³¹⁶ But both of these problems already exist in those states that have expanded their federal electorate beyond what UOCAVA requires.³¹⁷ The point is not that this is okay, but rather that the problem already exists, and making UOCAVA optional would not add some new dimension to it.

As for the symmetry requirement, states would be able to avoid the problem by granting their expatriate voters the ability to vote in state-house elections (as some states already do).³¹⁸ Again, giving the states a choice in the matter would not

³¹³ Cf. THOMAS, *supra* note 215, at 9 (noting potential use of the Spending Clause to extend congressional power over procedures (as opposed to voter qualifications) in federal elections).

³¹⁴ The Fourteenth Amendment states that any U.S. citizen residing in a state is a citizen of that state. U.S. CONST. amend. XIV, § 1. But while residence is a sufficient condition of citizenship, that does not make it a necessary one. Cf. Davidson, *supra* note 73, at 481 (arguing that state citizens who go overseas, as opposed to going to another state, retain citizenship in their previous state).

³¹⁵ Once states were freed from UOCAVA's shackles, they could adopt different formulas for permanent-expatriate participation. For instance, instead of granting the franchise to those whose last stateside address was in that state, they could use other standards in an attempt to include voters with a stronger connection to the state, such as those whose last *meaningful* address was in that state, those who had lived in that state longer than in any other, those who intended to move back to that state when they returned to the United States, those who had immediate family in that state, or (perhaps most controversially) those who were willing to pay that state a fee for the privilege. To the extent that states varied in their approaches, they would need to exclude those who chose to participate in another state. If it were using inducements here, Congress could reduce the burden by requiring states to use the current ("last state") eligibility formula as one of its conditions. Alternatively, Congress could assist in the administration of overseas voters' registration in a way that would force voters to choose one and only one state. This all seems messier than the current regime, though.

³¹⁶ See *supra* Section II.B.3.

³¹⁷ See *supra* text accompanying notes 54-55.

³¹⁸ See *supra* notes 174-175 and accompanying text (describing symmetry requirement); *supra* note 54 (describing state practices).

necessarily solve the problem, but neither would it worsen the status quo or foreclose a solution.

Whatever the benefits and problems of legislation of the sort discussed in this section, it is hard to imagine Congress acting to change a provision of the law that has operated successfully for 40 years, has not been questioned in court, and has no powerful constituency seeking to alter it. In the decades since OCVRA first enfranchised permanent expatriates, Congress has passed multiple updates to the law.³¹⁹ None of the updates have been in response to the constitutional problems; all of them have been intended to further facilitate overseas voting and thus to answer the same political demands and serve the same democratic interests that motivated OCVRA in the first place. If Congress is going to pass legislation remotely resembling the proposals discussed in this subsection, it will almost certainly be by necessity—in response to litigation that successfully challenges UOCAVA. In other words, it is unlikely to happen anytime soon.

B. The D.C. Solution

Another, more radical solution to UOCAVA's constitutional problems is for Congress to take the states out of the business of permanent-expatriate voting. Under this plan, UOCAVA would still cover overseas absentee voting by bona fide residents of states and might even restrict states' excessively stringent residence requirements, but those citizens who do not even purport to be residents of a state would not be able to continue voting there. Instead, they would participate in a new form of federal voting, effectively limited to presidential elections. Being a more radical plan, this still suffers from the fact that Congress has no current motivation to change UOCAVA. As discussed below, though, events in related spheres could tee up this issue and make it more conceivable that Congress would get it on the agenda.

This removal of permanent-expatriate voting from the states' purview would clear up more of UOCAVA's constitutional problems. Because only bona fide residents (overseas temporarily) would be voting in congressional elections, this would avoid the constitutional problems associated with voters who were not really "people of the states" and who are not eligible to vote for

³¹⁹ See *supra* note 21.

state house.³²⁰ It would mitigate the problem of unequal treatment for residents of the territories,³²¹ because permanent expatriates would no longer be able to vote in congressional elections. (Their continued ability to vote in presidential elections would still present a problem in the territories, but no larger a problem than the one presented currently by D.C. residents' right to vote for President.)

Given that presidential voting is pretty firmly under state control, there is only one way under the current system for the federal government to take over presidential voting by permanent expatriates. Under the Twenty-Third Amendment, Washington, D.C., gets to cast electoral votes for President, with Congress given the same power to choose the method of allocation that states are given over theirs.³²² Because Congress has this power, it would be very easy (as a constitutional matter, if not as a political one) for Congress to declare that permanent expatriates have Washington, D.C., as their "voting residence" and to allocate one of D.C.'s three electoral votes to those expatriates.³²³ It makes a certain sort of sense to link permanent expatriates officially to one particular place in the United States and to have D.C. be that place; a similar plan was floated when OCVRA was being considered.³²⁴

There are two obvious flaws with this plan. The first is that it would dilute the presidential voting power of current

³²⁰ One possible variation would take into account those states that voluntarily allow permanent expatriates to vote (including for state house), and apply the D.C. solution only to those for whom no such state is available.

³²¹ See *supra* Section II.B.4.

³²² U.S. CONST. amend. XXIII.

³²³ The constitutional problems with OCVRA's "voting residence" concept include the fact that Article I, Section 2 restricts congressional voting to people of the respective states, so that defining a nonresident as a person of the state for the sole purpose of voting is a troubling bootstrap, and that Section 5 of the Fourteenth Amendment does not give the federal government the authority to usurp the states' power to choose their own bona fide definitions of residence. These are not problems in D.C., though; it has no voting representation in Congress, and given the federal government's plenary power over the district, federalism is not at issue either. See U.S. CONST. art. I, § 8, cl. 17 (giving the federal government exclusive authority over the seat of government).

³²⁴ See, e.g., *Hearings on Representation of the District of Columbia*, *supra* note 120, at 19 (comments of Rep. Butler) (raising idea in the context of a constitutional amendment to give D.C. voting members of the House and Senate); *House Hearings*, *supra* note 18, at 259 (comments of Rep. Butler and Mary C. Lawton, Deputy Assistant Att'y Gen.) (broaching possibility of letting all overseas voters vote in D.C.); *id.* at 193 (results of survey of Americans overseas) (suggesting using D.C. as expatriates' voting residence); see also *Senate Hearings*, *supra* note 42, at 70 (statement of Sargent Shriver, Chairman, Ambassadors Comm. for Voting by Americans Overseas) (noting that expatriates see themselves as Americans rather than as citizens of a particular state).

D.C. residents.³²⁵ The Twenty-Third Amendment caps D.C.'s electoral votes at whatever number the least populous state has, which has always been three.³²⁶ This cap shortchanged D.C. between the 1961 passage of the amendment and 1980, because D.C. had a large enough population in the 1960 and 1970 Censuses to qualify for four electoral votes had it been measured as a state.³²⁷ This was not the case after 1980, though, and by the 2010 Census, D.C. had a smaller population than six of the seven states that have three electoral votes.³²⁸ But taking away one of D.C.'s three electoral votes to give to permanent expatriates would effectively return D.C.'s residents to the underrepresented status they suffered in the Electoral College before the 1980 Census.

It is hard to know just how these numbers cut. While in the 2012 presidential election there were roughly twice as many UOCAVA votes as total D.C. votes,³²⁹ it is unclear how many of those UOCAVA voters were permanent expatriates with no bona fide stateside residence, as opposed to bona-fide-but-absentee residents just using UOCAVA's procedures. This matters. If the number of permanent-expatriate voters is very large, giving them only one electoral vote might reduce their current voting power (though the political power of concentrating it instead of chopping it up into 51 little parts and mixing it in with 51 much larger resident populations might compensate for that). But if the number is very small, giving them one electoral vote might be far too generous. In the latter case, Congress could lump the permanent expatriates in with the rest of D.C.'s population rather than give them one electoral vote of their own. Of course, some might complain

³²⁵ Cf. *Hearings on Representation of the District of Columbia*, *supra* note 120, at 113, 119-20 (comments of J. Eugene Marans, Counsel, Bipartisan Comm. on Absentee Voting) (objecting to idea of a constitutional amendment giving voting rights to expatriates via D.C.).

³²⁶ U.S. CONST. amend. XXIII.

³²⁷ See DAVE TARR & BOB BENENSON, *ELECTIONS A TO Z* 719 (4th ed. 2012) (detailing historical allocations of electoral votes); *U.S. Population by State from 1900, DEMOGRAPHIA*, <http://www.demographia.com/db-state1900.htm> [<http://perma.cc/43MT-V5WT>] (last visited Feb. 29, 2016) (showing states' and D.C.'s population by decade).

³²⁸ See TARR & BENENSON, *supra* note 327; *U.S. Population by State from 1900*, *supra* note 327; U.S. CENSUS BUREAU, *POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010*, at 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> [<http://perma.cc/9JD2-5JQV>].

³²⁹ See *supra* note 11 (noting about 600,000 UOCAVA ballots); 2012 *Presidential General Election Results—District of Columbia*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/state.php?year=2012&fips=11&f=1&off=0&elect=0> [<http://perma.cc/3Twx-49D9>] (last visited Feb. 29, 2016) (noting total of under 300,000 votes cast).

about having a nonresident population skewing D.C.'s presidential choice in this manner, but that's currently what happens (albeit to a lesser degree) in every state and D.C. under the current UOCAVA system.

The second flaw with the plan is that permanent expatriates would lose their current UOCAVA-given right to vote for House and Senate.³³⁰ While that result would be more consistent with the Constitution, it would be politically unpalatable. Permanent expatriates vote for House and Senate because that's what Congress wanted when it passed OCVRA and because that choice has proved popular.

There are reasons to challenge that choice, though. When Americans living in one of the United States interact with the government in their daily lives, they deal with a combination of state and federal governments and a combination of legislative, executive, and judicial branches. When, by contrast, Americans permanently move overseas, they deal almost exclusively with the federal government—other than when they vote—and first and foremost with the executive branch in the form of the State Department.³³¹ Sometimes, of course, it can help to have a member of Congress in one's corner; congressional constituent-services offices are an important tool for aiding any American in cutting through bureaucratic red tape.³³² But Congress's nonvoting delegates from D.C. and the territories provide constituent services, too.³³³ There is no reason why the D.C. solution could not incorporate a new nonvoting representative in Congress for permanent expatriates, and having such a representative dedicated solely to their needs would presumably serve permanent expatriates better than the current system does.³³⁴

The deficiencies in the D.C. solution are not insignificant, though to some extent they highlight some of the status quo's

³³⁰ See KLEKOWSKI VON KOPPENFELS, *supra* note 10, at 220.

³³¹ Cf. *House Hearings*, *supra* note 18, at 192-93 (results of survey of Americans overseas) (expressing keen interest in voting for President but significantly less interest in voting for Congress); *Senate Hearings*, *supra* note 42, at 62-63 (testimony of Mary C. Lawton, Deputy Assistant Att'y Gen.) (noting Presidents' representation of the entire nation, in contrast to legislators' representation of just their districts).

³³² See *Senate Hearings*, *supra* note 42, at 67 (testimony of Sargent Shriver, Chairman, Ambassadors Comm. for Voting by Americans Overseas).

³³³ See, e.g., *Constituent Services*, CONGRESSWOMAN ELEANOR HOLMES NORTON, <http://norton.house.gov/services> [<http://perma.cc/PXL3-SVPT>] (last visited Feb. 29, 2016) (listing constituent services offered by D.C.'s nonvoting representative).

³³⁴ Cf. *House Hearings*, *supra* note 18, at 193 (results of survey of Americans overseas) (advocating for dedicated representation for expatriates); KLEKOWSKI VON KOPPENFELS, *supra* note 10, at 217 (noting 2008's new Democratic presidential primary for overseas voters as their own constituency).

deficiencies. The D.C. solution would dilute the votes of bona fide D.C. residents with those of a bunch of strangers—as UOCAVA currently does (to a lesser degree) in every state and congressional district. The D.C. solution would deprive permanent expatriates of the right to vote in congressional elections—and thereby makes them just like current residents of D.C. and the territories. This, in turn, highlights again the absurdity of UOCAVA’s equal protection problem. When permanent expatriates say that they should be able to vote for House and Senate because they are U.S. citizens, residents of D.C. and the territories can note bitterly that they are U.S. citizens too, and that they lack voting representatives. If permanent expatriates respond by remarking that they used to live in a state, the residents of D.C. and the territories can scoff that many of them used to live in a state, too. The D.C. solution would represent a step backward for permanent expatriates’ voting rights. But it would preserve permanent expatriates’ presidential voting rights and could grant them their own, dedicated, nonvoting representative in the House. Given that their position would be as good as D.C. residents’ and better than that of residents of the territories, their complaints would be much less sympathetic.

This all highlights the abysmal treatment of the residents of D.C. and the territories as third-class citizens. When OCVRA passed in 1975, it might have appeared that it was part of a wave of enfranchisement. A consistent forward march of voting-rights legislation had been enacted since the mid-1960s. Some may have assumed that the equal protection problems that UOCAVA produced were temporary, just until voting rights in D.C. and the territories were upgraded. A D.C. statehood amendment was in the air at the time,³³⁵ and three years later it passed Congress.³³⁶

That amendment was never ratified, though.³³⁷ While it is true that OCVRA and UOCAVA have allowed permanent expatriates to vote for 40 years without any adverse practical

³³⁵ See *Hearings on Representation of the District of Columbia*, *supra* note 120, at 27 (comments of Rep. Butler) (noting simultaneous consideration of OCVRA and constitutional amendment to give D.C. voting members in the House and Senate).

³³⁶ H.R.J. Res. 554, 95th Cong. (1978); 124 CONG. REC. 27,260 (1978) (Senate passage); *id.* at 5272-73 (House passage).

³³⁷ See Jonathan Turley, *Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 309 (2008) (describing fate of amendment); see also THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED; UNRATIFIED AMENDMENTS; ANALYTICAL INDEX, H.R. DOC. NO. 110-50, at 31 (2007) (text of amendment).

effects, it is similarly the case that the same 40 years have seen none of the anticipated progress on voting rights for D.C. and the territories. There is no great groundswell of public pressure to amend UOCAVA and fix its constitutional deficiencies with anything like the D.C. solution. But there could yet be a groundswell in favor of doing right by D.C. and the territories, an issue that has had no trouble finding space on the congressional agenda.³³⁸

The D.C. solution could be accomplished through ordinary legislation, but Congress is unlikely to take any such action in a vacuum. When the time comes for U.S. citizens in D.C. and the territories to finally get meaningful federal voting rights, it will probably entail a constitutional amendment.³³⁹ Once amending the Constitution is on the table, it would be feasible and sensible to fix UOCAVA at the same time. If Congress is really attached to UOCAVA's current mode of enfranchising permanent expatriates, it could amend the Constitution to retroactively legitimize the statute. Better yet, though, it could create a new federal constituency for permanent expatriates—with its own presidential voting and perhaps its own voting representatives in Congress—alongside similar ones for D.C. and the territories.³⁴⁰

C. *The Popular Vote Solution*

Another related issue that ranks much higher on the agenda than fixing UOCAVA—and thus makes it a potentially useful vehicle for fixing UOCAVA—is Electoral College reform, a perennial source of proposed constitutional amendments.³⁴¹

³³⁸ In one ironic example of this, a recent attempt to obtain a voting representative for D.C. without amending the Constitution spurred one proponent to use UOCAVA as evidence of congressional power in this arena. See *Hearing on D.C. House Voting Rights Act*, *supra* note 6, at 24-25 (statement of Viet Dinh, former Assistant Att'y Gen.); see also *id.* at 63-64 (statement of Jonathan Turley, Professor of Law, George Washington University Law School) (noting and disagreeing with Dinh's argument).

³³⁹ See Turley, *supra* note 337 (making case against applying mere legislative fix to D.C.'s lack of representation).

³⁴⁰ See KLEKOWSKI VON KOPPENFELS, *supra* note 10, at 220; Shurtz, *supra* note 6, at 155-56; *supra* note 334 and accompanying text. Puerto Rico, D.C., and the permanent-expatriate population are all large enough that each would warrant its own representation; the other territories are small enough that they would likely be combined into one constituency.

³⁴¹ See *U.S. Electoral College: Frequently Asked Questions*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/electoral-college/faq.html> [<http://perma.cc/7HH4-UUBD>] (last visited Feb. 29, 2016) ("Reference sources indicate that over the past 200 years, over 700 proposals have been introduced in Congress to reform or eliminate the

The National Popular Vote Interstate Compact (NPVIC), a clever suggestion for switching to a national popular vote without having to amend the Constitution, has recently gained momentum and attention.³⁴² The NPVIC leverages the states' ability to decide how to allocate their own electoral votes; states agree to award their electoral votes to the winner of the national popular vote, but only when enough states to constitute a majority of the Electoral College have signed on.³⁴³

The NPVIC would almost certainly open the door to further reform and would thereby make it much easier to get UOCAVA into the discussion. It seems likely that if the NPVIC passed or was close to passing, and if quick and definitive review of it in court seemed doubtful, Congress would at least consider taking up the issue of amending the Constitution.

This is not to say that Congress would necessarily approve of a popular-vote amendment.³⁴⁴ The point is that the NPVIC would thrust the issue to the top of the agenda, and anyone who was not completely satisfied with the NPVIC's result would likely seek a constitutional amendment to preempt or alter it. This could include traditionalists who would want to keep the status quo (though if the NPVIC was close to passage such an effort would seem futile). It could also include those who approved of the NPVIC's result and who wished to accelerate it, or who worried about its vulnerability in court and the dangerous uncertainty that it might entail and so wished to shore it up.

For our purposes, though, the most important group that would seize upon the opportunity presented by the NPVIC would be those interested in broadening the franchise. If Congress amends the Constitution to institute a national popular vote for President, it would present a perfect opportunity to discuss just what the proper scope of "national" should be. It would be an optimal time, in other words, to add

Electoral College. There have been more proposals for Constitutional amendments on changing the Electoral College than on any other subject.").

³⁴² See NAT'L POPULAR VOTE, <http://nationalpopularvote.com> [<http://perma.cc/9QYK-WYQB>] (last visited Feb. 29, 2016) (indicating that the plan is 61% of the way toward activation); see also JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (2013); Bennett, *supra* note 6 (providing an early version of the plan).

³⁴³ See *Explanation of National Popular Vote Bill*, NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com/written-explanation> [<http://perma.cc/5AFC-9NPH>] (last visited Feb. 29, 2016).

³⁴⁴ A popular-vote amendment came close to passing around the time that OCVRA did. See KOZA ET AL., *supra* note 342, at 128.

presidential voting rights for residents of the territories.³⁴⁵ In the process, the proffered constitutional amendment could guarantee presidential voting rights to all adult U.S. citizens,³⁴⁶ with Congress empowered to provide for the administration of voting by anyone who does not reside in any state. Presumably, territorial governments could handle their own elections; the federal government could take care of voting by permanent expatriates. This would be a marked improvement over the current systems for overseas voting, which require the federal government to attempt to oversee the diverse practices of each individual state.³⁴⁷

This could lead to placing UOCAVA on a sounder constitutional footing. Permanent expatriates would be able to vote for President based solely on their status as American citizens, rather than by forcing states to pretend that those citizens still live there. This, in turn, would make it easier to execute the same maneuver for congressional voting; states would no longer be forced to include nonresidents in their electorates. Just as with the D.C. solution, Congress could create a position for a nonvoting House member dedicated to representing permanent expatriates. Better yet, since the Constitution would be getting amended anyway, Congress could take the opportunity to add real congressional representation for D.C., the territories, and permanent expatriates. Unlike with the D.C. solution, permanent expatriates could gain these more solid, constitutionally sound voting rights without impinging on D.C. residents.

There are multiple options for fixing UOCAVA and placing voting rights for permanent expatriates on a sounder constitutional footing. None are perfect. Some require permanent expatriates to surrender their right to vote in congressional elections. Replacing the right to vote in congressional elections in one's former state with the right to vote for a dedicated nonvoting representative might suffice, though. If the price to pay to avoid UOCAVA's unconstitutionality is to give permanent expatriates the same congressional voting rights as American citizens living in D.C. and the territories, it is worth it.

³⁴⁵ The NPVIC itself would only count the popular vote of the 50 states and D.C. See *Explanation of National Popular Vote Bill*, *supra* note 343. Both major parties already allow the territories to vote in their presidential primaries.

³⁴⁶ See Cottle, *supra* note 254, at 321-31 (proposing an amendment extending presidential voting rights to residents of the territories). Felons, and perhaps ex-felons, would likely be excluded.

³⁴⁷ See PRESIDENTIAL COMMISSION ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE 59-60 (2014), <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [<http://perma.cc/K72E-6TAT>].

The cleanest option for preserving permanent expatriates' right to vote in presidential elections would require amending the Constitution, but constitutional amendments are so difficult to pass that one cannot blithely consider this as a likely solution. But linking permanent-expatriate voting rights to an amendment that establishes voting rights for residents of the territories—or one that establishes a national popular vote for President—would make it a more promising path politically and legally. Not only could such an amendment resolve all of the constitutional problems with UOCAVA's application to presidential voting, it might even lead to real representation in the House—all while finally enfranchising residents of D.C. and the territories.

CONCLUSION

UOCAVA is unconstitutional but entrenched because so many people are understandably more concerned with voting rights than with constitutional niceties. The list of policy goals for which the Constitution has been thrown overboard is long, but broadening the franchise is one of the worthier items on it. Yet as this article has demonstrated, there is no reason that voting rights for permanent expatriates needs to be on that list at all. Permanent expatriates can be enfranchised without disrespecting the Constitution, through a process that expands federal voting rights not just for permanent expatriates but for all U.S. citizens. To the extent that we need constitutional amendments to make that happen, the same support for UOCAVA that has made it so invulnerable should make those amendments (relatively) easy to pass because expanding voting rights for deserving citizens has so often proven to be a fruitful rallying point for amending the Constitution. UOCAVA's principles can be entrenched the old fashioned way: by writing them into the Constitution.