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‘Partly Constitutional’ Isn’t Enough: Senate Should Reject the ‘For the People Act’

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The Senate Rules Committee has marked up S.1, the omnibus elections bill, after wrangling over such topics as whether states should be forced to re-enfranchise murderers (sure!) and perpetrators of crimes against children (no, not them). It’s too bad the majority Democrats didn’t spend more time confronting an issue they’ve managed to evade: Should the bill get through, how many of its provisions would the courts find unconstitutional? The answer is: a whole lot.

Indeed, the pretentiously named “For The People Act” fairly bristles with provisions at odds with our nation’s founding document. There are free-speech violations, about which ACLU officials have expressed alarm. There are separation-of-powers problems. There’s plenty of federalism-mangling. For those who prefer the more arcane, there are likely Electors Clause and Qualifications Clause violations.

Last month I wrote a piece that tried to start a count of how many provisions were likely unconstitutional. I got up to seven without much trouble, and it’s anyone’s guess how many more are in there.

But don’t take my word for it. On May 5, *New York Times* legal reporter Adam Liptak published a piece previewing some of the likely legal battles should Congress approve this “grab bag of largely unrelated measures” (his words). Even the bill’s lead House sponsor, Representative John Sarbanes, who ironically represents Maryland’s gaudily gerrymandered Third District, conceded that “we can imagine [the present Roberts Court] will probably start from a place of favorability to some of these challenges.”

Liptak quoted supporters of the bill, and also a knowledgeable critic: John O. McGinnis of Northwestern University Law School. “It seems very willing to brush past, at least in some cases, some relatively clear constitutional provisions,” McGinnis said. One reason the bill is so sloppy: “It was first proposed as an aspirational document rather than a practical one in 2019, when Republicans controlled the Senate and it had no hope of becoming law.”

Some of the constitutional points, to be sure, are less settled than others. In a decidedly strange 1970 case called *Oregon v. Mitchell*, on whether Congress could impose on states by statute a lowering of the voting age to 18, Justice Hugo Black, in a deciding opinion not joined entirely by any other justice, seemed to read out of existence the straightforward constitutional requirement in Article 1, Section 2, and the 17th Amendment that “the electors [for Congress] in each state shall have the qualifications requisite for electors of the most numerous branch of the state

legislature." (H.R. 1/S. 1 would, in contradiction to this language, force states to enfranchise felons for purposes of electing Congress even if they do not choose to do so for purposes of electing state legislators.) A 2013 opinion by Justice Antonin Scalia makes it likely that Black's handling of the subject would not stand as good law, but we won't know for sure until the issue is squarely faced.

Regarding S.1's exceedingly ambitious provisions forcing every state to establish independent volunteer commissions to draw House lines, the law professor Liptak talks to seems mostly worried that the Court might revisit and overturn its 2015 decision that approved, by the narrowest of margins (5–4), the constitutionality of Arizona's voter-approved independent redistricting commission. My perspective is different: I think the redistricting section is a likely goner before the Court even has to reach that point, because of its separate line of cases disapproving congressional coercion and commandeering of the machinery of state government by the federal government.

Perhaps because space was limited, the *Times* account missed one of the sections of the bill I find most emblematic: It would oblige larger online platforms to keep public logs of ads on political topics. When my own state of Maryland actually tried to enact such a law, the federal courts proceeded without hesitation to strike it down. Judge J. Harvie Wilkinson's opinion for the Fourth Circuit called it "a content-based law that targets political speech and compels newspapers, among other platforms, to carry certain messages on their websites. In other words, Maryland's law is a compendium of traditional First Amendment infirmities."

To put it differently — I've made this point before, but am never going to tire of making it — the bill's sponsors aren't willing to drop parts of their bill that courts *have already declared unconstitutional*.

Members of Congress take an oath that requires them to "support and defend" the Constitution. It seems inconsistent with that obligation to vote for a bill with flagrantly unconstitutional sections — even if, as backers of the bill keep assuring the *Times*, it does contain quite a few other provisions that courts would be okay with. I suppose a few members will come back with the claim that they've thought through each of the ways the current state of constitutional law would trip up the bill as written, and after sincere reflection have decided they disagree with current precedent on every one of them.

But most members wouldn't be fooling anybody if they said something like that. In most cases, they don't try to think through the constitutionality of what they're doing at all. They treat it instead as a game: Their team gets to take as many shots at the adversary as it can, and the courts as goalies then block what shots they can.

It's no way to treat a Constitution.

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