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Protecting the Right to Vote in State and Local Elections Under the Conspiracy Against Rights Act

R. Paul Margie†

The right to vote is the centerpiece of our democratic system. Widespread electoral offenses, such as ballot box stuffing and voter intimidation, undermine citizens' confidence in the representative nature of their institutions. With each new election come stories of interference with the polls, voter registration fraud, and occasional physical interference or intimidation.

The federal government has many tools at its disposal to combat electoral offenses. For example, statutes outlaw vote buying,¹ fraudulent use of the postal service,² and official interference with the right to vote.³ One of the most powerful federal statutory tools is the Conspiracy Against Rights Act ("Section 241").⁴ Section 241 guards against conspiracies to interfere with "any right or privilege secured . . . by the Constitution or laws of the United States."⁵ Congress intended Section 241 to protect a wide variety of rights.⁶ The government has used this statute to prosecute federal election offenses for more than a century.⁷ Recently, federal prosecutors have used Section 241 successfully to prosecute offenses in elections that contain both federal and state or local components;⁸ a few courts have even applied Section 241 to purely state and local contests tainted by offenses perpetrated under color of law.⁹

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⁵ Id.
⁷ Ex Parte Yarbrough, 110 US 651 (1884); United States v Olinger, 759 F2d 1293 (7th Cir 1985).
⁸ Anderson v United States, 417 US 211 (1974)("Anderson II").
The question of whether prosecutors can use Section 241 to combat election offenses not perpetrated under color of law in exclusively state and local contests remains open. Section 241 protects rights or privileges secured by the Constitution or the laws of the United States. Therefore, Section 241's applicability hinges on whether the right to vote in a state or local election is federally secured.

This Comment argues that a federal right to vote in state and local elections does, in fact, exist. This determination is important because neither state election laws nor other federal laws adequately protect those who vote in purely state and local elections. Courts have found a constitutional right to vote in state and local elections in the Fourteenth Amendment and the Guarantee Clause of Article IV of the United States Constitution. However, federal law also may provide such a right. Grounding a Section 241 action in federal statutory rights rather than constitutional rights serves two important purposes. First, federal voting statutes increase the number of election offenses prosecutable under Section 241. Second, using a constitutional base for a Section 241 action exposes the prosecution to a powerful void-for-vagueness argument; using a federal statute as a predicate right is less susceptible to this defense.

Two federal statutes establish a right to vote in state and local elections. Section 1971(a)(1) of the Voting Rights Act ("VRA") states that all citizens qualified to vote in an election shall be allowed to vote in the election. Section 1973(i)(b) of the VRA grants all citizens the right to be free from intimidation.

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10 18 USC § 241.

11 For a good explanation of why state laws have proven inadequate in this role, see Note, Protecting the Polls from the Pols: Federal Prosecution of State and Local Election Fraud, 51 NYU L Rev 660, 660-61 (1976); Note, Election Administration in New York City: Pruning the Political Thicket, 84 Yale L J 61, 62 (1974). These Notes argue that not only are the state statutes either outdated or ineffective because they address antiquated types of fraud and contain unintelligible statutory language, but because political pressures from those who perpetrate the offense or benefit from it restrain even their limited bite.

Other federal laws also do not adequately protect against these electoral offenses. The Department of Justice lists nine federal statutes besides Section 241 that prosecutors use against electoral offenses. Of these, 18 USC § 242 (1988), is limited to actions taken under color of law; 42 USC § 1973(i)(c) and (e) (1988) and 18 USC §§ 594 and 608 (1988) are limited to protecting elections where a federal office is contested; 18 USC §§ 594 and 597 are limited to vote buying; 18 USC §§ 1341 and 1343 (1988) may be useless after the Supreme Court declared that "intangible rights" do not fall under their ambit; and 18 USC § 245(b)(1)(A) (1988) is merely a misdemeanor and requires a violent act.


threats, or coercion when voting. Prosecutors can reach electoral conspiracies with frequency and success by using these statutes as predicate rights to Section 241 actions.

I. FEDERAL PROTECTION OF THE RIGHT TO VOTE IS THE CENTERPIECE OF SECTION 241'S HISTORY

The Fourteenth and Fifteenth Amendments to the United States Constitution, passed in the wake of the Civil War, broadened the scope of the right to vote by granting the suffrage to African-American men. Not all Americans received African-American suffrage with enthusiasm, though. The control of state governments by the “Radical Republicans” and the right of African-Americans not only to vote but also to hold office drew a violent reaction from factions in the former Confederate states. Groups like the Ku Klux Klan organized to resist African-American advances in government. These groups committed violent acts, including murder and assault, with the specific goal of keeping African-Americans from the polls. To counter this interference, Congress passed the Enforcement Act of 1870 (the “Act”).

The Act remains virtually unchanged today as Section 241. Section 241 provides fines of up to $10,000 and imprisonment of up to ten years for persons who conspire to “injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same.” Section 241’s sister statute is the Deprivation of Rights Under Color

15 US Const, Amend XIV; US Const, Amend XV.
17 See generally Ex Parte Yarbrough, 110 US 651 (1884).
20 Id. Compare Enforcement Act of 1870, 16 Stat 140 with 18 USC § 241.
21 18 USC § 241 provides:
If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured . . . [t]hey shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or life.
of Law Act.\textsuperscript{22} It provides for criminal punishment of those who deny federally secured rights while acting under color of law in a nonconspiratorial setting.

Section 241 does not in itself create substantive rights. Prosecutions for violations of this section must stem from a predicate federal right, granted under the Constitution or a federal law.\textsuperscript{23} A plain reading of Section 241 thus suggests that this section covers an enormous number of rights. The Supreme Court and the lower courts have endorsed such a reading.\textsuperscript{24}

The legislative history of Section 241 is brief. Only one legislator commented on Section 241 upon its passage. Senator John Pool of North Carolina "urged that the section was needed in order to punish invasions of the newly adopted Fourteenth and Fifteenth Amendments."\textsuperscript{25} In the absence of a full Congressional explanation of the statute's scope, the Supreme Court used the plain language and the context of this section's passage to determine that Section 241's scope is extremely broad. The Court found that the level of violence and the number of rights violated in the postwar period when the statute was enacted made it "hardly conceivable that Congress intended § 241 to apply only to a narrow and relatively unimportant category of rights."\textsuperscript{26}

With the whole of the Constitution and the corpus of federal law as possible predicate rights, prosecutors have applied Section 241 to a wide range of offenses.\textsuperscript{27} Congress originally passed

\begin{itemize}
  \item \textsuperscript{22} 18 USC § 242 (1988).
  \item \textsuperscript{23} Anderson v United States, 417 US 211 (1974)("Anderson II").
  \item \textsuperscript{24} See note 27.
  \item \textsuperscript{25} Price, 383 US at 805.
  \item \textsuperscript{26} Id. The opinion states in relevant part:
  
  The language of § 241 is plain and unlimited. As we have discussed, its language embraces \textit{all} of the rights and privileges secured to citizens by \textit{all} of the Constitution and \textit{all} of the laws of the United States . . . . We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language.
  
  Id at 800-01 (emphasis in original).
  \item \textsuperscript{27} Utilizable predicate rights for § 241 claims span from criminal law to public housing. For cases relying on the right to inform the government of criminal activity, see Motes v United States, 178 US 458 (1900)(conspiring to injure a citizen who had informed the government of violations of the revenue laws was an offense under Section 241); United States v Smith, 623 F2d 627 (9th Cir 1980)(conspiring to violate civil rights of a citizen who informed officials of federal law violations); Nicholson v United States, 79 F2d 387 (8th Cir 1935)(conspiring to injure a citizen who informed officials of unlawful alcohol movement is prosecutable under Section 241). See also In re Quarles, 158 US 532 (1895). For cases relying on the Thirteenth Amendment as a predicate right, see United States v Kozinski, 487 US 931 (1988)(regarding the general ability of Section 241 to protect Thirteenth Amendment rights); Smith v United States, 157 F 721 (8th Cir 1907)(same); United States v Lewis, 649 F Supp 1109 (W D Mich 1986)(same). For a case which relies
  \end{itemize}
Section 241 to combat election offenses and prosecutors have used it for this purpose for over a century. The predicate right for most of these cases is found in the Constitution. The Constitution grants citizens the right to vote in a federal election in Article I, Section Two of the United States Constitution, as well as in the Fourteenth, Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments to the Constitution. Courts use these direct and obvious grants of the right to vote in federal elections as a basis to apply Section 241 whenever an election offense has marred a federal election.
The Supreme Court has held that Section 241 is applicable where a conspiracy targets a state or local contest that shares a ballot with a federal contest. In *Anderson v United States* ("*Anderson II*"), the Supreme Court found that several county officials violated Section 241 by conspiring to cast false votes in a "mixed" federal, state, and local primary election. The conspirators' primary purpose was to affect the outcome of local elections. However, since their actions diluted the voting power of citizens voting in federal elections, the Court found that they had conspired to interfere with a federal right granted by the Constitution or the laws of the United States.  

Recent circuit court opinions have applied *Anderson II*. In *United States v Townsley*, conspirators endeavored to destroy absentee ballots in order to affect a local election. The *Townsley* court held that as long as the conspiracy involved the destruction of ballots containing federal candidates, the fact that the conspiracy did not intend to affect a federal contest did not preclude a Section 241 prosecution. Similarly, in *United States v Olinger*, the Seventh Circuit confronted a conspiracy to intimidate elderly voters in their exercise of the right to vote. The conspiracy's purpose was to affect local contests. The court ruled that prosecutors properly initiated the Section 241 action because the election also involved federal candidates.

II. SECTION 241'S SCOPE IS LIMITED BY THE VOID-FOR-VAGUENESS TEST

The scope of Section 241, although extensive, is not unlimited. Section 241's language allows prosecutors to employ a wide range of federal rights as the foundation of a Section 241 ac-
tion. However, if prosecutors could use any federal right without limitation to support a Section 241 violation, they could punish transgressions "by reference to a large body of changing and uncertain law." Unlimited enforcement would expose defendants to uncertain liability and trigger concern that the statute is unconstitutionally vague on due process grounds. For example, the Supreme Court held that a penal statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law." In United States v Screws, defendants challenged Section 241's sister statute, Section 242, on the ground that it was unconstitutionally vague. In Screws, three policemen without provocation beat to death a suspected thief named M. Claude Screws. The prosecution argued that the policemen deprived Screws of two Fourteenth Amendment rights: (1) the right not to be deprived of life without due process of law, and (2) the right to be charged upon arrest and punished according to applicable law. The defendants argued that using Section 242 to criminalize due process violations was unconstitutional. The defendants claimed that because the due process clause does not provide an ascertainable standard of guilt, defendants are exposed to uncertain liability. The Court found Section 242 constitutional. It noted, however, that in tying Section 242 to any right or privilege secured by the Constitution or the laws of the United States, "Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts

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43 See note 27 and accompanying text.
44 Screws v United States, 325 US 91 (1945).
46 325 US at 91.
47 Id at 91. Section 242 prohibits individuals acting under color of law from depriving a citizen of rights protected by the Constitution or the laws of the United States. 18 USC § 242 (1988).
48 Screws, 325 US at 92-93.
49 Id at 91.
50 Id at 94-95.
51 Id at 93-94.
were prohibited."m52 Because this situation risked exposing citizens to uncertain punishment, the Court limited Section 242's scope by reinterpreting its "willfully subjects" language.\textsuperscript{53} The Court held that prosecutors must prove "a specific intent to deprive a person of a federal right."m54 More importantly, the right must have "been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."m55 These two requirements are known respectively as the "specific intent" requirement and the "definite and certain" requirement.

These requirements apply equally to Section 241. In \textit{United States v Williams},\textsuperscript{56} the Court split over whether Section 241 encompassed Fourteenth Amendment rights. Four Justices argued that because Section 241 did not contain the "willfully" language that allowed the \textit{Screws} Court to validate Section 242, the application of Section 241 to the Fourteenth Amendment was unconstitutionally vague.\textsuperscript{57} Because an equal number of Justices argued that the statute's conspiracy requirement implicitly included the "willfully" concept, the lower court's decision was affirmed and the Supreme Court did not resolve the question of Section 241's validity.\textsuperscript{58} Nevertheless, in \textit{United States v Price},\textsuperscript{59} the Court ultimately resolved this issue by holding that Section 241 did include the "willfully" concept and therefore survived \textit{Screws}.\textsuperscript{60}

\textsuperscript{52} \textit{Screws}, 325 US at 91.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed by the punishment of the citizens in § 242, shall be fined not more than $1000, or imprisoned not more than one year, or both.
\textsuperscript{56} \textit{Screws}, 325 US at 91.
\textsuperscript{57} Id.
\textsuperscript{58} Id at 104.
\textsuperscript{59} \textit{341 US 70 (1951)}.
\textsuperscript{60} Id at 82.
\textsuperscript{59} Id at 87-95 (Douglas dissenting).
\textsuperscript{61} \textit{383 US 787, 793 (1966)}.
\textsuperscript{62} Id at 793.
PROTECTING THE RIGHT TO VOTE

Screws's holding that Sections 241 and 242 require specific intent has become irrelevant to determining which applications of the statutes are unconstitutionally vague. However, the "definite and certain" requirement remains important. Yet, only one appeal has reversed a Section 241 conviction because of a failure to clear this hurdle. Defining "definite and certain" is a difficult task for the courts. In recent Section 241 cases, most courts have glossed over this requirement by assuming that the predicate rights were "definite and certain" and thus in accord with Screws.

III. PURELY STATE AND LOCAL ELECTIONS CAN BE PROSECUTED WITH SECTION 241

The question of whether Section 241 is applicable to elections involving only state and local contests is still undecided. Two factors control the issue: (1) whether a federal right to vote in state and local elections exists, and (2) whether application of Section 241 to such elections survives the Screws void-for-vagueness test as a valid exercise of federal power.

The Supreme Court has faced this issue several times without resolving it. Two nineteenth-century cases indicate in dicta that Section 241 is not applicable to infringements on voting in state and local elections. In Ex Parte Siebold, the Court found five Maryland election judges guilty of violating Section 241 after they interfered with a federal election. Still, the Court stopped short of holding that interference with nonfederal elections violated Section 241: "We do not mean to say, however, that for the election of State or county officers, they will be amenable

61 See Note, Federal Prosecution for Local Vote Fraud Under Section 241 of the Federal Criminal Code, 43 U Chi L Rev 542, 553-55 (1976). The specific intent requirement proved difficult for most courts to apply. Additionally, as a matter of logic, if the "definite and certain" requirement is met, the specific intent requirement can be implied by the conspiratorial actions. United States v O'Dell, 462 F2d 224 (6th Cir 1972)(holding that the right to reasonable bail in a state criminal case is not definite and certain even though two circuits and six districts had recognized the right).

62 See notes 52-55 and accompanying text.

63 O'Dell, 462 F2d at 224.

64 This may have to do with the fact that the Department of Justice has not attempted to use Section 241 to protect any controversial or borderline rights.

65 See note 23 and accompanying text.

66 See notes 43-55 and accompanying text.


68 100 US at 371.
to Federal jurisdiction. If the Maryland election judges had directed their actions to a purely state and local contest, then the *Siebold* Court would have found Section 241 inapplicable. *Blitz v United States* involved a man who impersonated qualified voters in a federal election. The Court included *dicta* comparable to that of *Siebold*: "[I]f, in voting for a state officer at such an election, he knowingly personated and voted in the name of another, it was an offense against the State, punishable alone by the State." More than seventy years later, the Court found that the right to vote in state and local elections is constitutionally protected, but it did not connect this conclusion to Section 241. In *Reynolds v Sims*, the Court held that the redistricting system for the Alabama legislature was invalid under the Equal Protection Clause of the Fourteenth Amendment. The Court wrote:

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections . . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

In *Oregon v Mitchell*, the Supreme Court tempered the *Reynolds* decision. There the Court expressed reservations about the federal government's role in controlling, policing, and regulating state elections in holding that Congress lacked the authority to impose a voting age of 18 on purely state and local elections.

The Supreme Court could have directly addressed the question of Section 241's applicability to state and local elections in *Anderson v United States* ("*Anderson II*"). *Anderson II* involved defendants who cast fictitious votes in a mixed federal and state elections.

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69 Id.
70 153 US at 308.
71 Id at 313.
73 Id at 554-55. See also *Duncan v Poythress*, 657 F2d 691, 700 (1981)(restating the importance of the right to vote in federal elections).
75 Id at 117-18, 124-28.
76 Id.
election. In attempting to exclude certain pieces of evidence from the trial, the defendants argued that prosecutors can only use Section 241 against election offenses in federal or mixed elections. The defendants argued that since election officials finalized federal returns before state and local returns, statements made after the federal returns tabulations occurred in the absence of a federal election and thus were beyond the scope of a Section 241 prosecution. The Court could have resolved this issue by ruling that Section 241 applies equally to federal, state, and local elections. It chose not to do so, however, opting to make a factual determination that the conspiracy implicated federal elections at all times and holding that the rules of evidence allow the disputed statements to be admitted regardless of the scope of Section 241. "We think it inadvisable . . . to reach out in this fashion to pass on important questions of statutory construction when simpler, and more settled, grounds are available for deciding the case at hand." The Supreme Court has not revisited the issue, and no federal court has held Section 241 inapplicable to prosecutions of purely state and local election offenses.

An argument can be made that federal prosecutions of electoral offenses in purely state and local elections tramples on traditional states' rights. Prosecutors should apply Section 241 to purely state and local elections even though this involves significant federal interference with state-run election schemes. The Supreme Court has allowed continuous federal advances into states' rights for a century. Judicial treatment of the Interstate Commerce Clause, the spending power, and the taxing power, US Const, Art I, demonstrates the Court's treatment of federalism-based restraints of federal power. Where once the federal government was carefully restrained, today virtually every type of activity can be regulated federally. See South Dakota v Dole, 483 US 203 (1987)(allowing federal government to tie highway funds to a drinking age requirement); Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985)(validating minimum wage and overtime laws); New York v United States, 326 US 572 (1946)(finding that states are not immune from federal excise tax). Federalism-based arguments have not checked the federal advance into state electoral districts. Traditionally, the Court has unhesitatingly allowed the federal government to regulate and prosecute districting plans for nonfederal elected offices. See Holder v Hall, 114 S Ct 2581 (1994); Johnson v De Grandy, 114 S Ct 2647 (1994)(finding that the Florida reapportionment plan unlawfully diluted the voting strength of minority voters); Voinovich v Quilter, 113 S Ct 1149 (1993)(finding that the Ohio reapportionment plan does not unlawfully dilute the voting strength of minority voters); Growe v Emison, 113 S Ct 1075 (1993)(finding that the Minnesota redistricting plan did not unconstitutionally dilute the voting strength of minority voters). See, however, United States v Lopez, 115 S Ct 1624 (1995)(determining that the Constitution does not empower the federal government to regulate firearms in school zones).

When the Court's general rejection of states' rights arguments is examined along

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78 Id at 214-15.
79 Id at 217-18.
80 Id.
82 Id at 218.
83
A. The Equal Protection and Guarantee Clause Theories Do Not Persuasively Establish a Predicate Federal Right to Vote in State and Local Elections

Presently two theories explain how federal prosecutorial power under Section 241 can legitimately extend to election offenses occurring in purely state and local elections. First, a pair of courts have held that the Equal Protection Clause of the Fourteenth Amendment can act as a predicate right for Section 241 purposes when election offenses are performed under color of law. Two commentators have subsequently elaborated upon this theory and analogized Section 241 prosecutions to redistricting cases. One of these commentators provided the second rationale for federal power, fashioning a theory that the Article IV, Section 4 Guarantee Clause also may act as a predicate right for purposes of a Section 241 prosecution.

In a case not involving voting rights, the Supreme Court held that the Equal Protection Clause can be the basis of a Section 241 action. Two courts have built on this holding by allowing prosecutors to apply Section 241 to state or local election offenses involving defendants who act under color of state or federal law. For example, in the predicate and subsequent cases to Anderson II, the Fourth Circuit held that poll officials who conspired to stuff ballot boxes were guilty under Section 241 even in the absence of a federal contest.

side of the states' inability or unwillingness to prosecute state and local elections, the propriety of using Section 241 in this context becomes apparent. Note, Election Administration in New York City: Pruning the Political Thicket, 84 Yale L J 61 (1974)(cited in note 11).

84 See United States v Anderson, 481 F2d 685, 699 (4th Cir 1973)("Anderson I"); United States v Stollings, 501 F2d 954 (4th Cir 1974); United States v Olinger, 759 F2d 1293 (7th Cir 1985); United States v Howard, 774 F2d 838 (7th Cir 1985)(upholding conviction of former Chicago precinct captains for vote fraud). Henceforth this theory will be called the "Equal Protection Clause predicate theory."


86 Note, 51 NYU L Rev at 667 (cited in note 11). Henceforth, this theory will be called the "Guarantee Clause predicate theory."

87 United States v Guest, 383 US 745 (1966)(overturning the dismissal of Section 241 charges against individuals who interfered with several African-American citizens' constitutional freedoms).

88 Anderson I, 481 F2d at 699; Stollings, 501 F2d at 954; Olinger, 759 F2d at 1293.

89 Anderson I, 481 F2d at 700-01; Stollings, 501 F2d at 955. Poll officials are employed by the state and act as its agents.
In the predicate case, *Anderson v United States* ("Anderson I"), the court combined the *United States v Price* court's discussion of the "inclusive nature" of Section 241, the "blunt" statement that the Constitution protects the right to vote in state and local elections found in *Reynolds*, and *United States v Guest*’s ruling that the Equal Protection Clause applied to Section 241 actions. With these ingredients, the court created a government actor theory, holding that Section 241 protects citizens from a violation of the Equal Protection Clause through election offenses perpetrated under color of law. Because conspirators acting under color of law are agents of the state, by their actions they act as extensions of a state denying citizens equal protections under the law. In *United States v Olinger*, the Fourth Circuit accepted the *Anderson I* government actor theory as an alternative ground in finding an election judge guilty of conspiracy to cast false votes under Section 241.

1. The Equal Protection Clause predicate theory.
   
   Two commentators have subsequently elaborated on the Equal Protection Clause predicate theory by demonstrating a nexus between Section 241 prosecutions and redistricting cases. The Supreme Court has held that the Equal Protection Clause protects citizens’ rights to participate in elections "on an equal basis with other citizens" and has used this theory to invalidate districting schemes. Interference with this constitutionally secured right, as with any federally secured right, is punishable under Section 241. Election offenses interfere with the right to participate on an equal basis by privileging one voter, group of voters, section of the electorate, or political entity over others. Discriminatory apportionment dilutes the votes of minorities. Ballot box stuffing, voter intimidation, and poll manipulation dilute the votes of voters with different political views than those of the conspirators. This is true in a purely state and local contest as well as a federal contest.

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90 481 F2d 685 (4th Cir 1973).
93 *Anderson I*, 481 F2d at 699-700.
94 Id at 699.
95 759 F2d at 1293. See also *Howard*, 774 F2d at 838.
However, as the Equal Protection Clause only concerns a state's unequal application of the law, in order to base a Section 241 action upon it, a prosecutor must still show that at least one conspirator acted under color of law. Thus, these theorists extend Section 241 to election offenses in state and local elections perpetrated under color of law, using the Equal Protection Clause as a predicate right.  

2. The Guarantee Clause predicate theory.

Commentators have proposed a second constitutional basis for extending Section 241 to electoral offenses in state and local elections—the Guarantee Clause of Article IV, Section 4 of the Constitution. This Guarantee Clause predicate theory stands on shaky ground, however. The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." Under the Guarantee Clause predicate theory, Section 241 requires the federal government to monitor United States citizens' right to republican government in each state by ensuring fair electoral practices in purely state and local elections. The theory assumes that democratic voting at every level in state elections is essential to a republican form of government.  

3. Problems with the Equal Protection Clause and Guarantee Clause predicate theories.

Neither the Equal Protection nor the Guarantee Clause theories persuasively establish a predicate federal right to vote in state and local elections. Both of these theories limit the number of election offenses prosecutable under Section 241. More importantly, a prosecution which relies on either theory is vulnerable to attack on vagueness grounds.

The Equal Protection Clause protects individuals from state action that denies an individual or group equal protection under the law. Therefore, Section 241, if based on the Equal Protection Clause, cannot be used to prosecute conspiracies that do not

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100 This assumption could mean that before all officials were elected by popular vote, a republican system was not present. Therefore, under this assumption, prior to the popular election of senators no state enjoyed a republican form of government.
101 US Const, Amend XIV.
involve state actors. For example, a conspiracy by a group of private individuals to use threats of violence to influence a citizen's vote does not involve a state actor. Moreover, private citizens in the employ of a political party who selectively destroy absentee ballots or registration applications are not state actors. The Equal Protection predicate theory reaches neither of these election offenses. Additionally, to violate the Equal Protection Clause, conspirators must favor some individuals' votes over others. A conspiracy to stuff a ballot box "dilutes" every vote equally, favoring none. Therefore, Section 241, if based on the Equal Protection Clause, will not reach many serious electoral improprieties.102

Using the Guarantee Clause as a predicate right is even more problematic. The Supreme Court refuses to recognize the Guarantee Clause as a source of judicial power.103 In Baker v Carr,104 an apportionment case, the Supreme Court unambiguously held that "complaints based on [the Guarantee Clause] have been held to present political questions which are nonjusticiable."105 Presumably, courts would not receive with enthusiasm a Section 241 prosecution based on a nonjusticiable right. Furthermore, the Guarantee Clause protects states, not citizens. Section 241, on the other hand, protects the rights that citizens derive from the Constitution and federal law, not the rights that states derive from the Constitution and federal law. Even if a prosecutor were to overcome these problems, she would need to prove that a particular election offense threatens the republican form of government for an entire state.

These shortcomings of the Equal Protection and Guarantee Clause predicate theories seriously impair their utility. Their vulnerability to attack on vagueness grounds threatens to make them completely useless. United States v Screws106 demands

102 As "[a] construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored," Snowden v Hughes, 321 US 1, 11-12 (1944), one must be wary of arguing that an equal protection problem arises each time a few individuals favor themselves over the rest of society through their fraudulent activities. See Note, 43 U Chi L Rev at 549-50 (cited in note 61), for a fuller treatment of the problems with the Equal Protection Clause predicate theory.

103 Luther v Borden, 48 US 1 (1849) (concluding that the issues surrounding the political agitations in Rhode Island were not within the province of the Court).

104 369 US 186 (1962) (finding that plaintiffs in a reapportionment case had stated a justiciable claim).

105 Id at 209.

106 325 US 91 (1945).
that the grant of a predicate federal right must be “definite and certain” to support a Section 241 action. Although each theory provides a federal right to vote in state and local elections, neither right flows definitely and certainly from the Constitution.

Judicial treatment of whether the Constitution grants a right to vote in state and local elections has been inconsistent and inconclusive. As discussed above, in the nineteenth century, the Supreme Court stated that the Constitution did not protect the right to vote in state and local elections.\(^\text{107}\) The *Siebold* and *Blitz* Courts opined that only the state could punish offenses directed at state contests.\(^\text{108}\) Subsequent cases conflict with *Siebold* and *Blitz* but do not clearly overrule them. Regarding redistricting questions, *Reynolds* and *Duncan* relied on the Equal Protection Clause in finding that citizens have the right to vote in all elections.\(^\text{109}\) However, only three cases have followed the Equal Protection predicate theory by fashioning these statements into a predicate right for Section 241: *Anderson I*,\(^\text{110}\) *United States v Stollings*,\(^\text{111}\) and *Olinger*.\(^\text{112}\) Critically, the Supreme Court had the opportunity to validate the Equal Protection predicate theory in *Anderson II* by making the constitutional grant of the right to vote in state and local elections “definite and certain.” By avoiding the question, the Court made a conscious decision to leave the grant’s existence undecided.\(^\text{113}\) The history of judicial opinion on the existence of a right to vote in state and local elections rooted in the Equal Protection Clause is anything but “definite and certain.” Therefore, it is likely to fail the *Screws* vagueness test.

B. The Voting Rights Act Can Provide the Predicate Right in Section 241 Prosecutions

The VRA\(^\text{114}\) provides a federal statutory predicate right to vote in state and local elections. By using the VRA in conjunction with Section 241, federal prosecutors can expand the scope of Section 241 actions and quiet vagueness concerns. A Section 241 prosecution does not need to find its predicate right in the Const-

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107 *Siebold*, 100 US at 393; *Blitz*, 153 US at 313.
108 *Siebold*, 100 US at 393; *Blitz*, 153 US at 313.
109 *Reynolds*, 377 US at 553; *Duncan*, 657 F2d at 691.
110 481 F2d at 885.
111 501 F2d 954 (4th Cir 1974).
112 759 F2d at 1293.
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stitution. Section 241 punishes injuries to the enjoyment of any right secured "by the Constitution or the laws of the United States." In United States v Johnson, the Supreme Court found that a federal statutory right, granted by the Civil Rights Act of 1964, could be the predicate right for a Section 241 prosecution. The Court accepted that a statute could be the basis of a Section 241 action almost as a matter of course.

1. Section 1971(a)(1) of the Voting Rights Act is broad enough to capture the majority of voting offenses.

Section 1971(a)(1) of the VRA ("Section 1971(a)(1)") provides a federal right to vote. "All citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude." This right to vote clearly extends to state and local elections. Those qualified to vote in "any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision" are granted a right to vote "at all such elections." That the right extends beyond federal elections is further substantiated by examining proximate sections of the VRA. Section 1971(b) explicitly limits its scope to elections "for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories." Section 1971(a)(1) is conspicuously free of such limiting language.

Using Section 1971(a)(1) as a predicate right for Section 241 provides a wider scope for potential prosecution than do the predicate rights explained by the Equal Protection and the Guarantee Clause predicate theories. Most importantly, no requirement exists that election offenses be perpetrated under color of law when a Section 241 prosecution is based on Section 1971(a)(1). Again, whereas companion sections are burdened with limiting language, Section 1971(a)(1) is conspicuous in its breadth.

116 Id at 563.
118 Id.
tion 1971(a)(2) explicitly limits its scope to "person[s] acting under color of law." 

Section 1971(a)(1) contains no such limitation. Indeed, courts have held that Section 1971(a)(1) applies to governments, state actors, and individuals equally.

Although the use of Section 1971(a)(1) as a predicate federal right solves many of the problems associated with the Equal Protection and Guarantee Clause predicate theories, it suffers from possible limitations of its own. Section 1971(a)(1) can be read as granting a right to vote free from racial discrimination, as opposed to granting a right to vote for all citizens, race, color, and previous condition notwithstanding. Although the legislative history is inconclusive, judicial treatment and the statutory scheme of the VRA suggest that the Section 1971(a)(1) grant is not limited to racial minorities. Congress did not directly address whether Section 1971(a)(1) protects against discrimination in voting or generally grants a right to vote. Statements in various congressional reports are ambiguous. The House Report for The Voting Rights Act of 1965 states that "[t]he bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4." This suggests that although the focus of the VRA is on combating discrimination to enforce the Fifteenth Amendment, the VRA was also intended to eliminate unequal voting rights by protecting the Fourteenth Amendment and to exercise Congress's power to regulate state electoral schemes in a way completely unrelated to race through Article I, Section 4.

The same report, however, admits that Congress does not have the power to "punish interference with voting on grounds


121 United States v Bruce, 353 F2d 474 (5th Cir 1965)(finding that the trial court erred in dismissing a complaint against Alabama citizens alleging that they interfered with African-American citizens' right to vote); United States by Katzenbach v Original Knights of the Ku Klux Klan, 250 F Supp 330 (E D La 1965)(enjoining Ku Klux Klan activities designed to interfere with African-American citizens' right to vote).

122 42 USC § 1971(a)(1).

123 House Report for the Voting Rights Act of 1965, HR Rep No 89-439, 89th Cong, 1st Sess 1 (1965); United States v Texas, 445 F Supp 1245 (S D Tex 1972)(ordering Texas voting registrar from refusing to register college dormitory residents unless they proved their intention to remain in the district after graduation); Dallas v Symm, 351 F Supp 876 (S D Tex 1972)(finding Burke County, Georgia at-large election system violates African-American citizens' Fourteenth Amendment rights); 42 USC § 1971(a)(1).

124 HR Rep No 89-439 at 1 (cited in note 123).
This limitation is directed at federal statutes that punish states for administering their elections in a discriminatory manner. Therefore, Section 1971(a)(1)'s less offensive general grant of suffrage may not be implicated.

Most cases involving Section 1971(a)(1) pertain to election offenses affecting racial minorities. This fact alone does not indicate that Section 1971(a)(1) cannot be used in another context. In fact, a line of cases not involving racial discrimination relies in part on Section 1971(a)(1). Several cases assert that local voter registration and residency requirements deprive college students of the right to vote in violation of Section 1971(a)(1). Although many of the students affected were minorities, many were not, and the decisions do not turn on the minority status of those students. If Section 1971(a)(1) provided a judicially recognized right for nonminority college students to vote, the section cannot be limited to those alleging their right was denied on account of race.

Moreover, the VRA's overall statutory scheme suggests that Section 1971(a)(1) is not limited to combating racial discrimination. Section 1971(a)(1) states that "[a]ll citizens who are otherwise qualified to vote ... [s]hall be entitled and allowed to vote ... without distinction of race, color, or previous condition of servitude." This text does not state that only a race-based distinction can give rise to a violation, whereas other sections require such a showing. For example, Section 1973(a) insists that an offending voting standard which denies the right to vote do so "on account of race or color." In contrast, Section 1971(a)(1)'s "without distinction" language merely clarifies its general grant of the right to vote by explaining that race, among other things, will not interfere with that right.

Another apparent limitation on Section 1971(a)(1)'s utility concerns the meaning of the right to vote. If a conspirator physically denies a qualified voter access to the polls, the voter's right to vote has been denied. But vote dilution does not literally deny a person's right to vote, since the injured party is allowed to cast a vote. If the right to vote does not include the right to have one's vote given full weight, ballot box stuffing and voter imperson-
ation cannot be prosecuted with a Section 241 action based on Section 1971(a)(1).

The legislative history of Section 1971(a)(1) stresses that the section was enacted to protect the right to vote because this right "is the sole means by which the principle of consent of the governed as the source of governmental authority is made a living thing." If the right to vote is protected to maintain the principle that all government exists by the consent of the governed, then the right to have one's vote given full weight is as important as the right to access the polls. An act of voting is useless if non-representative votes overwhelm it.

Case law supports the conclusion that vote dilution is a denial of the right to vote. Section 1971(a)(1) has been used successfully to correct apportionment systems which diluted minority voting strength and to correct "at-large" electoral schemes which effectively froze groups of voters out of power. These denials of the right to vote did not involve actually impeding citizens from casting a vote. The right to vote was denied by diluting each vote's effectiveness.

2. Section 1973(i)(b) complements the predicate rights of Section 1973(a)(1).

Section 1973(i)(b) of the VRA ("Section 1973(i)(b)") provides a federal right to vote free from intimidation, threats, or coercion. "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce . . . any person for voting or attempting to vote." This right should be construed to extend to state and local elections. While Section 1973(i)(c) states that "this provision shall be applicable only to general, special, or primary elections held solely or in part for . . . the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives," or other federal offices, Section 1973(i)(b), like Section 1971(a)(1), is conspicuously free of such restrictive language. Additionally, Section 1973(i)(b) is not restricted to actions performed under color of law. The statute states that persons are re-

130 Rodgers, 458 US at 613.
131 Id.
132 Id.
134 Id.
stricted from intimidating, threatening, or coercing voters, "whether [they are] acting under color of law or otherwise."136

The right that Section 1973(i)(b) offers to a Section 241 prosecution is not as broad as that of Section 1971(a)(1). However, since it is not restricted to state actors, and since it is not plausibly restricted to protecting racial minorities, it remains useful. Although vote-dilution schemes are beyond its reach,137 and although the destruction or alteration of ballots cannot be termed an intimidation, threat, or coercion, all acts of physical violence, threats of discontinued employment, and other obvious interferences with access to the polls fall within its ambit.

3. Section 1971(a)(1) and 1973(i)(b) are not void-for-vagueness because they establish definite and certain rights.

Both Section 1971(a)(1) and Section 1973(i)(b) increase the number of election offenses a prosecutor can reach in a Section 241 action. Perhaps more importantly, using these federal statutory rights does not expose a Section 241 prosecution to attack on vagueness grounds. The vital "definite and certain" question of the Screws vagueness test is whether a Section 241 predicate right has "been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."138

As discussed above, statutory language, legislative history, and case law clearly establish that Section 1971(a)(1) provides citizens with the right to be free of racial discrimination that denies them the right to vote in state and local elections for which they are otherwise qualified. Although these authorities suggest that Section 1971(a)(1) also includes a general right to vote in state and local elections, this right is not yet definite and certain. Future judicial treatment of the VRA or a legislative clarification of Section 1971(a)(1) may solidify this right to the extent that it could pass the Screws test if used as a Section 241 predicate right. For now, Section 241 prosecutions based on Section 1971(a)(1) must be limited to election offenses which deny a racial minority the right to vote in order to avoid vagueness problems.

[137] Section 1973(i)(b) cannot be used for this purpose as vote-dilution schemes do not involve intimidation, threats, or coercion, but merely alter the effectiveness of votes unknown to the voters.
Section 241 prosecutions based on Section 1973(i)(b) do not suffer from this limitation. The express terms of the VRA have made specific Section 1973(i)(b)'s right to vote without intimidation, threats, or coercion. As long as Section 241 prosecutions based on this section avoid election offenses which dilute instead of deny voting, courts will not invalidate them under Screws.

CONCLUSION

A dozen Supreme Court decisions explain the importance of the right to vote. When conspirators threaten a right central to the theory of our country's governance, the federal government must be equipped with the tools needed to defend its citizens. Today, the federal government must be able to prosecute election offenses occurring in state and local elections.

Prosecutors can employ Section 241 to accomplish this goal. However, in order for Section 241 to be effective, a predicate federal right to vote in state and local elections must be found which covers a large number of possible offenses and is not vulnerable to a void-for-vagueness argument. Sections 1971(a)(1) and 1973(i)(b) of the VRA satisfy these requirements. By using these federal statutory rights to vote predicate to Section 241, federal prosecutors will be able to combat electoral fraud more effectively.

139 42 USC § 1973(i)(b).