

# CHAPTER 1

## FEDERAL REGULATION OF STATE AND LOCAL ELECTORAL PRACTICES

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### I. INTRODUCTION

The Constitution entrusts states with the power and authority to hold elections,<sup>1</sup> but federal constitutional and statutory requirements nonetheless shape and constrain the state's regulatory power.

While federal constitutional protections apply to local, state, and federal elections, many federal statutes apply *only* to elections for federal offices. In practice, this distinction may be irrelevant as local, state, and federal elections are frequently held in tandem because the financial and logistical considerations generally preclude states from operating separate federal and state election systems. Thus, federal requirements tend to permeate all elections, although in some instances, federal statutory rights that are expressly limited to federal elections may not have a state counterpart.<sup>2</sup>

This chapter provides an overview of the main federal constitutional and statutory requirements that affect elections.<sup>3</sup> The chapter begins with a consideration of federal constitutional protections, next discusses the main federal statutes that govern the conduct of federal elections, and concludes with a brief overview of federalism considerations.

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<sup>1</sup> U.S. CONST. art. I, § 4, cl. 1; *Storer v. Brown*, 415 U.S. 724, 729-30 (1974).

<sup>2</sup> For example, while federal law requires states to offer some voters provisional ballots in federal elections, it does not require states offer provisional ballots in state elections held the same day. Instead, state law governs the voter's eligibility for a state provisional ballot. See *infra* Chapter 7: Election Day for additional information on provisional voting.

<sup>3</sup> Campaign finance regulations and the nuances of congressional districting are beyond the scope of this manual.

## II. FEDERAL CONSTITUTIONAL CONSIDERATIONS

The Constitution protects the right of all qualified<sup>4</sup> citizens to vote in state and federal elections.<sup>5</sup> Constitutional amendments explicitly address voting rights and prohibit the following:

- denying or abridging a citizen's right to vote because of race, color, or previous condition of servitude (15<sup>th</sup> Amendment),
- denying or abridging a citizen's right to vote because of sex (19<sup>th</sup> Amendment),
- denying the right to vote in a federal election because of the voter's failure to pay any poll or other tax (24<sup>th</sup> Amendment),
- denying the right to vote because of age if the citizen is eighteen or older (26<sup>th</sup> Amendment).

The constitutional amendments also:

- allow the reduction of a state's congressional representation if otherwise qualified voters are denied the right to vote for reasons other than participation in a rebellion or other crime (14<sup>th</sup> Amendment), and
- authorize the direct election of U.S. Senators by voters who are qualified to vote for the state's most numerous legislative branch (17<sup>th</sup> Amendment).

In addition to explicit protections for voting rights, other Constitutional guarantees are applicable to elections. These include:

- freedom of speech or expression, freedom of the press, and freedom of association,<sup>6</sup> and
- guarantees provided by the Due Process and Equal Protection clauses,<sup>7</sup> including the Supreme Court's description of voting as a fundamental right.

The Constitution also defines and divides important elements and duties of the electoral system in the United States between the states and the Congress. The Constitution authorizes state legislatures to set the times, places, and manner of electing Senators and Representatives,<sup>8</sup> while granting the power to judge the elections, returns, and qualifications of its members to each congressional chamber.<sup>9</sup> Congress and the states also divide power in presidential elections. State legislatures determine how the state selects its presidential electors,<sup>10</sup> while Congress

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<sup>4</sup> See *infra*, Chapter 5: State Regulations of Voters for additional information on the requirements to be considered a qualified voter.

<sup>5</sup> *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

<sup>6</sup> U.S. CONST. amend. I (incorporated against the states by the Fourteenth Amendment).

<sup>7</sup> U.S. CONST. amend. XIV, § 1.

<sup>8</sup> U.S. CONST. art. I, § 4, cl. 1 (granting Congress the authority to override a state legislature's decision except for the place of choosing Senators).

<sup>9</sup> U.S. CONST. art. I, § 5, cl. 1. See *Roudebush v. Hartke*, 405 U.S. 15 (1972) (holding which contestant should be seated in Congress was a non-justifiable question, but the state's Article I, Section 4 role in conducting federal elections allows it to conduct recounts).

<sup>10</sup> U.S. CONST. art. II, § 2; *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (finding that the state legislature's power to determine the selection method of electors is rooted in the United States Constitution and not reviewable by the state judiciary). See 3 U. S. C. § 5 (2000) (Safe Harbor provision) (protecting a state's presidential elector slate from challenge if the slate's composition is finalized by six days before the Electoral College meets).

establishes a uniform day when states will make their selections.<sup>11</sup> Congress also selects the day the electors meet and cast their votes.<sup>12</sup>

Constitutional challenges to state election regulations typically do not involve the explicit voting guarantees found in the Fifteenth, Seventeenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments. Instead, constitutional challenges to state election regulations usually focus on the protections and guarantees afforded under the First Amendment, particularly the rights of expression and association, as made applicable to the states by the Fourteenth Amendment, or on protections afforded by the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court has held that voting is one of the “fundamental rights” protected by the Due Process Clause of the Fourteenth Amendment, although it is a right that the state can infringe under certain circumstances.<sup>13</sup>

### III. FEDERAL STATUTORY CONSIDERATIONS

#### A. HELP AMERICA VOTE ACT OF 2002

The most recent federal foray into state election administration occurred when Congress passed the Help America Vote Act of 2002 (HAVA)<sup>14</sup> with overwhelming bipartisan support. A response to the disparities in voting system performance and election administration during the 2000 presidential election, HAVA addresses concerns about voting integrity, voter access, and voting technology. HAVA does not allow private lawsuits,<sup>15</sup> but many of its mandates are reflected in changes state legislatures made to their state election law, thereby making it possible for individuals to sue under the state’s implementing statutes.

HAVA contains a mixture of mandatory and discretionary changes to state<sup>16</sup> election administration. Among its myriad of provisions, HAVA provides the following:

- mandatory administrative compliance procedures for states opting to receive HAVA federal funding,<sup>17</sup>

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<sup>11</sup> See 2 U.S.C. § 7 (2000) (establishing the Uniform Federal Election Day which is to be held on the Tuesday next after the first Monday in November on every even numbered year).

<sup>12</sup> See 3 U.S.C. § 7 (2000) (setting the date that the Electoral College meets to the first Monday after the second Wednesday in December).

<sup>13</sup> *Reynolds v. Sims*, 377 U.S. 553, 554 (1964) (stating the U.S. Constitution “undeniably” protects the right of qualified electors to vote in state and federal elections); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 187 (1999) (noting that elections require “substantial regulation” (citing *Storer v. Brown*, 415 U.S. 724 (1974), *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983))).

<sup>14</sup> [Pub. L. No. 107-252](#), [116 Stat. 1666](#) (codified at [42 U.S.C. §§ 15301-545](#) and [36 U.S.C. §§ 152601-611](#) (Supp. IV 2004)).

<sup>15</sup> 42 U.S.C. § 15512 (Supp. IV 2004) (limiting enforcement to civil actions filed in federal district court by the Attorney General, who can sue states or localities for injunctive or declaratory relief).

<sup>16</sup> 42 U.S.C. § 15541 (Supp. IV 2004) (including the District of Columbia, Puerto Rico, Guam, American Samoa, and the United States Virgin Islands in the definition of “state”).

<sup>17</sup> 42 U.S.C. § 15512 (Supp. IV 2004).

- establishment of the Election Assistance Commission (EAC), which promotes state election “best practices” including requiring every state to develop and implement a uniform statewide definition of a valid vote for each voting system used,<sup>18</sup>
- grants to states that choose to replace their punch card or lever voting machinery,<sup>19</sup>
- error detection and voter notification standards for most voting technology used in federal elections held on or after January 1, 2006 regardless of whether the state opted to receive HAVA funding or not,<sup>20</sup>
- circumstances under which states must offer provisional voting in federal elections,<sup>21</sup>
- mandatory design, implementation and maintenance of a single, uniform, centralized, interactive statewide voter registration database by the states,<sup>22</sup> and
- determination of when voters must provide identification to be able to vote in a federal election.<sup>23</sup>

The most significant HAVA provisions address voting technology requirements, provisional voting, statewide voter registration databases, and voter identification. In elections for federal office held on or after January 1, 2006, states must use voting technology that:

- allows the voter to review and correct her ballot before she casts it,
- alerts the voter when she selects more candidates than the number of vacancies, and
- produces a permanent paper record with a manual audit capability.<sup>24</sup>

Localities must also provide one voting station per polling location that is accessible to persons with disabilities.<sup>25</sup>

Voters casting a ballot for federal offices must be offered the opportunity to vote by provisional ballot if:

- the voter’s name is not located in the voter registration list, and
- the voter attests he is registered in the jurisdiction where he is trying to vote.

Provisional ballots must be separated from other ballots and are not counted until the voter’s eligibility is verified.<sup>26</sup> Voters who vote in federal elections after the usual poll closing time solely because the hours were extended—as opposed to voters who were in line to vote before the normal poll closing time but were not able to vote until after closing time because the line moved too slowly—may only vote by provisional ballots, which must be separated from other

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<sup>18</sup> 42 U.S.C. § 15481(a)(6) (Supp. IV 2004).

<sup>19</sup> 42 U.S.C. § 15302 (Supp. IV 2004).

<sup>20</sup> 42 U.S.C. § 15481 (Supp. IV 2004) (requiring the test error rate to be no greater than 1 per 500,000 ballot positions). See U.S. ELECTION ASSISTANCE COMM’N, EAC ADVISORY 2005-005: LEVER VOTING MACHINES and HAVA SECTION 301(a) (Sept. 8, 2005), available at <http://www.eac.gov/docs/EAC%20Advisory%2005-005.pdf>.

<sup>21</sup> 42 U.S.C. § 15482 (Supp. IV 2004).

<sup>22</sup> 42 U.S.C. § 15483 (Supp. IV 2004) (requiring states to follow the voter registration purge requirements found in the National Voter Registration Act of 1993).

<sup>23</sup> 42 U.S.C. § 15483(b) (Supp. IV 2004).

<sup>24</sup> 42 U.S.C. § 15481 (Supp. IV 2004) (permitting jurisdictions that use paper ballots to substitute increased voter education and outreach for the notification requirements).

<sup>25</sup> U.S. ELECTION ASSISTANCE COMM’N, *supra* note 20.

<sup>26</sup> See *infra*, Chapter 9: Election Contents for additional information on provisional ballots.

provisional ballots.<sup>27</sup> Provisional ballot voters must be able to determine if their votes were counted and, if they were not, the reason they were not.<sup>28</sup>

Under HAVA, each state must develop, implement, and maintain a computerized, statewide voter registration list.<sup>29</sup> Voter registration applicants should not be added to the statewide database unless they provide their driver's license number, the last four digits of their social security number, or attest that they have neither of these documents.<sup>30</sup> If the applicant has neither of these documents, then the state must assign him a unique identification number.<sup>31</sup> States may only purge inactive voters from their registration databases after following the requirements listed in the National Voter Registration Act of 1993.<sup>32</sup>

Finally, HAVA addresses the circumstances under which federal election voters may be required to show identification before voting. First-time federal election voters who registered to vote by mail and did not provide identification documentation with the mailed-in form must present one of the HAVA specified forms of identification at the polls unless the voter is entitled to vote by absentee ballot under Voting Accessibility for the Elderly and Handicapped Act (VAEHA) or other federal statutes.<sup>33</sup>

## B. VOTING RIGHTS ACT OF 1965

Amended several times, the Voting Rights Act of 1965 (VRA)<sup>34</sup> prohibits discrimination on account of race, color, or previous condition of servitude in any election in which an individual is otherwise qualified to vote. The Voting Rights Act contains several sections, some of which impact every state and locality and some which do not.

The VRA prohibits all states and localities from using any law or practice that results in racial discrimination, even if this result was unintended.<sup>35</sup> All states and localities must allow a voter who needs assistance because of blindness or other disability to receive assistance by a non-employer, non-union representative person of the disabled voter's choice.<sup>36</sup> The VRA also prohibits all states or localities from conditioning the right to vote on the voter's ability to pass a literacy, subject matter or morals tests, or having another person vouch for the voter.<sup>37</sup> Finally,

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<sup>27</sup> 42 U.S.C. § 15482(c) (Supp. IV 2004).

<sup>28</sup> 42 U.S.C. § 15482(a) (Supp. IV 2004).

<sup>29</sup> 42 U.S.C. § 15482(a)(1)(B) (Supp. IV 2004) (exempting states that do not require voters to register to vote in elections for federal office from this requirement).

<sup>30</sup> 42 U.S.C. §15483(a)(5) (Supp. IV 2004) (exempting states that ask voter registration applicants to provide their complete social security number under the Privacy Act, 5 U.S.C. § 552a note, from this requirement).

<sup>31</sup> 42 U.S.C. § 15483(a)(5)(A)(ii) (Supp. IV 2004).

<sup>32</sup> 42 U.S.C. § 15482 (codified as amended in scattered sections of 42 U.S.C. (Supp. IV 2004)).

<sup>33</sup> 42 U.S.C. § 15482 (Supp. IV 2004).

<sup>34</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C. §§ 1973–1973bb-1 (2000)).

<sup>35</sup> 42 U.S.C. § 1973(a) (2000).

<sup>36</sup> 42 U.S.C. § 1973aa-6 (2000).

<sup>37</sup> 42 U.S.C. § 1973aa (2000).

all states and localities must allow voters who moved away from the jurisdiction fewer than thirty days before a presidential election to nonetheless cast an in-person or absentee ballot at their previous polling location for President and Vice President *only*.<sup>38</sup>

Localities with single language minority population groups of a specified size who, as a group, have limited English proficiency and higher rates of illiteracy than the national rate must provide bilingual ballots, registration forms, instructions, and assistance to these groups.<sup>39</sup> States and localities covered by Section Five<sup>40</sup> must preclear any changes in voting practices, laws or regulations with the Justice Department or the U.S. District Court of the District of Columbia.<sup>41</sup>

Although the VRA may be enforced by the U.S. Attorney General or by private citizens suing in federal district court,<sup>42</sup> the Supreme Court has held that state courts can determine that a proposed remedy may be subject to VRA preclearance and can order that preclearance be granted by the Justice Department or the U.S. District Court before the remedy is implemented.<sup>43</sup>

### C. NATIONAL VOTER REGISTRATION ACT OF 1993

The National Voter Registration Act of 1993 (NVRA),<sup>44</sup> also known as “Motor Voter,” requires states to make federal election voter registration forms available to, and accept the completed forms from, individuals who are applying for or renewing their motor vehicle license or are visiting state offices that provide public assistance or services to persons with disabilities.<sup>45</sup> A motorist’s submission of a change of address form for her driver’s license must also operate to update the motorist’s voter registration, unless the motorist requests otherwise.

The NVRA requires states to take “reasonable” efforts to purge ineligible persons from voter registration lists, and establishes procedures and limitations the state must follow in doing so, including prohibiting states from purging registered voters solely for failure to vote.

NVRA enforcement actions may be brought by the U.S. Attorney General or private citizens. Prevailing private plaintiffs may be awarded attorney’s fees.

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<sup>38</sup> 42 U.S.C. § 1973aa-1(e) (2000).

<sup>39</sup> 42 U.S.C. § 1973aa-1a (2000).

<sup>40</sup> 42 U.S.C. § 1973(c) (West 2007). See CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, SECTION 5 COVERED JURISDICTIONS, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited on November 3, 2006) (listing the jurisdictions currently covered by Section 5 of the VRA: all of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas and parts of Virginia, North Carolina, California, Florida, New York, South Dakota, Michigan, and New Hampshire).

<sup>41</sup> 42 U.S.C. § 1973c (2000).

<sup>42</sup> 42 U.S.C. § 1973a (2000).

<sup>43</sup> *Hathorn v. Lovorn*, 457 U.S. 255 (1982).

<sup>44</sup> Pub. L. 103-21, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg to gg-10 (2000 & Supp. IV 2004)).

<sup>45</sup> The Act does not apply to states that do not require registration to vote in federal elections or which permit polling-place registration on Election Day.

## D. UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)<sup>46</sup> delineates federal and state responsibilities for ensuring that absent uniformed services members and overseas citizens<sup>47</sup> can vote by absentee ballot in general, special, primary, or runoff elections for federal office.<sup>48</sup> To fulfill this mandate, states must:

- accept the standardized Federal write-in absentee ballot in general elections for federal offices from voters who requested an absentee ballot for that election,
- establish a “single office” to handle all absentee ballot requests from uniformed and overseas voters,<sup>49</sup>
- advise rejected absentee ballot applicants of the reason for the rejection,<sup>50</sup>
- not reject absentee ballot applications from eligible persons because the application was submitted too early,<sup>51</sup>
- consider an absentee ballot application from a uniform services or overseas voter to be an automatic application for an absentee ballot for the next two regularly scheduled federal elections plus any run-off elections,<sup>52</sup>
- accept absentee ballots without a stamp from uniformed service members, and
- report the number of absentee ballots issued to and returned by uniformed and overseas absentee voters.<sup>53</sup>

States determine whether the ballot is valid and can require it be returned by the state-established deadline.

The U.S. Attorney General enforces UOCAVA by suing in federal district court for the declaratory and injunctive relief necessary to carry out the Act. UOCAVA provides for fines and/or the imprisonment of individuals who intentionally deprive an individual of a UOCAVA right to vote, make false assertions of UOCAVA eligibility to vote, or attempt to influence an Armed Forces member's vote.<sup>54</sup>

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<sup>46</sup> Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 42 U.S.C. §§ 1973ff to ff-6 (2000 & Supp. IV 2004)).

<sup>47</sup> FEDERAL VOTING ASSISTANCE PROGRAM, U.S. DEP'T OF DEF., UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT (UNOCAVA) <http://www.fvap.gov/laws/uocavadefinition.html> (last visited July 15, 2007) (defining overseas citizens as U.S. citizens who reside outside the United States, and uniformed services members as U.S. citizens who are members of the Army, Air Force, Navy, Marine Corps, Coast Guard, the commissioned corps of the Public Health Service or National Oceanic and Atmospheric Administration, or the merchant marine, and their spouses and dependent family members).

<sup>48</sup> 42 U.S.C. § 1973ff (Supp. IV 2004).

<sup>49</sup> 42 U.S.C. § 1973ff-1(b) (Supp. IV 2004).

<sup>50</sup> 42 U.S.C. § 1973ff (Supp. IV 2004).

<sup>51</sup> 42 U.S.C. § 1973ff-3(e) (Supp. IV 2004).

<sup>52</sup> 42 U.S.C. § 1973ff-3(a) (Supp. IV 2004).

<sup>53</sup> 42 U.S.C. § 1973ff (Supp. IV 2004).

<sup>54</sup> 29 U.S.C. §§ 608-09 (2000).

## E. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA)<sup>55</sup> prohibits discrimination against individuals because of a disability. Title II prohibits discrimination in the provision of public services, programs, or activities,<sup>56</sup> while Title III prohibits discrimination in the enjoyment of goods, services, facilities, privileges, advantages, or public accommodations.<sup>57</sup> ADA-based voting-related lawsuits occur over polling place accessibility and accommodations that must be made to allow disabled individuals to cast a private ballot.

## F. VOTING ACCESSIBILITY FOR THE ELDERLY AND HANDICAPPED ACT OF 1984

The Voting Accessibility for the Elderly and Handicapped Act (VAEHA)<sup>58</sup> was intended to improve access to voter registration facilities and polling places for federal elections for elderly and handicapped individuals.<sup>59</sup> The VAEHA is enforced through restricted private causes of action seeking declaratory or injunctive relief against non-compliant state and political subdivisions.<sup>60</sup>

## III. FEDERALISM CONSIDERATIONS

The basis of a state court's decision may have a bearing on the losing party's success in pursuing additional redress in the federal courts, particularly if the losing party did not initiate the federal lawsuit until after the state court made its decision.

The *Rooker-Feldman* doctrine, which circumscribes federal court review of state court actions in certain circumstances, arose out of two Supreme Court cases decided sixty years apart<sup>61</sup> and had its contours sharpened in 2005.<sup>62</sup> *Rooker-Feldman* prevents federal district courts from hearing cases filed by a state court losing party that 1) were filed after the state court rendered its judgment, 2) complain of injuries created by the state-court judgment, and 3) ask the federal court to review and reject the state court's judgment.<sup>63</sup> Mere entry of a state court judgment is

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<sup>55</sup> 42 U.S.C. §§ 12101-12213 (2000 & Supp. IV 2004).

<sup>56</sup> 42 U.S.C. § 12182 (2000).

<sup>57</sup> 42 U.S.C. § 12182 (2000).

<sup>58</sup> 42 U.S.C. §§ 1973ee-1 to 6 (2000).

<sup>59</sup> The VEAHA has been held to apply only to federal elections. *NAACP v. Philadelphia Bd. of Elections*, No. 97-7085, 1998 U.S. Dist. LEXIS 8861 (E.D. Pa. June 15, 1998).

<sup>60</sup> 42 U.S.C. § 1973ee-4. (2000) (requiring the elderly or disabled plaintiff to first notify the state's chief election officer of the non-compliance and wait forty-five days for a response before suing).

<sup>61</sup> *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (holding that the only federal court with appellate jurisdiction to review state court judgments is the Supreme Court), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (holding that federal district court review of state court final judgments is barred when judgment stems from a judicial proceeding, but is not barred when the state court proceeding is non-judicial in nature).

<sup>62</sup> *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

<sup>63</sup> *Id.* at 283-84.

insufficient to trigger *Rooker-Feldman* if parallel state and federal litigation existed when the state court issued its opinion.<sup>64</sup> Independent claims presented by would-be federal district court plaintiffs that are not “inextricably intertwined” with the state court judgment can be heard by federal courts, with the caveat that the state law on preclusion determines if the federal court can proceed.<sup>65</sup>

Because state courts must be able to develop their jurisprudence without federal interference,<sup>66</sup> if a state court’s decision rests on bona fide independent and adequate state grounds, the result stands regardless of how a federal court might resolve the federal issues.<sup>67</sup> If the state court’s rationale is ambiguous or obscure, then the Supreme Court is able to review the validity of the state’s action under the federal constitution.<sup>68</sup>

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<sup>64</sup> *Id.*.

<sup>65</sup> *Id.* at 292-93.

<sup>66</sup> *Michigan v. Long*, 463 U.S. 1039, 1041 (1983).

<sup>67</sup> *See id.*

<sup>68</sup> *Id.* at 1041.