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COVID-19, Constitutions, and a Connected World: Assessing the Constitutionality of Remote Voting in Legislatures

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COMMENT*

COVID-19, Constitutions, and a Connected World: Assessing the Constitutionality of Remote Voting in Legislatures

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* Joseph R. Quinn, J.D. candidate, 2022, University of Nebraska College of Law; B.A., 2007, Drake University. This Comment is dedicated to my wife, Christina, and my son, Cameron, for without their support and inspiration my law school journey would not be possible. I would also like to thank my colleagues on the *Nebraska Law Review* for their hard work in preparing this Comment for publication.

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I. INTRODUCTION

In late December 2019, Chinese health officials notified the World Health Organization (WHO) of a new cluster of pneumonia cases in Wuhan City, Hubei Province of China.¹ Over the next several months, this initial outbreak would transform into one of the most widespread global pandemics of the past century. The cause of the pandemic was identified as a new novel coronavirus, and the disease it causes was termed COVID-19.²

As the disease continued to spread, governments and their agencies—including the Centers for Disease Control and Prevention (CDC) in the United States—attempted to put measures into place to slow the spread of the highly contagious virus.³ One of the primary measures was to restrict and warn against large gatherings of people, which could lead to higher transmission rates of the virus.⁴

By their very nature, sessions of Congress and state legislatures involve large gatherings that run counter to guidance or restrictions against large groups.⁵ The pandemic immediately prompted calls for suspending sessions or implementing distancing protocols⁶ and natu-

1. *Pneumonia of Unknown Cause—China*, WORLD HEALTH ORG. (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/> [https://perma.cc/27DH-QXDU].

2. *See infra* section II.A.

3. *Guidance for Organizing Large Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> [https://perma.cc/BL78-8SYS].

4. *Id.*; *see, e.g.*, NEB. DEP'T OF HEALTH & HUMAN SERVS., *Directed Health Measure Order 2020—LLHD-003* (June 1, 2020), <https://dhhs.ne.gov/Archived%20DHMs/LLHD-June%201st-2020.pdf> [https://perma.cc/X2E9-J82C] (restricting gatherings and other activities in Lancaster County, Nebraska).

5. *See supra* note 3 and accompanying text.

6. *See, e.g.*, *Senate To Return Under New Guidelines To Avoid Gatherings, Wear Masks When Possible*, NPR (May 1, 2020, 5:56 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/01/849318028/senate-to-return-under-new-guidelines-to-avoid-gatherings-wear-masks-when-possib> [https://perma.cc/YJ9Q-CSFN].

rally led some to consider the proposition of allowing members to participate and vote remotely due to health and safety concerns.⁷

The U.S. House of Representatives took a step towards remote voting by allowing remote proxy voting by members but still does not allow for direct remote voting by electronic means.⁸ The resolution allowing proxy voting did not permit it indefinitely, and the practice has come under intense political scrutiny.⁹ Some Members of Congress, such as House Majority Leader Steny Hoyer, have advocated for an expansion of remote voting via an electronic system that would allow members “indisposed by pregnancy, serious illness or even a natural disaster” to participate remotely.¹⁰ Others, such as House Minority Leader Kevin McCarthy, have argued proxy voting undermines the essential in-person nature of Congress and have vowed to fight against renewing the resolution.¹¹

Despite this opposition, the chamber should use the reauthorization requirement as an opportunity to expand remote voting to include remote participation and voting by electronic means. Additionally, while neither the U.S. Senate¹² nor the Nebraska Legislature¹³ has adopted provisions allowing members to cast votes remotely during times of emergency, now is the appropriate time to do so. Part II of this Article will provide relevant background information on the COVID-19 outbreak. Parts III and IV seek to address any potential constitutional barriers and offer solutions for remote voting at the national level. Part V will evaluate the constitutionality of remote voting in the Nebraska Legislature. This Article will demonstrate that while there may be practical hurdles to overcome in order to implement remote legislative voting, neither the U.S. Constitution¹⁴ nor the Constitution of the State of Nebraska¹⁵ provide any detrimental barriers.

7. *See infra* section III.A.

8. *See generally* James P. McGovern, *Dear Colleague: Resolution Introduced To Ensure Congress Can Continue Its Work During the Coronavirus Pandemic*, HOUSE COMM. ON RULES (May 13, 2020), <https://rules.house.gov/news/announcement/dear-colleague-resolution-introduced-ensure-congress-can-continue-its-work-during> [https://perma.cc/L6MX-URXZ] (noting the resolution does not allow for using technology to cast votes remotely).

9. *See* Nicholas Fandos, *Born of a Crisis, Remote Voting in Congress Has Become a Useful Perk*, N.Y. TIMES (July 18, 2021), <https://www.nytimes.com/2021/07/18/us/politics/congress-remote-voting.html?referringSource=ArticleShare> [https://perma.cc/PFR6-SK2G] (further noting a primary criticism against remoting voting is a perceived abuse of the system).

10. *See id.*

11. *See id.*

12. *See infra* Part III.

13. *See infra* section V.A.

14. *See infra* Part III.

15. *See infra* section V.B.

II. BACKGROUND

A. A Brief History of the COVID-19 Outbreak and Its Effects

WHO leaders were initially notified of a pneumonia outbreak of unknown origin on December 31, 2019.¹⁶ As of January 3, 2020, there were forty-four hospitalized patients, with eleven reported as being severely ill.¹⁷ An undisclosed number of the patients were either dealers or vendors at the Hunan Seafood market in Wuhan, which authorities closed for sanitation and disinfection on January 1.¹⁸ The WHO initially noted the link to the wholesale fish and live animal market could indicate an exposure link to animals.¹⁹ On January 7, 2020, Chinese officials identified and isolated a new type of novel coronavirus (nCoV)²⁰ as the cause of the outbreak.²¹ China shared the genetic sequence of the new virus with the WHO on January 12.²² On February 11, the WHO announced that the subsequent respiratory illness nCoV causes would be known as COVID-19.²³

By the end of January 2020, the virus had spread considerably throughout China, and confirmed cases were beginning to emerge

16. *Pneumonia of Unknown Cause—China*, *supra* note 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. “There are hundreds of coronaviruses, most of which circulate among animals such as pigs, camels, bats and cats. Sometimes those viruses jump to humans—called a spillover event—and can cause disease.” Nat’l Inst. of Allergy & Infectious Diseases, *Coronaviruses*, NAT’L INSTS. HEALTH, <https://www.niaid.nih.gov/diseases-conditions/coronaviruses> [https://perma.cc/22WW-ZGJK] (last visited Sept. 20, 2020). There are seven known coronaviruses that sicken humans; four cause mild to moderate illness and three can cause more serious to fatal disease. *Id.*

SARS coronavirus (SARS-CoV) emerged in November 2002 and caused severe acute respiratory syndrome (SARS). That virus disappeared by 2004. Middle East respiratory syndrome (MERS) is caused by the MERS coronavirus (MERS-CoV). Transmitted from an animal reservoir in camels, MERS was identified in September 2012 and continues to cause sporadic and localized outbreaks. The third novel coronavirus to emerge in this century is called SARS-CoV-2. It causes coronavirus disease 2019 (COVID-19), which emerged from China in December 2019 and was declared a global pandemic by the World Health Organization on March 11, 2020.

Id.

21. *See Novel Coronavirus—China*, WORLD HEALTH ORG. (Jan. 12, 2020), <https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON233> [https://perma.cc/NS24-TLMX] (“Other respiratory pathogens such as influenza, avian influenza, adenovirus, Severe Acute Respiratory Syndrome coronavirus (SARS-CoV), Middle East Respiratory Syndrome coronavirus (MERS-CoV) were ruled out as the cause.”).

22. *Id.*

23. *Listings of WHO’s Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), <https://www.who.int/news/item/29-06-2020-covidtimeline> [https://perma.cc/Q342-2228].

around the globe.²⁴ At the end of January, China reported 7,736 confirmed cases and suspected 12,000 more, and another eighty-two cases were confirmed across eighteen other countries²⁵ including the United States, where the first case was confirmed on January 22 in Washington State.²⁶ On January 31, the WHO declared a public health emergency for just the sixth time, and the Trump administration declared a public health emergency in the United States on February 3.²⁷

On March 11, 2020, the WHO declared COVID-19 a global pandemic, with WHO chief Tedros Adhanom Ghebreyesus calling for countries to take “urgent and aggressive action. We have rung the alarm bell loud and clear.”²⁸ President Donald Trump soon officially declared a national emergency in the United States on March 13, unlocking new sources of federal assistance to help battle the virus.²⁹

Both the health and economic consequences of the pandemic were profound. By the time the WHO finally declared COVID-19 to be a pandemic in March, the Dow Jones Industrial Average had shed twenty percent of its previous record high, set just a month earlier.³⁰ Major events such as the National Collegiate Athletic Association basketball tournaments,³¹ the National Basketball Association season,

24. *Novel Coronavirus (2019-nCoV) Situation Report – 10*, WORLD HEALTH ORG. (Jan. 30, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-sitrep-10-ncov.pdf?sfvrsn=D0b2e480_2 [<https://perma.cc/FJC3-M5J3>].

25. *Id.* (India, Finland, and the Philippines were among the first countries to confirm additional cases, all in persons that had a history of travel to Wuhan City).

26. Jennifer Harcourt et al., *Severe Acute Respiratory Syndrome Coronavirus 2 from Patient with Coronavirus Disease, United States*, 26 EMERGING INFECTIOUS DISEASES 1266, 1268 (2020), <https://doi.org/10.3201/eid2606.200516> [<https://perma.cc/5XjV-RLQ4>] (noting that the case-patient acquired the virus during travel to China).

27. *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (July 3, 2020), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> [<https://perma.cc/GY4T-GD7D>].

28. Jamey Keaten et al., *WHO Declares Coronavirus a Pandemic, Urges Aggressive Action*, AP NEWS (Mar. 11, 2020), [https://apnews.com/article/united-nations-michael-pence-religion-travel-virus-outbreak-52e12ca90c55b6e0c398d134a2cc286e#:~:text=GENEVA%20\(AP\)%20%E2%80%94%20The%20World,counterparts%20in%20banning%20large%20gatherings](https://apnews.com/article/united-nations-michael-pence-religion-travel-virus-outbreak-52e12ca90c55b6e0c398d134a2cc286e#:~:text=GENEVA%20(AP)%20%E2%80%94%20The%20World,counterparts%20in%20banning%20large%20gatherings) [<https://perma.cc/9US5-VQ7W>].

29. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (“As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID-19.”); see also *COVID-19 Roundup: Coronavirus Now a National Emergency, with Plans To Increase Testing*, AM. J. MANAGED CARE (Mar. 13, 2020), <https://www.ajmc.com/view/covid19-roundup2> [<https://perma.cc/G58H-U9CM>] (explaining that the declaration invoked the Stafford Act, which allowed for financial and physical assistance through the Federal Emergency Management Agency).

30. Keaten, *supra* note 28. As an example, the Dow dropped 1,464 points on March 11, 2020, putting it into a “bear market.” *Id.*

31. Laurel Wamsley, *No March Madness: NCAA Cancels Men’s and Women’s Basketball Tournaments*, NPR (Mar. 12, 2020), <https://www.npr.org/2020/03/12/81511>

and presidential campaign rallies were cancelled in an effort to control the spread of the virus through large gatherings.³² States and local governments began imposing restrictions on access to businesses such as dine-in restaurants, theaters, and other non-essential businesses, while others voluntarily closed their offices. Overall, authorities urged Americans to stay home as much as possible and self-quarantine for at least fourteen days after exposure to the virus³³ to protect essential workers and the general public. Unsurprisingly, the economic downturn, event cancellations, and restrictions on gatherings and non-essential businesses led to a significant rise in unemployment.³⁴

The national unemployment rate in April 2020 rose to 14.7%—a surge of 10.3 percentage points from the previous month—with non-farm payroll employment falling by 20.5 million jobs.³⁵ The 14.7% unemployment rate represented both the highest rate and the largest over-the-month increase in the history of available data dating to January 1948.³⁶ The sharp increase in rates was attributed to the COVID-19 pandemic and efforts to contain it.³⁷

B. The Legislative Response to the Outbreak

Congress took action to attempt to address the health, safety, and economic impacts of COVID-19. At the national level, on March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which provided stimulus payments to individuals, expanded unemployment coverage, supported employers by way of paycheck protection loans, suspended student loan payments, temporarily lifted penalties for early withdrawal from retirement accounts, and more.³⁸ The total cost of the package was

5557/no-march-madness-ncaa-cancels-mens-and-women-s-basketball-tournaments [https://perma.cc/W7VZ-LESZ] (noting the NCAA basketball tournaments were officially cancelled).

32. Keaten, *supra* note 28.

33. *COVID-19: Impact on Employment and Labor*, NAT'L CONF. OF STATE LEGISLATURES (May 13, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-impact-on-employment-and-labor.aspx> [https://perma.cc/E95Z-2U77].

34. *Id.*

35. U.S. DEP'T OF LABOR, USDL-20-0815, EMPLOYMENT SITUATION NEWS RELEASE (2020), https://www.bls.gov/news.release/archives/empst_05082020.htm [https://perma.cc/L622-ZBMQ].

36. *Id.* “In April, unemployment rates rose sharply among all major worker groups. The rate was 13.0 percent for adult men, 15.5 percent for adult women, 31.9 percent for teenagers, 14.2 percent for Whites, 16.7 percent for Blacks, 14.5 percent for Asians, and 18.9 percent for Hispanics.” *Id.* The number of people “who reported being on temporary layoff increased about ten-fold to 18.1 million in April.” *Id.*

37. *Id.*

38. Tara Siegel Bernard & Ron Lieber, *F.A.Q. on Stimulus Checks, Unemployment, and the Coronavirus Plan*, N.Y. TIMES (June 2, 2021), <https://www.nytimes.com/article/coronavirus-stimulus-package-questions-answers.html> [https://perma.cc/

estimated at \$2 trillion.³⁹ State governments were also active in passing emergency appropriations for COVID-19 relief efforts.⁴⁰

While legislatures at the national and state levels took take action, larger questions remained about the potential dangers of meeting in groups—including legislative sessions—in the wake of the outbreak.⁴¹ Naturally, these questions contemplated the necessity of in-person legislative action, which led to conversations about the possibility of allowing members to participate and vote remotely during periods of national emergency, including during the COVID-19 outbreak.⁴²

III. FEDERAL LEVEL: THERE ARE NO CONSTITUTIONAL BARRIERS TO REMOTE VOTING IN CONGRESS

A. Members of Congress Lobby for Remote Voting in Response to the COVID-19 Outbreak

In a letter to Chairman of the House Rules Committee James P. McGovern on March 23, 2020, over sixty-five members of Congress urged the Committee to enact a change to the House Rules to allow for remote voting by members during national emergencies, including the COVID-19 pandemic.⁴³ The letter, authored in part by Representative Eric Swalwell, noted:

By their very nature, national emergencies threaten the health and safety of the American people and require quick action by Congress. COVID-19 is upsetting the expectations and experiences of people across the country. . . . Helping families who may be suffering from drastically negative health and financial consequences is of paramount importance.

With COVID-19, and likely during any national emergency, that assistance must be provided with as much speed as Congress can muster. Unfortunately, during such circumstances, requiring Members to vote in person may pose public health risks or even be physically impossible for persons under quarantine. We need to provide a mechanism through which Congress can act during times of crisis without having to assemble in one place.⁴⁴

The letter advocated for the temporary use of remote voting, noting that millions of American businesses were already utilizing remote

5BBJ-JYJS]; see Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

39. Bernard & Lieber, *supra* note 38.

40. See, e.g., Martha Stoddard, *Nebraska Legislature to Reconvene Monday, One Senator Calls Virtual Meeting*, SCOTTSLUFF STAR-HERALD (Mar. 22, 2020), https://starherald.com/news/regional_statewide/nebraska-legislature-to-reconvene-monday-one-senator-calls-virtual-meeting/article_45fe8e1d-ecb3-538c-aa3c-0282b97d4a98.html [<https://perma.cc/4UQB-B2SW>].

41. See *supra* note 6 and accompanying text.

42. See *infra* section III.A.

43. Letter from Rep. Eric Swalwell et al. to James P. McGovern, Chairman, Comm. on Rules (Mar. 23, 2020), <https://www.politico.com/f/?id=00000171-084e-d8c8-a7f3-daff8a7a0000> [<https://perma.cc/XG2N-849F>].

44. *Id.* at 1.

technology at that time due to the pandemic and that Congress should similarly adapt.⁴⁵

B. Congress's Rulemaking Power in the Context of Remote Voting

It has long been understood that no matter how dire the situation may be, an emergency on its own does not create new powers for the government.⁴⁶ Chief Justice Hughes, writing on the constitutionality of a Minnesota statute challenged as an unconstitutional violation of the Contract Clause,⁴⁷ noted: “The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.”⁴⁸ Hughes continued: “While emergency does not create power, emergency may furnish the occasion for the exercise of power. ‘Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.’”⁴⁹ Therefore, the threshold question in the remote voting inquiry is: Does the Constitution provide Congress with the power to make such a decision?

The principle that Congress may conduct business remotely, specifically using a virtual voting system, is constitutionally untested.⁵⁰ Broadly speaking, the Constitution provides each chamber the power to determine its own rules of proceedings, commonly known as the Rulemaking Power.⁵¹ The power has but one limitation. In *United*

45. *Id.*

46. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425–26 (1934).

47. *Id.* at 415–16, 447–48. The appellant in the case alleged the statute—the Minnesota Mortgage Moratorium Law—violated the Constitution's Contract Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 415–16. The Act provided that during an emergency, relief may be had through the courts with respect to foreclosures, execution sales of real estate, and such sales may be postponed, and periods of redemption may be extended. *Id.* at 416–18. The statute was enacted in response to the national and worldwide business and financial crises during the 1930s. *Id.* at 422–23. The Court held the statute as applied did not violate the Contract Clause of the Constitution, nor did it deny the appellant's right to due process under the Fourteenth Amendment. *Id.* at 447–48.

48. *Id.* at 425.

49. *Id.* at 426 (quoting *Wilson v. New*, 243 U.S. 332, 348 (1917)).

50. MAJORITY STAFF OF H. COMM. ON RULES, 116TH CONG., REP. EXAMINING VOTING OPTIONS DURING THE COVID-19 PANDEMIC 11 (2020), https://rules.house.gov/sites/democrats.rules.house.gov/files/StaffReport_VotingOptions.pdf#page=13 [<https://perma.cc/U9RF-9MB2>] (compiled by majority staff and not officially adopted by the Committee on Rules).

51. U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

States v. Ballin, the Supreme Court held that Congress may not “ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.”⁵² The Court also held that the power to make a rule is not one which is exhausted once it has been exercised, but rather one which can be continuously exercised by a house.⁵³ The Court gave Congress wide authority and discretion to make its own rules, holding that “within the limitations suggested, [the authority is] absolute and beyond the challenge of any other body or tribunal.”⁵⁴

Considering the Court’s holding in *Ballin*, the pertinent inquiries must be whether remote voting violates any constitutional restraints or fundamental rights and whether it is reasonably calculated to achieve the desired result.⁵⁵

C. The Political Question Doctrine Would Likely Lead the Court To Reject a Challenge to the Rulemaking Power

Since the time *Ballin* was decided, several courts have rejected challenges to congressional rulemaking power on the grounds that they present nonjusticiable political questions.⁵⁶ Justice Brennan, writing for the majority in *Baker v. Carr*, laid out the contours of the so-called political question doctrine by identifying six circumstances under which an issue might present a nonjusticiable political question: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” (5) “an unusual need for unquestioning adherence to a political decision already made; or” (6) “the potentiality of embarrassment from multifarious pronounce-

52. *United States v. Ballin*, 144 U.S. 1, 5 (1892).

53. *Id.*

54. *Id.*; *see also* *Common Cause v. Biden*, 909 F. Supp. 2d 9, 30 (D.D.C. 2012) (holding that a challenge to the Senate’s cloture rules presented a nonjusticiable political question).

55. *See infra* section III.D.

56. The political question doctrine was not well established at the time *Ballin* was decided. *See generally* TODD GARVEY, CONG. RSCH. SERV., LSB10447, CONSTITUTIONAL CONSIDERATIONS OF REMOTE VOTING IN CONGRESS 4 (2020) (noting doctrines such as political question, enrolled bill rule, and equitable discretion could conceivably limit judicial review).

ments by various departments on one question.”⁵⁷ The presence of any one of these factors could indicate a nonjusticiable political question.⁵⁸

In *Common Cause v. Biden*, a district court rejected a rulemaking power challenge to the Senate’s cloture rules on political question grounds.⁵⁹ The court began its analysis by reaffirming the textual, constitutional commitment of the rulemaking power to Congress and reaffirming that for the court to hear the case, the plaintiffs would need to point specifically to a constitutional provision that expressly limited the authority to make the specific rule.⁶⁰ The court refused to apply the analysis employed in *Powell v. McCormack*, in which the Supreme Court held justiciable a challenge to the House’s power to judge the qualifications of its members.⁶¹ Instead, the court likened the case to *Nixon v. United States*,⁶² in which the Supreme Court found a nonjusticiable political question on the issue that the power to try impeachments—including the form of such trials—was textually committed to the Senate.⁶³

The district court rejected Common Cause’s arguments, finding it could not identify any constitutional provision that expressly limited the Senate’s rulemaking power, nor did the culture rules violate any fundamental rights.⁶⁴ Common Cause attempted to present the Quorum Clause, Presentment Clause, and presence of some provisions requiring supermajority votes as textual restraints on the Senate’s ability to make cloture rules, but the court held none of the provisions “expressly limits the Senate’s power to determine its rules, including when and how debate is brought to a close.”⁶⁵ The court drew an important distinction between a rule conflicting with a constitutional

57. 369 U.S. 186, 217 (1962).

58. *Id.* at 217–18.

59. *Common Cause*, 909 F. Supp. 2d at 29–30.

60. *Id.* at 27–28.

61. *Id.* at 28; see *Powell v. McCormack*, 395 U.S. 486, 547–50 (1969). In *Powell*, the Court held the plaintiff’s challenge to his exclusion from the U.S. House of Representatives was justiciable because the House’s power to “be the Judge of the Qualifications of its own Members,” was expressly limited by Article I, Section 2, Clause 2, which sets forth the three textual criteria for membership (age, residency, and citizenship). *Id.* at 521 (quoting U.S. CONST. art. 1, § 5).

62. 506 U.S. 224 (1993). In *Nixon*, a federal judge challenged his removal by the Senate, alleging that Senate Rule XI—which governs impeachment trials—was unconstitutional because it permitted the Senate to appoint a committee to receive evidence and take testimony. *Id.* at 227–28. Nixon appealed on the grounds that only the whole Senate—not just a committee—was given the power to impeach a federal judge. *Id.* at 228. In finding the question to be nonjusticiable, the Court concluded: “In the case before us, there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word ‘try’ in the Impeachment Trial Clause.” *Id.* at 237.

63. *Common Cause*, 909 F. Supp. 2d at 28.

64. *Id.*

65. *Id.* at 28–29.

provision and a provision that “expressly limits the Senate’s power to determine” its rules, with the latter triggering a potential justiciable question.⁶⁶ The distinction made in *Common Cause* set the bar quite high for a court to even hear a challenge to the rulemaking power on constitutional grounds.

The court concluded there were no judicially discoverable and manageable standards by which to judge the rule,⁶⁷ and that in order for the court to reach the merits of the case it would “require an invasion into internal Senate processes at the heart of the Senate’s constitutional prerogatives as a House of Congress, and would thus express a lack of respect for the Senate as a coordinate branch of government.”⁶⁸ The court noted several instances in which the Supreme Court had found justiciable questions related to the rulemaking power, but all of those instances involved either (1) Congress having violated its own rule, or (2) the Court rejecting a statutory provision that violated the explicit text of the Constitution.⁶⁹ In none of the cited instances did the Court find an actual rule unconstitutional.⁷⁰

Much of the same discussion would apply to a congressional rule regarding remote voting. As described in *Common Cause*, there is a strong textual commitment to delegating rulemaking power to Congress.⁷¹ In scouring the text of the Constitution, there are only a few provisions that may raise questions. The first two, Article I, Section 4⁷² and the Twentieth Amendment,⁷³ both require Congress to assemble at least once every year. Yet, even if the Court were to interpret “assemble” to mean in person, the provisions only require one such meeting. Applying the analysis in *Common Cause*, while a court may interpret assemble to conflict with a rule allowing for remote voting, it is hard to imagine a court finding the constitutional yearly assembly

66. *Id.* at 29 & n.14.

67. *Id.* at 30 (“Here, Plaintiffs point to no standard within the Constitution by which the Court could judge whether or not the Cloture Rule is constitutionally valid.”).

68. *Id.* at 31.

69. *Id.* at 29–30; *see also* *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) (finding a statute violated the express text of the constitution); *Yellin v. United States*, 374 U.S. 109, 114 (1963) (recognizing congressional rules are judicially cognizable in finding a committee violated its own rules); *Christoffel v. United States*, 338 U.S. 84, 88–89 (1949) (finding that the relevant question was what the House rules were and whether the committee actually followed them).

70. *Common Cause*, 909 F. Supp. 2d at 29.

71. *See supra* note 49 and accompanying text.

72. U.S. CONST. art. I, § 4, cl. 2 (“The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.”).

73. U.S. CONST. amend. XX, § 2 (“The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.”).

standard as expressly limiting Congress's power to make their own rules regarding voting.⁷⁴

Another provision, Article I, Section 5, allows Congress to compel the "Attendance of absent Members,"⁷⁵ and prohibits Congress from adjourning to "any other Place than that in which the two Houses shall be sitting."⁷⁶ Much of the same analysis applies to the attendance provision. The Constitution does not define attendance, and even if the attendance provision somehow conflicts with the rulemaking power, it does not seem to expressly limit it in the context of remote voting. The Adjournments Clause may appear to have a larger impact, as it imposes geographic limits on where a house can adjourn to, but it is inapplicable in the context of remote voting because Congress would not actually be adjourning. It would be in session, allowing members to place votes from elsewhere. The quorum requirement, discussed below in section II.C, arguably supplies the strongest argument that the Constitution expressly limits Congress's power to promulgate remote voting rules.

Absent an express provision limiting congressional power, there still remains two additional issues under the political question framework that may prevent the Court from finding a justiciable question: Are there judicially discoverable standards within the Constitution by which to judge the rule, and would hearing a challenge to the rule express a lack of respect for a different branch of government?⁷⁷ Admittedly, the first of these two issues does not seem to present the same issue as in *Common Cause*. The Court could conceivably use "assemble" as a standard that contemplates an in-person gathering, but doing so would require embarking on an analysis of the kind the Court rejected in *Nixon*.⁷⁸ The second provision, invading another branch of government in the context of remote voting, appears to be squarely the kind of concern addressed in *Common Cause*.

The inevitable conclusion is that the Court would refuse to hear a challenge to Congress's rulemaking power in the remote voting context on political question grounds. The next section explores what could happen if the Court viewed the quorum requirement as an express limitation on the power to adopt rules for voting outside the Capitol Building.

74. See *supra* note 61 and accompanying text.

75. U.S. CONST. art. 1, § 5, cl. 1.

76. U.S. CONST. art. 1, § 5, cl. 4.

77. See *supra* note 57 and accompanying text.

78. See *supra* note 62 and accompanying text.

D. The Quorum Requirement as a Potential Express Limitation to Congress's Rulemaking Power in the Remote Voting Context

Suppose for a moment the Court did decide the quorum requirement put an express limitation on Congress's rulemaking power for this purpose, or if the Court decided to ignore the political question doctrine entirely and embark on an analysis based on the framework laid out in *Ballin* itself. *Ballin* is significant in the remote voting context not just for its holding regarding the constitutional rulemaking authority of Congress, but also because it directly addresses a challenge to the Constitution's quorum requirement.⁷⁹ The requirement provides that a majority of each house "shall constitute a Quorum to do Business," but does not provide for *how* the quorum should be counted.⁸⁰ The pertinent rule in *Ballin* allowed for members that were present in the chamber but not voting to be counted when determining whether the quorum requirement was met.⁸¹

The *Ballin* Court held that, because the Constitution did not specify the method for determining the presence of a quorum, it was "within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact."⁸² At the time the case was considered, the Court pondered three primary methods of ascertaining the presence of a quorum: a roll call; the "passage of members between tellers, and their count as the sole test; or the count of the Speaker or the clerk, and an announcement from the desk of the names of those who are present."⁸³ The Court concluded that any of these methods was reasonably certain to ascertain whether a quorum was present, and the Houses may adopt any or all of them to do so.⁸⁴

A surface-level reading of *Ballin* does not seem to present a quorum-related constitutional hurdle to Congress adopting rules for re-

79. *United States v. Ballin*, 144 U.S. 1, 5 (1892).

80. Article 1, Section 5 states:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

U.S. CONST. art. I, § 5, cl. 1 (emphasis added).

81. *Ballin*, 144 U.S. at 5. The exact rule was:

On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business.

82. *Id.* at 6.

83. *Id.*

84. *Id.*

mote voting. The Houses of Congress are given broad authority to make their own rules, and so long as whatever means they choose is “reasonably certain to ascertain”⁸⁵ the presence of a quorum, the requirement should be satisfied.

That, of course, may not be the end of the inquiry. The Court in *Ballin* held that “[a]ll that the Constitution requires is the *presence* of a majority, and when that majority are present the power of the house arises.”⁸⁶ In the context of *Ballin* (decided in 1892), the Court contemplated two types of physical presence and its holding turned on whether the Constitution allowed a non-voting member to count toward the requisite quorum.⁸⁷ In other words, the means of counting members was at issue.⁸⁸ In 1892, the concept of *presence* obviously did not contemplate any kind of virtual presence. If the Court declined to apply the political question doctrine and instead conducted an analysis based on the rule from *Ballin*, it would arrive at the same conclusion, regardless of the interpretation used.

While the meaning of presence as it is used in the constitutional quorum requirement has never been directly challenged, various courts have wrestled with the concept in other settings. In *Braniff Airways Inc. v. Civil Aeronautics Board*, the United States Court of Appeals for the District of Columbia took up the meaning of presence for purposes of a quorum in the administrative agency setting.⁸⁹ In *Braniff*, the court considered whether the quorum requirements for a board decision under the Federal Aviation Act were met, and concluded that the “quorum acting on a matter need not be *physically present* together at any particular time to ponder the evidence.”⁹⁰ The court reasoned that such a finding allowed the review board to proceed with its members acting separately in their offices, a similar process used by the court itself for processing motions and considering petitions for rehearing cases en banc.⁹¹ Such a process allowed for increased efficiency by the administrative board.⁹²

The Supreme Court has also taken a seemingly different approach on occasion. In *Christoffel v. United States*, the Court considered whether House rules required a quorum of the Committee of Education and Labor to be “actually and physically” present when a defen-

85. *Id.*

86. *Id.* (emphasis added).

87. *Id.* at 4–5.

88. *Id.* at 6.

89. *Braniff Airways, Inc. v. Civ. Aeronautics Bd.*, 379 F.2d 453 (D.C. Cir. 1967).

90. *Id.* at 460 (emphasis added); see Federal Aviation Act of 1958, 49 U.S.C. § 1321(c) (1964) (repealed 1978) (“Three of the members shall constitute a quorum of the board.”).

91. *Braniff Airways, Inc.*, 379 F.2d at 460.

92. *Id.* (noting that such a process was “a reasonable way for the Board to proceed in dealing with its not inconsiderable work load”).

dant allegedly committed perjury.⁹³ Although fourteen of the Committee's twenty-five members were present for the roll call, the defendant made the allegedly perjurious statements when there were as few as six members physically present.⁹⁴ The defendant's objection rested largely on the question of whether under House rules a committee was considered a competent tribunal within the meaning of the criminal perjury statute without a quorum present at the time the statements in question were made.⁹⁵ The Court's analysis of committee rules did not rest on the Constitution's quorum requirement but rather on the interpretation of the specific rules adopted by the House itself.⁹⁶ The rule in question at the time, House Rule XV, allowed for a call of the House, and if a quorum was not present, the only business that could be conducted was a motion to adjourn.⁹⁷ The rule was applied to the committees by House Rule XI(2)(f).⁹⁸

The Court in *Christoffel* reversed the defendant's conviction on the grounds that the lower court erred in instructing the jury to find a competent tribunal where less than a quorum of members were actually and physically present at the time the statements were made.⁹⁹ The Court made a point to mention that "[c]ongressional practice in the transaction of ordinary legislative business is of course none of our concern," and that their sole purpose was to decide what rules the House had established and whether they were followed.¹⁰⁰

Although on its face *Christoffel* would seem to negatively impact the prospects for remote voting by finding that a quorum of members must be actually and physically present, nothing in the holding would seem to impact whether the House could change their rules to accomplish those ends. In fact, the Court explicitly recognized the power of the House to determine its own rules under the Constitution,¹⁰¹ and

93. *Christoffel v. United States*, 338 U.S. 84, 86 (1949).

94. *Id.* at 85–86.

95. *Id.*; see also D.C. CODE ANN. § 22-2402(a)(1) (West 2013) (Perjury is defined as: “[h]aving taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered, that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true, wilfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true.”). The defendant's main argument was that a House committee, consisting of less than a quorum, did not constitute a “competent tribunal” under the meaning of the statute. *Christoffel*, 338 U.S. at 85–86.

96. *Christoffel*, 338 U.S. at 87.

97. *Id.*

98. *Id.* (noting that House Rule XI(2)(f) stated, in relevant part: “The rules of the House are hereby made the rules of its standing committees so far as applicable”).

99. *Id.* at 89–90.

100. *Id.* at 88–89.

101. *Id.* at 87.

the holding in *Christoffel* turned entirely on the specific rules the House had in fact adopted.

The Supreme Court took yet another different position on a quorum requirement in *New Process Steel v. NLRB*, holding that in a multi-member government board setting, the statutory quorum requirement was only met if the number of *participating* members met the required threshold.¹⁰² In *New Process Steel*, the National Labor Relations Board had only two members remaining of the five that constituted a full membership.¹⁰³ The board's quorum requirements specified that three members of the board would constitute a quorum, except in instances where the full board delegated to any group of three or more members the powers which the full board could exercise—in which case any two members of the delegation would constitute a quorum.¹⁰⁴ The court interpreted the statute to require the board's overall powers to be vested at all times in at least three members, which was “consonant with the Board quorum requirement, which requires three *participating* members ‘at all times’ for the Board to act.”¹⁰⁵

Again, nothing in *New Process Steel* appears to be inconsistent with remote voting principles. The Court was interpreting a statute, the Taft-Hartley Act,¹⁰⁶ and not the Constitution's quorum requirement. The Court also only required participation to fulfill the quorum requirements of the statute—literally whether there were enough bodies on the board to meet the requirements—and did not specify whether such participation had to be in person or could be accomplished by other means.

The prospect of remote voting also finds support in the underlying purposes for the quorum requirement, as expressed by the framers at the Constitutional Convention.¹⁰⁷ Specifically, the framers articulated

102. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 680 (2010).

103. *Id.* at 678.

104. *Id.* at 679. The Court cites 29 U.S.C. § 153(b), which provides:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

105. *Id.* at 680 (emphasis added); *see also id.* at 683–84 (posing a series of definitions of quorum, eventually defining it as “the number of members of a larger body that must participate for the valid transaction of business”).

106. *See id.* at 676.

107. James Madison, *Madison Debates: August 10*, in THE AVALON PROJECT: NOTES ON DEBATES IN THE FEDERAL CONVENTION (Gaillard Hund & James Brown Scott eds., 1920), https://avalon.law.yale.edu/18th_century/debates_810.asp [<https://perma.cc/Q4EB-AM47>]; *see also* GARVEY, *supra* note 56, at 4 (describing two underlying concerns of the framers that remote voting would potentially address).

two fears regarding the quorum requirement, and remote voting addresses both. First, the framers expressed the sentiment that the quorum for each house should be set at less than the majority to avoid excessive interruptions of congressional action and to stave off anticipated inconvenience as the numbers of legislators increased.¹⁰⁸ On the other hand, the framers worried that allowing for less than a majority quorum could give advantages to “Central States” located within a reasonable distance, which made it easier to travel to the seat of government.¹⁰⁹

At the core, the framers’ quorum debate centers on access to the legislative process. Physical presence is only implicated because it was the sole means of legislative participation at the time, so debate necessarily centered on how barriers to physical presence might improperly impede or skew legislation. Remote voting assuages these fears by eliminating the problems with or limitations on access created when physical presence is required.¹¹⁰ If the framers considered less than a majority to constitute a quorum to avoid inconvenience or delay in enacting legislation, the same logic supports the prospect of remote participation and voting, which would help to remedy this problem in the event of a national emergency preventing members of Congress from returning to Washington D.C. Remote voting would naturally be less inconvenient and more timely in the event members were unable to travel. Second, allowing for remote participation and voting would eliminate the risk that favorably located states would have a disproportionate influence in legislative matters in times of emergency. Of course, this risk is lower in 2020 than it was in the late 1700s, yet it is still not difficult to imagine a situation where members of Congress from nearby states could simply hop in their cars and drive to Washington D.C., while members from outlying states may be forced to rely on civilian air transportation that may be more readily disrupted during a national emergency. The prospect of remote voting would mitigate the potential harm in these instances.

All considered, even if the Court endeavored to determine what the quorum requirement actually contemplated using precedent as a guide, there is nothing apparent in the Court’s history that would suggest a complete bar to a rule authorizing remote voting. The most

108. Madison, *supra* note 107.

109. *Id.* Framers George Mason expressed:

In this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws. The Central States could always take care to be on the Spot and by meeting earlier than the distant ones, or wearying their patience, and outstaying them, could carry such measures as they pleased.

Id.

110. *See generally* GARVEY, *supra* note 56.

likely outcome is the Court's finding of a nonjusticiable political question,¹¹¹ but even an exhaustive review of remote voting rules in light of the quorum requirement itself leads to the same likely conclusion: A rule allowing for remote voting in Congress is constitutional.

E. Other Considerations: The Use of Technology in Constitutional Settings, Previous Actions To Address Mass Vacancies in Congress, and Technological Hurdles to Remote Voting

Although it has not done so in the remote voting context, the Supreme Court has not been shy to incorporate or apply new technology to existing constitutional standards. Some of the most high-profile cases in this context involve the Fourth Amendment as it relates to unreasonable searches.

In *Kyllo v. United States*, the Court held that the use of thermal imaging technology to explore details of a home from outside constituted a search for Fourth Amendment purposes and therefore required a search warrant.¹¹² The majority reasoned “[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”¹¹³ Because the government used the thermal imaging device to collect details about an individual's home that “would previously have been unknowable without physical intrusion,” use of the device was a search and therefore “presumptively unreasonable without a warrant.”¹¹⁴

The same logic can be applied to the quorum requirement. At the time the Constitution was adopted, the only means by which Congress could gather the required number of members to satisfy the quorum requirement was an in-person gathering. Similarly, at the time of its writing, the Fourth Amendment's ban of unreasonable searches necessarily contemplated a physical presence. But *Kyllo* exemplifies that physical presence can be incidental when, as the Court stresses in *Kyllo*, the impermissible search—peering into a home to gather information—is the same whether accomplished by physically entering the space or using technology. By analogy, access to the legislative process—the quorum—is the same whether members are physically at the Capitol Building or present via technology. The important aspect of the requirement is the gathering, not the in-person aspect. There is

111. *See supra* section III.C.

112. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

113. *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

114. *Id.*; *see also* *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that the Fourth Amendment draws a “firm line at the entrance to the house”).

no constitutional hurdle in using technology to accomplish an end that was unimaginable at the time the framers wrote the Constitution.

The Court has also embraced evolving technology in the Commerce Clause¹¹⁵ context. In 1967, the Court held that, under the dormant Commerce Clause, it was unconstitutional for states to impose use taxes on out-of-state mail order firms with no retail outlet in the state.¹¹⁶ In *Bellas Hess*, the Court found that unless a seller maintained a physical presence such as “retail outlets, solicitors, or property within a [s]tate,” the state lacked the power to levy local use taxes on the retailer.¹¹⁷ The Court’s ruling rested not only on the retailer having the requisite contacts under the Commerce Clause, but also on due process grounds.¹¹⁸ The Court re-examined the *Bellas Hess* holdings in *Quill v. North Dakota*.¹¹⁹ Although the Court in *Quill* overruled the *Bellas Hess* due process holding, it did not overrule its interpretation of the “substantial nexus” required under the Commerce Clause and thus affirmed the physical presence rule.¹²⁰ The Court grounded its decision in the logic that physical presence is necessary to create a “substantial nexus” between the taxing state and the retailer.¹²¹ Writing for the majority in *Quill*, Justice Stevens invited Congress to disagree with the Court’s conclusion and intervene if necessary.¹²²

In 2018, the Court overruled *Quill*’s physical presence rule in *South Dakota v. Wayfair, Inc.*¹²³ The respondents in *Wayfair* were a group of online merchants with no employees or real estate in South

115. U.S. CONST. art. I, § 8, cl. 3 (stating Congress shall have power “[t]o regulate commerce with foreign Nations, and among the several states, and with the Indian tribes”).

116. See Nat’l Bellas Hess, Inc. v. Dep’t of Revenue, 386 U.S. 753 (1967), overruled by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). The Court in *Bellas Hess* noted:

In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.

Id. at 758.

117. *Id.*

118. See *id.*

119. *Quill Corp.*, 504 U.S. at 298.

120. *Id.* at 307–08.

121. *Id.* at 311; see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (holding that a state tax will survive a Commerce Clause challenge so long as the “tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State”).

122. *Quill Corp.*, 504 U.S. at 318.

123. 138 S. Ct. 2080, 2099 (2018).

Dakota.¹²⁴ The state enacted a law requiring “out-of-state sellers to collect and remit sales tax ‘as if the seller had a physical presence in the state.’”¹²⁵ In acknowledging the physical presence rule was “unsound and incorrect,”¹²⁶ the Court held that a substantial nexus was established “when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”¹²⁷ Writing for the majority, Justice Kennedy noted:

The “dramatic technological and social changes” of our “increasingly interconnected economy” mean that buyers are “closer to most major retailers” than ever before—“regardless of how close or far the nearest storefront.” Between targeted advertising and instant access to most consumers via any internet-enabled device, “a business may be present in a State in a meaningful way without” that presence “being physical in the traditional sense of the term.” A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.¹²⁸

Although *Wayfair* overturned a judicially-created rule and did not directly interpret a constitutional provision, Justice Kennedy’s reasoning applies equally well to implementing remote voting. Just as “a business may be present in a state in a meaningful way without” that presence “being physical in the traditional sense of the term,”¹²⁹ with today’s technology, presence for quorum and voting purposes can be just as meaningful virtually as physically.

Wayfair also illustrates an efficiency argument for remote voting. At the time *Wayfair* was decided, it was estimated that the *Quill* physical presence rule cost states between \$8 and \$33 billion every year in lost tax revenues.¹³⁰ Although exact figures are difficult to extrapolate, the time and efficiency gained from not having members of Congress traveling to Washington D.C. during emergency situations would likely be significant.

The COVID-19 outbreak is not the first time the House has contemplated a remote voting system. Following the terrorist attacks on

124. *Id.* at 2089. The plaintiffs were Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. Wayfair, Inc. alone had net revenues of over \$4.7 billion in 2017. *Id.*

125. *Id.* (quoting S.D. CODIFIED LAWS § 10-64-2 (2016)).

126. *Id.* at 2099.

127. *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

128. *Id.* at 2095 (quoting *Direct Mktg. Assn. v. Brohl*, 575 U.S. 1, 17–18 (2015) (Kennedy, J., concurring)).

129. *Id.* (quoting *Direct Mktg. Ass’n*, 575 U.S. at 18 (Kennedy, J., concurring)).

130. *See id.* at 2088. The physical presence rule necessitated states relying on consumers to pay the use tax owed on online purchases, which was impractical. Consumer compliance rates were low, with one estimate as low as four percent. The South Dakota Department of Revenue estimated the state lost \$48–\$58 million annually. *Id.*

September 11, 2001, “Congress spent substantial time reviewing the possibilities of establishing a remote voting system.”¹³¹ The effort ultimately failed in part due to lack of “[c]ongressional or public support to make the difficult decisions and investments needed to address challenging questions that were identified.”¹³²

Of course, the prospect of incorporating remote voting also poses significant technology and security concerns. As a recent study by the House Rules Committee noted, the existing closed electronic voting system required over fifty bills and resolutions and 100 years to put into place in 1970.¹³³ Due to the threat of cyber-attacks or interference by third parties and the challenges of identification and authentication, such a system could not be put in place overnight.¹³⁴ The House report also notes the importance of a secure deliberation space apart from the influence of potential bad actors as a concern.¹³⁵ The House report also cites examples of technology failures in a voting context as cautionary tales of implementing a new system, including the 2020 Iowa Caucus failures and 2007 failure of the in-person electronic voting system on the House floor.¹³⁶ While these challenges are real and significant, the presumption is they are surmountable with sufficient time and resources. Therefore, they will not be considered in depth here.

IV. EXECUTION: SETTING CHAMBER RULES TO ALLOW FOR REMOTE VOTING

The current rules of the House allow for the use of an in-person electronic voting system.¹³⁷ Members of the House have a minimum of fifteen minutes to record their vote.¹³⁸ As of this writing, the House resolution allowing for proxy voting requires reauthorization in August 2021 and presents an opportunity to further amend chamber rules to allow for direct remote voting.¹³⁹ Senate rules still require the more traditional roll call voting.¹⁴⁰

Representative Eric Swalwell introduced the Members Operating to Be Innovative and Link Everyone Resolution (MOBILE Resolution),

131. See MAJORITY STAFF OF H. COMM. ON RULES, *supra* note 50, at 12.

132. *Id.* at 7.

133. See *id.* at 7–11.

134. *Id.*

135. *Id.* at 7.

136. *Id.* at 8–9.

137. See H.R. DOC. NO. 115–177, at 844 (2019) (House Rule XX(2)(a) provides “[u]nless the Speaker directs otherwise, the Clerk shall conduct a record vote or quorum call by electronic device”).

138. *Id.*

139. See Fandos, *supra* note 9 and accompanying text.

140. See S. DOC. NO. 113–118, at 8 (2013).

in an attempt to authorize remote voting.¹⁴¹ The resolution called for the House to amend Rule XI to allow for participation of absent members in committee hearings, as well as for members to vote remotely on suspension motions.¹⁴² Both portions of the resolution included language allowing members casting a vote with a remote voting system to be treated as present for quorum purposes.¹⁴³ For committee purposes, the resolution simply called for members to be allowed to participate and vote by using “video conferencing and related technologies.”¹⁴⁴ However, for remote votes to be cast on motions to suspend the rules, the resolution stated that the “Clerk, Chief Administrative Officer, and Sergeant at Arms shall work together to develop and implement a secure remote voting system under which any member who is absent from the floor shall be permitted to cast a vote remotely . . . if the vote is taken by electronic device.”¹⁴⁵ The resolution was referred to the House Committee on Rules without any further action.¹⁴⁶

Senator Rob Portman introduced a similar resolution in the Senate, calling for an amendment to the rules allowing for remote participation of absent senators during a national crisis.¹⁴⁷ The Senate resolution would require an agreement between the majority and minority leaders “that an extraordinary crisis of national extent exists in which it would be infeasible for senators to cast their votes in person.”¹⁴⁸ The senators could then cast their votes by technological means approved by the Secretary of the Senate, Sergeant at Arms, and Director of the Doorkeepers for thirty days.¹⁴⁹ A vote of three-fifths of senators “duly chosen and sworn” could extend the period beyond the initial thirty days.¹⁵⁰ The resolution also included language allowing for senators casting remote votes to be counted for quorum purposes.¹⁵¹

141. MOBILE Resolution, H.R. 890, 116th Cong. (2020) (“Amending the Rules of the House of Representatives to permit absent Members to participate in committee hearings using video conferencing and related technologies and to establish a remote voting system under which absent Members may cast votes in the House on motions to suspend the rules.”)

142. *Id.* §§ 2–3.

143. *Id.*

144. *Id.* § 2(a).

145. *Id.* § 3.

146. *All Actions Except Amendments H.Res.890*, CONGRESS, <https://www.congress.gov/bill/116th-congress/house-resolution/890/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22%5C%22remotevoting%5C%22%22%5D%7D> [<https://perma.cc/86Q7-CESH>] (last visited Sept. 20, 2020).

147. S. 548, 116th Cong. (2020).

148. *Id.* § 1.

149. *Id.*

150. *Id.*

151. *Id.*

Much like the House resolution, the Senate resolution was referred to the Committee on Rules and Administration, where no further action was taken.¹⁵² Despite the appearance of bi-partisan support,¹⁵³ the resolution faced opposition from Rules Committee Chairman Roy Blunt and Senate Majority Leader Mitch McConnell.¹⁵⁴

The most effective solution to modifying the rules to allow for remote voting would simply be for each house to consider adopting one of the existing resolutions. Both would accomplish the goal of allowing members to cast their votes and participate remotely.

V. REMOTE VOTING IN THE NEBRASKA LEGISLATURE IS CONSTITUTIONAL AND SHOULD BE IMPLEMENTED

A. Survey of Remote Voting at the State Level

According to the National Conference of State Legislatures, at least thirty-six states, the U.S. Virgin Islands, Guam, and Puerto Rico have considered or adopted bills or resolutions relating to legislative operations in the wake of the COVID-19 outbreak, including bills or resolutions for remote participation and voting.¹⁵⁵ The range of provi-

152. *All Actions S.Res.548*, CONGRESS, <https://www.congress.gov/bill/116th-congress/senate-resolution/548/all-actions?r=15&overview=closed&s=8#tabs> [https://perma.cc/YS8G-QFP4] (last visited Sept. 20, 2020).

153. *Cosponsors: S.Res.548*, CONGRESS, <https://www.congress.gov/bill/116th-congress/senate-resolution/548/cosponsors?r=15&s=8&searchResultViewType=expanded> [https://perma.cc/2DTJ-FSKE] (last visited Sept. 20, 2020) (setting forth that the bill was co-sponsored by seven Democrats, two Independents, and seven Republicans).

154. See Melissa Quinn & Alan He, *Remote Voting Gains Traction in Senate After House Coronavirus Diagnoses*, CBS NEWS (Mar. 19, 2020, 5:47 PM), <https://www.cbsnews.com/news/remote-voting-gains-traction-in-senate-after-house-coronavirus-diagnoses/> [https://perma.cc/6R8Y-TUND]. Senator Roy Blunt was quoted as saying: “Not gonna happen . . . The speaker doesn’t want to do it, the leader doesn’t want to do it. It’s not going to happen.” Senator Mitch McConnell told reporters “that senators would adapt to new guidelines for dealing with the coronavirus ‘without fundamentally changing the Senate rules.’” Other Senators expressed far more support for the measure. Senator Amy Klobuchar, the top Democrat on the Rules Committee, stated:

The Senate must do its job to protect the American people from the health and economic impacts of this pandemic. That means we need updated emergency plans including remote Senate voting to ensure that we can pass legislation during any crisis As ranking member of the Rules Committee, I commend Senators Durbin and Portman for their work on this proposal, and I will continue working with them to pass their bill to ensure our continuity plans address the reality of new threats.

Id.

155. *COVID-19: State Actions Related to Legislative Operations*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx> [https://perma.cc/5J8G-8RS9] (Mar. 30, 2021).

sions has varied significantly from state to state.¹⁵⁶ For example, Utah adopted wide-ranging electronic meeting rules that allow the legislature to conduct electronic sessions and meetings under certain circumstances.¹⁵⁷ New Jersey adopted similar provisions allowing for the conduct of state business and legislative sessions by electronic means.¹⁵⁸ Other states, such as Oregon, attempted but failed to pass state constitutional amendments to allow remote participation.¹⁵⁹ So far, Nebraska is not among the states that have formally introduced measures allowing for remote legislative participation or voting.¹⁶⁰

B. Remote Voting in Nebraska: Constitutional Considerations

Despite a lack of action, there have been calls for the Nebraska Legislature to adopt remote voting mechanisms in the wake of the COVID-19 outbreak. Following the legislature suspending its session in March 2020 in light of COVID-19 concerns,¹⁶¹ State Senator Patty Pansing Brooks sent an email and memorandum to fellow legislators advocating for and addressing the constitutionality of remote voting.¹⁶² In the memorandum, Pansing Brooks noted:

I do not believe we are required to be together to vote, especially during states of emergency. I believe we could access an electronic system . . . where we could meet virtually as a Legislature, hear discussions, vote publicly, have it

156. *See id.*

157. *Id.*; see UTAH CODE ANN. § 1-4-401 (LexisNexis 2020) (allowing for the president of the senate or speaker of the house to call for electronic sessions for a wide range of legislative sessions and meetings provided certain circumstances are present).

158. *COVID-19: State Actions Related to Legislative Operations*, *supra* note 155; see N.J. REV. STAT § 52:1-1 (2020).

159. *COVID-19: State Actions Related to Legislative Operations*, *supra* note 155; see S.J. Res. 201, 80th Leg. Assemb., Reg. Sess. (Or. 2020).

160. *COVID-19: State Actions Related to Legislative Operations*, *supra* note 155.

161. Martha Stoddard, *Nebraska Legislature Suspends Session Because of Coronavirus Concerns*, OMAHA WORLD-HERALD (Mar. 16, 2020), https://omaha.com/livewellnebraska/health/nebraska-legislature-suspends-session-because-of-coronavirus-concerns/article_c4d92fd5-4112-5c62-a15b-2e5fa86f0935.html?utm_medium=social&utm_source=email&utm_campaign=user-share [https://perma.cc/6K7X-9CYP] (“We have made this decision primarily for the health and safety of the state and to protect the health of the members in the body . . .”).

162. Martha Stoddard, *Nebraska Legislature To Reconvene Monday, One Senator Calls Virtual Meeting*, SCOTTSBLUFF STAR-HERALD (Mar. 22, 2020), https://starherald.com/news/regional_statewide/nebraska-legislature-to-reconvene-monday-one-senator-calls-virtual-meeting/article_45fe8e1d-ecb3-538c-aa3c-0282b97d4a98.html [https://perma.cc/3Q9E-Y4UZ] (“Can any one of us be reasonably assured that we will not infect a colleague, and thereby their family, or be infected by a colleague and thereby infect our family, with this rash assembly, which could be quickly replaced by remote technology?” (quoting Pansing Brooks)).

recorded in the Journal, live stream it and have it broadcast by NET [Nebraska Public Media]. With our 21st Century technology, we could reconvene electronically, as quickly as in person, perhaps even more quickly.¹⁶³

She concluded the Nebraska constitution did not provide any barriers to remote voting.¹⁶⁴

In a follow up memorandum, Pansing Brooks proposed changes to existing legislative rules to allow for remote voting.¹⁶⁵ She also identified several rules that contemplated physical presence in the chamber and noted that such rules would have to be suspended or subordinated to new emergency rules.¹⁶⁶

The legislature would meet for just three days following its initial suspension in March before finally reconvening in late July.¹⁶⁷ A small group of senators on the rules committee met virtually to discuss remote voting and participation options, with no final action taken.¹⁶⁸

There are several provisions in the Constitution of the State of Nebraska that could impact the constitutionality of remote voting. For instance, Article III-10 lays out the state's quorum requirement and prescribes the legislative rulemaking power: "A majority of the members elected to the Legislature shall constitute a quorum; the Legislature shall determine the rules of its proceedings and be the judge of the election, returns, and qualifications of its members."¹⁶⁹ Article III-11 provides that all votes must be taken *viva voce* (oral, rather than written), that the doors of the legislature shall be open except when the business need be secret, and that the yeas and nays should be recorded in the journal.¹⁷⁰

163. Memorandum from Patty Pansing Brooks, Neb. State Sen., to Nebraska Legislature on Constitutional Requirements for How Legislators Vote in Nebraska Legislature Re COVID-19 (Mar. 20, 2020), <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:ed150159-7e41-4f71-b4c5-5fba28571fd4#pageNum=1> [<https://perma.cc/9295-UC7V>] (regarding constitutional requirements for how legislators vote in Nebraska Legislature during COVID-19).

164. *Id.* at 1 ("There is no provision in the Nebraska Constitution that requires that members must be present in the Legislative Chamber to vote, or present with each other for that matter. The votes must be public and recorded in the Journal. Period.").

165. Memorandum from Sen. Patty Pansing Brooks to Sen. Jim Scheer et al. (May 20, 2020) (on file with author).

166. *Id.* at 8–9 (noting several rules—including one that provides "[o]nly senators physically in the legislative chamber may vote"—would need to be suspended or superseded despite seeming to contradict other rules).

167. See JoAnne Young, *State Senators Consider Remote Meeting, Voting Options for this Month's Session*, LINCOLN J. STAR (Aug. 13, 2020), https://journalstar.com/legislature/state-senators-consider-remote-meeting-voting-options-for-this-months-session/article_a9e3ece3-9ab4-562e-87b2-51e710e662b6.html [<https://perma.cc/E8CU-ZW4U>].

168. *Id.*

169. NEB. CONST. art. III-10.

170. NEB. CONST. art III-11:

The strongest—and perhaps most definitive—authority on legislative voting matters in Nebraska is *Day v. Walker*, in which the court contemplated the constitutionality of the electronic roll call system in the legislature.¹⁷¹ The primary challenge was that pressing an electronic button (yea, nay, not voting) installed at each desk did not amount to voting *viva voce* as the constitution required.¹⁷²

In upholding the use of the electronic roll call system as constitutional, the Supreme Court of Nebraska took a broad interpretive view, finding that “[i]n interpreting a constitutional provision, the language used therein must be taken as having been designed to meet the needs of a progressive society, and should not be strictly confined to its meaning as understood at the time the instrument was adopted.”¹⁷³ On the importance of maintaining flexibility during emergencies, the court noted: “Constitutions are not made for existing conditions only, nor in the view that the state of society will not advance or improve, but for future *emergencies and conditions*, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men.”¹⁷⁴

The court went on to hold that the *viva voce* provision in the constitution was aimed simply at giving publicity to votes—as opposed to casting secret written ballots—and that the electronic roll call system provided that publicity.¹⁷⁵ So long as the votes were properly recorded in the journal, there could be no challenge to a bill’s passage.¹⁷⁶ Perhaps even more critically, the court closed its analysis by holding:

[T]he question of whether they should resort to the electric roll call system, or the old-style *viva voce* voting, is a question entirely within the discretion of the legislative bodies. So long as the system used gives publicity to the member’s vote, and his yea or nay vote is properly recorded on the journal, no other requirement in that respect is necessary.¹⁷⁷

The Legislature shall keep a journal of its proceedings and publish them, except such parts as may require secrecy, and the yeas and nays of the members on any question shall at the desire of any one of them be entered on the journal. All votes shall be *viva voce*. The doors of the Legislature and of the committees of the Legislature shall be open, except when the business shall be such as ought to be kept secret. The yeas and nays of each member of any committee of the Legislature shall be recorded and published on any question in committee to advance or to indefinitely postpone any bill.

171. 124 Neb. 500, 500–02, 247 N.W. 350, 350–51 (1933).

172. *Id.*

173. *Id.* at 505, 247 N.W. at 352 (citing *State v. Keating*, 173 P. 1156, 1158 (Mont. 1917)).

174. *Id.* at 504, 247 N.W. at 352 (emphasis added) (citing *Elwell v. Comstock*, 109 N.W. 698, 699 (Minn. 1906)).

175. *Id.* at 506, 247 N.W. at 353.

176. *Id.*

177. *Id.* at 506, 247 N.W. at 352–53.

In the context of remote voting, the explicit holding in *Day* seems to settle the issue of constitutionality. So long as whatever remote system used (1) gives proper publicity to the members' votes, and (2) the yea or nay votes are properly recorded in the legislative journal,¹⁷⁸ then no other requirement is necessary.¹⁷⁹ The question seems to become one of designing and implementing the appropriate technology, as opposed to one of constitutionality. While there may be potential statutory or legislative rules to overcome—which will not be discussed in detail here—remote voting in Nebraska does not seem to face any constitutional barriers.

VI. CONCLUSION

In the wake of COVID-19 and with potential unknown threats always lurking in the background, both Congress¹⁸⁰ and the Nebraska Legislature¹⁸¹ should heed the opportunity to enact measures allowing remote legislative participation and voting. At the federal level, the Court's decision in *Ballin* gives Congress wide authority and discretion to determine its own rules, save for those that violate constitutional restraints.¹⁸² Ultimately, the Court would likely reject a challenge to congressional rulemaking power on political question grounds.¹⁸³ Even if the Court decided to ignore the political question doctrine and embark on a *Ballin*-like analysis, the text of the Constitution does not appear to provide any express limitations on the rulemaking power in the remote voting context.¹⁸⁴ Further, the Court has been receptive to changes in technology in a variety of cases, including those involving the Fourth Amendment and the Commerce Clause.¹⁸⁵

The path to implementing remote voting in Nebraska faces fewer constitutional hurdles than at the federal level. The Nebraska Supreme Court's holding in *Day* seemingly settles the constitutional issue and leaves it to the legislature to suspend or change the rules as it sees fit.¹⁸⁶

178. *See also* *State v. Abbott*, 59 Neb. 106, 106, 80 N.W. 499, 500 (1899) (finding the legislative journals are the official records of the proceedings relative to the enactment of laws and are the only competent evidence in regard to the passage of a bill).

179. This is not to say that there are not other potential challenges, such as security and technology. *See supra* section III.E.

180. *See supra* Part III.

181. *See supra* Part V.

182. *See supra* notes 52–54 and accompanying text.

183. *See supra* section III.C.

184. *See supra* section III.D.

185. *See supra* section III.E.

186. *See supra* section V.B.

Despite practical, albeit surmountable, challenges to remote voting, there are no detrimental or dispositive constitutional hurdles at either the federal or state level standing in the way.