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THE INDEPENDENT STATE LEGISLATURE THEORY AND ITS POTENTIAL TO DISRUPT OUR DEMOCRACY

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

JULY 28, 2022

Printed for the use of the Committee on House Administration

BOOK 2 OF 2



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Democrat Election Misinformation Tracker

Date	Name	Medium	Summary of Comments	Link
2005	Nancy Pelosi	House Floor	"There were problems in this election…before the election, there were complaints about absentee ballots, and the patchwork use of provisional ballots, led to unequal treatment under the law."	https://www.youtube.com/watch?v=VcwJOnOnkYM&t=22s
2005	Barack Obama	Remarks	"That's why we need paper trails on these election machines, so that you actually have something you can hang onto after you punch that letter…make sure that it hasn't been hacked into."	https://www.youtube.com/watch?v=VcwJOnOnkYM&t=22s
2005	Bernie Sanders	Senate Floor	I agree with tens of millions of Americans who are very worried that when they cast a ballot on an electronic voting machine, that there is no paper trail to record that vote."	https://www.youtube.com/watch?v=VcwJOnOnkYM&t=22s
2017	Sheila Jackson Lee	House Floor	Researchers have repeatedly demonstrated that ballot reporting machines and other reporting systems are suceptible to tampering."	https://www.youtube.com/watch?v=VcwJOnOnkYM&t=22s
2017	Nancy Pelosi	Twitter	Our election was hijacked. There is no question. Congress has a duty to #ProtectOurDemocracy & #FollowTheFacts.	https://twitter.com/speakerpelosi/status/864522009048494080?s=10&t=tN
2018	Kamala Harris	Remarks	"We brought in folks who before our eyes hacked election machines," Ms. Harris said in 2018.	https://www.washingtontimes.com/news/2022/feb/2/democrats-hypocrisy-
2019	Hillary Clinton	Remarks	"You can run the best campaign, you can even become the nominee and you can have the election stolen from you," former Secretary of State and failed presidential candidate Hillary Clinton said in 2019.	https://www.washingtontimes.com/news/2022/feb/2/democrats-hypocrisy-
2019	Stacey Abrams	CBS This Morning	We received more than 50,000 phone calls of people who were denied the right to vote. I am complicit if I say that system is fair.	https://www.youtube.com/watch?v=VcwJOnOnkYM&t=22s
2019	Jimmy Carter	NBC News	Jimmy Carter says Trump only won the election because Russia 'interfered on his behalf'	https://www.nbcnews.com/politics/politics-news/jimmy-carter-says-trump-
2019	Joe Biden	Insider/Campaign Stop	Insider: During a campaign event in New Hampshire, former Vice President Joe Biden said he agreed with a woman who said that President Donald Trump is an "illegitimate president in my mind."	https://www.insider.com/joe-biden-says-he-agrees-trump-is-illegitimate-
2019	Hillary Clinton	WaPo/CBS News	WaPo: Hillary Clinton dismissed President Trump as an "illegitimate president" and suggested that "he knows" that he stole the 2016 presidential election in a CBS News interview to be aired Sunday.	https://www.washingtonpost.com/politics/hillary-clinton-trump-is-an-
5/11/20	Amy Klobuchar	MSNBC program	"You could easily hack into [voting machines]. It makes it seem like all these states are doing different things, but, in fact, three companies are controlling [elections]."	https://www.westernjournal.com/amy-klobuchar-issues-threat-republicans-
1/19/22	Joe Biden	Press Conference	Biden, when asked whether the upcoming elections would be viewed as legitimate, said 'The increase in prospect of it being illegitimate is in direct proportion to us not being able to get these reforms passed."	https://www.msn.com/en-us/news/politics/biden-ties-midterm-
1/25/22	Steny Hoyer	POLITICO Interview	Democrat Leader Steny Hoyer says President Biden is correct that the midterm elections will be illegitimate if Congress doesn't pass Democrats' election takeover bills.	https://twitter.com/MikeKBerg/status/1486050031169847300?s=20

ARTICLES

THE ORIGINAL SCOPE OF THE CONGRESSIONAL POWER TO REGULATE ELECTIONS

Robert G. Natelson[*]

Courts testing the constitutionality of federal campaign finance laws usually focus on First Amendment issues. More fundamental, however, is the question of whether campaign finance laws are within Congress's enumerated power to regulate the "Times, Places and Manner of holding Elections." This Article is an objective examination into the intended scope of this congressional power, using numerous sources overlooked by other legal writers. The Article concludes that the intended scope of the power was wide enough to authorize most modern congressional election statutes, but not wide enough to support modern federal campaign finance laws.

[*]Senior Fellow in Constitutional Jurisprudence, the Independence Institute, Golden, Colorado; Professor of Law (ret.), The University of Montana School of Law. I am grateful to Geri Fox at The University of Montana School of Law for administrative assistance and to Daranne Dunning, UM School of Law Class of 2010, for research assistance.

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I. INTRODUCTION[1]

A. *Reasons for this Inquiry*

Citizens United v. Federal Election Commission[2] was the latest of several cases[3] in which the Supreme Court has tested federal campaign finance laws against the First Amendment of the United States Constitution. Not discussed in *Citizens United*, however, is a more fundamental question: Does the Constitution's scheme of enumerated congressional powers grant Congress power to regulate political

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1 *Bibliographical Note.* This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

ANNALS OF CONG. (Joseph Gales ed., 1834) (multiple vols.), *available at http://memory.loc.gov/ammem/amlaw/lwac.html* [hereinafter ANNALS OF CONG.].

DETERMINATIONS OF THE HONOURABLE HOUSE OF COMMONS, CONCERNING ELECTIONS, AND ALL THEIR INCIDENTS (London 1774) [hereinafter DETERMINATIONS].

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976) (multiple vols. projected; not all completed) [hereinafter DOCUMENTARY HISTORY].

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836) (multiple vols.) [hereinafter ELLIOT'S DEBATES].

THEODORE FOSTER'S MINUTES OF THE CONVENTION HELD AT SOUTH KINGSTON, RHODE ISLAND, IN MARCH, 1790 (R.I. Historical Soc'y 1929) [hereinafter FOSTER'S MINUTES].

THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909) (multiple vols.) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

THE FEDERALIST (Alexander Hamilton et al.) (George W. Carey & James McClellan eds., 2001) [hereinafter THE FEDERALIST].

GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) [hereinafter LAWSON ET AL., ORIGINS].

Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*].

Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) [hereinafter Natelson, *Founders' Hermeneutic*].

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937 & Supp. 1987) [hereinafter FARRAND'S RECORDS and FARRAND, SUPPLEMENT, respectively].

THE REMEMBRANCER; OR, IMPARTIAL REPOSITORY OF PUBLIC EVENTS (London 1775–84) (multiple vols.) [hereinafter THE REMEMBRANCER].

2 130 S. Ct. 876 (2010).

3 McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) (largely sustaining campaign finance laws); Buckley v. Valeo, 424 U.S. 1 (1976) (partly sustaining campaign finance laws); *cf.* United States v. Cong. of Indus. Orgs., 335 U.S. 106, 120–24 (1948) (finding it unnecessary to reach First Amendment issues, but sustaining the holding of the lower court, which had invalidated an early federal campaign law on First Amendment grounds).

campaigns at all? If not, such regulations are, of course, invalid, and it is unnecessary to consider First Amendment issues.[4]

The reputed basis for federal authority over congressional campaigns is the enumerated power granted by Article I, Section 4, Clause 1[5] and its incidents under the Necessary and Proper Clause.[6] The modern Supreme Court sometimes calls Article I, Section 4, Clause 1 the "Elections Clause,"[7] but it is more accurately called the "Times, Places and Manner Clause," since it is only one of many constitutional provisions governing elections.[8]

In this Article, I report on my investigation into the scope of congressional power under the Times, Places and Manner Clause, according to its original understanding and meaning. I designed this investigation to be objective; in other words, unlike much constitutional writing, this is *not* a brief for or against particular laws, proposals, or modes of interpretation.[9]

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4 *But see* Burroughs v. United States, 290 U.S. 534, 545–46 (1934) (recognizing, in an opinion by Justice Sutherland, an apparently extra-constitutional power in Congress to regulate presidential elections). The *Burroughs* reasoning bears some similarity to the more famous Sutherland "inherent sovereign authority" opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317–18 (1936). However, the doctrine of extra-constitutional powers in the federal government is contradicted by the wording of the Tenth Amendment. *See* Kansas v. Colorado, 206 U.S. 46, 89–90 (1907).

5 U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

6 *Id.* § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

7 *E.g.*, *McConnell*, 540 U.S. at 134.

8 There are at least eleven other "elections clauses." *See* U.S. CONST. art. II, § 1, cls. 2, 3 (describing the procedure for presidential elections); *id.* amend. XII (revising that procedure); *id.* amend. XV, § 1 (preventing discrimination in voting based on "race, color, or previous condition of servitude"); *id.* amend. XVII (providing for direct election of U.S. Senators); *id.* amend. XIX (preventing discrimination in voting based on sex); *id.* amend. XX (term-limiting the President); *id.* amend. XXIII, § 1 (allowing electors in the District of Columbia to vote for presidential electors); *id.* amend. XXIV, § 1 (banning discrimination in voting based on payment of tax); *id.* amend. XXV, § 2 (providing for election of a Vice President to fill a vacancy); *id.* amend. XXVI, § 1 (limiting age discrimination in voting). As made clear later in the text, constitutional provisions governing qualifications for and terms of office may be added to the list. *E.g.*, *id.* art. I, § 2, cls. 1–3 (providing for qualifications of electors and members of the House of Representatives and for allocation of Representatives among states).

9 On the defects in "originalist" writings caused by the desire of legal writers to argue a cause rather than engage in honest historical investigation, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 377–78 (1981).

B. Text and Post-Founding History

The text of the Times, Places and Manner Clause is as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."[10]

As this provision seems to contemplate, historically the states have been the chief regulators of congressional elections. Yet Congress has intervened on important occasions. The first time was in 1842, when Congress mandated that states electing more than one member of the House of Representatives do so by districts rather than at-large.[11] Congress enacted other regulatory statutes during the Reconstruction Era[12] and at various points during the twentieth century.[13] The most recent interventions are the Help America Vote Act[14] and the Bipartisan Campaign Reform Act,[15] both adopted in 2002. The last was partially invalidated by *Citizens United*. With few exceptions,[16] the purported basis for these statutes was the Times, Places and Manner Clause.

Although the Supreme Court has heard several challenges to these statutes,[17] it never has examined thoroughly the intended scope

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10 U.S. CONST. art. I, § 4, cl. 1.

11 1842 Apportionment Act, ch. 47, 5 Stat. 491.

12 Enforcement Act of 1870, ch. 114, 16 Stat. 140; Force Act of 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

13 *E.g.*, Tillman Act, ch. 420, 34 Stat. 864 (1907); Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (adopted in its initial form in 1910 as 36 Stat. 822); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of U.S.C.); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended in 42 U.S.C. § 1973gg (2006)).

14 Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in 42 U.S.C. § 15301 (2006)).

15 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of U.S.C.).

16 The Reconstruction Era laws, *see* sources cited *supra* note 12, were adopted wholly or entirely under the powers given Congress by the U.S. Constitution's Fourteenth and Fifteenth Amendments. U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2. *United States v. Wurzbach*, 280 U.S. 396 (1930), sustained the application to federal employees of the Federal Corrupt Practices Act, 43 Stat. 1070, as justified by congressional implied powers over federal employees. It declined to reach the issue of whether the Act was within the scope of the Times, Places and Manner Clause. *Wurzbach*, 280 U.S. at 396.

17 *E.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Classic, 313 U.S. 299 (1941); Smiley v. Holm, 285 U.S. 355 (1932); Newberry v. United States, 256 U.S. 232 (1921); United States v. Gradwell, 243 U.S. 476 (1917); *Ex parte* Yarbrough (Ku-Klux Cases), 110 U.S. 651 (1884); United States v. Gale, 109 U.S. 65 (1883); *Ex parte* Clarke, 100 U.S. 399 (1879); *Ex parte* Siebold, 100 U.S. 371 (1879).

of the congressional power under the Times, Places and Manner Clause. Some of the Court's pronouncements have asserted extensive congressional power without citing much authority.[18] Others have asserted extensive congressional power while relying only on cases that themselves cited little authority.[19] Occasionally, the Court has derived conclusions about eighteenth-century understanding from fragmentary evidence of scant probative value, as when it relied on the definition of "election" appearing in a nineteenth-century dictionary.[20]

In only one case, *Newberry v. United States*,[21] a 1921 decision written by Justice McReynolds, has the Court made some effort to reconstruct the Founding-Era record—and the results were distinctly different from the results of the Court's other cases.[22] The issue in *Newberry* was whether the Times, Places and Manner Clause was broad enough to authorize Congress to regulate primary elections as well as general elections. The Court concluded that the power was not sufficiently broad. Justice Pitney, writing for himself and two colleagues, dissented from that part of the opinion; but as has been true of other justices taking an expansive view of the Clause, he cited little Founding-Era material.[23] When the Court overruled *Newberry* two decades later, it relied on Pitney's *Newberry* opinion, citing no additional Founding-Era evidence.[24]

Not even the *Newberry* Court's survey of the evidence was particularly thorough. For example, the Court did not discuss eighteenth-

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18 The treatment of Founding-Era understanding in *Yarbrough*, 110 U.S. at 660–61, was summary, as was that in *Classic*, 313 U.S. at 317–18. Other cases construing or applying the Times, Places and Manner Clause have not examined the Founding-Era understanding at all. *See, e.g.*, *McConnell*, 540 U.S. at 93; *Siebold*, 100 U.S. at 371.

19 *E.g.*, *Buckley*, 424 U.S. at 14 n.16 (citing cases); *Smiley*, 285 U.S. at 366–67 (citing cases, some not relevant); *Gradwell*, 243 U.S. at 482 (citing cases); *Gale*, 109 U.S. at 66 (citing cases).

20 Foster v. Love, 522 U.S. 67, 71 (1997).

21 256 U.S. at 232.

22 *Id.* at 250–51, 255–56.

23 However, he did deal briefly with some of the majority's arguments based on the Federalist Papers. *Id.* at 283–91 (discussing *The Federalist No.* 60 (Alexander Hamilton), *supra* note 1).

24 United States v. Classic, 313 U.S. 299 (1941). The Court in *Classic* actually said it was unnecessary to overrule *Newberry* because Justice McReynold's decision spoke for only four justices. *Id.* at 317. However, Justice McKenna (the fifth vote) had concurred with the portion of the opinion construing the original meaning of the Times, Places and Manner Clause, so it really was an overruling. *Newberry*, 256 U.S. at 258. Justice Stone's opinion for the Court in *Classic* promised a review of "the words of the Constitution read in their historical setting as revealing the purpose of its framers," but failed to deliver. *Classic*, 313 U.S. at 317.

century election laws, understandings, or practices. Moreover, as explained below, the *Newberry* conclusion was erroneous.[25]

Scholarly commentary on the original understanding or original meaning of the Times, Places and Manner Clause has been brief and usually has marshaled Founding-Era sources primarily to serve a larger argument. The most complete examination, by Professor Stephen J. Safranek, appeared in an article contending for the constitutionality of a Colorado term-limits initiative.[26] Professor Safranek relied on the ratification-era debates to conclude that the Constitution's reservation to the *states* of power to regulate the "manner" of elections was broad enough to justify application of the term-limits initiative to congressional candidates.[27] Similarly, a student author used the same sort of material to construct a case for the constitutionality of the National Voter Registration Act.[28] Although neither of those treatments was truly comprehensive, others have been even briefer.[29]

C. *The Interpretive Method Employed in this Article and the Evidence of Original Public Meaning*

In order to recreate the original force of the Times, Places and Manner Clause, one must take account of maxims of textual interpre-

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25 *Infra* note 209 and accompanying text.

26 Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321, 327–43 (1993).

27 The analysis would seem unnecessary since the Tenth Amendment reserves all undelegated power to the states and people; hence, state regulations, unlike congressional regulations, should not be confined by the constitutional meaning of "Manner of holding Elections." *Cf.* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). There is no requirement that states actually have been exercising a power (in this case, control over federal elections) at the time the Tenth Amendment was adopted for that power to be reserved; otherwise, any police power unexercisable in 1791 (*e.g.*, regulation of automobiles) could not be exercised today. Nevertheless, current Supreme Court doctrine is that the "grant" to states by the Times, Places and Manner Clause is their exclusive source of authority over federal elections. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 586 (2005); Cook v. Gralike, 531 U.S. 510, 523–24 (2001) (following U.S. Term Limits v. Thornton, 514 U.S. 779 (1995)); *cf. Newberry*, 256 U.S. at 281 (Pitney, J., concurring in part).

28 Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 51–60 (1996) (discussing National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended in 42 U.S.C. § 1973gg (2006)).

29 *E.g.*, Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 289–90 (1989) (citing the Clause in arguing how the Founders' designed the Constitution to respond to social change); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1750–51 (2002); Anthony Peacock, *Election Regulations, in* THE HERITAGE GUIDE TO THE CONSTITUTION 71–73 (Edwin Meese III et al. eds., 2005).

tation current in the eighteenth century. Modern commentators tend to be skeptical of such maxims, but in the Founding Era, judicially-approved rules of construction enjoyed great standing.[30]

Among the most important of the interpretive rules was that textual uncertainties in a document (including a constitution) should be resolved in accordance with "the intent of the makers."[31] In the constitutional context, the "makers" were the ratifiers, and their "intent" was their subjective understanding.[32] If the subjective understanding (which I refer to in this Article as *original understanding*) was either not recoverable or not coherent, then one marshaled available evidence to infer an objective substitute for subjective intent—a construct modern writers call the *original public meaning*.[33] The original public meaning is defined as how the text "would have been understood by a hypothetical, objective, reasonably well-informed reader"[34] at the time of ratification.

A person employing the Founding-Era interpretive method may begin *either* with evidence of original understanding, filling any gaps with evidence of public meaning, *or* with evidence of public meaning, amending it with any inconsistent understandings. The ultimate result of the inquiry should be the same using either method. In my investigation, I began by seeking evidence of original public meaning. For the Times, Places and Manner Clause, that evidence encompasses:

- Contemporaneous writings referencing the "manner" of elections;
- British parliamentary statutes regulating the times, places, and manner of elections (as former British subjects knowledgeable in the law

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30 1 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 6 (1772) ("Maxims . . . are of the same Strength as Acts of Parliament when once the Judges have determined what is a Maxim . . . ."); *accord* State v. ____, 2 N.C. 28, 1794 WL 87 (N.C. Super. L. & Eq. 1794).

31 Natelson, *Founders' Hermeneutic*, *supra* note 1, at 1249–55.

32 *Id.* at 1288–89 (citation omitted) (internal quotation marks omitted), 1297–03.

33 *Id.* at 1286.

34 *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) ("[H]ow the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted. . . . We call this approach *original, objective-public-meaning textualism*." (citations omitted)). Kesavan and Paulsen offer this definition as part of the common argument that constitutional interpretation should be guided by original meaning textualism rather than by original intent of the drafters or original understanding of the ratifiers. After Kesavan and Paulsen wrote, however, I undertook a review of eighteenth-century interpretive method that left little doubt that the Founders granted original understanding (when coherent and available) primacy over original meaning. *See generally* Natelson, *Founders' Hermeneutic*, *supra* note 1.

of the British Empire, the Founders were familiar with British election laws and discussed them during the ratification controversy);[35]

- Provisions in contemporaneous state constitutions regulating the times, place, and manner of elections;
- Early state statutes designed to comply with the mandate of the Times, Places and Manner Clause. This category includes only statutes (a) adopted by states that already had ratified the Constitution (b) during the period before all the original thirteen had ratified—i.e., before Rhode Island's ratification on May 29, 1790; and
- The drafting, text, and structure of the Constitution.

After collecting evidence of original public meaning, I then turned to the ratification record to determine if the ratifiers adopted any special understandings inconsistent with the original public meaning. I concluded that the ratifiers' understanding did not differ from the original public meaning, except in one particular: The conventions of several states ratified only after being assured—and in some cases stating the understanding explicitly—that congressional power under the Times, Places and Manner Clause would be construed narrowly.

II. THE "MANNER OF ELECTION" IN THE EIGHTEENTH CENTURY

A. *Documents Referenced*

Eighteenth-century English-language writings contain many occurrences of the phrase "manner of election," and some occurrences of its synonym, "mode of election."[36] A Gale Company database, *Eighteenth-Century Collections Online*, contains a fairly good sample of these, although I found numerous instances elsewhere as well. My conclusions of original meaning were based on documents that (1) referred to the "manner" or "mode" of election, (2) offered illustrations of what the phrase meant, (3) were prepared prior to May 29, 1790, the

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35 For example, participants in the ratification debates often referred to an incident in which Parliament had lengthened terms in the House of Commons from three to seven years. *E.g.*, Agrippa, *Letter XIII*, MASS. GAZETTE, Jan. 22, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 770 (referring to "the usurpation by which they continued themselves from three to seven years").

36 For references to the "mode of election," see, e.g., 4 ELLIOT'S DEBATES, *supra* note 1, at 52 (reporting remarks by Samuel Spencer at the North Carolina ratifying convention); FOSTER'S MINUTES, *supra* note 1, at 44 (quoting John Sayles at the first sitting of the Rhode Island ratifying convention as using "Mode of Election" when discussing the Times, Places and Manner Clause); and Ordinance of the Convention of New-York, for Settling the New Form of Government of that State (May 8, 1777), *in* THE REMEMBRANCER, *supra* note 1, at 238, 240. *See also infra* notes 66 & 69; *cf.* FOSTER'S MINUTES, *supra* note 1, at 88 (referring to the "Mode of Putting the Vote").

day Rhode Island became the thirteenth state to ratify the Constitution, and (4) were prepared within the geographic limits of what had been Great Britain's Atlantic empire—that is, England, Scotland, Ireland, and (before 1776) British North America. Some of the documents are discussed in the text below while others are referenced only in footnotes.

B. Documents from England, Scotland, and Ireland

The Royal Charter of the Dublin Society[37] stated that the Society's "manner of election" included time limits, qualifications, and a procedure for selecting a voting place.[38] William Coxe's English work, *Sketches of the Natural, Civil, and Political State of Swisserland*[39] [sic] described "[t]he manner of election" for office in a Swiss canton as involving popular election of five candidates, and choice of a final victor from them by lot. Similarly, Philip Morant described the "manner of election" of an English mayor as involving an election by the burgesses, "or the major part of them, in common Hall assembled [who] nominated and returned two Aldermen to the bench of Aldermen: who, retiring into the Council, or Record-room, chose one of the two to be *Mayor* for the year ensuing."[40] Rules pertaining to the "manner of election" in London prescribed the election of candidates from districts, the qualifications of the electorate, the choice of candidate, and methods of certification.[41] A *History of Great Yarmouth* described

37 The Royal Charter of the Dublin Society (1785).

38 *Id.* at 5, 7, 9 (providing for "such others as shall from Time to Time be elected in the Manner herein after directed," and stating that the aforesaid "Manner" was that the members designated "within forty Days next after the Date of this our Grant, to meet together at such Time and Place . . . to the said Members, or such of them as live within our City, or Liberties of our City of *Dublin* . . . where they, or the major Part of them then present, may nominate, elect and chuse [sic] new Members" and "that the said Corporation, or any seven or more of them, whereof the President, or one of the Vice-Presidents, to be one, shall have full Power to elect such Persons to be Members of the said Society").

39 WILLIAM COXE, SKETCHES OF THE NATURAL, CIVIL, AND POLITICAL STATE OF SWISSERLAND 54 (1779) (referring to election in a Swiss canton); *see also* AEOLUS: OR, THE CONSTITUTIONAL POLITICIAN 30 (1770) (stating, "Plutarch goes on—'The manner of their Election was as follows[]'" and further stating that the people were called together, locked together in a room so they could not see outside, and generally decided according to shouts of the people); REV. T. WILSON, AN ARCHAEOLOGICAL DICTIONARY 234 (1783) (stating that "the manner of their election" was drawing by lots from a particular body).

40 1 PHILIP MORANT, THE HISTORY AND ANTIQUITIES OF THE COUNTY OF ESSEX 98 (London, 1768).

41 THE LAWS AND CUSTOMS, RIGHTS, LIBERTIES, AND PRIVILEGES, OF THE CITY OF LONDON 39–40 (1779) ("[T]he manner of which election has several times varied: but in the year 1714 . . . it was enacted, that . . . there shall be chosen only one citizen by the inhabitants of every ward destitute of an alderman, and the person so elected to be returned by the

the "[m]anner of electing, sending, and receiving the Port Bailiffs" as involving an election in June or July by the common assemblies of the particular towns whose turn it was to send [the Port Bailiffs]," followed by presentation

> to the general assembly of the Cinque Ports, and the towns of Rye and Winchelsea, on Tuesday after the feast of St. Margaret, to be by them approved, acknowledged, confirmed, and deputed .... And if any objection appeared to either of the persons elected, an order was given for another to be elected in his stead.[42]

To a considerable extent, Parliament had standardized regulations for the "manner of election" to the House of Commons. Parliamentary legislation governing the choice of burgesses prescribed public notice and proclamations, times and places of voting, the identity, duties, and oaths of the supervising officers, *viva voce* voting (alterable to secret ballot if the assembled voters requested it), generation and retention of a list of qualified and disqualified voters, adjudication of disputed elections, and punishment for selling one's vote.[43] The "Manner of the Election of Knights" to the Commons also included provisions for the forms and substance of writs, proclamations, times, and for a written and sealed ballot.[44]

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lord mayor (or other returning officer, duly qualified to hold a court of wardmore) to the court of lord-mayor and aldermen, by whom the person so returned is to be admitted, and sworn into the office of alderman."); *see also* CHARLES BURLINGTON ET AL, THE MODERN UNIVERSAL BRITISH TRAVELLER [sic] 264 (1779) (stating that the Lord-Mayor of London "is elected in the following manner" and that the livery chose two aldermen, the body of aldermen selected one from them, the chancellor gave his approval, and the designee was sworn in).

42 THE HISTORY OF GREAT YARMOUTH 269–70 (1776).

43 *E.g.*, DETERMINATIONS, *supra* note 1, at 42–79; *see also* 4 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 330–32, 557 (1780) (indexing the "Manner of Election" for Burgesses in Parliament to include proclamation, voting in person, sheriff as officer in charge, hours of voting, time of voting, place of voting, voting either "by Hearing of the Voices, or View of the Hands held up" provision for a poll (secret ballot), appointment and duties of clerk, swearing of clerks, naming of inspectors, timely process, delivery of a copy of the poll to anyone who desired and paid for it, delivery of "check-books" to the clerk of the peace, erection of polling booths, and the requirement that the sheriff list the towns from which each booth was appointed and deliver a copy of the list to any candidate on request); A GENTLEMAN OF THE INNER-TEMPLE, LAWS CONCERNING THE ELECTION OF MEMBERS OF PARLIAMENT 84 (1774) (reporting that the "Manner of Election" referred to the Sheriff receiving an election writ and directing election of commissioners, who then chose representatives in Parliament).

44 1 THE STATUTES AT LARGE 469–70 (1768–70) (mentioning and giving, in 8 Hen. IV, c. XV, "The Manner of the Election of Knights of Shires for a Parliament," the form of the writ, proclamation of day and place of Parliament and of election of knights, free election of the full county, and the names of persons chosen to be written in an indenture under seals of those who chose them).

This standardization was not complete, however. The "manner of election" to the Commons varied somewhat according to locale. John Impey's treatise *The Office of Sheriff* explained that in Scotland also the "manner" included provision for writs of election, oaths administered to electors, designation of the sheriff as the officer who gave notice of the time of election, the meeting of freeholder-electors, returns of elections, and punishment for defaulting officials.[45] Scotland differed from England in that the Scottish "manner of election" to the House of Commons often was indirect—that is, the voters chose "commissioners" who actually elected the Member of Parliament.[46] The "manner of election" varied in Ireland as well.[47]

These English, Scottish, and Irish sources used the phrase "manner of election" to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot). "Manner of election" included regulation of elections decided in two tiers, as when one group chose electors and the electors chose the winner, or when a group selected several candidates and the winner was chosen by lot. However, regulations of the "manner of election" in these documents seem not to have included governance of campaigns.

C. "Manner of Election" in America

Americans ascribed the same general content to the phrase "manner of election" as the English, Irish, and Scots did. The *Transactions* of Benjamin Franklin's American Philosophical Society provided for the "manner of . . . election" of officers, and for the time and place of election, notice to electors one week before the election,

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45 JOHN IMPEY, THE OFFICE OF SHERIFF 303–10 (1786); *see also* GEORGE CHALMERS, THE HISTORY OF THE UNION BETWEEN ENGLAND AND SCOTLAND 498 (1786) (describing proceedings of Scottish Parliament on Jan. 29, 1707, as determining the "manner in which the burrows shall elect their representatives to the House of Commons of Great Britain" to include districting for election of Scots representatives); DETERMINATIONS, *supra* note 1, at 82–84 (providing for "[t]he Manner of & Proceeding at the Election of the Commoners for Scotland" to include writs of election, precepts to boroughs to elect commissioners, punishment for defaulting sheriff, punishment for defaulting chief magistrate of borough, summoning council of the borough, appointment of day for election, and prescribing two days between the date on which the time of election was appointed and the actual election of commissioners and commissioners' election of the member of Parliament).

46 *Id.*

47 9 THE STATUTES AT LARGE, PASSED IN THE PARLIAMENTS HELD IN IRELAND 68 (1786) (statute passed in 1763, referring as the "same manner of election" a master gathering together a minimum number of voters and their election).

choice of election judges, appointment of secretaries for recording the names of voters, voting by ballot or written ticket rather than *viva voce*, and for breaking tie votes by lot.[48] A 1721 South Carolina election code described "the Manner and Form of electing Members" to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days. Within the code also were provisions for writs of election, times for elections, oaths and enrollment of electors, the choice of election managers and the conduct of voter assemblies (which were to continue for no more than two days). Voting was by paper ballot. Ballots were deposited in designated boxes, which were then sealed. Double ballots were invalid. The winner was determined by a majority rather than a plurality. The code specified punishment for corrupt election officials and persons who disrupted elections.[49]

Connecticut's royal charter provided that there was to be "One Governor, One Deputy-Governor, and Twelve Assistants, to be from time to Time constituted, elected and chosen out of the Freemen of the said Company for the Time being, in such *Manner and Form* as hereafter in these Presents is expressed."[50] The "Manner and Form" included meetings of the citizens on the second Thursday of October and the second Thursday of May, and selection by majority votes of two persons in each "Place, Town, or City" to serve in the General As-

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48 2 TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY vi–vii (1786). For another example of "manner" as including the method of balloting in a private organization, see THE LIFE AND ADVENTURES OF MR. BAMPFYLDE-MOORE CAREW 48 (1786), describing an imaginary "manner of election" by which the voter puts a white ball in the box designated for his candidate and a black ball in the other candidates' boxes.

49 S.C. STAT, 113–15 (1721) ("An Act to ascertain the Manner and Form of electing Members . . . in the Commons House of Assembly.").

50 CHARTER OF CONN. 1662, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 530 (emphasis added). The charter stated as follows:

> [T]here shall be One Governor, One Deputy-Governor, and Twelve Assistants, to be from time to Time constituted, elected and chosen out of the Freemen of the said Company for the Time being, in such Manner and Form as hereafter in these Presents is expressed, . . . And further we . . . Do ordain and grant, That the Governor . . . shall and may from Time to Time upon all Occasions, give Order for the assembling of the said Company, and calling them together to consult and advise of the Business and Affairs of the said Company, and that for ever hereafter, twice in every Year, *That is to say*, On every Second Thursday in *October*, and on every Second Thursday in *May*, or oftener in case it shall be requisite; the Assistants, and Freemen of the said Company, or such of them (not exceeding Two Persons from each Place, Town, or City) who shall be from Time to Time hereunto elected or deputed by the major Part of the Freemen of the respective Towns, Cities, and Places for which they shall be elected or deputed, shall have a General Meeting or Assembly . . . whereof the Governor of Deputy-Governor, and Six of the Assistants at least, to be Seven, shall be called the General Assembly, and shall have full Power and authority to alter and change their Days and Times of Meeting .

Id. at 530–31.

sembly, which in turn was to elect the governor. The charter of Rhode Island prescribed "manner" regulations of the same general kind.[51]

After independence, Connecticut and Rhode Island continued to operate under their charters, with some amendments. The other states drafted new constitutions for themselves. Several of these constitutions explicitly regulated the "manner" of elections. The provisions governing "manner of election" varied in scope, although their subject-matter was generally consistent. The Constitution of North Carolina provided that the "manner" of election of delegates to the Continental Congress would be for them to be "chosen annually by the General Assembly, by ballot; but may be superseded [i.e., replaced in office], in the mean time, in the same manner."[52] Georgia's "manner" rules for selecting state representatives were as follows:

> The manner of electing representatives shall be by ballot, and shall be taken by two or more justices of the peace, in each county, who shall provide a convenient box for receiving the said ballots; and, on closing the poll, the ballots shall be compared in public with the list of votes that have been taken, and the majority immediately declared; a certificate of the same being given to the persons elected, and also a certificate returned to the house of representatives.[53]

The 1780 Massachusetts Constitution described the "manner" by mandating the time of election (annually, on the first Monday of April), property and age qualifications of electors, a notice of election, and who would serve as election judges.[54] It also required that the "Legislature shall, by standing laws, direct the time and manner of convening the electors, and of collecting votes, and of certifying to the Governor the officers elected."[55] The "manner" regulations in Maryland's constitution[56] included voter qualifications,[57] time and frequency of elections,[58] the identity of the election judges,[59] *viva voce* majority voting for senatorial electors,[60] secret ballot plurality voting

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51 CHARTER OF R.I. AND PROVIDENCE PLANTATIONS 1663, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 3215.

52 N.C. CONST. of 1776, art. XXXVII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 2793.

53 GA. CONST. OF 1777, art. XIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 780.

54 MASS. CONST. of 1780, ch. 1, § 2, arts. II, IV (setting forth manner of election for state senators).

55 *Id.* ch. 2, § 1, art. X.

56 MD. CONST. of 1776.

57 *Id.* arts. II, IV, XII.

58 *Id.* arts. II, XIV (one and five years for different legislative houses).

59 *Id.* arts. VI, IX, XVII.

60 *Id.* art. XIV.

among those electors for senators,[61] and oaths for electors.[62] The New Hampshire constitution provided for election to the state council "in the following manner," and then specified how many council members were to come from each county.[63] The "manner" of electing the governor of New Jersey was by a majority vote of a joint ballot of the two legislative houses, with service for a one-year term.[64] The constitutions of the other states all defined the manner of election in ways consistent with the illustrations just given.[65]

State election laws adopted after Independence employed "manner of election" and its variants in the same general way. The "mode of holding elections" in a 1777 New York statute[66] provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It specified the places for election, the supervising officers and election judges, times of no-

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61 *Id.* arts. XV, XVI.

62 *Id.* art. XVIII.

63 N.H. CONST. of 1776.

64 Article VII of The New Jersey Constitution of 1776 provides:

> VII. That the Council and Assembly jointly, at their first meeting after each annual election, shall, by a majority of votes, elect some fit person within the Colony, to be Governor for one year, who shall be constant President of the Council, and have a casting vote in their proceedings; and that the Council themselves shall choose a Vice-President who shall act as such in the absence of the Governor.

N.J. CONST. of 1776 art. VII. Article XII provides:

> XII. That the Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years: and the Provincial Treasurer shall continue in office for one year; and that they shall be severally appointed by the Council and Assembly, in *manner* aforesaid.

N.J. CONST. of 1776 art. XII (emphasis added).

65 DEL. CONST. of 1776, art. 27 (specifying "manner" to include choice of election inspectors and assessors and use of secret ballot); N.Y. CONST. of 1777, arts. VI–VII, X, XII (prescribing "manner and form" of election by *viva voce* or by ballot; providing for "election of senators . . . after this manner," and dividing states into senatorial districts, proportioning by census, electing by freeholders, and providing term limits); PA. CONST. of 1776, § 19 (providing for "manner" and "mode" of electing supreme executive council: districting the state and selection by ballot by freemen for particular terms); S.C. CONST. of 1778, arts. XXVII–XXIX (including in "manner" of elections the choice by ballot, term of office and identity of electors); S.C. CONST. of 1776, arts. II, III, XIII, XXI, XXVII (providing for "manner" of election of legislative council, state president, and sheriffs, including selection by ballot, quorum, and qualification of electors); VT. CONST. of 1786, ch. II, arts. VII, X (similarly outlining "manner" of elections); VT. CONST. of 1777, ch. II, §§ XVI, XVII, XLIV (including in "manner" of elections the choice of two representatives from each town, frequency of elections, ballot voting, sealing of ballots, vote counting, majority voting); VA. CONST. of 1776 (including in "manner" of elections legislative districting, qualifications of voters, returns by election officers, and terms of office).

66 Ordinance of the Convention of New-York, for Settling the New Form of Government of that State (May 8, 1777), *in* THE REMEMBRANCER, *supra* note 1, at 238–43.

tice, returns of poll lists, declaration of winner, and some voter qualifications.[67]

A 1781 Maryland law mandated that certain special elections "be held in county in manner and form following," and prescribed the time and place of election, the issuance of notice, the formalities pertaining to election officials, the administration of oaths, the announcement of the results, and that a plurality should determine the victor.[68] A 1787 New York statute prescribed as the "Mode of conducting every such Election," the delivery of a paper ballot with the names of the candidates, the voter's receipt of the ballot in the presence of inspectors, the folding and closing of the ballot, its placement in a box to be locked, who was to keep the key, inspection of the poll lists, protection of ballot boxes, the disposition of voter challenges, oaths to voters of questionable loyalty, the opening and counting of ballots, the punishment of corrupt officials and of persons disrupting an election, and the qualifications of voters.[69] In this particular statute, the location of the voting was designated separately.[70] States that did not use the precise phrase "manner [or mode] of election" adopted analogous measures.[71]

By its terms, the Constitution was to come into effect upon ratification by nine states.[72] While the Constitution was still pending elsewhere, some of the ratifying states adopted statutes whose recited purpose was to comply with the state's duty under Article I, Section 4 to prescribe the times, places, and manner of election.[73] The South

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67 *Id.* at 241–42.

68 An Act for Holding Special Elections in Caecil County, 1781 Md. Laws, ch. IX; s*ee also* An Act to Alter the Place of Holding the Elections for Members of the Legislature, and Parish Officers for the Parish of Saint John, Colleton County (Feb. 27, 1788), *reprinted in* PUBLIC LAWS OF SOUTH CAROLINA 440 (1790).

69 An Act for Regulating Elections (Feb. 13, 1787), § VI, *reprinted in* 2 LAWS OF THE STATE OF NEW YORK 27, 29–30 (1789).

70 *Id.*

71 *See, e.g.*, An Act Concerning Election of Members of General Assembly (Dec. 20, 1785) *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 22–26 (1790) (specifying qualifications of electors, a fine for failing to vote, privilege from arrest for voters, secret polls if live voting was not practical, extension of voting up to four days, resolution of conflicts, the oath for electors, the form of certification of election, writs of election in the event an office was vacant, punishment for a disobedient sheriff, and punishment for those who buy votes).

72 U.S. CONST. art. VII, cl. 1.

73 An Act for Prescribing on the Part of this State, the Times, Places, and Manner of Holding Elections for Representatives in the Congress, and the Manner of Appointing Electors of a President of the United States (Nov. 4, 1788), *reprinted in* PUBLIC LAWS OF SOUTH CAROLINA 462 (1790); *see also* An Act Directing the Times, Places and Manner of Electing Representatives in this State, for the House of Representatives of the Congress of the United States of America (Jan. 27, 1789), 1789 N.Y. Laws, c. XI, *reprinted in* 2 LAWS OF THE

Carolina measure, for example,[74] divided the state into five districts, with one federal Representative to be elected by a plurality in each district. The law also provided that the place of election was to be the same as for the state house, and that the election was to be regulated and conducted under the same rules. The law identified the conducting officials, specified how they were to make returns, and required examination of the returns by the governor. It provided for proclamation of election, the deposit of original poll with the secretary of state, and a procedure in case the same person was elected in more than one district. It further provided for the choice of presidential electors, to be appointed by legislature on the first Wednesday of the following January, and required them to take an oath.

D. Summary of the Evidence on "Manner of Election"

The foregoing sources—British, Scottish, Irish, and American—all used the phrase "manner of election" (or a close variant) and specified one or more components of that phrase. The sources tend to supplement and reinforce rather than contradict each other. Considered in the aggregate, they suggest that regulating the "manner of election" encompassed the following:

- Fixing the qualifications of the electors and of candidates;
- Setting the time of the election, including terms of office;
- Fixing the place of election, including description of district boundaries;
- Determining whether election was to be a single-tier or double-tier process—i.e., whether voters decided the winner directly, or merely selected a class of people who either selected the ultimate winner or from whom the ultimate winner was chosen by lot;
- Setting the rules for both tiers of a double-tier process;
- Determining whether the victor needed a majority or a plurality;
- Regulating the mechanics of voting, including provisions for notice, returns, ballots or *viva voce* voting, and counting;

STATE OF NEW YORK 395 (1789). This law divided the state into six representative districts, provided that each elector was entitled to vote for one person, provided for signing of poll lists, opening of election box, delivery to Sheriff, transmittal of box unopened to Secretary of State, canvassing procedure, election by plurality, certification, an oath for canvassers, dates of election, a vacancy procedure, penalties for bribery and corrupt conduct and for failure of administrator to perform his duty, no calling of militia during election or with twenty days before, and no service of civil process on elector on election day or day preceding.

74 An Act for Prescribing on the Part of this State, the Times, Places, and Manner of holding Elections for Representatives in the Congress, and the Manner of appointing Electors of a President of the United States (Nov. 4, 1788), *reprinted in* PUBLIC LAWS OF SOUTH CAROLINA 462, 463–63 (1790).

- Erecting procedures to resolve election disputes; and
- Regulating Election Day behavior—e.g., providing for freedom for civil process and for punishment of Election Day misconduct.

With this background, we proceed to examine the electoral provisions the Framers actually drafted.

III. THE FRAMING AND LANGUAGE OF THE TIMES, PLACES AND MANNER CLAUSE

A. Drafting History

Although the intent of the Constitution's drafters—the Framers—is not as authoritative as the original understanding and original public meaning,[75] their intent is useful evidence as to both since the Framers were part of the wider public and, in many cases, were influential ratifiers. This section, therefore, reviews the drafting history of the Times, Places and Manner Clause.

After the Constitutional Convention achieved a quorum on May 25, 1787, it debated and adopted a series of resolutions designed to serve as the basis for the new Constitution.[76] On July 26, the tired delegates adjourned for a ten-day recess, leaving behind them a "Committee of Detail" to convert the resolutions into a draft constitution. The committee consisted of five members. One was Nathaniel Gorham of Massachusetts, a merchant who had been president of Congress and was then chairman of the Convention's Committee of the Whole. The other four consisted of some of America's most distinguished lawyers. One was the committee chairman, John Rutledge of South Carolina, then serving as the state's chancellor. The remaining three were Edmund Randolph of Virginia, then his state's governor and a former attorney general; James Wilson, one of Pennsylvania's foremost legal practitioners; and Judge Oliver Ellsworth of Connecticut.

If construed literally, one of the convention's resolutions would have bestowed almost unlimited authority on the new government: It granted to Congress, in addition to the powers the Confederation Congress had enjoyed, authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the

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75 *See supra* Part I.C.

76 The convention resolutions for the Committee of Detail are collected at 2 FARRAND'S RECORDS, *supra* note 1, at 129–33.

United States may be interrupted."[77] However, that resolution had been adopted rather early in the process, and by the latter part of July, a growing number of delegates apparently were having second thoughts about giving the new Federal Congress so much power.[78] The Committee of Detail decided to follow the trend rather than the resolution, substituting a list of discrete enumerated federal powers.[79] On the list was an early version of the Times, Places and Manner Clause.

The Committee of Detail's "times, places and manner" clause granted to the "Legislature of the United States" authority to alter any state rules regulating the "Times and Places and Manner of holding the Elections of the Members of each House."[80] A few days later, James Madison and Gouverneur Morris moved to add a proviso exempting from congressional control the places for electing Senators.[81] They believed that because Senators were to be elected by the state legislatures, it would not be proper for Congress to dictate where a state legislature was to convene.[82] Although this proviso was voted down at the time, the Convention reversed itself the following month,[83] and the final version of the Clause was fixed.

The constitutional language governing congressional elections differed from usual eighteenth-century "manner of election" provisions in two important respects. First, the usual "manner of election" provision included elector and candidate qualifications, times of election (including terms of office), places of election (including district boundaries), as well as other administrative details.[84] The Constitution, on the other hand, listed qualifications, times, and places sepa-

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77 2 FARRAND'S RECORDS, *supra* note 1, at 131; *see also* Natelson, *Enumerated*, *supra* note 1, at 472.

78 Natelson, *Enumerated*, *supra* note 1, at 472–73.

79 *Id.* at 473.

80 The committee version read: "The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States." 2 FARRAND'S RECORDS, *supra* note 1, at 165 (reporting records of the Committee of Detail). The committee reported to the convention on August 6, 1787.

81 On August 9, James Madison and Morris moved to add a proviso exempting the places of electing Senators, which was voted down. *Id.* at 240.

82 3 ELLIOT'S DEBATES, *supra* note 1, at 366 (reporting remarks of James Madison in the Virginia ratifying convention).

83 The latter vote was unanimous. 2 FARRAND'S RECORDS, *supra* note 1, at 613 (Sept. 14, 1787).

84 *See supra* Part II.

rately from "Manner."[85] Second, after providing for qualifications, times, and places, the Constitution described the residuum as "the Manner of *holding* Elections." This precise phrase seems to have been newly coined[86] to denote a subset of traditional "manner" regulation. Unlike the phrase "manner of elections," it excluded qualifications, times, and places.

In view of the legal qualifications, experience, and abilities of the men primarily responsible for this language, it is unlikely that the Constitution's reference to "Manner of holding" rather than the traditional "manner of elections" was accidental or unconsidered. Indeed, the Constitution's counterpart for presidential elections, set forth in Article II, confirms this.

The Article II counterpart to "Manner of holding" was *not* the Article II phrase that actually employed the word "Manner"—"Each State shall appoint, in such *Manner* as the Legislature thereof may direct, a Number of [presidential] Electors."[87] That phrase referred to a manner of *appointment* rather than election, and permitted states to dispense with election of presidential electors entirely in favor of another mode of choice, such as designation by the governor.[88] It was an acknowledgment of state power to fix the qualifications (or identity) of the person or persons appointing the presidential electors, and as such it served as the counterpart to the provision in Article I authorizing the states to set the qualifications of persons choosing the House of Representatives.[89]

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85 U.S. CONST. art. I, § 2, cl. 1 (two-year terms for Representatives and qualifications of voters for Representatives), *id.* cl. 2 (qualifications of Representatives); *id.* art. I, § 3, cl. 1 (terms of Senators; their electors to be state legislators), *id.* cl. 3 (qualifications of Senators); *id.* art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own members . . . .").

86 A Jan. 28, 2010 search in the Gale Database, *Eighteenth Century Collections Online*, which covers nearly 200,000 works of the era (including most leading legal works), uncovered no instances of phrases with the words "manner," "holding," and "election(s)" within three words of each other before the publication of the Constitution in 1787. A 1777 New York election law had labeled its "manner" regulations as covering the "mode of holding elections," and a 1787 New York law referred to the "mode of conducting" elections. *See supra* notes 66 & 69 and accompanying text.

87 U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

88 *Id.* *But see* Kesavan, *supra* note 29, at 1750 (arguing that "[t]here is little reason to suppose that the word "Manner" in the Times, Places and Manner Clause has a substantially different meaning from the word "Manner" in Article II, Section 1, Clause 2"). As explained in the text, however, the Article II use of "Manner" is broader than its use in the Times, Places and Manner Clause.

89 U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

Rather, the presidential counterpart to the Article I "Manner of holding" was the list of residual election regulations that makes up most of Article II, Section 1, Clause 3.[90] Like Article I, Article II provided separately for times,[91] places,[92] candidate qualifications,[93] and elector qualifications.[94] The residuum (most of Article II, Section 1, Clause 3) consisted of whom electors could vote for; how many candidates each could vote for; creation of a voting list; signing, certifying, and transmitting the list; the identity of the presiding election official; formalities of opening of the certified lists; the requirement that the victor obtain a majority; and procedures for selection if no candidate received a majority.[95] As the counterpart to Article I's "Manner of holding," this list strongly suggests the sort of rules the Framers had in mind when they used that phrase in Article I. Moreo-

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90 Article II, Section 1, Clause 3 provides:

> The Electors shall . . . vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse [sic] by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse [sic] the President. But in chusing [sic] the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

Id. art. II, § 1, cl. 3.

91 *Id.* art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."); *id.*, art. II, § 1, cl. 1 ("He shall hold his Office during the Term of four Years.").

92 *Id.* art. II, § 1, cl. 3 ("The Electors shall meet in their respective States.").

93 *Id.* art. II, § 1, cl. 5 ("No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

94 *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

95 *Id.* art. II, § 1, cl 3.

ver, when added to qualifications, times, and places, the list corresponds closely to what other contemporary sources have to say about regulating the "manner of elections."[96]

B. Significance of the Constitutional Plan: The Original Public Meaning

Part II described the understood scope of regulating the "manner of election" in Anglo-American legal practice. That scope included the qualifications of electors and elected; terms of office and other issues of time; legislative districting and other issues of place; and rules of decision and other Election Day conduct. "Manner of election" also included procedure for both single-tier and double-tier elections.

Part III.A showed how the Framers divided traditional "manner of election" rules into qualifications, times, places, and a residual phrase of narrower scope: "Manner of *holding* Elections." The results may be represented in formulaic terms as follows:

"Manner of election" = Qualifications + Times + Places + "Manner of holding."

Or, if one prefers:

"Manner of holding" = "manner of election" – qualifications – times – places.[97]

From the foregoing, we might describe the *original public meaning* of congressional power under the Times, Places and Manner Clause as follows:

- Subject to some override (see below), the Clause left untouched the states' reserved police power to regulate elections. State laws were not necessarily limited to the understood scope of "manner of election" regulations. States might adopt other kinds of laws, even if they affected federal elections. For example, a state might alter the composition of its legislature in a way that influenced the election of Senators.[98]
- The Constitution withheld from both state and congressional control the qualifications and terms of office for Senators and Representatives.

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96 *Supra* Part II.

97 The accuracy of this formula was confirmed in the ratification debates by Federalist spokesman Tench Coxe. *Infra* note 153 and accompanying text; *see also* FOSTER'S MINUTES, *supra* note 1, at 44 (quoting Federalist Henry Marchant at the first sitting of the Rhode Island ratifying convention as correcting an Anti-Federalist by excluding qualifications of electors from the Times, Places and Manner Clause).

98 *Cf.* Newberry v. United States, 256 U.S. 232, 257 (1921) ("Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these.").

- The Constitution withheld from congressional control the qualifications of electors for Senators and Representatives and the places of choosing Senators.
- Subject to the last two exceptions, the Clause granted Congress power to override state "manner" regulations.
- Because congressional authority was limited by the terms of the grant, however, the Clause gave Congress no authority to regulate subjects outside of the understood scope of "manner of election" regulation.

IV. THE TIMES, PLACES AND MANNER CLAUSE IN THE RATIFICATION DEBATES

A. The Level of Controversy and the Sources

During the ratification debates, the Times, Places and Manner Clause proved to be one of the most controversial provisions in the new Constitution. At the Virginia ratifying convention, delegate George Nicholas fairly described the extent of the controversy when he said that objections against the Clause had "echoed from one end of the continent to the other."[99] Because the Times, Places and Manner Clause was so controversial, the historical record contains a massive number of references to it. For example, the transcript of the Massachusetts ratifying convention contains several days of debate on the subject.[100]

This embarrassment of riches presents a dilemma. In articles of this type, my practice has been to provide fairly exhaustive citation for every historical conclusion, so readers readily can check the sources for themselves. In the case of the Times, Places and Manner Clause, exhaustive citation is not possible—footnotes would completely overwhelm the text. Therefore, many of the footnotes below include illustrative citations only. Readers can access further examples by checking the indices of standard sources.[101]

B. The Arguments in the Ratification Debates

One of the political principles to which both Anti-Federalists and Federalists were committed was that of "sympathy" between govern-

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99 3 ELLIOT'S DEBATES, *supra* note 1, at 9 (reporting remarks by George Nicholas at the Virginia ratifying convention).

100 Debate on this and related election provisions dominated the debate from January 11, 1788 through January 17. 2 ELLIOT'S DEBATES, *supra* note 1, at 5–39.

101 *See, e.g.*, ELLIOT'S DEBATES, *supra* note 1; DOCUMENTARY HISTORY, *supra* note 1.

ment officials and governed.[102] Today we might say "empathy" rather than "sympathy," but the general idea was that there should an identity of interest and ideals between public officials and the people as a whole.[103] Favorite devices for effectuating sympathy were large legislatures with members elected from small districts and frequent—usually annual—elections.[104]

Anti-Federalists argued that the Constitution would not sufficiently assure sympathy. The Senate was to be small, indirectly elected, and installed for long terms. The President was to be indirectly elected for a four year term, without the check of an elected executive council. In such a government, the people's primary hope would lie with the House of Representatives.[105] But the House initially was to consist only of sixty-five members, and never more than one representative for every thirty thousand people. A body of such small size, the Anti-Federalists argued, easily could be "corrupted"—diverted from its duty to serve as the people's guardians, servants, agents, and trustees.[106]

Anti-Federalists did not claim that *every* session of Congress would be so corrupted. But any congressional majority could employ the Times, Places and Manner Clause to overrule state election laws so as to ensure its own perpetuity and convert the government into a here-

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102 *See generally*, Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2002–03).

103 *Id.* at 358.

104 *Id.* at 367–72.

105 4 ELLIOT'S DEBATES, *supra* note 1, at 55 (reporting remarks of Timothy (or James; which is not certain) Bloodworth in the North Carolina ratifying convention: "The House of Representatives is the only democratical branch. This clause may destroy representation entirely"); Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 240, 241 ("[I]f they will have any security at all in this government, [they] will find it in the house of representatives.").

106 A COLUMBIAN PATRIOT (Mercy Otis Warren), OBSERVATIONS ON THE CONSTITUTION (Feb. 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 272, 281 (stating that "[o]ne Representative to thirty thousand inhabitants is a very inadequate representation; and every man who is not lost to all sense of freedom to his country, must reprobate the idea of Congress altering by law, or on any pretence [sic] whatever, interfering with any regulations for the time, places, and manner of choosing our own Representatives"); *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 326 (reporting Governor Clinton, an Anti-Federalist, defending the proposed federal Senate: "It was true, he said, the representatives of the people, and the senators, might deviate from their duty, and express a will distinct from that of the people, or that of the legislatures; but any body might see that this must arise from corruption"); *cf.* 2 ELLIOT'S DEBATES, *supra* note 1, at 32 (reporting remarks by William Widgery at the Massachusetts ratifying convention on the small size of the representation).

ditary aristocracy.[107] This was exactly why, they asserted, Baron Montesquieu viewed a republic's election laws as "fundamental."[108]

In what ways could Congress manipulate the election laws to assure its own perpetuity? Some of the Anti-Federalist answers were not tenable from a fair reading of the constitutional text. Among these was the claim that the Times, Places and Manner Clause would enable Congress to extend its own terms indefinitely,[109] just as Parliament previously had extended the terms of the House of Commons from

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107 The alleged aristocratic tendencies of the Times, Places and Manner Clause—and, indeed, of the entire Constitution—were a common Anti-Federalist theme. *E.g.*, Cincinnatus, *Letter VI: To James Wilson, Esquire*, N.Y. J., Dec. 6, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 360, 363; *cf.* Centinel, *Letter VIII*, PHILA. INDEP. GAZETTEER, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 231, 232 ("[T]hat which gives Congress the absolute controul [sic] over the time and mode of its appointment and election, whereby, independent of any other means, they may establish hereditary despotism . . . ."). For more information, see the Anti-Federalist satire written by "Aristocrotis," who discussed how the Times, Places and Manner Clause could be used to create a hereditary aristocracy. ARISTOCROTIS (William Petrikin), THE GOVERNMENT OF NATURE DELINEATED; OR AN EXACT PICTURE OF THE NEW FEDERAL CONSTITUTION (1788), *cited in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 229, *reprinted in* 2 MFM. SUPP. Pa. 661.

108 THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 13, 24 (quoting Montesquieu); Federal Farmer, *Letter XII*, Jan. 12, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 310 ("It is well observed by Montesquieu, that in republican governments, the forms of elections are fundamental; and that it is an essential part of the social compact, to ascertain by whom, to whom, when, and in what manner suffrages are to be given. Wherever we find the regulation of elections have not been carefully fixed by the constitution, or the principles of them, we constantly see the legislatures new modifying its own form, and changing the spirit of the government to answer partial purposes."); *see also Address of the Minority of the Md. Convention*, ANNAPOLIS GAZETTE, May 1, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 242, 246 ("The second objection respecting the power of congress to alter elections, they thought indispensable. Montesquieu says, that the rights of election should be established unalterably by fundamental laws in a free government.").

109 Agrippa, *Letter I*, MASS. GAZETTE, Nov. 23, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 303, 305 ("Should the people cry aloud the representative may avail himself of the right to alter the *time of election* and postpone it for another year."); Centinel V, PHILA. INDEP. GAZETTEER, Dec. 4, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 343, 347; Samuel, INDEP. CHRON., Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 678, 680 ("And there is nothing to hinder, but ample provision made, for Congress to make themselves perpetual. For by Art. I, Sect. 4 the Congress may at any time, make and alter the time, place and manner of choosing Representatives; and the time and manner of choosing Senators."); *see also* 4 ELLIOT'S DEBATES, *supra* note 1, at 52 (reporting remarks by Samuel Spencer at the North Carolina ratifying convention); THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *supra* note 108, at 23; 2 DOCUMENTARY HISTORY, supra note 1, at 426 (reporting remarks by Robert Whitehill at the Pennsylvania ratifying convention).

three to seven years.[110] Anti-Federalists argued that Congress could impose additional qualifications on voters and candidates for office,[111] rip the choice of Senators away from the state legislatures,[112] and eventually annihilate the states.[113] When the Federalists pointed out that such apprehensions were contradicted by the text,[114] some Anti-

110 Anti-Federalists frequently cited this precedent. *See, e.g.*, 4 ELLIOT'S DEBATES, *supra* note 1, at 61–62 (reporting remarks by David Caldwell at the North Carolina ratifying convention); Agrippa, *Letter XIII*, *supra* note 35, at 770; Centinel III, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 55, 60.

111 Cornelius, HAMPSHIRE CHRON., Dec. 18, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 410, 413 ("By this Federal Constitution, each House is to be the judge, not only of the elections, and returns, but also of the *qualifications* of its members; and that, without any other rule than such as they themselves may prescribe."). For another entrant in this Anti-Federalist parade of horribles, see Agrippa, *Letter XIII*, *supra* note 35, at 770 (By altering the time they may continue a representative during his whole life; by altering the manner, they may fill up the vacancies by their own votes without the consent of the people; and by altering the place, all the elections may be made at the seat of the federal government). *See also* 3 ELLIOT'S DEBATES, *supra* note 1, at 175–76 (reporting remarks of Patrick Henry at the Virginia ratifying convention on voter qualifications, citing precedent of ancient Rome).

112 Letter from Samuel Osgood, to Samuel Adams (Jan. 5, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 263, 265 ("How far the Word 'Manner' extends I know not—But I suppose, if Congress should determine, that the People at large, or a certain Description of them, should vote on the Senators, it would only be altering the Manner of choosing them—If this be true, Congress will have the exclusive Right of pointing out the Qualification of the Voters for Senators . . . .").

113 Luther Martin, *Genuine Information IV*, BALT. MD. GAZETTE, Jan. 8, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 296, 299 (claiming that the Times, Places and Manner Clause was designed to annihilate the state governments); 2 DOCUMENTARY HISTORY, *supra* note 1, at 397–98 (reporting remarks by Robert Whitehill at the Pennsylvania ratifying convention).

114 *E.g.*, 3 ELLIOT'S DEBATES, *supra* note 1, at 202–03 (reporting remarks of Edmund Randolph at the Virginia ratifying convention); 4 ELLIOT'S DEBATES, *supra* note 1, at 53 (reporting remarks of James Iredell at the North Carolina ratifying convention); *id.* at 60–61 (reporting remarks by William Davie at the North Carolina ratifying convention); *id.* at 63 (reporting remarks by [probably William rather than Archibald] MacLaine at the same convention); A Citizen of New Haven (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 280, 282 ("[T]he qualifications of the electors [for House of Representatives] are to remain as fixed by the constitutions and laws of the several states."); THE FEDERALIST NO. 60 (Alexander Hamilton), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 195, 199; A Freeman (Tench Coxe), *Letter II*, PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 508, 509 ("The elections of the President, Vice President, Senators and Representatives, are exclusively in the hands of the states, even as to filling vacancies. The smallest interference of Congress is not permitted, either in prescribing the qualifications of electors, or in determining what persons may or may not be elected. The clause which enables the foederal [sic] legislature to make regulations on this head, permits them only to say at what time in the two years the house of representatives shall be chosen, at what time in the six years the Senate shall be chosen, and at what time in the four years the President shall be elected; but these elections, by other provisions in the constitution, must take place every two, four and six years . . . .").

Federalists responded that the Times, Places and Manner Clause trumped the Constitution's language governing qualifications and terms because that Clause appeared later in the instrument.[115] To be sure, this reading contradicted the rules of construction in force during the Founding Era.[116] But, as one North Carolina Anti-Federalist suggested, "sophistry would enable them to reconcile them."[117] As far-fetched as these Anti-Federalist claims may have been, they were grounded in the public meaning of what it was to regulate the "manner of election."[118] One problem, however, is that they were not encompassed by the phrase the Constitution actually used: "Manner of holding Elections."[119]

Other Anti-Federalist concerns were more consistent with the text. Some of the Constitution's opponents observed that the Clause was not particularly well-drafted, leaving it open to misconstruction.[120] Federalists do not seem to have addressed that concern. Other Anti-Federalists expressed apprehension that Congress might fix the date and place of election to benefit the powerful and employ plurality-winner rules and *viva voce* voting to assure the election of favored candidates.[121]

These latter concerns were realistic in a world in which electors convened in open meetings in central locations to vote and in which

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115 *E.g.*, Consider Arms, Malachi Maynard & Samuel Field, *Dissent to the Massachusetts Convention*, NORTHAMPTON HAMPSHIRE GAZETTE, April 9 & 16, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 42, 44 ("[Y]et all this is wholly superseded by a subsequent provision, which empowers Congress at any time to enact a law, whereby such regulations may be altered, except as to the places of chusing [sic] senators.").

116 One example of such a rule is the rule of construction against surplus. *See* TIMOTHY BRANCH, PRINCIPIA LEGIS ET AEQUITATIS 134 (London 1753) (*Sic interpretandum est ut Verba accipiantur cum effectu*—that is, "One should interpret so that words are received with an effect" (translation by the author)); *see also id.* at 117 (*Verba aliquid operari debent,—debent intelligi ut aliquid operentur*—"Words should have some effect; they should be understood to have an effect (translation by the author)). Thus, Federalist Robert Steele could ask the North Carolina ratifying convention: "Is it not a maxim of universal jurisprudence, of reason and common sense, that an instrument or deed of writing shall be so construed as to give validity to all parts of it, if it can be done without involving any absurdity?" 4 ELLIOT'S DEBATES, *supra* note 1, at 71.

117 4 ELLIOT'S DEBATES, *supra* note 1, at 106 (reporting remarks of William Taylor at the North Carolina ratifying convention).

118 *See supra* Part II.

119 U.S. CONST. art. I, § 4, cl. 1.

120 *E.g.*, 4 ELLIOT'S DEBATES, *supra* note1, at 54–55 (reporting remarks of Samuel Spencer at the North Carolina ratifying convention); A FEDERAL REPUBLICAN, A REVIEW OF THE CONSTITUTION (1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 255, 262–63 (attacking the ambiguity of the Clause, and stating that it cannot be merely to provide regulations if a state refuses to do so, because if the state does not hold an election, there can be nothing to regulate).

121 *Infra* notes 123–27and accompanying text.

people living in remote areas might spend several days traveling to the designated location. If Congress were to decree that elections were to be held in the middle of winter or during harvest time, many voters would be effectively disenfranchised.[122] Moreover, there was no requirement that Representatives be elected in districts. Congress could decide that a state's entire delegation would be selected at large[123] and designate a single location for voting in each state.[124] A Congress dominated by the merchant class might select a seacoast location in each state (for example, Boston or New York City), thereby making it easy for merchants and their allies to vote and very difficult

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122 Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 240, 241 ("Congress may establish a place, or places, at either the extremes, center, or outer parts of the states; *at a time and season too, when it may be very inconvenient to attend*; and by these means destroy the rights of election" (emphasis added)).

123 2 ELLIOT'S DEBATES, *supra* note 1, at 327 (reporting remarks of Melancthon Smith at the New York ratifying convention); Federal Farmer, *Letter III*, Oct. 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 30, 31.

124 Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 105, at 240, 241–42 ("It is a good rule, in the construction of a contract, to suppose, that what may be done will be; therefore, in considering this subject, you are to suppose, that in the exercise of this government, a regulation of congress will be made, for holding an election for the whole state at Poughkeepsie, at New-York [sic], or, perhaps, at Fort-Stanwix [sic]: who will then be the actual electors for the house of representatives?"); *see also* Cumberland County Petition to the Pennsylvania Convention, Dec. 5, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 309, 311 ("Here appears to be scarcely the shadow of representation provided, because the Congress may at their pleasure, order the election for the Representatives of the State of Pennsylvania, to be held in Philadelphia, where it will be impossible for the people of the state to assemble for the purpose; and thus the citizens of Philadelphia would be represented, and scarcely any part else of the commonwealth. The MANNER and TIME may prevent three-fourths of the present electors of the state, from giving a vote as long as they live.").

As "Cato's" comment about Fort Stanwix illustrates, some Anti-Federalists suggested that elections might be held only in remote, inconvenient areas. *E.g.*, Anonymous, *Blessings of the New Government*, PHILA. INDEP. GAZETTEER, Oct 6, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 345–46 (satirically claiming, "Among the *blessings* of the new-proposed government our correspondent enumerates the following. . . . Elections for Pennsylvania held at Pittsburg, or perhaps Wyoming [Pennsylvania]"); *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 30 (reporting remarks by Charles Turner at the Massachusetts ratifying convention as saying the elections might be held at the "extremity of a state"); 4 ELLIOT'S DEBATES, *supra* note 1, at 55 (reporting remarks of Timothy (or James; which is not certain) Bloodworth in the North Carolina ratifying convention: expressing similar sentiments); Letter from Richard Henry Lee, to James Gordon, Jr. (Feb. 26, 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 210, 212 (suggesting that Virginia's elections might be held at Cape Henry).

for back-country farmers to do so.[125] Anti-Federalists alleged that this already had proved a problem in some states.[126]

The Anti-Federalist essayist calling himself "The Federal Farmer" emphasized the danger from a plurality-victor rule. In a scattered field of candidates, a relatively low percentage of the vote might amount to a plurality. A small but organized commercial or "aristocratic" faction could easily elect an unpopular candidate in a crowded field, particularly if the polls were located in a city dominated by that faction.[127] To show that this was not a chimerical fear, the Federal Farmer cited precedents.[128] Other Anti-Federalists pointed to Congress's power to mandate *viva voce* voting, thereby better enabling dominant factions to control election results.[129]

"Brutus," one of the best of the Anti-Federalist writers and a common foil for the "Publius" of the Federalist Papers,[130] summarized these concerns:

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125 *See, e.g.*, *Vox Populi*, MASS. GAZETTE, Oct. 30, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 168, 170 ("Supposing Congress should direct, that the representatives of this commonwealth should be chosen all in one town, (Boston, for instance) on the first day of March—would not that be a very injurious institution to the good people of this commonwealth?—Would not there be at least nine-tenths of the landed interest of this commonwealth entirely unrepresented? . . . . What, then, would be the case if Congress should think proper to direct, that the elections should be held at the north-west, south-west, or north-east part of the state, the last day of March? How many electors would attend the business?"); *see* Cornelius, HAMPSHIRE CHRON., Dec. 18, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 410, 413–14 (discussing the risk that mercantile interests will dominate elections located in seaport towns); *see also* 3 ELLIOT'S DEBATES, *supra* note 1, at 60 (reporting remarks by Patrick Henry at the Virginia ratifying convention expressing similar fears); AMERICAN HERALD, Jan. 14, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 709, 711 (expressing similar fears); Cato (N.Y. Gov. George Clinton), *supra* note 105, at 242 ("And would not the government by this means have it in their power to put whom they pleased in the house of representatives?").

126 Centinel I, PHILA. INDEP. GAZETTEER, Oct. 5, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 326, 334 ("[T]he inhabitants in a number of larger states, who are remote from the seat of government, are loudly complaining of the inconveniencies and disadvantages they are subjected to on this account, and that, to enjoy the comforts of local government, they are separating into smaller divisions.").

127 Federal Farmer, *supra* note 123, at 31. Lee argued that the Constitution should have required single-member districts and that Representatives reside in their districts. *Id.* at 32. His most complete treatment is in Federal Farmer, *supra* note 108, at 311–15.

128 Federal Farmer, *supra* note 108, at 314 (referring to British and American precedents).

129 Centinel III, *supra* note 110, at 59 (stating that Congress could abolish the secret ballot); *see also* Letter from William Symmes, Jr., to Peter Osgood, Jr. (Nov. 15, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 107, 110 (stating that instead of allowing Congress to prescribe the manner of holding elections, the Constitution should have specified the manner, such as the secret ballot).

130 "Brutus" may have been Judge Robert Yates, who had served as a federal convention delegate from New York, but left the convention early in dissatisfaction.

> It is clear that, under [the Times, Places and Manner Clause] the foederal [sic] legislature may institute such rules respecting elections as to lead to the choice of one description of men. The weakness of the representation [i.e., small size of the House], tends but too certainly to confer on the rich and *well-born*, all honours; but the power granted in this [section], may be so exercised, as to secure it almost beyond a possibility of controul [sic]. The proposed Congress may make the whole state one district, and direct, that the capital . . . shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend . . . They may declare that those members who have the greatest number of votes, shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order or profession, residing in populous places, by uniting their interests, might procure whom they pleased to be chosen—and by this means the representatives of the state may be elected by one tenth part of the people who actually vote.[131]

Accordingly, Anti-Federalists urged that the Constitution either be rejected, accepted after removal of the Times, Places and Manner Clause, or amended to weaken congressional control over elections.[132] If the final say over federal elections had to be lodged somewhere,

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131 Brutus, *Letter IV*, N.Y. J., Nov. 29, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 297, 301–02; *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 11 (reporting remarks by remarks of Ebenezer Peirce [sic] at the Massachusetts ratifying convention).

132 *E.g.*, Agrippa, *Letter XVI*, MASS. GAZETTE, Feb. 5, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 863, 865 (proposing that "the [C]onstitution . . . be received only upon" condition that it be amended to limit congressional power to "fining such state as shall neglect to send its representatives or senators, a sum not exceeding the expense of supporting its representatives or senators one year"); Federal Farmer, *supra* note 108, at 318 ("[A]t most, congress ought to have power to regulate elections only where a state shall neglect to make them."); Robert Whitehall, *Reporting Remarks*, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 598 (observing "that the several states shall have power to regulate the elections for Senators and Representatives, without being controlled either directly or indirectly by any interference on the part of Congress"). George Mason suggested as part of a proposed bill of rights that

> Congress shall not exercise the [Times, Places and Manner Clause], but in Cases when a State neglects or refuses to make the Regulations therein mentioned, or shall make Regulations subversive of the Rights of the People to a free and equal Representation in Congress agreeably to the Constitution, or shall be prevented from making Elections by Invasion or Rebellion; and in any of these Cases, such Powers shall be exercised by the Congress only until the Cause be removed.

Letter from George Mason to John Lamb (June 9, 1788) (enclosure), *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 40, 44. A caucus of Pennsylvania citizens proposed another amendment to similar effect. Proceedings of the Meeting at Harrisburg, Sept. 3, 1788, *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 1, at 542 ("That Congress shall not have power to make or alter regulations concerning the time, place, and manner of electing senators and representatives, except in case of neglect or refusal by the state to make regulations for the purpose; and then only for such time as such neglect or refusal shall continue."); *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 325–26 (reporting remarks of Samuel Jones at the New York ratifying convention).

they said, lodging it in the state legislatures was a less risky alternative than placing it in Congress. State legislatures were more numerous bodies, usually elected annually, and thus more likely to be in sympathy with the interests of the people.[133] In addition, state lawmakers were familiar with local conditions.[134]

Anti-Federalist arguments about the Times, Places and Manner Clause resonated even with some of those otherwise committed to the Constitution; indeed, a number of important Federalists acknowledged the force of those arguments. Noah Webster (the future lexicographer) wrote an influential pamphlet[135] praising every aspect of the Constitution, but criticizing the Times, Places and Manner Clause as unclear and potentially dangerous.[136] He argued that the Clause could be read as giving a power to Congress to make regulations "prescribed 'in each State by the Legislature thereof,'"[137] a phrase he said made no sense. He added that to the extent the Clause gave Congress power to "alter" regulations already prescribed, it "put[] the election of representatives *wholly*, and the senators *almost wholly*, in the power of Congress."[138] "I see no occasion," he wrote, "for any power in Congress to interfere with the choice of their own body . . . . [T]he clause . . . gives *needless* and *dangerous* powers . . . ."[139]

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133 Republican Federalist, *Essay VI*, MASS. CENTINEL, Feb. 2, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 843, 847; *see also* Brutus, *supra* note 131, at 302; Federal Farmer, *supra* note 108, at 317.

134 Agrippa, *supra* note 132, at 864 ("As in every extensive empire, local laws are necessary to suit the different interests, no single legislature is adequate to the business. All human capacities are limitted [sic] to a narrow space; and as no individual is capable of practising [sic] a great variety of trades no single legislature is capable of managing all the variety of national and state concerns. Even if a legislature was capable of it, the business of the judicial department must, from the same cause, be slovenly done. Hence arises the necessity of a division of the business into national and local."); *see also* Letter from William Symmes, Jr., to Peter Osgood, Jr., *supra* note 129, at 107–16 (stating that he did not think Congress would have the wisdom to make regulations within the states); *Vox Populi*, *supra* note 125, at 170 ("And it is a little remarkable, that any gentleman should suppose, that Congress could possibly be in any measure as good judges of the time, place and manner of elections as the legislatures of the several respective states.").

135 Letter from James McClurg to James Madison (Oct. 31, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 406 (implying the importance of the pamphlet).

136 A Citizen of America (Noah Webster), *An Examination into the Leading Principles of the Federal Constitution* (1787), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787–1788, at 373 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

137 *Id.* at 387. At least one Anti-Federalist repeated Webster's points about the vagueness of the Clause. Expositor, *Essay II*, N.Y. J., Apr. 28, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 823, 828–29.

138 A Citizen of America, *supra* note 136, at 387 (emphasis in original).

139 *Id.*

Webster urged that the ratifying conventions accept the rest of the Constitution but reject that provision.[140]

Webster was then a young political newcomer, but some seasoned Federalists shared his doubts as well—among them, James McClurg, who had served as a delegate to the federal convention.[141] Some Federalists suggested that the Clause be amended to scale back congressional control over federal elections.[142]

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140 *Id.*

141 Letter from James McClurg to James Madison, *supra* note 135, at 406. Another Federalist skeptic was David Ramsey, a former president of Congress and leading supporter of the Constitution in South Carolina. Letter from David Ramsey to Benjamin Rush (Nov. 10, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 83, 84; *see also* FOSTER'S MINUTES, *supra* note 1, at 44 (quoting Federalist Benjamin Bourn at the first sitting of the Rhode Island ratifying convention as conceding, "this is the most except[ion]al part of the Constitution" [meaning the most exceptionable part]); Letter from George Cabot, to Theophilus Parsons (Feb. 28, 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 248, 249 (suggesting that some uniform rules could have been put in the Constitution rather than relying wholly on the discretion of Congress and the states); Letter from John Brown Cutting, to William Short (Dec. 13, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 475, 479 (without mentioning Webster, echoing that writer's views about the Times, Places and Manner Clause); Letter from Walter Minto, to the Earl of Buchan (Oct. 28, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 505 (complaining of the same lack of clarity Webster cited; generally supporting the Constitution, but stating of the Times, Places and Manner Clause, that "[t]here are three or four things in it that I do not like. Of these there is one which *must* be thrown out"); Letter from George Lee Turberville, to James Madison (Apr. 16, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 23, 24 (Robert A. Rutland & Charles F. Hobson eds., 1977) (lavishly praising Constitution in general, but decrying the lack of clarity of Times, Places and Manner Clause); *see also Many Customers*, INDEP. GAZETTEER, Dec. 1, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 306, 307–08 (acknowledging that the Constitution has many virtues but proposing omitting the Times, Places and Manner Clause). The young John Quincy Adams also was doubtful. Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 222 ("Why must congress have the power of regulating the times, places, and manner of holding elections; or in other words, of prescribing the manner of their own appointments. This power is insidious, because it appears trivial, and yet will admit of such construction, as will render it a very dangerous instrument in the hands of such a powerful body of men."). His correspondent favored a power to regulate time in the interest of uniformity, but saw no reason for place and manner powers. Letter from William Cranch, to John Quincy Adams (Nov. 26, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 224, 225.

142 *E.g.*, Hampden, MASS. CENTINEL, Jan. 26, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 806, 808 (proposing adopting the Constitution with an amendment striking the Clause and inserting: "But if any State shall refuse to prescribe time and place for such elections, Congress shall provide therefor [sic] by laws made for that purpose"). The author added the following "Remark": "this amendment takes off the main objection made to this article, and gives Congress power to perpetuate its own existence." *Id; see also* Letter from David Ramsey to Benjamin Rush (Nov. 10, 1787), *supra* note 141, at 84 (favoring amendment to make the Times, Places and Manner Clause applicable only if states failed to make regulations).

Those defenders of the Constitution who did not share Anti-Federalist doubts argued that the inherent legislative responsibility to "Judge of the Elections, Returns, and Qualifications of its own Members"[143] included authority to ensure that elections were conducted fairly.[144] They added that the Clause would enable Congress to fix nationally-uniform election days,[145] thereby forestalling opportunities for intrigue by factions and the well-connected.[146] At least some Anti-Federalists agreed with the latter idea,[147] but pointed out that the scope of the Clause far exceeded the power to fix such a day.[148] If the latter were the Framers' goal, then why had they not merely fixed a day in the Constitution,[149] or at least granted Congress power to do so using language similar to that in the Time Clause of Article II?[150]

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143 U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members.").

144 2 ELLIOT'S DEBATES, *supra* note 1, at 537 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention); *see also id.* at 510 (reporting remarks by James Wilson at the Pennsylvania ratifying convention).

145 *E.g.*, THE FEDERALIST NO. 61 (Alexander Hamilton), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 214, 216; 2 DOCUMENTARY HISTORY, *supra* note 1, at 413 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention).

146 3 ELLIOT'S DEBATES, *supra* note 1, at 10–11 (reporting remarks by George Nicholas at the Virginia ratifying convention); *id.* at 367 (reporting remarks by James Madison in the Virginia ratifying convention); 4 ELLIOT'S DEBATES, *supra* note 1, at 105 (reporting remarks by James Iredell at the North Carolina ratifying convention); 2 DOCUMENTARY HISTORY, *supra* note 1, at 413 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention).

147 2 DOCUMENTARY HISTORY, *supra* note 1, at 510 (quoting the notes of William Findley, an Anti-Federalist leader at the Pennsylvania ratifying convention).

148 Letter from William Cranch to John Quincy Adams (Nov. 26, 1787), *supra* note 141, at 225 (favoring a power to regulate time in the interest of uniformity, but opposing place and manner powers).

149 Anonymous, *Strictures on the Proposed Constitution*, PHILA. FREEMAN'S J., Sep. 26, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 243, 245 ("The *time*, then, might as well have been fixed in Convention—not subject to *alteration* afterwards." (emphasis in original)). Hamilton responded that this "was a matter which might safely be entrusted to legislative discretion; and that if a time had been appointed, it might upon experiment have been found less convenient than some other time." THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 145, at 216; *see also* 3 ELLIOT'S DEBATES, *supra* note 1, at 367, 408 (reporting remarks of James Madison in the Virginia ratifying convention, expressing similar sentiments). Edmund Randolph's initial outline of a constitution for the Committee of Detail (before emendations by John Rutledge) had mandated a uniform day: "The elections shall be *biennially* held on the *same* day through the state(s): except in case of accidents, and where an adjournment to the succeeding day may be necessary." 2 FARRAND'S RECORDS, *supra* note 1, at 139 (reproducing records of the Committee of Detail).

150 U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing [sic] the Electors, and the Day of which they shall give their Votes; which Day shall be the same throughout the United States.").

Federalists responded in a number of ways. First, they emphasized the purely residual nature of the power to regulate the "Manner of holding" congressional elections. As Tench Coxe, perhaps the most influential Federalist essayist at the time,[151] remarked:

> Congress therefore were [sic] vested also with the power . . . of prescribing merely the circumstances under which the elections shall be *holden* [sic], not the qualifications of the electors, nor those of the elected—nor the duration of the senate—nor the duration of the representatives. These are prescribed by the constitution, *unalterably by Congress*."[152]

To Anti-Federalist suggestions that Congress might abuse its authority, the friends of the Constitution responded with scenarios of their own. The state legislatures might run amok if left in unchecked control of federal elections.[153] They might require electors to assemble in a remote location.[154] They might draw congressional districts in grossly unfair ways.[155] They might mandate *viva voce* voting.[156] They might rig the election rules so that state legislatures controlled the House of Representatives as well as the Senate.[157]

Federalists supplemented their case by adding that congressional abuse of the Times, Places and Manner Clause was unlikely because of a lack of motive,[158] because the diverse interests of states and "fac-

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151 JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978).

152 *A Pennsylvanian to the New York Convention*, PA. GAZETTE, Jun. 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1145 (italics in original).

153 *E.g.*, THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 145, at 214–15; Rufus King and Nathaniel Gorham, *Response to Elbridge Gerry's Objections* (Nov. 3, 1787), *reprinted in* FARRAND, SUPPLEMENT, *supra* note 1, at 280, 281–82; *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 27 (reporting remarks by Theophilus Parsons at the Massachusetts ratifying convention).

154 2 ELLIOT'S DEBATES, *supra* note 1, at 441 (reporting remarks by James Wilson at the Pennsylvania ratifying convention); *id.* at 303 (reporting remarks by Charles Coatsworth Pinckney during the South Carolina legislative debates preparatory to calling a state ratifying convention); FOSTER'S MINUTES, *supra* note 1, at 45 (quoting Federalist William Barton at the first sitting of the Rhode Island ratifying convention as defending the Clause as a way for Congress to prevent states from fixing an inconvenient voting place).

155 2 ELLIOT'S DEBATES, *supra* note 1, at 50–51 (reporting remarks by Rufus King at the Massachusetts ratifying convention); 3 ELLIOT'S DEBATES, *supra* note 1, at 367 (reporting remarks of James Madison in the Virginia ratifying convention).

156 2 DOCUMENTARY HISTORY, *supra* note 1, at 413 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention).

157 2 ELLIOT'S DEBATES, *supra* note 1, at 441 (reporting remarks by James Wilson at the Pennsylvania ratifying convention); *id.* at 26 (reporting remarks by Theophilus Parsons at the Massachusetts ratifying convention). This concern also had been expressed at the federal convention. 2 FARRAND'S RECORDS, *supra* note 1, at 240–41 (recording comments by James Madison and Gouverneur Morris).

158 A Citizen of New Haven (Roger Sherman), *supra* note 114, at 282 ("[W]hat motive can either [the state legislatures or Congress] have to injure the people in the exercise of that right?"); Letter from Roger Sherman to Unknown Addressee (Dec. 8, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 386, 388; *see also* THE FEDERALIST NO. 60 (Al-

tions" would prevent it from happening,[159] because such a move would ignite popular outrage,[160] and because the Senate would represent the interests of the state legislatures.[161] They also noted that Congress's power over "manner" would be no greater than that exercised by the states.[162]

None of these was the proponents' decisive argument, however. Their decisive argument was one that had first been raised at the federal convention:[163] that the Times, Places and Manner Clause was needed to enable Congress to preserve its own existence. In absence of a congressional power to regulate congressional elections, a group of states could destroy the House of Representatives by refusing to provide for those elections or by creating regulations designed to sabotage them. As a precedent, the Federalists alleged that Rhode Island had damaged the operations of the Confederation Congress by refusing to send delegates to that body.[164] The Federalists made this argument over and over, using it to sway votes in crucial states.[165]

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exander Hamilton), *supra* note 114, at 196. Hamilton and others suggested that a ruthless Congress with an army behind it would not seize power by the indirect method of rigging the election laws. *Id.* at 199; *see also* 3 ELLIOT'S DEBATES, *supra* note 1, at 10 (reporting remarks of George Nicholas at the Virginia ratifying convention).

159 4 ELLIOT'S DEBATES, *supra* note 1, at 303 (reporting remarks by Charles Coatsworth Pinckney during the South Carolina legislative debates preparatory to calling a state ratifying convention as stating, "it cannot be supposed that any state wilt consent to fix the election at inconvenient seasons and places in any other state, lest she herself should hereafter experience the same inconvenience"); THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 114, at 196; *cf.* 2 ELLIOT'S DEBATES, *supra* note 1, at 510 (reporting remarks by James Wilson at the Pennsylvania ratifying convention as stating, "the general government will be more studious of the good of the whole than a particular state will be").

160 *E.g.*, THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 114, at 196; *cf.* 3 ELLIOT'S DEBATES, *supra* note 1, at 408 (reporting remarks of James Madison at the Virginia ratifying convention); Letter from Timothy Pickering, to Charles Tillinghast (Dec. 24, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 193, 196–97 (claiming that Congress would have nothing to gain from abusive regulations, that it would cost Senate and President their seats).

161 THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 114, at 27 (reporting remarks by Theophilus Parsons at the Massachusetts ratifying convention).

162 4 ELLIOT'S DEBATES, *supra* note 1, at 61 (quoting William Davie at the North Carolina ratifying convention, "Congress has ultimately no power over elections, but what is primarily given to the state legislatures").

163 2 FARRAND'S RECORDS, *supra* note 1, at 240–41 (recording comments by Rufus King and Gouverneur Morris).

164 *E.g.*, A Friend of Society and Liberty (Tench Coxe), PA. GAZETTE, Jul. 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 280; A Landholder (Oliver Ellsworth), *Letter IV*, Nov. 26, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 231, 233–34 (citing the case of Rhode Island); *A Pennsylvanian to the New York Convention* (Tench Coxe), *supra* note 152, at 1144–45 (citing the case of Rhode Island). Anti-Federalists responded that the depiction of Rhode Island's malefactions was greatly overdrawn. *E.g.*, 2

In New York, for example, Alexander Hamilton developed the "congressional self-preservation" argument at length in Number 59 of *The Federalist.*[166] He suggested that foreign influence might induce some states to try to destroy the central government by sabotaging elections for the House of Representatives.[167] Hamilton acknowledged that a group of states also could destroy the central govern-

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ELLIOT'S DEBATES, *supra* note 1, at 23 (reporting remarks by Phanuel Bishop at the Massachusetts ratifying convention); Agrippa, *supra* note 132, at 863. *But see id.* (reporting remarks by Rufus King and Nathaniel Gorham assuring Bishop of the accuracy of the charge against Rhode Island, to Bishop's satisfaction); *id.* at 24 (reporting remarks of Caleb Strong at the Massachusetts ratifying convention).

165 *E.g.*, Cassius, *Letter VI*, MASS. GAZETTE, Dec. 17, 1788, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 423, 425–426 ("What is intended, by saying that Congress shall have power to appoint the place for electing representatives, is, only to have a check upon the legislature of any state, if they should happen to be composed of villains and knaves, as is the case in a sister state; and should take upon themselves to appoint a place for choosing delegates to send to Congress; which place might be the most inconvenient in the whole state; and for that reason be appointed by the legislature, in order to create a disgust [i.e., distaste] in the minds of the people against the federal government, if they themselves should dislike it."). Besides those mentioned in the text, additional examples of Federalist use of this argument were as follows:

Massachusetts: Rufus King and Nathaniel Gorham, *Response to Elbridge Gerry's Objections* (Nov. 3, 1787), *reprinted in* FARRAND, SUPPLEMENT, *supra* note 1, at 280, 281–82.

New York: Fabius, ALBANY FED. HERALD, Mar. 17, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 862, 863 (expressing similar sentiments); Albany Federal Committee, *An Impartial Address* (1788), *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 1, at 1388, 1391; *A Pennsylvanian to the New York Convention* (Tench Coxe), *supra* note 152, at 1145.

North Carolina: 4 ELLIOT'S DEBATES, *supra* note 1, at 53–54 (reporting remarks of James Iredell at the North Carolina ratifying convention); *id.* at 59 (reporting remarks of William Davie at the North Carolina ratifying convention).

Pennsylvania: 2 DOCUMENTARY HISTORY, *supra* note 1, at 544 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention); 2 ELLIOT'S DEBATES, *supra* note 1, at 440–41 (reporting remarks by James Wilson at the Pennsylvania ratifying convention).

Virginia: 3 ELLIOT'S DEBATES, *supra* note 1, at 9–10 (reporting remarks by George Nicholas at the Virginia ratifying convention); *id.* at 367 (reporting remarks of James Madison in the same convention).

See also Remarker, INDEP. CHRON., Jan. 17, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 734, 738 ("[T]he obstinacy of one State might lead them to refuse to elect at all. In others, perhaps, the legislature might abuse the inhabitants, by appointing a place for holding the elections, which would prevent some from attending, and burthen others with very great inconveniences."); Letter from Timothy Pickering to Charles Tillinghast (Nov. 24, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 193, 196–97 (expressing similar sentiments). A variation of this argument was that congressional power to regulate congressional elections was necessary to the independence of Congress. A Friend to Good Government, POUGHKEEPSIE COUNTRY J., Apr. 15, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 917, 918–19.

166 THE FEDERALIST NO. 59 (Alexander Hamilton), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 185, 186.

167 *Id.* at 189.

ment by refusing to elect Senators.[168] But he pointed out that destroying the government by refusing to elect Senators would be more difficult than doing so by refusing to elect members of the House: The terms of only a third of the Senators would expire at any one time, so destruction of the upper chamber would take several years. The terms of the entire House expired at once, so that body could be obliterated at once.[169]

In Maryland, convention delegate James McHenry added that the risk to the federal government might not arise from state malice: An insurrection or rebellion might prevent a state legislature from administering an election.[170] As James Iredell told the North Carolina ratifying convention, "[a]n occasion may arise when the exercise of this ultimate power in Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina, and occasionally of some other states, during the late war)."[171]

Anti-Federalists observed that the terms of the Times, Places and Manner Clause did not limit congressional power to emergency use.[172] Nevertheless, the congressional self-preservation argument seems to have convinced many. Noah Webster, for one, resorted to it

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168 The Anti-Federalist "Federal Farmer" had pointed this out. Federal Farmer, *supra* note 108, at 316 ("Should the state legislatures be disposed to be negligent, or to combine to break up congress, they have a very simple way to do it, as the constitution now stands—they have only to neglect to chuse [sic] senators."). It was conceded by former federal convention delegate William Davie at the North Carolina ratifying convention. 4 ELLIOT'S DEBATES, *supra* note 1, at 58.

169 THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 166, at 188 ("But with regard to the Fœderal [sic] House of Representatives, there is intended to be a general election of members once in two years.").

170 James McHenry, Speech Before the Maryland State House of Delegates (Nov. 29, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 279, 282 (stating that the "Convention had in Contemplation the possible events of Insurrection, Invasion, and even to provide against any disposition that might occur hereafter in any particular State to thwart the measures of the General Government").

171 4 ELLIOT'S DEBATES, *supra* note 1, at 53–54.

172 Luther Martin, Speech Before the Maryland State House of Delegates (Nov. 29, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 285, 289 (stating "if it was intended to relate to the cases of Insurrection or Invasion, why not by express words confine the power to these objects?"). Of course, the Suspension Clause had been so limited. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 23, 25 (reporting remarks of Phanuel Bishop at the Massachusetts ratifying convention); 3 ELLIOT'S DEBATES *supra* note 1, at 403 (reporting remarks of George Mason at the Virginia ratifying convention); 4 ELLIOT'S DEBATES *supra* note 1, at 56–57 (reporting remarks of William Goudy and William McDowell at the North Carolina ratifying convention).

in a tract in which he reversed his earlier opposition.[173] However, the congressional-preservation argument carried with it a corollary: If Congress's power to fix the "Manner of holding Elections" was designed principally to preserve Congress from destruction or serious prejudice, then perhaps the power should be construed as applying *only* in situations that threatened destruction or serious prejudice.

Some Anti-Federalists proposed constitutional amendments to write this corollary into the document.[174] Notable advocates of the Constitution signaled that they would be open to such amendments—among them James Iredell[175] and David Ramsey,[176] leading Federalist spokesmen in North and South Carolina, respectively. Accordingly, the ratifying conventions of Massachusetts,[177] South Carolina,[178] New Hampshire,[179] Virginia,[180] New York,[181] North Carolina,[182]

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173 America (Noah Webster), *To the Dissenting Members of the Late Convention of Pennsylvania*, N.Y. DAILY ADVERTISER, Dec. 31, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 194, 195 (stating "the time and manner of exercising that right [election] are very wisely vested in Congress, otherwise a delinquent State might embarrass the measures of the Union. The safety of the public requires that the Federal body should prevent any particular delinquency").

174 *Supra* note 132; *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 552 (reproducing an amendment proposed by the minority at the Maryland Ratifying Convention, "[t]hat the Congress shall have no power to alter or change the time, place, or manner of holding elections for senators or representatives, unless a state shall neglect to make regulations, or to execute its regulations, or shall be prevented by invasion or rebellion; in which cases only, Congress may interfere, until the cause be removed").

175 4 ELLIOT'S DEBATES, *supra* note 1, at 54 ("I should, therefore, not object to the recommendation of an amendment similar to that of other states—that this power in Congress should only be exercised when a state legislature neglected or was disabled from making the regulations required.").

176 Letter from David Ramsey to Benjamin Rush, *supra* note 141, at 84 ("If the clause which gives Congress power to interfere with the State regulations for electing members of their body was . . . altered so as to confine that power simply to the cases in which the States omitted to make any regulations on the subject I should be better pleased.").

177 2 ELLIOT'S DEBATES, *supra* note 1, at 177, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 68 (quoting Massachusetts amendments).

178 18 DOCUMENTARY HISTORY, *supra* note 1, at 71–72 ("*Whereas* it is essential to the preservation of the rights reserved to the several states, and the freedom of the people under the operations of a general government that the right of prescribing the manner, time and places of holding the elections to the federal legislature, should be for ever inseparably annexed to the sovereignty of the several states. This Convention doth declare, that the same ought to remain to all posterity a perpetual and fundamental right in the local, exclusive of the interference of the general government, except in cases where the legislatures of the states shall refuse or neglect to perform and fulfill the same, according to the tenor of the said constitution.").

179 18 DOCUMENTARY HISTORY, *supra* note 1, at 187–88 ("That Congress do not exercise the powers vested in them by the 4th section of the first article, but in cases when a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations contrary to a free and equal representation.").

and Rhode Island[183] all proposed such amendments. The Massachusetts amendment is illustrative:

> That Congress do not exercise the powers vested in them by the 4th section of the 1st article but in cases where a state shall neglect or refuse to make regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the constitution.[184]

Leading Federalists argued that, even without amendment, the Clause should be construed as limited to emergencies. Alexander Contee Hanson, a member of Congress whose pamphlet supporting the Constitution proved popular,[185] stated flatly that Congress would exercise its times, places, and manner authority only in cases of invasion, legislative neglect or obstinate refusal to pass election laws, or if a state crafted its election laws with a "sinister purpose" or to injure the general government. "It was never meant," Hanson wrote, "that congress should at any time interfere, unless on the failure of a state

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180 3 ELLIOT'S DEBATES, *supra* note 1, at 661, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 205 ("That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.").

181 The New York ratification instrument provided as follows:

> [T]hat the Congress shall not make or alter any Regulation in any State respecting the times places and manner of holding Elections for Senators or Representatives, unless the Legislature of such State shall neglect or refuse to make Laws or Regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the Premises; provided that Congress may prescribe the time for the Election of Representatives.

Ratification of the Constitution by the State of New York (July 26, 1788), *available at* http://avalon.law.yale.edu/18th_century/ratny.asp.

182 4 ELLIOT'S DEBATES, *supra* note 1, at 249 ("The Congress shall not alter, modify, or interfere in the times, places, or manner, of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled by invasion or rebellion, to prescribe the same.").

183 The Rhode Island ratification instrument provided as follows:

> Congress shall not alter, modify or interfere in the times, places or manner of holding elections for Senators and Representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion to prescribe the same; or in case when the provision made by the states, is so imperfect as that no consequent election is had, and then only until the legislature of such state, shall make provision in the premises.

Ratification of the Constitution by the State of Rhode Island (May 29, 1790), *available at* http://avalon.law.yale.edu/18th_century/ratri.asp.

184 2 ELLIOT'S DEBATES, *supra* note 1, at 177, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 68 (quoting Massachusetts amendments).

185 On March 27, 1788, Hanson wrote to Tench Coxe of "the avidity, with which I am informed my humble essay has been bought up." Letter from Alexander Contee Hanson to Tench Coxe (Mar. 27, 1788), *in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 520, 521 (internal citations omitted).

legislature, or to alter such regulations as may be obviously improper."[186]

Federalist Jasper Yeates made a similar representation to the Pennsylvania ratifying convention: "Sir, let it be remembered that this power can only operate in a case of necessity, after the factious or listless disposition of a particular state has rendered an interference essential to the salvation of the general government."[187] John Jay implied as much at the New York convention.[188]

Accordingly, the ratifying conventions of three states—New York,[189] North Carolina,[190] and Rhode Island[191]—adopted resolutions of understanding limiting the scope.

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186 Aristides (Alexander Contee Hanson), *Remarks on the Proposed Plan* (Jan. 31, 1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 522, 526.

187 2 DOCUMENTARY HISTORY, *supra* note 1, at 437 (reporting remarks by Jasper Yeates at the Pennsylvania ratifying convention).

188 2 Elliot's Debates, *supra* note 1, at 326 ("Suppose that, by design or accident, the states should neglect to appoint representatives; certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have power, by law, to support the government, and prevent the dissolution of the Union. He believed this was the design of the federal Convention.")

189 The New York ratifying convention resolved as follows:

> In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make Laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises.

Ratification of the Constitution by the State of New York (July 26, 1788), *available at* http://avalon.law.yale.edu/18th_century/ratny.asp. The New York convention added this paragraph as well:

> WE the Delegates of the People of the State of New York . . . [d]o declare and make known. . . . That nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing Laws at its discretion from time to time to divide such State into convenient Districts, and to apportion its Representatives to and amongst such Districts.

Id.; *see also* 18 DOCUMENTARY HISTORY, *supra* note 1, at 301–02.

190 4 ELLIOT'S DEBATES, *supra* note 1, at 246 ("That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe the same.").

191 The Rhode Island ratification instrument stated in part:

> We the said delegates . . . ratify . . . .[i]n full confidence nevertheless . . . [t]hat the Congress will not make or alter any regulation in this State, respecting the times, places and manner of holding elections for senators or representatives, unless the legislature of this state shall neglect, or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that n [sic] those cases, such power will only be exercised, until the legislature of this State shall make provision in the Premises.

Ratification of the Constitution by the State of Rhode Island (May 29, 1790), *available at* http://avalon.law.yale.edu/18th_century/ratri.asp.

C. Observations on the Ratification Debates: The Original Understanding

With respect to other federal powers granted in the proposed Constitution, Anti-Federalists made exaggerated claims as to the scope of federal authority.[192] But their claims about the substantive power granted by the Times, Places and Manner Clause were more limited. That is, the Anti-Federalists assumed that the Clause enabled Congress only to adopt regulations customarily associated with regulating the "manner of election"—including a few denied by the constitutional text. Anti-Federalists did not suggest that the provision would empower Congress to tax anyone, or regulate speech or the press, or adopt a comprehensive criminal code, or favor some religions over others, or control finances. All of their scenarios were based on apprehensions about how Congress might manipulate the date and place of elections, the composition of legislative districts, the form of the vote, and the rules of decision. This strongly suggests that all sides understood the Clause to authorize Congress to do nothing outside the scope of accepted "manner" regulation.

This inference is supported further by other remarks made by leading figures throughout the Founding Era. At the federal convention, James Madison characterized "times, places & manner" as "words of great latitude," but cited only examples of standard manner-of-election rules.[193] During the ratification fight, Tench Coxe cited as an example of the "Manner of holding" only the choice of *viva voce* or secret ballot voting.[194] During the first session of the First Congress, Senator William Maclay referred to the "mode" of congressional voting as *viva voce* or by ballot.[195] During the same session,

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192 For example, the Anti-Federalists portrayed the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, and the General Welfare Clause, *id.*, art. I, § 8, cl. 1, as having very great sweep. *See* Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, *in* LAWSON, ET AL., ORIGINS, *supra* note 1, at 94–96 (summarizing Anti-Federalist claims about the Necessary and Proper Clause); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 30–38 (2003) (summarizing Anti-Federalist claims about the General Welfare Clause).

193 At the federal convention, James Madison said of what became the Times, Places and Manner Clause:

> These were words of great latitude. . . . Whether the electors should vote by ballot or vivâ voce[sic], should assemble at this place or that place; should be divided into districts or all meet at one place, shd [sic] all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the [state] Legislatures.

2 FARRAND, RECORDS, *supra* note 1, at 240–41.

194 Tench Coxe, *supra* note 152, at 1145.

195 *The Diary of William Maclay and Other Notes on Senate Debates* (Kenneth R. Bowling & Helen E. Veit eds., 1988), *in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 81 (Johns Hopkins Univ. Press 1988).

Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies.[196] During the ensuing floor discussion, the only examples given of congressional power under the Clause were deciding between secret ballot and *viva voce* voting,[197] fixing polling places,[198] and legislative districting.[199]

The real Founding-Era debate over the Clause, therefore, was not about whether it gave Congress unfamiliar powers. It was over three other issues. The first was whether the Clause granted Congress some traditional "manner" powers (over terms of office and voter and candidate qualifications) actually denied by other provisions of the Constitution. The second issue was whether Congress would abuse the authority that all conceded Congress would enjoy under the Clause: Would Congress hold elections on days convenient for all? Would it choose polling places and draw legislative districts fairly? Would it replace secret ballot voting with *viva voce* voting or majority-victor rules with plurality rules?[200]

The third issue was whether the Clause granted Congress authority to act in non-emergency situations. Anti-Federalists said it did. Some Federalists thought so, some not. A limiting amendment would have resolved this question authoritatively, and several states proposed such amendments, but none was adopted.[201] Yet in several key states, ratification was secured only after Federalists represented that the Clause was limited to emergencies, and three state conventions ratified only on the explicit understanding that the Clause was so limited.[202]

While the ratifying conventions' resolutions of understanding are not absolutely binding determinants of the Clause's legal effect, those resolutions—especially when coupled with Federalist representations in key states such as Pennsylvania—are persuasive evidence of how

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196 1 ANNALS OF CONG. 768 (1789) (Joseph Gales ed., 1834).

197 *Id.* at 798 (quoting Rep. Elbridge Gerry). Another example: Richard Symmes, a young Massachusetts lawyer (and a moderate Anti-Federalist who eventually voted for the Constitution in his state's ratifying convention), thought of "manner" mostly in terms of *viva voce* or secret ballot voting. Letter from William Symmes, Jr. to Peter Osgood, Jr., *supra* note 129, at 110.

198 1 ANNALS OF CONG. 799 (1789) (Joseph Gales ed., 1834) (quoting Rep. Elbridge Gerry).

199 *Id.* at 801 (quoting Rep. Thomas Tudor Tucker).

200 *E.g.*, 4 ELLIOT'S DEBATES, *supra* note 1, at 60 (reporting remarks by William Davie at the North Carolina ratifying convention: "At present, the manner of electing is different in different states. Some elect by ballot, and others *viva voce*. It will be more convenient to have the manner uniform in all the states").

201 *Supra* notes 177–183.

202 *Supra* notes 185–88 and accompanying text.

the Clause should be construed. Indeed, the Supreme Court often considers such evidence in deciding whether to interpret a provision narrowly or broadly.[203] In the case of the Times, Places and Manner Clause, many of the leading Founders—Federalists and Anti-Federalists alike—were gravely concerned about the danger that a self-dealing Congress might abuse its "manner of election" power. In response, leading Federalists represented that the power could not be used except in cases of serious need. If not for such representations, the Constitution may never have been ratified. Of course, others may point out that the "emergency only" rule was never formally written into the Constitution, presumably because some people thought it was undesirable and others thought the ratification-era understanding made it unnecessary. Perhaps the best way to balance these concerns is not to apply a literal "emergencies only" limitation, but to construe the grant of congressional authority narrowly, so that doubts as to the scope of the power are resolved against coverage. That certainly was the least for which the skeptical ratifiers bargained.

V. CONCLUSION: IMPLICATIONS FOR MODERN "MANNER" LEGISLATION

Historical evidence does not always offer clear guidance on the constitutionality of modern legislation, but in this case, it does. The Times, Places and Manner Clause gave Congress authority to regulate the manner of election within the widely accepted meaning of that concept, excepting only the qualifications of electors and candidates, the terms of office, and the places for electing Senators. The grant of power to set "Times" enabled Congress to establish the dates and hours for federal elections. The grant of power to determine "Places" authorized Congress to fix the locations for voting for Representatives and the contours of congressional districts. The "Manner of holding" grant bestowed the residuum of manner-of-election regulation. It conferred authority over voter registration,[204] appointment

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203 Thus, the Court interprets the Equal Protection Clause of the Fourteenth Amendment more broadly in cases of race than in other sorts of cases because that Amendment's ratification history shows that its core purpose was to assure racial equality. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 695 (3d ed. 2006) (discussing justifications for strict scrutiny analysis of race classifications). Similarly, the Court has developed the "dormant commerce clause" branch of Commerce Clause interpretation because of the historical purposes behind the Commerce Clause and allied provisions. *Id.* at 421–22 (discussing the Framers' intent to "prevent state laws that interfered with interstate commerce" as justification for the dormant commerce clause).

204 *E.g.*, The Enforcement Act of 1870, ch. 114, 16 Stat. 140 (imposing penalties for obstruction of voting rights and allowing use of military force to enforce the law).

and qualifications of election administrators,[205] delineation of the form of the ballot and the method of voting,[206] notices and deadlines, rules of decision (majority or plurality), procedures for resolving contests, and punishment of crimes in election administration.[207] The "Manner of holding" grant further authorized regulation of two-tier election procedures, which surely included governance of primary as well as general elections.[208]

Authority over the normal conduct of political campaigns[209] was outside the accepted scope of "manner-of-election" regulation. As such, that authority was outside the power literally conferred by the Times, Places and Manner Clause. Congress could regulate campaigns, therefore, only if campaign regulation qualified as an incidental power under the Necessary and Proper Clause.

Then, as now, campaigns affected elections. Under the law of the time, however, for a power to qualify as incidental required more than an effect or other factual connection between the incidental and principal power. The law also required that the putative incident be less (in the language of the day) "worthy" than the principal.[210] In other words, regulation of the outside activity had to be less important—less socially or economically significant—than regulation of the principal activity. Moreover, the agent claiming a power was incidental had to demonstrate either that the lesser power was a *customary* way of carrying out the principal power or, alternatively, that inability to exercise the incidental power would result in *great prejudice* to the exercise of the principal power.[211] These requirements served the ultimate purpose of assuring that the claimed incident was within the

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205 *E.g.*, The Force Act of 1871, ch. 99, 16 Stat. 433 (banning the use of terror, force, or bribery to prevent citizens from voting).

206 *E.g.*, Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 2, 5, 36, and 42 U.S.C.) (requiring states to replace punch card and lever voting and imposing federal standards for voting systems and instructions).

207 *E.g.*, ch. 114, 16 Stat. at 433.

208 *Cf.* United States v. Classic, 313 U.S. 299, 315–21 (1941) (upholding such regulations). There is an irony here: By far the Supreme Court's most thorough analysis of the Founding-Era meaning of the Times, Places and Manner Clause is Justice McReynold's opinion in *Newberry*. Yet because the opinion did not examine contemporaneous usages of the term "manner of election," it reached the wrong conclusion (*i.e.*, holding that Congress could not regulate federal primary elections).

209 The normal conduct of political campaigns was not understood to include corrupting the election machinery by direct bribery of voters or election officials. *See supra* note 73.

210 The discussion in this part generally follows the discussion in Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, *in* LAWSON, ET AL., ORIGINS, *supra* note 1, at 52–83.

211 *Id.* at 61.

actual or presumed intent of the grantors.[212] Founding-Era lawyers sometimes summed these requirements by saying that an incident could not be a "different thing" or have a "different nature" from its principal.

Consider a hypothetical federal law altering the composition of state legislatures. Since under the unamended Constitution state legislatures elected United States Senators, this law might affect the election of Senators; indeed, it might be designed to do so. The factual connection, however, would not have rendered the power to pass such a law incidental to the express power to regulate the "Manner of holding" senatorial elections. Altering the composition of state legislatures would have been seen as a "different thing" having a "different nature" from the principal power, and thus not within the Necessary and Proper Clause.

The governance of congressional campaigns was similarly outside the scope of incidental congressional power.[213] Governance of congressional campaigns is an endeavor at least as ambitious as (as "worthy" as) regulating election mechanics: It is a more complicated enterprise, entailing the regulation of far more resources than are devoted to mere election administration. Furthermore, even if campaign governance were deemed less "worthy" than election administration, Founding-Era law would require a showing *either* of a customary connection between campaign regulation and manner-of-election regulation *or* of "great prejudice" to the former from absence of the latter. However, the eighteenth-century materials reveal no customary or legal connection between campaign rules and manner-of-election regulation. To be sure, campaign discourse was a subject of legal governance, but that governance was carried out through the wholly separate area of defamation law[214]—a subject the Federalists explicitly assured the ratifying public was reserved exclusively for state, not federal, oversight.

The absence of a customary connection thus leaves one to argue that without the power to regulate campaigns, Congress would suffer "great prejudice" in the administration of electoral mechanics. This is a difficult case to make, since unfair advertising and unrestricted

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212 *Id.* at 66, 82–83.

213 That is, other than by expulsion from Congress of the offending candidate. *See* U.S. CONST. art. I, § 5, cl. 2 (empowering each chamber of Congress to expel a member "with the Concurrence of two-thirds").

214 On the eighteenth-century law of defamation, see, for example, ANONYMOUS, A DIGEST OF THE LAW CONCERNING LIBELS (W. Owen et al. eds., 1770) and 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 490–98 (John Exshaw ed. 1781).

campaign spending do not greatly impede the conduct of such operations as erecting polling booths, maintaining voter registration lists, or counting the ballots. In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed.[215]

215 *Supra* text accompanying note 202.

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IDEAS

There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory

Such a doctrine would be antithetical to the Framers' intent, and to the text, fundamental design, and architecture of the Constitution.

By J. Michael Luttig



Erik Carter / The Atlantic

OCTOBER 3, 2022 SHARE

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The Supreme Court will decide before next summer the most important case for American democracy in the almost two and a half centuries since America's founding.

In *Moore v. Harper*, the Court will finally resolve whether there is a doctrine of constitutional interpretation known as the "independent state legislature." If the Court concludes that there is such a doctrine, it would confer on state

legislatures plenary, exclusive, and judicially unreviewable power both to redraw congressional districts for federal elections and to appoint state electors who quadrennially cast the votes for president and vice president on behalf of the voters of the states. It would mean that the partisan gerrymandering of congressional districts by state legislatures would not be reviewable by the state courts—including the states' highest court—under their state constitutions.

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Such a doctrine would be antithetical to the Framers' intent, and to the text, fundamental design, and architecture of the Constitution.

The independent-state-legislature theory gained traction as the centerpiece of President Donald Trump's effort to overturn the 2020 presidential election. In the Supreme Court, allies of the former president argued that the theory, as applied to the electors clause, enabled the state legislatures to appoint electors who would cast their votes for the former president, even though the lawfully certified electors were bound by state law to cast their votes for Joe Biden because he won the popular vote in those states. The Supreme Court declined to decide the question in December 2020. The former president and his allies continued thereafter to urge the state legislatures, and even self-appointed Trump supporters, to transmit to Congress alternative, uncertified electoral slates to be counted by Congress on January 6.

That as many as six justices on the Supreme Court have flirted with the

independent-state-legislature theory over the past 20 years is baffling. There is literally no support in the Constitution, the pre-ratification debates, or the history from the time of our nation's founding or the Constitution's framing for a theory of an independent state legislature that would foreclose state judicial review of state legislatures' redistricting decisions. Indeed, there is overwhelming evidence that the Constitution contemplates and provides for such judicial review.

To the extent that advocates of the independent-state-legislature theory have any evidence at all to support the theory, it is exceedingly thin. Their textual argument is that the total disempowerment of state courts necessarily follows from the fact that the elections clause empowers the state legislatures to prescribe the "manner" of holding congressional elections.

But there is neither more nor less significance to the fact that the Constitution assigns this quintessential legislative power to the state legislatures than that the Constitution assigns federal lawmaking to Congress, rather than to the executive or the judiciary. And yet, the Constitution provides for judicial review of the actions of both.

Adam Serwer: Is democracy constitutional?

Proponents of the independent-state-legislature theory argue that, because the elections clause does not assign this legislative role to the state governors and courts, the burden is on those who argue against the theory to come forward with compelling evidence that the Framers intended state courts to review state-legislative election laws. But that's to reverse the burden of proof. Because there is no evident support at all for the theory, the burden instead is on those who argue for the theory to come forward with compelling evidence

from the text, structure, or design of the Constitution, or from the history at the time of the framing or founding, that confirms that the Constitution conferred on the state legislatures judicially unreviewable authority to redraw congressional districts. The proponents of the theory have not carried this heavy burden to date, and they cannot possibly carry this burden in *Moore v. Harper*.

Not only does the Framers' assignment of the power to prescribe the manner for holding congressional elections to the state legislatures not prove the theory and end the inquiry, as its proponents contend, that assignment is actually the beginning of the proof that the Constitution does not foreclose state judicial review of those decisions. For, where the proponents identify literally no evidence at all that the Framers intended to foreclose state judicial review, there is actually overwhelming evidence in the text and structure of the Constitution, and in the pre- and post-ratification history, that the Framers understood and assumed that there would be judicial review of the legislatures' redistricting decisions. This is as would be expected, given the Framers' obvious acceptance and accommodation of the sacred judicial role in the states' governments—which not incidentally enjoyed the same sanctity in the new national government—as well as their deep suspicions of the natural partisan tendencies of the state legislatures.

The Constitution is a grand compact born of a compromise between the states and the new national government. It created and empowered that new national government out of the whole of the power of the United States, which before ratification was possessed entirely by the American colonies and the states. That new national government comprised three separated governmental authorities—the legislature, executive, and judiciary—each checked by the others according to its respective constitutionally assigned role, just as the states had and would

establish for themselves post-ratification. The Constitution preserves and accommodates the previously existing power of the states that they did not surrender to the national government in order to create the union, as well as their governments and governance by separated powers. This accommodation and preservation was made explicit in the Tenth Amendment—that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"—and also in the Constitution's "guarantee to every State in this Union a Republican Form of Government" in Article IV, Section 4.

Because the Constitution preserved the states' reserved powers and accommodated their state governments of separated powers through which those reserved powers are exercised, it would have been a constitutionally radical idea for the Framers to have considered foreclosing state judicial review of the state legislatures' redistricting decisions. There is every reason to believe that the states would not have agreed to a constitution that denied their highest courts that judicial review. But in all events, such an idea would not have been blithely and, at very best, silently implied in the Constitution's text and nowhere else even mentioned. Had the Framers intended to foreclose state judicial review and done so, there would be substantial historical evidence from the time of the framing that they intended such, and unmistakable language in the Constitution that they did so. There is neither.

Much to the contrary, abundant evidence confirms that there is no such doctrine as the "independent state legislature" in the Constitution's animating understanding of the allocated powers between the new national government and the states; in the history and practice of state judicial review of all legislative enactments and actions—including state and federal election-related enactments—before and after the time of the nation's founding and

the Constitution's framing; and in the guarantee and supremacy clauses. In the complete absence of evidence that there is such a theory, this unmistakable evidence that there is not such a theory confirms the intuitive constitutional sense of the matter that such a doctrine is antithetical to the Framers' intent and the fundamental design and architecture of the Constitution.

Specific to the historical record of state judicial review, the Framers wrote the elections clause against the backdrop that most state constitutions at the time constrained their respective legislatures when they regulated both state and federal elections. And immediately following the federal Constitution's ratification, state constitutions continued to constrain the power of state legislatures in their prescription of the manner for holding elections. From 1789 to 1810, 13 state constitutions were enacted or amended, and all but two of these regulated congressional elections. And from 1789 to 1821, 23 state constitutions were enacted, amended, or both, and 17 of these regulated congressional elections. Many of the Founders of the country and the Framers of the Constitution were authors of these state constitutions.

Thomas Wolf and Ethan Herenstein: The case that could blow up American election law

Because of the indisputable absence of any evidence that the Constitution forecloses state judicial review of the state legislatures' redistricting decisions under the state constitutions, the best, if not compelled, understanding of the elections clause is that, where Congress has not chosen under Article I, Section 4, to "make or alter" the particular "manner" for holding the federal election at issue, the Constitution does not in any way limit the state supreme courts' review of redistricting decisions. The Constitution's empowerment of Congress to prescribe the manner for holding congressional elections when it chooses does not confirm that there is no state judicial review of the state

legislatures' decisions because there is a congressional check on the legislatures, as proponents of the independent-state-legislature theory contend. Rather, this empowerment of Congress confirms that there is state judicial review and that the federal check on the power of the states over congressional elections is not Congress's power, but instead the federal judiciary's power to review the decisions of the state supreme courts under the United States Constitution. That is, the federal interest in the holding of these elections is protected not by usurping the states' judicial power to review their legislatures' enactments under their own state constitutions, but by federal judicial review of the state supreme courts' decisions under the U.S. Constitution.

In an attempt to establish that the state courts have no authority to review the legislatures' decisions under the elections clause, proponents of the independent-state-legislature theory go to extraordinary lengths to argue that the state legislatures have not delegated their legislative power to the state courts and are constitutionally prohibited by the elections clause from doing so. This, and their textual argument for judicially unreviewable legislative redistricting, are the fatal flaws in their argument. When the state courts review the decisions of their state legislatures under their state constitutions, they are not exercising federal power delegated to them by the state legislatures; they are exercising the judicial power of the states, which was reserved to the states by the federal Constitution and accorded the state supreme courts by their state constitutions. The state courts do not exercise delegated federal power from the state legislatures even when they review state legislative enactments for consistency with the federal Constitution. In the former instance, they exercise judicial power conferred on them directly by the state constitutions, and in the latter instance, they exercise judicial power under the supremacy clause to enforce the federal Constitution. It is simply constitutional non sequitur to conclude from the fact that the legislatures exercise federal power when they redistrict that the elections clause forbids state judicial review.

This is why, as in *Moore v. Harper*, where the state legislature itself has legislated a comprehensive scheme for state judicial statutory and constitutional review of the legislature's redistricting decisions, and the state courts have reviewed the legislature's decisions pursuant to that scheme, there is neither authority, justification, nor warrant for commandeering the state's constitution and judicial processes. The state supreme court's decision under the North Carolina constitution is conclusive under that constitution, and it is only reviewable by the federal courts and the Supreme Court of the United States thereafter for a determination of whether that decision violates the federal Constitution.

If there were authority in the Constitution to limit the state supreme courts in their exercise of the states' judicial power, that authority would be found in the elections clause, because when the state legislatures prescribe the manner for holding federal elections, they do exercise federal constitutional power granted to them in that clause. But if the Supreme Court were to interpret the elections clause to permit some circumscription of the state supreme courts' review of their legislatures' redistricting decisions, that circumscription would necessarily be exceedingly limited, restricted first by the Tenth Amendment and restricted even further by the palpable lack of any discernible constitutional guidance for even a minimal incursion on the states courts' constitutionally mandated judicial review.

That circumscription could be no greater than that necessary to protect the federal interest in the state legislatures' prescription of the manner of holding congressional elections where Congress has chosen not to dictate the manner of holding those elections. In that circumstance, the federal interest is protected not by commandeering the states' constitutions and judicial processes, but rather by the U.S. Supreme Court's review of the state supreme courts' decisions under the federal Constitution. For the Supreme Court of the United States to commandeer and command the state courts to any greater extent—by, for example, attempting to restrain and confine the state

supreme courts to some preconception of their proper roles under the state constitutions, as if they were federal courts interpreting the federal Constitution—would represent a manifestly unconstitutional federal co-opting of the most sacred power reserved to the states: judicial review of their legislatures' laws under their state constitutions.

With all the means and judicial resources available to it, the Supreme Court itself is all but powerless to prevent judicial "legislating" by the federal courts. Given that commandeering the state constitutions and judicial processes would be required but is impermissible under the Tenth Amendment, there would be exponentially fewer means, if any, available for the Supreme Court to prevent the state supreme courts from "legislating" from the bench.

The only federal interest to be protected by constraining the state supreme courts in their interpretations of their state constitutions is in ensuring that the legislatures, as the states' lawmakers, prescribe the laws governing congressional elections. There is no federal interest in having the legislatures prescribe the rules without state judicial review. The only way for the Supreme Court to protect this federal interest is to attempt to prevent the state supreme courts from "legislating," as opposed to interpreting and applying, their constitution. But for all purposes under the federal Constitution (and under the state constitutions as well), when a court—federal or state—renders a decision, it is always interpreting the law. It is never legislating the law. The Supreme Court might reverse a lower or higher federal court or a state supreme court, and a federal court might reverse a state supreme court from time to time. But those reversals are never for legislating from the bench. By definition of the judicial function, such reversals are necessarily for misinterpreting the law, not for legislating the law.

As the law has become more politicized, critics of judicial opinions, including courts and judges themselves, have accused courts of legislating, rather than interpreting, the laws, as proponents of the independent state legislature accuse the North Carolina Supreme Court of doing in *Moore v. Harper*. This accusation has taken on meaning and has been a powerful rhetorical sword in the effort to limit courts to their proper role as interpreters, not makers, of the law. But this accusation of judicial legislating is only a figure of speech that has been used to powerful rhetorical effect. It is not a statement of fact as to what courts do, because it is literally not possible for courts to legislate. If courts misinterpret the law, they are simply misinterpreting the law; they are not legislating. It is for this reason that the North Carolina Supreme Court did not usurp the role of the legislatures by legislating the state's congressional districts, contrary to what the theory's advocates maintain.

James Piltch: North Carolina is a warning

Because one judge's—or, for that matter, one justice's—legislating is another's interpretation, were the Supreme Court to attempt to constrain the state supreme courts in their interpretation of their constitutions, it would be required to identify a different ground than judicial "legislating." But the fact is that there is no constitutionally legitimate ground upon which the Court could say that the state supreme courts exceed their authority in interpreting their own state constitutions. There is, therefore, no limitation the Court could legitimately impose on the state supreme courts to constrain their interpretation of those constitutions. Indeed, the attempt to do so would be an exercise in federal judicial "legislating" no different from the state judicial "legislating" that the Court would be attempting to prevent.

It would be impossible for the Court even to identify and articulate a standard

that would distinguish state supreme court interpretation from legislation under the guise of interpretation. Even if it could articulate such a standard in the abstract, it would be folly for the Court to attempt to fashion standards that would confine the state courts to their interpretive roles, if for no other reason than that those roles, and the interpretive methodologies and sources that the supreme courts use in interpreting their constitutions, vary from state to state depending on the state constitution and its respective interpretive histories. The 50 state constitutions, and therefore the constitutional provisions that might apply to the state legislatures' redistricting decisions, vary widely in substance and language across the states as well. And finally, the state constitutional provisions that could apply to the state legislatures' congressional-redistricting decisions are in many cases no less capacious and indeterminate than the provisions of the U.S. Constitution that would apply were Congress to prescribe the rules for holding congressional elections and the Supreme Court to review those laws under the U.S. Constitution.

The Supreme Court does not agree on the nature, scope, and standards governing its own review of Congress's enactments under the U.S. Constitution. Every day the Court sits, its members employ different and shifting outcome-determinative interpretive methodologies and consult different sources when interpreting and applying the U.S. Constitution. There is no reason to believe that there would or should be any agreement among the justices as to how to fashion federal constitutional constraints on the state supreme courts' review of their legislatures' laws under their own respective state constitution. But there is every reason that they should never try.

All of which goes to confirm that the Constitution neither contemplates nor permits federal constitutional commandeering of the states' constitutions and their judicial processes. Rather, it contemplates and provides only for federal judicial review of the state supreme courts' state constitutional decisions by the U.S. Supreme Court for consistency with the United States Constitution.

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The Independent State Legislature Theory Should Horrify Supreme Cou

Supreme Court grants cert in Moore v. Harper, taking on the question of state legislatures' power over federal

by Helen White
June 30, 2022

This morning, the Supreme Court decided to hear *Moore v. Harper*, a challenge to the congressional maps in North Carolina that has the p years of election law. In *Moore*, members of the state legislature are urging the Supreme Court to reinstate the map they drew – and that down as unconstitutional and redrew – using what is known as the "independent state legislature" theory (or ISL). That theory claims tha gives state legislatures the power to regulate federal elections without checks from other state officials or constraints from the state's cor concerns congressional redistricting, the ISL theory reaches far further and would have sweeping and dangerous implications for most as

In 2020, Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and, at times, Brett Kavanaugh all indicated that they would have adopted consequences on the emergency docket. These justices are all part of the Court's "originalist" faction. Originalists, like these four justice Barrett, contend that constitutional provisions mean what they meant to the public that adopted them. As Justice Barrett has explained, people understood words to mean at the time that the law was enacted because those people had the authority to make law."

Since 2020, however, new historical research has emerged that puts the ISL theory at odds with the original public meaning of the Consti be on Justice Barrett, who has not yet opined on the theory, *Moore* also offers the rare opportunity for Justices Thomas, Alito, Gorsuch, an principled nature of their commitment to originalism by updating their views in light of new Founding-era historical analysis.

Defining the Independent State Legislature Theory

The ISL theory is really multiple overlapping theories that fall within the broad name. The crux of any version of the theory is that the fe of state "legislatures" in the Elections and Electors Clauses should be understood as a grant of sole authority to state legislatures in setti and presidential elections, respectively. In some versions, that means a state legislature's regulation of federal elections could not be stru state constitutional grounds – the exact scenario at issue in *Moore*. The *Moore* petitioners go further and claim that, under the theory, a s delegate power to other state actors, like courts or election officials, to implement state election law where the legislature fails to addres

Under some other versions of the theory not at issue in *Moore*, governors could not veto state laws concerning federal elections, nor coul change the rules for federal elections. Proponents of this version of the theory read the reference to "legislature" to mean only state asse (sometimes called "institutional" or "formal" legislatures) and not the broader legislative processes, such as gubernatorial veto or citizen state. And, while the Supreme Court has never adopted the theory, in *Bush v. Gore*, Chief Justice William Rehnquist, joined by Justices Ant Thomas, advanced a version of the theory that would allow federal courts to step in and block state court interpretations of state law whe those interpretations to diverge too much from the plain text.

Any or all of these versions of the ISL theory promise to be hugely disruptive to federal elections. Laws struck down under state constitut initiative could be revived for federal elections, resulting in the disenfranchisement of countless voters. And, because ISL would not have governing *state* elections, administrators and voters would need to comply with two different and potentially conflicting sets of rules for simultaneously. That chaos, in turn, may make it easier to gin up false claims of election fraud and so make it easier for politicians to mes wrongfully refuse to certify election results.

It is worth a quick pause, however, to clarify what the independent state legislature theory *is not*. Through the January 6th Committee he about Trump's effort in 2020 to have state legislatures overturn the will of their voters and appoint their own preferred slate of electors. underpinning that effort claimed that state legislators had a gobsmacking amount of power, the independent state legislature theory – ev form – would *not* give state legislatures the right to veto their voters' choices. That is because, under the ISL theory in all of its forms, sta comply with federal law, including the many federal and constitutional provisions that set the framework for federal elections, guarantee arbitrariness and discrimination in the counting of ballots.

Debunking the Independent State Legislature Theory

On, then, to the merits of the theory and, in particular, the Constitution's text. The proponents of the theory rest their argument primaril Elections and Electors Clauses of the Constitution refer to "legislatures" as opposed to "states" as the entities that regulate federal electi according to the theory's proponents, therefore means that *only* the legislature, and not other state-level actors, is empowered to regulat singling out of a single word without looking to the broader context of the constitution or the historical context of its enactment is exact [that] strips language of its context" that Justice Barrett decried as an academic. A contextual reading of these clauses plainly rebuts the I

Start with "legislature." At a basic definitional level, the term "legislature" requires reference to the state constitution that creates it. Is t unicameral? How many people, with what qualifications sit in it? Answering those basic questions requires incorporating state constituti state's legislature. The theory's proponents thus are asking the Court's textualists to read the word "legislature" to mean "as defined by s constitution's provisions." Moreover, the Framers generally said so when they wanted to give a branch unreviewable power. *See, e.g.*, Art. Representatives shall choose their speaker and other officers; and shall have the *sole* power of impeachment." (emphasis added)). Adoptir the text where the framers kept it out.

That implausible reading is all the more improbable when considered in light of the Founding-era historical context. As Vikram Amar an 2022 article, at the Founding, "the public meaning of state 'legislature' was clear and well accepted . . . : A state 'legislature' was . . . an en *by* its state constitution." Unsurprisingly, then, as Hayward Smith explains in his own 2022 article, in the decade after ratification of the f state except South Carolina to have had a constitutional convention adopted state constitutional provisions regulating federal elections. if the Founding-era generation understood the federal Constitution to bar state constitutions from doing so. And more recent historical Eliza Sweren-Becker and Michael Waldman, explains why state constitutional constraints on state legislatures regulating federal were so founding generation were concerned that self-interested partisans would "twist[] election rules to benefit their faction." Were there any practice, Michael Weingartner's 2021 piece shows that, since the Founding, across the country, "state constitutions have regulated both t of federal elections" and "state courts [have] consistently reviewed laws regulating federal elections."

And the Supreme Court has repeatedly rejected the ISL theory when upholding this kind of state regulation. Over a century ago, in *Ohio e* Supreme Court held that the Elections Clause's reference to "Legislature" is to "the legislative power" of a state, which contains "the stat too, in *Smiley v. Holm*, where the Supreme Court held that legislative action under the Elections Clause must be made "in accordance with has prescribed for legislative enactments," including the state's constitution. As recently as 2015, in *Arizona State Legislature v. Arizona In Commission*, the Supreme Court rejected ISL by upholding the use of independent redistricting commissions – bodies that are decidedly r federal congressional elections. And, in 2019, in *Rucho v. Common Cause*, all nine justices agreed that state constitutions could be used as gerrymandering in congressional elections. Adopting the ISL theory is thus at odds with more than a hundred years of Supreme Court pre whole bodies of law written by state legislatures and reviewed by state courts relying on that precedent.

The momentum to adopt ISL – and upend this unbroken line of precedent and related state practice – began building in 2020, when Justi and, at times, Kavanaugh all signaled a desire to do so in various cases concerning the 2020 election. But new arguments and scholarship doing so would be inconsistent with the original meaning of the Constitution. And that should doom the theory. As Justice Barrett explai hearings, as an originalist, she views the Constitution's meaning as fixed at the time of ratification. It "doesn't change over time and it's n infuse my own policy views into it." Through that lens, the modern effort to inject ISL theory into constitutional doctrine should horrify Court's other originalists. All eyes will be on the Court to see whether she and the other conservative justices now live up to the principle professed.

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Symposium

The Law of Presidential Elections: Issues in the Wake of Florida 2000
Hayward H. Smith[a1]

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But it is said, the constitution has fixed this matter, because it says that the senators shall be chosen by the *legislature*—When men get attached to a party, or to a sentiment, trifles light as air will have weight to support them in their opinions—Were it not for ***732** this, I can hardly imagine any sensible man would lay much stuff upon this argument. [1]

I. INTRODUCTION

In *Bush v. Palm Beach County Canvassing Board*[2] (*Bush I*), the Supreme Court suggested that when state legislatures direct the manner of appointing presidential electors under Article II, Section 1,[3] they must remain free from state constitutional limitations.[4] In *Bush v. Gore*[5] (*Bush II*), three Justices argued that Article II legislatures must remain free from obviously incorrect state court statutory interpretation.[6] Since then, several defenders of the Court's Election 2000 decisions have embraced this idea that Article II grants to state legislatures a degree of independence that they do not otherwise enjoy.[7] This Comment investigates whether there is any historical basis for such an Article II "independent state legislature" doctrine, a task entirely neglected by the Court in *Bush I*, the concurrence in *Bush II*, and all but one of the commentators.[8] It concludes ***733** that the founding generation's original understanding of Article II did not include special solicitude toward state legislatures. Moreover, the doctrine's actual origins in the Civil War Era and its subsequent history reveal that it has never been anything but a trifle which politicians and courts call upon to lend legal weight to sentiments otherwise unrecognized by the law.

A. Bush I, Bush II, *and the Article II Independent Legislature Doctrine*

A dispute arose in the presidential election of 2000 over which candidate, George W. Bush or Al Gore, received more votes in the state of Florida. The winner of the state's electoral votes would become the next President. On November 21, 2000, the Florida Supreme Court determined that the "protest" provisions of Florida election law required state election officials to include in their official vote total the results of manual recounts requested by Gore in four Florida counties.[9] The Florida court construed the election law in light of suffrage principles embodied in the Florida Constitution.[10]

In *Bush I*,[11] the United States Supreme Court vacated the Florida Supreme Court's judgment.[12] Although in normal cases the Court defers to state court interpretations of state statutes, in this case it did not. The Court explained that when the Florida Legislature enacted the law governing the selection of presidential electors it was "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under [Article II, Section 1, Clause 2] of the United States Constitution."[13] That clause ***734** provides that "[e]ach state shall appoint, in such Manner as the *Legislature* thereof may direct, [presidential electors]."[14] The Elector Appointment Clause, according to the Court, embodies a federal constitutional limitation on the extent to which a state constitution can "'circumscribe"' its legislature's power to direct the manner of appointing electors.[15] Because there were "expressions" in the Florida Supreme Court opinion[16] that could be read to indicate that it interpreted the election law "without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power,"' the Court vacated and remanded the case, asking the Florida court to clarify the extent to which it saw the Florida Constitution as limiting the legislature's authority.[17]

The Supreme Court thus sketched a rough outline of an Article II "independent legislature" doctrine.[18] Under this doctrine, a state legislature directing the manner of appointing electors pursuant to Article II operates with independence from its own state constitution. The question left open by *Bush I*, however, is *how much* independence an Article II legislature has from its constitution.[19] The Court's opinion, which implies that even constitutional suffrage guarantees impose improper restraints on the legislative prerogative, suggests a strong form of the doctrine in which the legislature must remain completely unconstrained by its constitution.[20]

Alternatively, the doctrine could manifest itself in a weak form that would permit state constitutions to place minimal restrictions on the manner of elector appointment. Under this version of the doctrine, for instance, it would be permissible for a state constitution to impose suffrage requirements on the popular election of electors, so long as popular election is the mode of appointment chosen by the ***735** state legislature. Thus, the Florida Supreme Court's interposition of the Florida Constitution in *Bush I* would be appropriate, as would constitutionally mandated procedures for resolving contested elections.[21] Yet, a more intrusive constitutional command— one, for instance, which would require the legislature to appoint electors via a winner-take-all popular election—would too tightly circumscribe the legislature's authority.

A third possibility would be to deny the existence of any meaningful Article II independent legislature doctrine. On this view, a state constitution could require its legislature to direct appointment of electors by the mode of direct popular vote.[22] Article II would prohibit only those restraints which are completely incompatible with its text. A state constitution which placed the power to appoint electors in the hands of the governor, for instance, would be plainly inconsistent with Article II and thus unconstitutional.

In Election 2000, however, the Supreme Court did not decide the extent to which a state constitution can circumscribe a legislature's Article II powers. The Florida Supreme Court reissued its judgment in the *Bush I* case after expunging all references to the state constitution from its opinion.[23] More importantly, the Florida Supreme Court's intervening decision in the case that became *Bush II* made the ultimate resolution of *Bush I* virtually irrelevant.[24] In that case, Gore, pursuant to the "contest" provisions of Florida election law, challenged the state's certification of Bush as the winner of the state's electoral votes. On December 8, the Florida Supreme Court agreed with Gore that uncounted legal votes existed which "place [d] the results of [the] election in doubt," ordered a manual recount of "undervotes" in Miami-Dade County, and authorized the lower court in the case to order all Florida counties to conduct similar recounts.[25] ***736** Unlike in *Bush I*, however, the Florida court left out any reference to the state constitution in its construction of the legislature's "contest" scheme.[26] The Florida court's judgment in *Bush II*, therefore, appeared to be impervious to the independent legislature doctrine as described by the Supreme Court in *Bush I*.

Indeed, the Supreme Court did not decide *Bush II* on the basis of Article II. On December 9, a sharply divided Court stayed the recounts ordered by the Florida Supreme Court.[27] Three days later, on December 12, a majority of five Justices held that the recounts would violate the Fourteenth Amendment's Equal Protection Clause and that because the Florida Legislature had intended to obtain the benefits of a federal safe harbor provision[28] requiring selection of electors to be completed by December 12, there was no time to conduct constitutionally adequate recounts without violating Florida election law.[29]

Yet, three of the majority still held the belief that Article II provided a basis for reversing the Florida Supreme Court, even though the Florida court had not relied on the Florida Constitution at all in its interpretation of the Florida law.[30] Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, in a concurrence penned by the Chief Justice, argued that under Article II, any "significant departure" by a state court from the legislature's elector appointment scheme "presents a federal constitutional question."[31] This super-strong independent legislature doctrine, Chief Justice Rehnquist claimed, was based on "a respect for the constitutionally prescribed role of state *legislatures*."[32] Because the concurring Justices considered the remedy ordered by the Florida Supreme Court to be a "significant departure" from the statutory framework in existence at the time of the election, they felt that the remedy "infringed upon the legislature's [Article II] authority."[33]

***737** *B. The Lack of Modern Authority in Support of the Doctrine*

The history of the Article II independent legislature doctrine deserves detailed study because the *Bush* opinions conspicuously fail to offer any compelling textual, doctrinal, or policy rationale for its existence. Even with selective italicization of the word "legislature," the doctrine does not arise ineluctably from the text of the Constitution.[34] As for Supreme Court precedent, the Court itself admitted in *Bush I* that the leading case on the meaning of the Elector Appointment Clause, *McPherson v. Blacker*,[35] does not address the independence of state legislatures.[36] With respect to intertextual analysis,[37] the Court in *Smiley v. Holm*[38] explicitly rejected the argument that state legislatures ***738** under Article I, Section 4[39] act independently of their constitutions when they prescribe the times, places, and manner of holding elections for Senators and Representatives.[40] And while in *Hawke v. Smith*[41] the Court held that state legislatures *do* enjoy independence when they decide whether to ratify a constitutional amendment under Article V,[42] it was careful to explain that such "expression of assent or dissent" was "entirely different" than the authority "plainly give[n] ... to the state to legislate [with respect to the manner of holding elections]."[43]

In light of the indeterminacy of the constitutional text and the absence of any compelling precedent in support of the doctrine, one might have expected the Court to enunciate some policy or structural reason why it is essential to protect Article II legislatures from their own constitutions or courts. The question is easy to formulate: what special competence do state legislatures have with respect to elector appointment which suggests that they should be independent with ***739** respect to that function?[44]

The Court's opinion in *Bush I*, however, makes no attempt to answer this question.[45] And while the concurrence in *Bush II* emphasizes that "state-imposed restrictions [in a presidential election] implicate a uniquely important national interest," it never explains exactly what that interest is or how the independent legislature doctrine would further it.[46] Sympathetic commentators have attempted to fill the void left by the Court, but their arguments ring hollow.[47]

740** ***C. A Caveat With Respect to the Super-Strong (Bush II) Version of the Doctrine

In evaluating the historical pedigree of the Article II independent legislature doctrine (in both its strong and super-strong forms), I assume that in order for the doctrine to be sustainable as constitutional principle, it must have arisen—either at the Founding or subsequently—from some confidence in the special competence of state legislatures to direct the manner of elector appointment. But because I search history for signs of *confidence* in the functioning of Article II *legislatures*, my analysis may not fully extend to the more negative aspects of the super-strong version of the doctrine. While the concurring Justices insisted that they were grounding their argument in a structural "respect for ... state *legislatures*" rather than a "disrespect for state *courts*,"[48] their underlying concern with abuses by the Florida court is readily apparent.[49] Similarly, academics who have embraced the Article II rationale seem more disturbed by the Florida court's rulings than enamored with the competence of state legislatures.[50]

As Professor Richard H. Pildes explains in this symposium, however, federal courts have traditionally dealt with "runaway" state courts in the context of disputed elections under the guise of the Due Process and Equal Protection Clauses.[51] In reversing novel state court interpretations of state election laws in order to avoid "patent and fundamental unfairness," these federal courts have required a ***741** much stronger showing of ex post facto creation of "new law" than that required, in the name of Article II, by the *Bush II* concurrence.[52] Thus, even as a manifestation of *dis*respect for state courts, the super-strong version of the independent legislature doctrine must depend on some positive characteristic of Article II legislatures which would, in Professor Pildes' words, "justify a greater federal court willingness to find 'new law' [under Article II] than do the general provisions of the Fourteenth Amendment."[53]

D. Summary of Historical Findings

Part II pursues an originalist inquiry into how the founding generation of Americans understood the language of Article II's Elector Appointment Clause. An originalist inquiry into the independent legislature doctrine seems especially appropriate because Justices Scalia and Thomas, two of the Justices who seemed most committed to the doctrine in *Bush I* and *Bush II*, are outspoken proponents of a jurisprudence of original intent.[54]

Part II finds that in designing the Electoral College at Philadelphia, the Framers of the Constitution did not explicitly state whether they understood legislatures to act independently under the Elector Appointment Clause. Nor did the Ratifiers so explicitly state when they debated the merits of Article II in the ratifying conventions. This does not mean, however, that there is "no relevant legislative history."[55] An inferential analysis of the reasoning and compromises underlying the crafting of the Elector Appointment Clause, whose language echoes that contained in a key provision of the Articles of Confederation,[56] counsels against the assumption that the Founders understood it to create independent legislatures. Moreover, the manner in which the state legislatures exercised their federal constitutional powers in the first federal elections of 1788 indicates that the founding generation did not believe that Article II announced the independence of state legislatures.

Part III examines the *post*-Founding history of the independent legislature doctrine. Contrary to the impression left by the Court's ***742** opinions[57] and contrary to the belief of at least one prominent commentator,[58] the *Bush* cases were not the first time that a court has passed on the independence of Article II legislatures. Although the *Bush II* super-strong version of the doctrine *is* completely unprecedented, the actual origins and subsequent history of the strong version of the doctrine and its Article I, Section 4 cousin demonstrate that politicians and courts have always utilized the concept of independent legislatures in an unprincipled and results-driven manner, without ever providing a functional justification for legislative independence from state constitutions, let alone state courts.

Specifically, Part III locates the origins of the strong version of the independent legislature doctrine, not in *Bush I* or even the now-famous *McPherson* case, but rather in an obscure set of voting rights cases which arose during the American Civil War

—the "soldier-voting" cases. [59] The doctrine, it seems, was born out of desperate and transparently manipulative judicial and political attempts to prevent state constitutions from accidentally disfranchising Civil War soldiers who had risked their lives to preserve the Union and end slavery.

Thus, the Civil War soldier-voting cases, while perhaps morally sound in result, did not provide a very compelling source of principled constitutional interpretation. Nevertheless, in a curious turn of events, the strong independent legislature doctrine survived the Civil War era and emerged as dicta in the 1892 Supreme Court case of *McPherson v. Blacker*. [60] Subsequently, after the turn of the century, courts faced with issues less egregious than soldier disfranchisement ignored the precedent of the soldier-voting cases and the unpersuasive *McPherson* dicta and soberly rejected both Article II and Article I, Section 4 independent legislature doctrines. [61] In 1944, however, ***743** when war once again threatened to disfranchise soldiers, a state court resurrected the doctrine in order to avoid that untenable result, frankly admitting its doubt as to the weight of the doctrine but resting on the democratic sentiment to which it had become attached. [62]

II. ORIGINAL UNDERSTANDING OF THE ARTICLE II INDEPENDENT LEGISLATURE DOCTRINE

The original understanding of the constitutional text, [63] as Justice Thomas recently said, is "what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean." [64] Or, as Justice Scalia recently put it, "[t]he Constitution means now what its text reasonably conveyed to intelligent and informed people at the time it was drafted and ratified." [65] Applying that standard, there is no indication in the historical record that the Elector Appointment Clause was originally understood to grant independence to state legislatures. On the other hand, there are strong indications that the founding generation conceived of Article II legislatures in the normal sense "as creatures born of, and constrained by, their state constitutions." [66]

A. The Constitutional Convention

At the Constitutional Convention, the Founders did not specifically address whether state legislatures operate independently of their constitutions when they exercise their Article II powers. Simply put, the Convention debates over the mode of electing the national executive focused on more fundamental matters than the role of state constitutions.

The Framers chose an electoral college system over two other basic modes of election: election by the national legislature and election by the people directly. [67] The feasibility of the presumptive mode—election by the national legislature [68]—was intimately related to two ***744** other issues: the executive's term of office and his eligibility for reelection. "Since the executive was to be elected by the legislature, it was deemed essential that he not be eligible for reelection, for reeligibility would compromise his independence; but if he was to serve only one term, then it ought to be a reasonably lengthy one." [69]

Opponents of election by the legislature pointed out that popular election would allow for reeligibility, "the great incitement to merit public esteem." [70] It would relieve the concern voiced by James Madison that election by the legislature would create a dangerous "dependence of the Executive on the Legislature." [71]

Yet, popular election presented other problems. First, the size of the nation put in doubt the ability of the people to make an informed choice. As Shlomo Slonim explains, the "vast expanse of the United States, the difficulty of communication, and the unfamiliarity of the general populace with national personalities—all militated against" this mode. [72] The people would never be able to produce a majority for one candidate. [73] Second, as Jack Rakove explains, any national majority that did form in a popular election "would take a strongly sectional cast favoring the North, because in a vote taken at large the free white citizens of the South would be a permanent minority." [74]

Selection of the President by means of a weighted electoral college had the advantages of popular election—eligibility for reelection without dependence [75]—without its liabilities. Members of such an entity would be in a better position to select

candidates than the people at large, [76] and the small and slave states would enjoy the same handicap with respect to the President that they did, thanks to the Connecticut Compromise, with respect to the national legislature. [77]

Most of the Convention debates over the mode of selecting the President occurred at this fundamental level. [78] Moreover, almost all ***745** occurred well before the language of the Elector Appointment Clause was first proposed. David Brearley's committee, which designed the proposal that became Article II, Section 1, did not propose electors "appoint[ed] in such manner as [the] Legislature may direct" until the very late date of September 4. [79]

Even during the short debate over the Brearley committee's proposal, Madison did not record any comments as to why the delegates decided that electors should be appointed by each state "in such manner" as the legislatures "may direct." [80] Instead, the delegates readily agreed on the committee's general scheme, [81] which, in the words of Shlomo Slonim, "so successfully blended all the necessary elements to ensure a safe and equitable process for electing a president and which reserved considerable influence for the states." [82] Debate focused not on the mode of appointing electors, but rather on what was to happen in the event the electors failed to produce a majority for one candidate. [83] Thus, it is difficult to know precisely what the language of Article II, Section 1 meant to the Framers, let alone the extent to which they thought it put limitations on state constitutions. [84]

746** ***B. The Ratification Debates

The Ratification debates offer little more than the Convention debates with respect to a specific original understanding of the independent legislature doctrine. Compared to other subjects, the mode of electing the President received little attention from the Ratifiers. Hamilton, introducing *The Federalist No. 68*, commented that the "mode of appointment of the chief magistrate ... is almost the only part of the system, of any consequence, which has escaped without severe censure." [85] In his speech to the Pennsylvania Convention, James Wilson likewise noted the dearth of opposition to the mode of presidential appointment set forth in Article II. [86]

As in the Federal Convention, the debate that occurred in the state conventions focused on more fundamental aspects of Article II than its relation to state constitutions. The Ratifiers, like the Framers, expressed more interest in how the Electoral College avoided the pitfalls of alternative modes of appointment. [87] Or, they focused on Article II's post-Electoral College scheme whereby the election was thrown into the House of Representatives when there was no majority of electoral votes for one candidate. [88]

But while Madison did not record any comments by the Convention delegates regarding the exact manner in which electors were to be appointed under the Elector Appointment Clause, many speakers ***747** at the state conventions did touch on this question, at least tangentially. [89] Some, like Hamilton in *The Federalist No. 68*, [90] assumed that the people would select electors. [91] Others thought that the state legislatures would select the electors. [92] Wilson begged the question when he said that, "[w]ith the approbation of the state legislatures, the people may elect with only one remove: for 'each state shall appoint, in such manner as the legislature therof may direct, [presidential electors].'" [93] Thus, even in the most basic sense, the meaning of the words "in such manner as the legislature thereof may direct" was unclear to the Ratifiers. [94]

748** ***C. Original Purposes of the Elector Appointment Clause

Given the Founders' uncertainty about the meaning of the Elector Appointment Clause, it is doubtful that they held a specific understanding as to the more precise question presented by the independent legislature doctrine. If an originalist inquiry is to provide any insight into what they would think of the doctrine, therefore, it can do so only by inference from their comments and compromises. The question is this: when the Framers debated electoral college schemes at the Federal Convention, did they express commitment to any underlying purpose or principle which might be served by independent legislatures?

1. Narrative of the Convention Debates Over Electoral College Schemes

Pennsylvania's James Wilson, who had been one of the first delegates to suggest popular election of the national executive, [95] was also the first to propose an electoral college scheme at the Convention. [96] In place of election by the legislature, he moved on June 2 that the states be divided into districts. [97] The people of each district would select one elector, and all the electors together would select the "Executive magistracy." [98] His reasoning was twofold: first, the system would avoid "intervention of the States," and second, it "would produce more confidence among the people in the first magistrate, than an election by the national Legislature." [99]

Elbridge Gerry of Massachusetts "liked the principle of Mr. Wilson's motion" but voiced two objections. [100] First, he feared that it "would alarm & give a handle to the State partizans, as tending to supersede altogether the State authorities." [101] Second, he was "not clear that the people ought to act directly even in [the] choice of electors" because they would be "too little informed of personal characters in large districts" and also "liable to deceptions." [102] Hugh Williamson of North Carolina remarked that he did not see the advantage of electors over state legislatures, and warned that electors ***749** "would be attended with great trouble and expence." [103] The states voted against Wilson's motion eight to two, dropped the idea of electors, and returned to the debate over the relative merits of legislative and popular appointment. [104]

On July 17, Maryland's Luther Martin tried to break the deadlock in that debate by proposing another electoral college system. He moved that the executive "be chosen by Electors to be appointed by the several Legislatures of the individual States." [105] Madison did not record Martin's reasoning. Perhaps by substituting "several Legislatures" for "the people" Martin was attempting to address the concerns that Gerry had raised with Wilson's scheme in June. In any event, without any recorded comment, the states voted against Martin's proposal 8 to 2. [106]

On July 19, the Convention agreed on an electoral scheme similar to the one now in Article II, after Gouverneur Morris gave a "lengthy address [extolling] the virtues of popular election." [107] The main objections to popular election remained its feasibility and the power imbalance it would create between the large and free states and the small and slave states. Rufus King, partial to popular election but worried about its feasibility, [108] suggested "appointment by electors chosen by the people." [109] Patterson largely "coincided" with King's suggestion, and proposed in addition that the electors "be chosen by the States in a ratio that would allow one elector to the smallest and three to the largest States." [110] Madison, concerned about the power imbalance which popular election would create, remarked that Patterson's proposed electoral ratio "obviated" this concern. [111] Thus, the Framers saw that a weighted electoral college scheme addressed the two main concerns of those wary of popular election. It also avoided the dependence and reeligibility problem presented by legislative appointment of the executive: "[b]ecause the college would meet once and then forever dissolve, the executive could not be bound to toady to its demands." [112]

***750** Immediately prior to Madison's comments, Wilson remarked that "he perceived with pleasure that the idea was gaining ground, of an election mediately or immediately *by the people*." [113] But the manner in which the electors would be chosen had not yet been debated. Although King, Patterson, and Madison seem to have been contemplating popular election of electors, it was Gerry who took the initiative. Reiterating his opposition to popular election and his concern that "[t]he people are uninformed, and would be misled by a few designing men," [114] Gerry "urged the expediency of an appointment of the Executive by Electors to be chosen by the State *Executives*." [115] He believed that having the people choose the first branch of the national legislature, the state legislatures choose the second branch, and the state executives choose the national executive "would form a strong attachnt. in the States to the National System." [116]

Oliver Ellsworth of Connecticut apparently disagreed that the state executive was the appropriate body to choose electors, and he moved instead that the executive "be chosen by electors appointed by the Legislatures of the States," the electors being allocated in a ratio favorable to the small states. [117] Gerry responded that he preferred Ellsworth's idea over appointment by the national legislature or the people, but "not to an appt. by the State Executives." [118] Ellsworth's motion for appointment of electors by state legislatures then passed by a vote of 8 to 2. [119]

The agreement of July 19 did not last long. On July 23, William Houston of Georgia "urged the extreme inconveniency & the considerable expense, of drawing together men from all the States for the single purpose of electing the Chief Magistrate." [120]

He feared the "improbability, that capable men would undertake the service of Electors from the more distant States." [121] North Carolina's Hugh Williamson likewise warned that "[t]he proposed Electors would certainly not be men of the 1st. nor even of the 2d. grade in the States." [122] Such men, he said, "would all prefer a seat either in the ***751** Senate or the other branch of the Legislature." [123] To forestall a motion by Houston to return to appointment by the national legislature, Gerry proposed to eliminate the electors from the scheme adopted on July 19: "the Legislatures of the States should vote by ballot for the Executive in the same proportions as it had been proposed they should chuse electors ...." [124] On the motion to postpone to consider Gerry's proposal, however, "*noes* were so predominant that the States were not counted." [125] Instead, Houston's motion passed 7 to 4. [126] Accordingly, the difficult questions of reeligibility and term of office returned to haunt the Convention. [127]

The ensuing debate of late July ranged widely over all the proposed modes of selecting the executive. [128] The Convention moved away from electoral college schemes and placed selection of the executive in the hands of the national legislature, where it stayed until the end of August with much wrangling over details. [129] Then, on August 24, Gouverneur Morris moved to have the President [130] "chosen by Electors to be chosen by the people of the several States." [131] The motion was narrowly defeated 6 to 5. [132] That the mode of choosing *electors*, as opposed to the mode of choosing the President, remained a stumbling block is apparent from the ensuing attempt to restore some sort of electoral college scheme by posing the "abstract question" of whether the President "shall be chosen by electors." [133] That attempt was defeated by an equally divided vote of the states. [134]

The near success of Morris' August 24 motion meant that the mode of selecting the President remained unsettled. [135] The Convention referred this question and others to a new committee chaired by ***752** David Brearley of New Jersey. [136] On September 4, Brearley's committee recommended what would become, with some modification, the electoral college scheme codified in Article II. [137] The committee's report took up where Ellsworth's July 19 proposal had left off, marrying the notion of electors to a voting ratio which favored the small and slave states; it provided that "[e]ach State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature." [138]

2. Inferences

Brearley's report appears to be the first time that the Convention contemplated the language "in such manner as its Legislature may direct." In schemes previously debated, electors had been "chosen by the people," [139] "chosen by the State Executives," [140] "appointed by the Legislatures of the States," [141] or "chosen by the Legislatures of the States." [142] Why did the Framers settle on this language?

Once the basic idea of an electoral college came into play, the Framers were faced with a choice between popular election of electors (popular electors) and appointment of electors by the state legislatures (legislative electors). On June 2 and July 19, in response to proposals for popular electors, Elbridge Gerry articulated two basic reasons to prefer legislative electors. [143] First, popular electors would tend to "supersede altogether the State authorities." [144] On the other hand, placing the power to choose electors in the hands of a branch of state government "would form a strong [attachment] in the States to the National System." [145] Second, because the people were "uninformed" and "would be misled by a few designing men," a mode ***753** of appointing electors once removed from the people would be preferable. [146]

Not coincidentally, Gerry's two reasons to prefer legislative appointment—(1) protection of state interests and the federal system and (2) filtration of the popular will through an intermediate body—echoed those offered to explain state legislative appointment of Senators under Article I, Section 3. [147] As Madison explained in *The Federalist No. 62*, legislative selection of Senators was "recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and may form a convenient link between the two systems." [148] Madison may have even felt that Article I, Section 3 created independent legislatures: in *The Federalist No. 45*, he wrote that "[t]he Senate will be elected absolutely and exclusively by the State Legislatures." [149]

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Moreover, since the Founding, proponents of independent legislature doctrines have pointed to Article I, Section 3 to support their arguments. [150]

Absent other evidence, Gerry's two reasons to prefer legislative electors and Article II's superficial similarity to Article I, Section 3 might explain why the Framers decided to give legislatures the power to "direct" the "manner" of appointing electors. [151] Moreover, if the Founders shared Gerry's propositions, they might be considered ***754** fundamental principles of representation that were constitutionalized upon ratification of the Constitution. If so, those underlying principles form part of the original understanding of the text of the Elector Appointment Clause. A determined originalist might even argue that the Framers held those principles so deeply that they were symptomatic of an original understanding that the Elector Appointment Clause was to give virtually *unlimited* discretion to state legislatures in the appointment of electors. Under this view, the Founders would have understood legislative discretion under the Clause not as a mere baseline but as an essential and absolute requirement. The principles of representation articulated by Gerry might, in other words, provide the basis for an originalist defense of the independent legislature doctrine.

Assuming the Founders did have such an understanding, it might justify the weak version of the independent legislature doctrine, but not the strong. While guaranteeing state legislatures the right to choose the *mode* of elector appointment may enable the legislatures to protect the federal system and filtrate the will of the people through direct legislative appointment, guaranteeing them the additional right to disregard lesser constitutional limitations on the *manner* of appointment would not. Once a legislature chooses to appoint electors via popular election (as did the Florida Legislature in Election 2000), no federalism-safeguarding or filtrating purposes are served by immunizing the popular election from state constitutional requirements.

At any rate, it would be a mistake to think that the Framers chose the language they did because they thought it would ensure that independent Article II legislatures, like Article I, Section 3 legislatures, would protect the federal system or filtrate the people's will. After all, the Framers did not confer on Article II legislatures the power to "chuse" electors, as they had given Article I, Section 3 legislatures, but only the power to "direct" the "manner" of their appointment. [152] This language echoed that contained in Article V of the Articles of Confederation, which had provided that delegates to Congress "shall be annually appointed in such manner as the legislature of each State shall direct." [153] Pursuant to that language, states had chosen delegates to Congress by either legislative appointment or popular election. [154] As detailed above, [155] the Ratifiers understood the Elector Appointment Clause to establish at least the same choice.

***755** Moreover, the founding generation never understood Article V of the Articles of Confederation to create independent legislatures serving state-protection or filtration functions. The Articles, of course, contemplated a much more robust form of state sovereignty than the Constitution which replaced them; [156] thus, any attempt to derive the Founders' understanding of Article II from their previous understanding of Article V of the Articles of Confederation must be made with caution. Nevertheless, the analogy provides a baseline understanding. As it was, three out of the four state constitutions adopted after the Articles were proposed in November 1777, but before the Federal Constitution was adopted, contained explicit provisions purporting to regulate the selection of congressional delegates. [157] This practice was consistent with the pre-Confederation state constitutions of 1776 and 1777, of which eight out of ten had similar provisions. [158] The Framers were certainly aware of this understanding ***756** when they settled on the language of the Elector Appointment Clause for the new Federal Constitution. Thus, the clause, like Article V of the Articles of Confederation before it, was intended to serve federalism only in the sense that, "by virtue of their status as independent sovereigns within a federal system," [159] *states*—not independent state legislatures —decided the mode by which they would appoint their electors.

Furthermore, during the Convention, many of the Framers demonstrated their general hostility to a decisive role for state legislatures in the appointment of electors. When Gerry suggested that the legislatures choose the executive directly, for instance, the "*noes* were so predominant" that the votes were not even counted. [160] Even with respect to an electoral college system, many delegates do not appear to have desired giving legislatures any power. Rather, delegates repeatedly proposed electoral college schemes involving popular electors. Wilson did so in June; [161] King, Patterson, and Madison did so on July 19; [162] and Morris did so on August 24. [163] Gerry himself would have preferred assigning the power to choose electors to the state executives. [164] The idea of exclusive legislative appointment of electors—perhaps embodied in the convention's brief acceptance of Ellsworth's July 19 compromise for electors appointed by state legislatures [165] — ***757** became acceptable, it seems, only as a compromise that would placate those who, like Gerry, were opposed to direct election of anything. The near success of Morris's August

24 motion for popular electors indicates that, even at that late date, many delegates would still have preferred to bypass state legislatures altogether with popular electors. [166]

In light of this split in opinion, which characterized the Convention's entire debate over the shape of the Electoral College, the ultimate success of the Brearley committee's proposal to have electors appointed in "such Manner as the [state] Legislature[s] thereof may direct" [167] should not be seen as enshrining Gerry's principles of representation at the expense of state constitutions. Instead, it was a rather ambiguous compromise which enabled the Framers to wrap up their work in Philadelphia by resorting to the familiar language of the Articles of Confederation. As the Ratifiers demonstrated at their conventions, Article II, Section 1 meant different things to different people; some would have state legislatures choose electors, while others would have the people do it. There is no indication, however, that any of the Founders understood the text of Article II, Section 1 as the sort of strong endorsement of Gerry's principles that would be essential to an originalist defense of the Article II independent legislature doctrine.

D. Contemporaneous Practice

The Constitutional Convention and the state ratifying conventions are not the only sources of evidence concerning the original understanding of the Elector Appointment Clause. The thoughts and actions of those Americans who implemented the new Constitution immediately after its adoption also provide strong evidence.

1. State Constitutions After the Founding

An indication of the founding generation's understanding of the relationship between state constitutions and the selection of national representation is the degree to which post-Founding state constitutions purported to regulate that selection. Admittedly, the pre-1789 pattern of regulation described above was not as pervasive in the state constitutions adopted after 1789. Neither the Georgia Constitution of 1789, the Pennsylvania Constitution of 1790, nor the South Carolina Constitution of 1790 contained any provisions regarding the selection of Federal Representatives, Senators or Electors. ***758** [168] (Previous constitutions in all three states *had* contained such provisions regarding the selection of delegates to Congress.) [169] Neither did the constitutions of the new states which entered the Union in the 1790s—Kentucky, Vermont, and Tennessee. [170]

On the other hand, in 1792, Delaware adopted a new constitution which provided that federal representatives "shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." [171] And in 1795, Georgia amended its constitution of 1789 to provide that "[a]ll elections to be made by the general assembly, shall be by joint ballot of the senate and house of representatives." [172] Georgia retained and further refined that change, which would appear to encompass the election of Senators and electors, in the Georgia Constitution of 1798. [173] In addition, in 1799, Kentucky scrapped its first constitution after only seven years and included in the new version a clause mandating that in all elections, whether by the people or the legislature, "the votes shall be personally and publicly given *viva voce*." [174] Yet, no state constitution explicitly regulated the appointment of electors until 1810, when Maryland amended its constitution of 1776 to guarantee every free white male citizen of the state a right to vote for not only state elected officials, but also Representatives and electors. [175]

***759** *2. Exercise of Article I, Section 4 and Article II Powers at the First Federal Elections*

There could be many reasons why, as a general matter, post-Founding state constitutions did not explicitly regulate Article I, Section 4 and Article II "manner" legislation. The process by which the original states selected their first Federal Representatives, Senators, and electors better illustrates how the founding generation perceived the relationship between state constitutions and the provisions of the new national Constitution. The narrow historical question is whether the Founders thought that state legislatures were acting as creatures bound by their constitutions when they enacted the first laws under Article I, Section 4 and Article II, Section 1.

The historical record reveals that the founding generation did indeed think that state constitutions restrained this legislative activity. First, they considered state constitutional veto mechanisms applicable to both Article I, Section 4 and Article II

legislation. Second, they considered state constitutions relevant to the question of whether they were to appoint electors and Senators in joint session or concurrently.

a. State Constitutional Veto Mechanisms—In 1788, the constitutions of only two states—Massachusetts and New York—contained veto mechanisms. In both states, the vetoing authority exercised its constitutional right to approve or veto legislation even though the legislation had been enacted pursuant to Article I, Section 4 or Article II. [176] This suggests that the founding generation did not have an overriding respect for "the constitutionally prescribed role of state *legislatures*." [177]

(i) Massachusetts

The Massachusetts Constitution of 1780 provided that "[n]o bill or resolve" would become law until it had been "laid before the governor for his revisal." [178] If the governor "approve[d]" of the bill or resolution, he was to sign it, but if he had "any objection" to its passage, he was to return it to the legislature "together with his objections ***760** thereto." [179] If two-thirds of both houses of the legislature nevertheless passed the vetoed bill, it would become law. [180]

On November 20, 1788, both houses of the General Court agreed on resolutions providing for the election of Federal Representatives and electors. [181] The governor, John Hancock, "approved" the resolutions with his signature. [182] To Massachusetts lawmakers in 1788, then, directing the manner of choosing Representatives and electors was a matter of lawmaking which had to conform to state constitutional procedures. [183]

(ii) New York

The veto mechanism in New York involved not only the state executive but also the judiciary. Article III of New York's Constitution of 1777 required that "all bills about to be passed into laws by the legislature" be presented to a "council" made up of the governor, the chancellor, and the judges of the supreme court, "or any two of them, together with the governor." [184] If a majority of the Council of Revision (as it became known) did not approve of the bill, the Council returned it to the Legislature for reconsideration. [185]

Although in the winter of 1788-89 the Assembly and Senate of New York failed to agree on an omnibus bill governing the manner of selecting Representatives, Senators, and electors, they were able to agree on a separate bill governing the times, places, and manner of electing Representatives. [186] When the two houses agreed on the details of that bill on January 23, 1789, the Senate ordered it delivered to the Council of Revision. [187] The Council of Revision—Governor Clinton, Justice Yates, and Justice Hobart—"duly considered" the bill and "[r]esolved that It does not appear improper to the Council that the said bill should become a [l]aw of this State." [188] ***761** Governor Clinton signed the bill and returned it to the Senate, whereupon it became law. [189]

The New York Legislature never agreed on a manner of appointing electors, and the state wholly failed to participate in the first presidential election. [190] Moreover, it was only after months of dispute that the Legislature finally agreed on a manner of choosing Senators. The bill "*prescribing the manner of holding Elections for Senators*" was delivered to the Council of Revision. [191] The Council, led by Governor Clinton, considered the bill and rejected it as "inconsistent with the Public good." [192] The Assembly failed to override the veto, and the New York Legislature decided to appoint senators by concurrent resolution. [193] Thus, as in Massachusetts, the founding generation in New York did not think that Article I, Section 4 legislatures were independent of their constitutions or other branches of government.

b. Joint or Concurrent Legislative Appointment—A Matter of State Constitutional Law.—In 1788, state legislatures faced with the task of choosing Senators and appointing electors had to decide whether they were to do so in joint session or concurrently. The lower, more numerous, house of the legislature would naturally want to choose in joint session, while the upper house would want to maintain the negative over the lower house guaranteed by concurrent selection. When debate over this question arose in state legislatures during the first federal elections, as it did in Massachusetts and New York, [194] both sides of the debate

framed their arguments in terms of state constitutional commands. Few suggested that the state constitutions could not, as a matter of federal constitutional law, determine the question.

762** ***(i) Massachusetts

When the Massachusetts General Court debated how to exercise its responsibilities under Article I, Section 4, a joint committee of the state Senate and House of Representatives suggested that "the Senators be chosen by the two houses of the legislature, each having a negative upon the other." [195] This recommendation appears to have contradicted the pre-Founding Massachusetts Constitution of 1780, which provided that delegates to Congress were to be chosen "by joint ballot of the senate and house of representatives." [196] Members of the joint committee, however, did not think so. Thomas Dawes, for example, explained to the House of Representatives that the Federal Constitution directed the "legislatures of the several states" to make the choice. [197] "In order to ascertain what was meant by the term legislature," he said, "a recurrence was had to the constitution of this state, and it had there been found, that the legislature consisted of the two branches of the General Court, acting on each other by a negative." [198] To conform to this constitutional command, therefore, the legislature had no choice but to elect Senators concurrently.

The House of Representatives, however, rejected the joint committee's proposal for concurrent election in favor of "election by joint ballot of both houses as in the choice of delegates to Congress." [199] Members of the House reasoned that under the language of Article I, Section 4, "any mode that the legislature might prescribe would be [agreeable] to the Federal Constitution." [200] The state constitution's requirement that each branch of the legislature act on each other by a negative "did not extend to elections, but to acts, etc." [201] Otherwise, "the revisionary power of the Supreme Executive would be necessary to completing the choice, as it is in the completion of laws." [202] In Massachusetts, then, each side of the debate argued that its proposed mode of choosing Senators conformed not only to the new Federal Constitution, but also the state constitution.

763** ***(ii) New York

In New York, the natural inclinations of the upper and lower houses with respect to this question were exacerbated by a sharp partisan division between the Assembly and the Senate: anti-Federalists dominated the Assembly while Federalists controlled the Senate. [203] As a result, the ultimately fruitless debate over legislation to direct the manner of appointing Senators and electors was particularly spirited. Throughout, the legislators resorted frequently to both state and federal constitutional principles. Some contended that appointment must be concurrent because the state constitution required each house to have a negative on the other house. [204] Others in that camp insisted that the Federal Constitution's use of the word "legislature" required the separate action of both houses. [205] On the other hand, the opposition argued that Article XXX of the state constitution, [206] which had existed prior to the Founding and called for appointment of delegates to Congress by joint ballot, continued to regulate the state's appointments to Congress under the new Constitution. [207] Those in favor of concurrent ***764** election responded that Article XXX was a mere relic which did not apply to the new offices created by the Constitution. [208] With few exceptions, [209] however, they did not deny that if the state constitution did speak to the new offices, it would apply. [210]

III. HISTORY OF THE DOCTRINE AFTER THE FOUNDING

The Article II independent legislature doctrine, then, does not arise from an original understanding. Instead, the super-strong (*Bush II*) version of the doctrine—which protects state legislatures from state courts— appeared for the first time in the *Bush II* concurrence, [211] and the merely strong (*Bush I*) version of the doctrine—which protects state legislatures from state constitutions—originated in an obscure set of Civil War voting rights cases. The strong version's origins in the Civil War and its subsequent history reveal that, ***765** until now, it has served almost exclusively as a tool to expand the franchise, [212] and also that no special competence of Article II state legislatures has ever been identified which would provide a principled, functional justification for legislative independence from state constitutions (or courts).

A. The Civil War Soldier-Voting Cases

1. The Problem of Soldier-Voting

State constitutions at the time of the Civil War contained provisions which could be interpreted to require voters to cast their votes within state or town borders.[213] Because soldiers in the Union Army were out of state fighting the war, they could not comply with such requirements. While Rhode Island amended its constitution to grant absent soldiers to right to vote,[214] legislatures in other states tested the constitutional restrictions with laws allowing otherwise qualified voters in military service to cast their votes even when they were absent from the state on the day of the election.[215] State courts were ***766** asked to decide whether these "soldier-voting" statutes were valid exercises of legislative authority.

The courts faced intense pressure. In the Michigan soldier-voting case, *People ex rel. Twitchell v. Blodgett*, Judge Christiancy recorded his belief "that no question has arisen in our Courts, since the organization of the State, which has excited so much public interest, or so generally enlisted the patriotic impulses, the passions and the prejudices of the people."[216] Nevertheless, the Michigan court and those in New Hampshire, Pennsylvania, California, and Connecticut resisted the pressure.[217] "If our constitution deprives of the privilege of voting a class of men to whom we are largely indebted for having the right preserved to ourselves," Judge Campbell wrote in *Twitchell*, "the only remedy is to invoke the people to amend a restriction which has become too narrow for complete justice."[218]

On the other hand, courts in Iowa, Ohio, and Wisconsin saw no state constitutional impediments to soldier-voting laws.[219] The Wisconsin court, perhaps revealing the impetus behind its constitutional interpretation, commented that:

> history has furnished no better example illustrating the capacity of the people for self government [than] citizen soldiers pausing amid the horrors of war to discharge their duties as the primary legislators of the republic, and to guard by an intelligent use of their ballots ... the welfare of their country, and those principles of civil ***767** liberty for which they are ready at any moment to lay down their lives upon the field of battle.[220]

2. Hints of the Doctrine: Vermont and New Hampshire

Most of the Civil War soldier-voting cases did not implicate the Federal Constitution because they involved only state elections. Vermont's highest court was the first court to directly address a soldier-voting law which purported to regulate the election of Federal Representatives.[221] The statute in question allowed all qualified voters in volunteer military service to vote for governor, lieutenant governor, state treasurer, Federal Representatives, and presidential electors "wherever [the soldiers] may be, within or without the state."[222]

The court held the law unconstitutional with respect to state elections.[223] The court went on, however, to uphold the law as applied to elections of Representatives and electors.[224] The state constitution, the court noted, had been adopted several years prior to the admission of the state into the Union.[225] It was "entirely silent upon the subject" of federal elections,[226] and had "never been understood by [the] legislature as affect[ing]" them.[227] Moreover, neither Article I, Section 2,[228] Article I, Section 4, nor Article II, Section 1 established any restrictions as to the place of voting for Representatives or electors.[229] Thus, the Vermont court reconciled the federal aspects of the soldier-voting law with both the state and the federal constitutions.

A few months later, the New Hampshire Supreme Court cited the Vermont court's analysis when it upheld New Hampshire's latest soldier-voting law, which also vested absentee soldiers with the right to vote for Representatives and electors.[230] The court framed the question as whether "under the Constitution of the United States *and* the Constitution of this State," the legislature had the power to authorize absentee soldier voting.[231] As for the applicability of the ***768** state constitution, the court concluded that the right of suffrage in New Hampshire was left to the control of the legislature, "except so far as the legislative authority over the subject has been restrained by the Constitution of this State, or that of the United States."[232]

That conclusion, of course, was just a restatement of the question, but it seems to have assumed the applicability of the state constitution.

In its subsequent analysis of the federal constitutional question, however, the court employed more ambiguous language which can be read to endorse a strong independent legislature doctrine. The new law, the court explained, applied only to elections for Representatives and electors, a matter which "is governed wholly by the Constitution of the United States as the paramount law." [233] The legislature's action "is not an exercise of [its] general legislative authority under the Constitution of the State, but of an authority delegated by the Constitution of the United States." [234] Thus, the state constitution "has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States." [235] The court clearly held that the Federal Constitution—specifically, Article I, Section 2, [236] Article I, Section 4, and Article II, Section 1—did not take away the state legislature's power to pass the soldier-voting law. [237] Yet the court was not clear as to whether it believed that the Federal Constitution rejected the state constitutional suffrage limitations the court had announced in an earlier case dealing with state elections, [238] or whether it agreed with the Vermont court that the Federal Constitution was indifferent to the restrictions of the state constitution, but that those restrictions, as a matter of state constitutional law, applied only to state elections and not to elections for Representatives and electors.

***769** ***3. Birth of the Doctrine*: Baldwin v. Trowbridge**

Civil War exigencies pushed New Hampshire's Supreme Judicial Court toward recognition of an independent legislature doctrine, but no one clearly enunciated that doctrine until the United States House of Representatives took up the disputed election case of *Baldwin v. Trowbridge* in 1865. [239] In 1864, Rowland E. Trowbridge faced Augustus C. Baldwin in an election for Representative of Michigan's fifth congressional district. [240] Trowbridge won by only 710 votes, but that margin of victory depended on 1,538 votes which were cast outside of the state by residents serving in the Union Army. [241] Without the soldier vote, which Trowbridge won more than 3 to 1, Baldwin would have won the election by 125 votes. [242] Baldwin contested Trowbridge's victory on the ground that the votes cast by absent soldiers pursuant to Michigan's 1864 soldier-voting law had violated the Michigan Constitution's requirement that all voters give their votes "in the various townships or wards in which they resided." [243]

The House of Representatives, acting under its authority "[to] be the Judge of the Elections, Returns, and Qualifications of its own Members," [244] referred the matter to the House Committee of Elections. [245] A majority of the committee filed a report recommending that Trowbridge retain his seat. [246] A minority report filed by Illinois Representative S.S. Marshall recommended that the House award Baldwin the seat. [247] The House sided with the majority report by a vote of 108 to 30, and the independent legislature doctrine was born. [248]

(a) The Majority Report.—The majority report of the Committee of Elections is the first and most comprehensive defense of the independent legislature doctrine ever made. [249] Its constitutional interpretation, ***770** however, borders on the incoherent and is ultimately unpersuasive.

The Michigan Supreme Court's recent ruling in *People ex rel. Twitchell v. Blodgett* had declared the soldier-voting law unconstitutional as applied to an election for county attorney. [250] The majority report assumed that the Michigan constitution also forbade absentee soldier voting in elections for Federal Representatives. "Here is an unmistakable conflict of authority," the report stated. "The constitution plainly prohibits what the legislature as plainly permits." [251] Yet, "the power to act at all" with respect to elections for Representatives was derived from Article I, Section 4 of the Federal Constitution, so the question of whether the Michigan Legislature exceeded its authority in passing the soldier-voting law was one of federal constitutional law. [252]

Under the Constitution, the report argued, "the power [to prescribe the times, places, and manner of elections for Representatives] is conferred upon the *legislature*." [253] The word "legislature," according to the report, means "the legislature *eo nomine*, [254] as known in the political history of the country," not "the legislative power of the State." [255] The legislative

power of the state "would include a convention authorized to prescribe fundamental law." [256] The Framers, however, were aware of the difference between "organic conventions" and "legislatures." [257] Indeed, the Constitution uses the two terms "to denote different legislative bodies, and in such contrast as to clearly indicate that ["legislature"] is employed in its historic rather than in its normal sense." [258] Thus, the report concluded, if the Framers had "intended to confer [Article I, Section 4] power upon State organic conventions, [they] would have chosen some word less liable to misconstruction [than 'legislature']." [259]

This portion of the majority report recognized that, at the time of the Founding, every state had legislatures "created or restrained by some fundamental law, in the shape of charters or constitutions." [260] Yet, it never explained why the Framers would not have considered the term "legislature" in this "normal" sense, as opposed to its "historic" sense. Instead, it fell back on *ipse dixit* and the bizarre intertextual ***771** distinction between the word "legislature" and the word "convention." The distinction is bizarre because it is not at all inconsistent to recognize it and still think of legislatures as creatures of their constitutions, even if the constitutions were made by conventions; and thinking that would not, as the report argued, require equating "conventions" with "legislatures" in every constitutional clause which uses the term "legislature." [261]

The report next urged, in what purports to be an alternative argument, that even if "legislature" were taken in its "most enlarged sense," the soldier-voting legislation would still be "sustained as against the [Michigan] constitution." [262] The state legislature's authority in this case was derived from the Federal Constitution, which was acting as a "*constructive legislature.*" [263] As such, the Constitution's power was a "continuing power" that "survive[d] the dissolution" of the convention which created it. [264] The continuing power of the Constitution did "not authorize any [state] convention or legislature to tie the hands of its successors." [265] The people of Michigan therefore "had no power to enlarge or restrict the language of the [Federal Constitution]" by placing restrictions in their state constitution. [266] Thus, the state constitution, unlike the Federal Constitution, was not a "constructive legislature" when it came to regulating federal elections. [267] The power of the convention that adopted it "was just as ample as that of any subsequent legislature," but "no more." [268]

Stated directly, the majority report held in this passage that the Federal Constitution empowered the Michigan legislature to supersede ***772** the "legislation" of the Michigan constitutional convention. It is not clear why the report adopted the complex "constructive legislature" theory instead of simply stating, as it had in the first part of its argument, that Article I, Section 4 trumped the state constitution. Perhaps its drafters hoped that such an inscrutable argument would obscure the fact that they did not provide a single reason *why* the Framers would have wanted to create independent legislatures under Article I, Section 4.

(b) The Minority Report.—By contrast, the minority report promptly addressed the original purpose of Article I, Section 4. "The object manifestly was simply to leave to the States the power to determine the times, places, and manner of holding these elections, until Congress saw proper to exercise the powers conferred upon it for that purpose." [269] It was not to confer upon any "department" of a state "any powers whatever." [270]

According to the minority report, construing Article I, Section 4's "legislature" as a dependent legislature was consistent with not only the original purpose of the clause but also the "the proper definition of the term," the "history" of the section, and precedent established by the Committee of Elections and the House. [271] As for the "proper definition," the minority report contended that "legislature," as used in Article I, Section 4, means "that body in which all the legislative powers of a State reside, and that body is the people themselves who exercise the elective franchise." [272] The people, if they wanted, could "abolish" whatever "subordinate body in which is usually lodged a portion or residuum of the legislative power" and provide for the "periodical assembling of their convention, which would exercise and perform all legislative powers." [273] Such a convention "is *the* legislature *par excellence* of the State." [274] Therefore, a normal legislature—"whether called a 'general assembly,' 'general court,' or otherwise"—is the "creature" of the "paramount legislature" and "the organic law of the State" which it creates. [275] In other words, a legislature "owes its existence to [the organic law created by the paramount legislature], and can rightfully do nothing in contravention of its provisions." [276]

Moreover, history had taught that legislatures were not independent. "[F]rom the adoption of the Federal Constitution until this ***773** time," the report stated, "it was never before contended ... that [Article I, Section 4] conferred upon [a state legislature] power to act utterly independent of, and in utter disregard of, the State constitution." [277] State constitutions had fixed limitations

upon the Article I, Section 4 actions of their legislatures. [278] According to the report, "in every instance" where a conflict arose between such limitations and an act of the legislature, "the constitution has, by courts and legislative bodies, been sustained, and the acts of the legislature ... held to be null and void." [279] Such a "long and undisturbed construction of [the] power to fix these limitations," the report concluded, should not be disturbed "at this late day." [280]

Finally, the minority report argued that the House's own decisions in two previously disputed election cases established that legislatures were not independent. [281] First, in the contested election case of *Shiel v. Thayer*, [282] Oregon held two elections on different dates for the same congressional seat. [283] George K. Shiel won the first election, held in June 1860, pursuant to a state constitutional command that "general elections shall be held on the first Monday of June, biennially." [284] Andrew J. Thayer won the second election, held in November 1860, pursuant to the provisions of a bill the Oregon Legislature had nearly enacted. [285]

Thayer argued that because Oregon had no law on the books providing for election of a Representative to the current Congress, and because the state constitutional command did not apply to congressional elections, the election held in June was void. [286] The people of Oregon, however, had a constitutional right to representation in Congress, "of which they cannot be deprived by the neglect or refusal of the legislature." [287] Therefore, Thayer argued, "in the exercise of that right" the people "did assemble" on the day of the presidential election in November "and cast their votes for him as their representative." [288]

The Committee of Election's report in the *Shiel* case held that the state constitution's June date did indeed apply to congressional elections. ***774** [289] Thus, Shiel's election in June accorded with law, and Shiel deserved the seat. [290] The report hesitated in rendering its opinion only because the Oregon Legislature, believing it had the power to set a date for election contrary to that provided by the state constitution, had come close to passing a bill setting the date for election in November instead of June. [291] However, because the committee had "no doubt that the constitution of the State has fixed, *beyond the control of the legislature*, the time for holding an election of representative in Congress," it decided that what the legislature might have done was irrelevant. [292] Subsequently, the House, heeding the committee's report, voted to install Shiel as the rightful Representative. [293]

The second disputed election case cited by the minority report in *Baldwin* was *Farlee v. Runk*. [294] In that case, Isaac G. Farlee lost an election for New Jersey Representative to John Runk by only sixteen votes. [295] At least nineteen votes, however, were cast by Princeton students who claimed to be residents of the congressional district encompassing the town of Princeton. [296] Farlee argued that the student votes were illegal because New Jersey law provided that students did not become residents of their college town simply by going there for school. [297] A majority of the Committee on Elections held that the students were residents of Princeton and that their votes were therefore valid; the newly adopted state constitution superseded any state law to the contrary. [298] The House narrowly agreed with the committee's recommendation, and Runk retained his seat. [299]

After reviving history and precedent, Representative Marshall's minority report in *Baldwin* concluded that the language of Article I, Section 4 must mean that "the time, place and manner of holding elections for representatives shall be prescribed in each State by the legislature thereof, such legislature acting in subordination and in ***775** conformity to that organic law to which it owes its own existence." [300] The independent legislature doctrine advanced by the majority report was entirely novel, and Marshall called upon the House "to pause long before they establish a precedent that will operate as an invitation to the State legislatures to disregard those wholesome limitations which the people have attempted to place around the action of their own servants." [301]

B. McPherson v. Blacker *and Senator Morton's 1874 Report*

Given the shallowness of the majority report in *Baldwin*, [302] it is surprising that the strong version of the independent legislature doctrine became anything more than a nontransferable ticket, good for only Rowland Trowbridge and his supporters in the Union Army. Nevertheless, the doctrine managed to survive the cauldron of the Civil War and, in 1892, find itself a place as especially unpersuasive dicta in the Supreme Court case *McPherson v. Blacker*. [303]

In that case, the Michigan Legislature had abandoned the statewide winner-take-all method of electing presidential electors in favor of a modified district system.[304] The new system was challenged on the ground that it was in conflict with Article II, Section 1 of the Constitution.[305] The argument was not that the state constitution had interfered with the legislature's appointing power but rather that the legislature, by dividing the state's electoral votes, had interfered with the state's Article II responsibility to appoint electors *as a state* through a statewide election.[306]

The Court rejected this argument and upheld the district system.[307] It ruled that the Constitution "leaves it to the legislature exclusively to define the method" of appointing electors.[308] The fact that every state had, over time, adopted election by general ticket did not ***776** mean that the Michigan Legislature had lost its constitutional power to appoint in a different manner.[309]

The holding of *McPherson*,[310] therefore, says nothing about the relationship between state constitutions and Article II legislatures.[311] Yet, the opinion contains two passages of dicta that do. In the first, the Court began with the proposition that "[w]hat is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist."[312] Then, however, the Court qualified that proposition by stating what is arguably a weak formulation of the independent legislature doctrine. "[T]he insertion" of the words "in such manner as the legislature thereof may direct" into the Elector Appointment Clause, the Court noted, "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power [to appoint Electors]."[313]

Both sides of the independent legislature debate look to this passage for support.[314] At most, however, the passage recognizes "a limitation" upon state constitutions.[315] But that is not a remarkable proposition. Even those who deny the existence of any independent legislature doctrine would recognize *some* limitation on circumscription, if only to avoid doing blatant violence to the constitutional text. The critical question left open by this passage, and by the remand in *Bush I*, is *to what extent* a state constitution can circumscribe the legislative power.

The second passage of dicta in *McPherson* directly supports a strong version of the doctrine but is of little value as precedent. After the Court demonstrated that state legislatures had always appointed electors in any manner they saw fit, without regard to national uniformity or past practice, it noted that many constitutional amendments had been proposed—and rejected—in the pursuit of uniformity. ***777** [316] As an example, the Court quoted extensively from an 1874 Senate Report in support of one such proposal.[317] Language in the report reinforced the Court's holding that Article II does not require state legislatures to direct any one particular manner of elector appointment.[318]

In addition, some of the report's excerpted language unequivocally supported a strong version of the independent legislature doctrine. The power to appoint electors, according to the report, was

> conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[319]

However, because this language appears in the United States Reports in a lengthy quotation supporting a different legal proposition than the doctrine, it would provide a court with an extremely shaky foundation upon which to build an otherwise insubstantial constitutional doctrine.[320]

When the excerpted language of the report is considered in its original historical context, moreover, the foundation that it provides for the doctrine appears even more dubious. Indiana Senator Oliver P. Morton submitted Senate Report 395 in support of his proposal to amend the Constitution to require a uniform system of popular election of the President.[321] In the report,

Morton, much like the House of Representatives in *Baldwin*,[322] sought to demonstrate that state legislatures enjoyed immunity from state constitutions, but for a completely ***778** different reason. Whereas the House had affirmed that immunity to extend the franchise to soldiers, Morton affirmed it, not because of its merits but rather because of its obvious demerits. The specter of independent Article II legislatures demonstrated the need for constitutional reform of the Electoral College.

Demonstrating that need to his colleagues would not have been easy, even in 1874, as every state had by then independently adopted the popular election/general ticket mode of appointment.[323] Thus, Morton, "who was at this time the most earnest and zealous advocate of the necessity of a change,"[324] was compelled to point out every conceivable way in which the ostensibly settled and uniform system actually presented "contingencies, some of them not remote, but near and probable, which threaten the country with revolution and the government with destruction."[325] (Abraham Lincoln once commented, "Morton is a good fellow, but at times he is the skeeredest man I know ....")[326] For instance, although the theory of the independent elector had been "overturned in practice for more than seventy years," and "scarce an instance is known where electors have violated [their] pledges," Morton argued that selection of the President by electors was "a dangerous and useless system" because of the possibility for "election errors."[327] Although all the states provided for at-large election, Morton worried that no state had made "any legal provision ... for the settlement of any contest that may arise in regard to such election[, a problem] entirely without remedy or redress upon the part of the Government of the United States."[328] And perhaps most ominously, although every state legislature had provided for popular election of electors, Morton warned that popular election could not be assured because the appointment of the electors was "placed absolutely and wholly with the legislatures."[329] Without amendment to the Federal Constitution, and in spite of any state constitutional restraints,[330] it would remain "in the power of any legislature to repeal all laws providing for the ***779** election of electors by the people and take such election into their own hands."[331] This potential for the system to "[set] at defiance the popular will" demonstrated "the necessity for a uniform constitutional rule."[332]

Morton's forceful but overstated forensics in support of a failed[333] amendment, while perhaps prescient,[334] should not be taken as a persuasive source of constitutional principles[335] or even as a reflection of contemporaneous sentiment. The doctrine had by no means become widely accepted at the time of Morton's report. One year before, in 1873, Pennsylvania had adopted a new constitution which purported to regulate the procedure for resolving contested elections of electors.[336] Two years after, in 1876, the state of Colorado entered the union with a constitution which required its General Assembly to directly appoint electors in the 1876 presidential election.[337] The constitution further required that, after the 1876 election, the General Assembly "shall provide that ... the electors of the electoral college shall be chosen by direct vote of the people."[338]

C. Judicial Rejection of the Doctrine

During the first decades of the twentieth century, and in spite of the *McPherson* dicta,[339] courts faced with more palatable legal outcomes ***780** than the disfranchisement of soldiers refused to accept arguments based on the independent legislature concept. In 1910, the South Dakota Supreme Court rejected the Article I, Section 4 version of the doctrine, holding that administrative "manner" regulations of congressional elections were subject to the state constitution's referendum requirement.[340] (Interestingly, the South Dakota court relied on the *minority* report from *Baldwin v. Trowbridge*,[341] which, the court explained in a subtle dig at the incoherence of the majority report, presented "the legal side of the controversy."[342]) Likewise, in 1919, the Supreme Court of Maine, denying that Article II gives a legislature "any superiority over or independence from the organic law of the state in force at the time when a given law is passed," held that "an act granting to women the right to vote for presidential electors" was subject to Maine's constitutional referendum provision.[343] Finally, in 1932, the Supreme Court in *Smiley v. Holm* decided that Article I, Section 4 legislatures are subject to gubernatorial vetoes, at least with respect to congressional redistricting.[344]

***781** *D. Rebirth of the Doctrine: The World War II Soldier-Voting Case*

The independent legislature doctrine did not fully reemerge until 1944 when Kentucky's soldiers, overseas fighting the Axis, found themselves disfranchised by their state's constitution.[345] As had courts during the Civil War, the Kentucky Supreme

Court in *Commonwealth ex rel. Dummit v. O'Connell* felt compelled to come to the "right" result, as it telegraphed to the public in the opening paragraph of its opinion:

> In this solemn moment in the Country's history it has devolved upon this Court to say whether the youth of our native State, now absent in the defense of the nation, shall be permitted to enjoy the right attempted to be conferred upon them by the 1944 General Assembly to vote in presidential and congressional elections. As to their moral right, there can be no question. Their legal right, denied by the State Constitution, is dependent upon whether the Legislature, in endeavoring to confer it, was so empowered by the people of the whole Union, speaking through the Federal Constitution. The question turns upon the meaning and intent of [Article II, Section 1 and Article I, Section 4 of the United States Constitution]. [346]

Yet, in order to reach its result via the independent legislature doctrine, the *O'Connell* court needed to overcome significant judicial precedent which had accumulated since the Civil War. The tortured distinctions made by the court reveal its determination to uphold the soldier-voting law.

First, in *Smiley v. Holm*, the Supreme Court had held that the Minnesota Constitution required its legislature to submit an Article I, Section 4 regulation to the Governor for his approval before it became law. [347] This was not a problem, the *O'Connell* court argued, because while "a legislature must function in the method prescribed by the State Constitution," it "does not necessarily follow" that "the scope of its enactment on the indicated subjects is also limited by the provisions of the State Constitution." [348]

Second, *State ex rel. Schrader v. Polley* [349] and the Maine case concerning female suffrage [350] had required legislatures, pursuant to state constitutions, to submit "manner" regulations to referendum ***782** votes. This precedent did not stand in the way of recognizing the independent legislature doctrine, the *O'Connell* court explained, because referendums had been recognized "as part of the legislative authority of the State" referred to by the word "legislature" in the Federal Constitution. [351]

The distinctions made by the *O'Connell* court, although accurate, are not distinctions that ought to make any difference. It is true that *Smiley, Schrader*, and the Maine case all applied state constitutional lawmaking *procedures* to "manner" legislation, not constitutional *substance*. But in defending the doctrine with this distinction, the *O'Connell* court implicitly acknowledged that there is nothing inherently special about state *legislatures* when it comes to regulating federal elections. [352] Rather, under the court's distinction, there must be something special about the state *legislative authority's* ability to regulate federal elections. If the word "legislature" in the Federal Constitution means "legislative authority" and the Federal Constitution recognizes popular referendums as part of that legislative authority, there is no reason to think it would not also recognize state constitutional conventions as part of that authority. [353] In many states, after all, the difference between a referendum and a constitutional amendment is difficult to discern.

For support, the *O'Connell* court relied exclusively on an American Law Reports annotation describing the history of soldier-voting laws. [354] The annotation itself cites only the majority report from the *Baldwin* case [355] (which clearly supports the independent legislature doctrine), and the New Hampshire [356] and Vermont [357] soldier-voting cases (which only tenuously support the doctrine, if at all). [358] Thus, the court admitted that it possessed "no certainty" that its conclusions about the independence of the Kentucky Legislature were "correct." [359] Nevertheless, given its aversion to declaring legislative acts unconstitutional and the "sacredness ... of the right of all adult Americans" to vote, the court upheld the Kentucky Legislature's otherwise unconstitutional soldier-votingggggg ***783** g law as a proper exercise of federal constitutional power. [360]

IV. CONCLUSION

Part II of this Comment assumed that the absence of modern authority supporting the independent legislature doctrine might be excused as long as the founding generation of Americans understood the Elector Appointment Clause to create independent legislatures. It appears, however, that the Founders did not have that understanding. The Framers carefully crafted the clause as a compromise which rejected a decisive role for state legislatures. They intended it to empower the people of each state as much as, if not more than, the legislatures of the states. For that reason, the language of the Elector Appointment Clause echoed

that of Article V of the Articles of Confederation, under which state constitutions had been known to regulate state legislatures' selection of national representation.

Perhaps even more tellingly, state legislators at the first federal elections assumed that state constitutional veto mechanisms applied to the exercise of Article II and Article I, Section 4 powers. No questions were raised when the state executive, and, in New York, members of the state judiciary, interfered with what the *Bush II* concurrence called "the constitutionally prescribed role of state *legislatures*." [361] Likewise, state legislators of the founding generation assumed that state constitutional principles helped determine whether they were to appoint electors and Senators jointly or concurrently. This also indicates that they did not conceive of Article II legislatures as purely ministerial creatures of ***784** the Federal Constitution but rather as subordinate instruments of state constitutions.

Part III demonstrated how the strong independent legislature doctrine sprung, not from the genius of the Founding, but from the passions of the Civil War, when officials faced the unsavory prospect of upholding state constitutional provisions which would disfranchise soldiers who had volunteered to fight the Confederacy. State courts resisted pressure to manipulate state constitutions, and only Civil War Congressmen, in the course of resolving the disputed election case of *Baldwin v. Trowbridge*, [362] had the temerity to first clearly articulate the doctrine, albeit with barely coherent legal reasoning. Thereafter, in 1874, Senator Morton brandished the horrors of the doctrine to illustrate why the country should adopt his proposed reform of the Electoral College; and, in 1892, the Supreme Court in *McPherson* quoted Senator Morton's report and recognized "a limitation" on state constitutional circumscription of the appointment power. [363] Yet, the first time the doctrine determined the result in a court case was when the Kentucky Constitution threatened to disfranchise World War II soldiers "absent in the defense of the nation." [364]

Part III also demonstrated how the Supreme Court's failure in Election 2000 to offer a principled structural defense of the doctrine has been endemic to its proponents throughout its history. Presumably, the House of Representatives in *Baldwin* and the Kentucky Supreme Court in *O'Connell* shared a conviction that soldiers fighting in the two greatest moral crusades in American history ought to be allowed to vote in federal elections. [365] From an originalist perspective, that moral conviction provided a reason to formally amend the state constitution but not to distort the meaning of the Federal Constitution by creating the independent legislature doctrine. [366] On the other hand, from a more pragmatic perspective, it may be permissible for such a non-original moral or democratic principle to dictate an otherwise trifling structural principle. [367] But even if that is so, what moral or democratic principle ***785** dictates prohibition of Florida's constitutional suffrage guarantees or the recounting of votes?

Footnotes

a1 A.B. cum laude, Harvard College, 1996; J.D., cum laude, New York University School of Law, 2001. Great thanks to Professors Richard Pildes and David Golove for their comments and encouragement. Thanks also to Chris Schwegmann and Russell Unger for reviewing an early draft.

1 *A Federal Republican*, N.Y. J., Jan. 1, 1789 (emphasis added), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-90, at 264 (Merrill Jensen et al. eds., 1976) [hereinafter FIRST FEDERAL ELECTIONS].

2 531 U.S. 70 (2000) (per curiam).

3 U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, [presidential electors].").

4 *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 77.

5 531 U.S. 98 (2000) (per curiam).

6 *See id.* at 111-13 (Rehnquist, C.J., concurring).

7 *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 111 (Dennis J. Hutchinson et al. eds., 2001).

> By assigning to state legislatures the task of determining the manner by which federal electors would be picked, Article II may be supposed to have federalized disputes over whether the authority thus granted to those legislatures has been usurped by another branch of state government, including a court that invokes a vague provision of the state's constitution to displace the legislature's authority and in effect write its own election code.

Id.; see also Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 619-20 (2001) (arguing that "the root of the sensible challenge to the decisions of the Florida Supreme Court rests" in the proposition that if "the state courts or state executive officials have failed properly to apply the state scheme, resulting in a gross deviation from the legislature's directives, then a federal court can review the matter under Article II"); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 659-61 (2001) (arguing that Article II, Section 1, Clause 2 "departs from the usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among their state governing institutions"); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 790 (2001) ("I vastly prefer the theory put forward by the Chief Justice's concurrence: Florida's judiciary had so rewritten the state's electoral laws that it had violated Article II's delegation of authority to the state legislatures to choose the method for selecting presidential electors.").

8 *See* POSNER, *supra* note 7, at 31-34, 153-57 (offering a cursory review of the history of Article II, Section 1). As for the original understanding of the clause, Posner insists that "[w]e cannot be certain that the choice of the word ['legislature']" was made "simply because the legislature is the branch of government that makes laws." *Id.* at 154. He ultimately concedes, however, that the *Bush II* concurrence gave that clause "a meaning very likely unintended by the Constitution's framers." *Id.* at 217-18; *see also* James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 501 (1962) ("[A] reading of the debates in the Constitutional Convention and State Ratifying Conventions is of little assistance."). In Part II of this Comment, I offer a more detailed review of the history and concur with Posner's ultimate conclusion. As for the law that developed subsequent to the Founding, Posner states that the theory of the *Bush II* concurrence is "supported by the few cases on point (although they are state rather than federal cases)" and by the one piece of scholarly commentary predating the 2000 election. POSNER, *supra* note 7, at 156 (citing State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279 (Neb. 1948), and Kirby, *supra*, at 504). In Part III of this Comment, I demonstrate why this statement is misleading and incorrect: (1) the relevant cases are actually split; (2) the cases and article cited by Posner support state legislative independence from state *constitutions*, not state *courts* (after all, *state courts* decided these cases); and (3) those cases provide no principled justification for legislative independence from state constitutions which might, by extension, justify independence from state courts.

9 *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

10 *See id.* at 1236-37.

11 531 U.S. 70 (2000) (per curiam).

12 *Id.* at 78.

13 *Id.* at 76.

14 U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

15 Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 77 (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

16 The Court provides, as examples, the Florida court's statement that election laws were "'valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage' guaranteed by the state constitution," and its statement that election laws must be "liberally construed" in favor of the right to vote, because such laws "are intended to facilitate the right of suffrage." *Id.* (quoting Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1236-37 (Fla. 2000)).

17 *Id.* (quoting *McPherson*, 146 U.S. 1).

18 *See also* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000) (discussing the Article V "independent legislature" doctrine).

19 *See* David A. Strauss, Bush v. Gore: *What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) (noting that the Court failed to explain "where the line might be drawn between acceptable and unacceptable [state constitutional limits]").

20 *Id.* (noting that the Court's opinion in *Bush v. Palm Beach County Canvassing Board* can "quite naturally" be "taken to mean that [the Florida Constitution's] 'circumscription' might be unconstitutional").

21 Pennsylvania's constitution, for instance, requires that "[t]he trial and determination of contested elections of electors of President and Vice-President ... shall be by the courts of law ...." PA. CONST. art. VII, § 13. This has been the case since 1873. *See* PA. CONST. of 1873, art. VIII, § 17, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 325 (William Finley Swindler ed., 1973-79) [hereinafter SOURCES AND DOCUMENTS].

22 The Colorado Constitution of 1876 required its legislature to do just this. *See* COLO. CONST. of 1876, schedule, § 20, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 93 ("The general assembly shall provide that after the year one thousand eight hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.").

23 *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).

24 The Florida Supreme Court case was *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000). On appeal to the United States Supreme Court, the case became *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

25 Gore v. Harris, 772 So. 2d at 1260-62. The court also ordered that hundreds of Gore votes from Palm Beach and Miami-Dade Counties be included in the certified results despite the fact that the tally of the Palm Beach votes had been submitted after the deadline set by the court in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla. 2000), and that the tally of the Miami-Dade votes was the result of only a partial recount. *See* Gore v. Harris, 772 So. 2d at 1262.

26 *See* Gore v. Harris, 772 So. 2d at 1248 ("The Legislature of this State has placed the decision for election of President of the United States, as well as every other elected office, in the citizens of this State through a statutory scheme. These statutes established by the Legislature govern our decision today.").

27 Bush v. Gore, 531 U.S. 1046 (2000).

28 *See* 3 U.S.C. § 5 (1994).

29 Bush v. Gore, 531 U.S. at 110-11. Justices Souter and Breyer agreed with the majority that the recounts as ordered by the Florida courts presented equal protection problems but dissented because they would have allowed constitutionally adequate recounts to proceed. *Id.* at 129 (Souter, J., dissenting); *id.* at 144 (Breyer, J., dissenting). Dissenting Justices Stevens and Ginsburg completely rejected the majority's equal protection analysis. *Id.* at 123 (Stevens, J., dissenting); *id.* at 135-36 (Ginsburg, J., dissenting).

30 *See id.* at 111-12 (Rehnquist, C.J., concurring).

31 *Id.* at 113 (Rehnquist, C.J., concurring).

32 *Id.* at 115 (Rehnquist, C.J., concurring).

33 *Id.* at 112-15 (Rehnquist, C.J., concurring). Justice Ginsburg, speaking for all four dissenting Justices, rejected the concurrence's notion that Article II "authorizes federal superintendence over the relationship between state courts and state legislatures." *Id.* at 141 (Ginsburg, J., dissenting). The Framers, she argued, "understood that in a republican government, the judiciary would construe the legislature's enactments." *Id.* (citing THE FEDERALIST NO. 78 (Alexander Hamilton)). Moreover, reading Article II to require the Supreme Court to "protect one organ of the State from another ... contradicts the basic principle that a State may organize itself as it sees fit." *Id.*

Justice Stevens, speaking for himself and Justices Ginsburg and Breyer, rejected not only the concurrence's super-strong independent legislature doctrine but also the strong form of the doctrine hinted at by the Court in *Bush v. Palm Beach County Canvassing Board*. *See* Bush v. Gore, 531 U.S. at 123 (Stevens, J., dissenting). Article II, he argued, "does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions." *Id.* The Florida Constitution subjects the legislative power of the state to judicial review, and "nothing in Article II of the Federal Constitution frees the state legislature from" that review. *Id.* at 124.

34 *Compare* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76 (2000) ("[W]ords operate 'as a limitation upon the State in respect of any attempt to circumscribe the legislative power [to appoint electors].'") (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892), *and* Bush v. Gore, 531 U.S. at 112-14 (Rehnquist, C.J., concurring) (emphasizing the word "legislature"), *with* Bush v. Gore, 531 U.S. at 142 (Ginsburg, J., dissenting) (suggesting that the words "State" and "thereof" call for a "fundamental solicitude ... to the legislature's sovereign").

35 146 U.S. 1 (1892).

36 Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 77 (noting that the Court in *McPherson* "did not address the same question petitioner raises here"); *see also infra* Part III.B. (analyzing the decision in *McPherson*).

37 "Sometimes interpretation of a phrase in the Constitution benefits from a comparison of how similar language elsewhere in the document has been understood." Amar, *supra* note 18, at 1068. In one sense, the constitutional provision which is most analogous to Article II is the Twenty-third Amendment, which gives the District of Columbia the right to appoint presidential electors as if it were the least populous state in the Union. *See* U.S. CONST. amend. XXIII ("The District

[of Columbia] shall appoint in such manner as the Congress may direct [presidential electors]."). *See generally* ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 126-30 (1978). The language of the amendment is precisely parallel to that of Article II; "the district" has been substituted for "each State" and "the Congress" has been substituted for "the Legislature thereof." *See* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 492 n.64 (1992) (noting that Congress designed the Twenty-third Amendment to mimic Article II). If the logic of the Article II independent legislature doctrine were carried to its extreme vis-à-vis the Twenty-third Amendment, the *Federal* Constitution could not limit the manner in which Congress directs the appointment of the District's electors.

38 285 U.S. 355 (1932).

39 "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

40 *Smiley*, 285 U.S. at 367 (holding that state legislature must reenact redistricting legislation vetoed by the governor); *see also* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 570 (1916) (recognizing as nonjusticiable the claim that a constitutionally required referendum is repugnant to Article I, Section 4's delegation of power to state legislatures). Neither *Bush I* nor the concurrence in *Bush II* addresses the implications of these cases. Justice Stevens, however, did cite *Smiley* in his dissent from *Bush II*. *See* Bush v. Gore, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting).

41 253 U.S. 221 (1920).

42 U.S. CONST. art. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress ....

Id.

43 *Hawke*, 253 U.S. at 231 (holding that the legislature's ratification of the Eighteenth Amendment did not have to be submitted to the people pursuant to the referendum mechanism of the state constitution); *see also* Leser v. Garnett, 258 U.S. 130, 136-37 (1922) (Brandeis, J.) (rejecting the argument that legislative ratifications of the Nineteenth Amendment were invalid because of failure to comply with state constitutional requirements) (citing *Hawke*); *cf.* Kimble v. Swackhamer, 439 U.S. 1385, 1385 (1978) (Rehnquist, J.) (denying a request to enjoin nonbinding referendum on Equal Rights Amendment as he believed four Justices would not think jurisdiction over the case existed). Neither *Bush I* nor *Bush II* cite these Article V cases in support of the Article II doctrine. Nevertheless, Justice Stevens commented that Bush's reliance on *Hawke* was misplaced because "Article I, [Section] 4, and Article II, [Section] 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision." Bush v. Gore, 531 U.S. at 123 n.1 (Stevens, J., dissenting).

44 *See Smiley*, 285 U.S. at 366 (explaining that to determine the applicability of state constitutions to legislative action taken pursuant to a federal constitutional delegation, "it is necessary to consider the nature of the particular action in view"); *see also* Kirby, *supra* note 8, at 502-03 (recommending a functional analysis, "looking to the nature of the action" taken by the legislature).

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45 *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000).

46 *See* Bush v. Gore, 531 U.S. at 112 (Rehnquist, C.J., concurring) (quoting Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983)). A federalism-safeguarding defense of the Article II independent legislature doctrine has little contemporary force in light of the long-settled practice of popularly electing electors. *See* Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 225 (2000) (explaining that the Electoral College "does nothing to help state governments fend off preemptive federal legislation").

47 *See* Epstein, *supra* note 7, at 620 (arguing that "the strong federal interest in the selection of the President of the United States makes it appropriate for federal courts to see that all state actors stay within the original constitutional scheme"); *see also* POSNER, *supra* note 7, at 158 ("The 'Manner directed' clause can head off Presidential election crises by preventing one branch of state government, disappointed perhaps by the outcome of the election, from changing the outcome by altering the election rules after the result is known, provoking an interbranch struggle that is a recipe for chaos."); McConnell, *supra* note 7, at 661-63 (stating that by specifying "[l]egislature," Article II, Section 1: (1) "ensures that the manner of selecting electors will be chosen by the most democratic branch of the state government" and (2) "places authority to set electoral rules in the institution least able to manipulate the rules to favor a particular candidate"). Epstein's argument rings hollow because it is circular. Those of McConnell and Posner ring hollow because they fail to adequately explain why the Constitution requires the Supreme Court to be the ultimate arbiter of what the election rules were prior to the deadlock. An Article II independent legislature doctrine does not eliminate retrospective judicial interpretation of a state legislature's "prospective" election rules—it simply shifts it from the state court to the Supreme Court. The Supreme Court can just as easily manipulate those rules after the election as can the state court and is no less "interested" in doing so. *See* POSNER, *supra* note 7, at 180-81 (noting that judges on the Florida Supreme Court "had a smaller stake in the outcome of the Presidential election than the Justices of the U.S. Supreme Court did, because the President does not appoint state judges"); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 725 (2001) [hereinafter Pildes, *Judging "New Law"*] ("[T]here is no general structural reason to think that federal courts, or the United States Supreme Court, are better positioned than the state courts to have a comparative institutional advantage that would predictably make them less prone to the appearance or reality of partisan pressures or temptations."). Therefore, if there is indeed no genuine structural interest in maintaining especially close adherence to the intentions of an Article II legislature, and if the state court has not violated any individual constitutional rights, *see id.* at 702-06 (describing how a state court may violate the Fourteenth Amendment by creating "new law" after an election), then it is difficult to see why the Supreme Court, as opposed to Congress, should decide which branch of the state government should emerge victorious from an election deadlock. *See* U.S. CONST. art. II, § 1, cl. 3 (assigning responsibility to count electoral votes to Congress); U.S. CONST. amend. XII (same); 3 U.S.C. §§ 1-15 (1994) (setting the ground rules for counting electoral votes in Congress); Bush v. Gore, 531 U.S. at 154 (Breyer, J., dissenting) ("The legislative history of the [Electoral Count] Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts ...."); Richard H. Pildes, *Disputing Elections, in* THE LONGEST NIGHT: COMPARATIVE PERSPECTIVES AND POLEMICS (Arthur Jacobson & Michele Rosenfeld eds.) (forthcoming 2001) (manuscript at 9) (explaining how Congress passed the Electoral Count Act of 1887 after several years of deliberation "in as non-partisan a context as could be selected," and not only "specifically chose a national political institution, the Congress itself, for resolving disputed Presidential elections," but also "specifically considered and rejected the alternative of United States Supreme Court resolution"). *See generally* Elizabeth Garrett, *Leaving the Decision to Congress, in* THE VOTE 38 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

48 Bush v. Gore, 531 U.S. at 115 (Rehnquist, C.J., concurring).

49 *See, e.g., id.* at 119 (Rehnquist, C.J., concurring) (describing the Florida court's opinion as "of course absurd"); *see also* Pildes, *Judging "New Law," supra* note 47, at 713 (outlining how the Court's "dominating concern [was] that the Florida Supreme Court was creating 'new law' in the midst of resolving the 2000 election").

50 *See* POSNER, *supra* note 7, at 158-60 (arguing that the "lawlessness" of the Florida court is a consideration which should inform interpretation of Article II, Section 1); Epstein, *supra* note 7, at 621 (arguing that the Florida Supreme Court "created its own electoral scheme that substituted judicial authority for that of the Secretary of State"); McConnell, *supra* note 7, at 666 (arguing that the work of the Florida court "was obviously not 'interpretation'"); Robert H. Bork,

Sanctimony Serving Politics: The Florida Fiasco, NEW CRITERION, Mar. 2001, at 4, 11 (describing *Bush I* as "a valiant effort" to restrain a "lawless state court" which had been "captured" by "runaway political passions").

51 Pildes, *Judging "New Law," supra* note 47, at 699, 722.

52 *Id.* at 701.

53 *Id.* at 726.

54 In addition, Robert Bork, another dean of originalism, has put his stamp of approval on the *Bush II* concurrence. *See* Robert H. Bork, Introduction to the Francis Boyer Lecture at the American Enterprise Institute (Feb. 13, 2001) (transcript on file with author), *available at* www.aei.org/boyer/2001intro.htm ("The rationale offered by the concurring opinion was absolutely correct."); *see also* Bork, *supra* note 50, at 5 (stating that the *Bush II* majority's equal protection holding "raises serious difficulties" but that the rationale of the concurrence was "better").

55 McConnell, *supra* note 7, at 661.

56 U.S. ARTS. OF CONFEDERATION art. V (providing that delegates to Congress "shall be annually appointed in such manner as the legislature of each State shall direct").

57 *McPherson v. Blacker*, 146 U.S. 1 (1892), was the only case dealing with Article II, Section 1 cited by either the Court in *Bush I* or the concurrence in *Bush II*.

58 *See* Epstein, *supra* note 7, at 619 ("To the best of my knowledge no case, prior to *Bush v. Gore*, had passed on the proper interpretation of the Article II, Section 1, Clause 2 requirement that Florida shall 'appoint' its presidential electors 'In such manner as the [Florida] Legislature [] May Direct.'") (alterations in original).

59 *See* Opinion of the Judges, 37 Vt. 665 (1864); Opinion of the Justices, 45 N.H. 595 (1864), *available at* 1864 WL 1585; CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901, at 200-01 (Greenwood Press 1976) (1901) (describing the contested election case of *Baldwin v. Trowbridge*, H.R. MISC. DOC. NO. 39-13 (1866)).

60 146 U.S. at 8-11.

61 *See* Smiley v. Holm, 285 U.S. 355, 367-69 (1932), *rev'g* 238 N.W. 494 (Minn. 1931); State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 535-37 (Mo. 1932), *aff'd*, 285 U.S. 380 (1932); Koenig v. Flynn, 179 N.E. 705, 707-08 (N.Y. 1932), *aff'd*, 285 U.S. 375 (1932); Opinion of the Justices, 107 A. 705, 705-06 (Me. 1919); Schrader v. Polley, 127 N.W. 848, 849-51 (S.D. 1910). *But see* Parsons v. Ryan, 60 P.2d 910 (Kan. 1936) (arguably employing independent legislature doctrine).

62 *See* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694-96 (Ky. 1944); *see also* State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286-87 (Neb. 1948) (employing independent legislature doctrine).

63 *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA 143-60 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

64 Clarence Thomas, Francis Boyer Lecture at the American Enterprise Institute (Feb. 13, 2001) (transcript on file with author), *available at* http://www.aci.org/boyer/thomas.htm.

65 Laurie Asseo, *Scalia Speaks on Constitution*, Associated Press, Feb. 24, 2001 (on file with author).

66 Bush v. Gore, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

67 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 259 (1996).

68 *See* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 37 (1986). Slonim notes that both the Virginia Plan and the New Jersey Plan provided for election of the executive by the national legislature. *Id.*

69 *Id.* at 38.

70 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (Max Farrand ed., 1966) (statement of Governeur Morris) [hereinafter FARRAND, RECORDS].

71 *Id.* at 34 (statement of Madison).

72 Slonim, *supra* note 68, at 41.

73 RAKOVE, *supra* note 67, at 259.

74 *Id.; see also* Slonim, *supra* note 68, at 46 (describing the "disadvantage from which both the smaller and the southern states would suffer" as the "underlying causes of the opposition to popular election of the executive").

75 *See* RAKOVE, *supra* note 67, at 259-60.

76 *See* 2 FARRAND, RECORDS, *supra* note 70, at 55-56 (statement of Rufus King) (proposing electoral college scheme).

77 Slonim, *supra* note 68, at 53.

78 Madison came the closest to addressing the narrow question of independent legislatures on July 25 when he surveyed the various modes of executive selection that had been proposed. He found four general sources of authority: "The election must be made either by some existing authority under the Natil. or State Constitutions—or by some special authority derived from the people—or by the people themselves." 2 FARRAND, RECORDS, *supra* note 70, at 109. Under the national constitution, the "[e]xisting authorities ... [would] be the Legislative & judiciary," neither of which was appropriate. *Id.* "The existing authorities in the States," he continued, "are the Legislative, Executive & Judiciary," all of which he found unsuitable. *Id.* at 110. The remaining choice, therefore, was between an electoral scheme involving "electors chosen by the people"—which would presumably constitute the "special authority derived from the people" which he had referred to earlier—and "an immediate appointment by the people." *Id.* at 109-10. In Madison's thinking, therefore, a scheme in which the state legislatures directly selected the national executive would derive authority from the state constitutions, while a scheme in which electors chosen by the people selected the executive would derive authority "from the people" directly. But from what source he thought the hybrid scheme of Article II derived *its* authority remains

unclear. It seems unlikely, though, that Madison thought the authority was derived solely from the Federal Constitution, as a strong or super-strong independent legislature doctrine would imply.

79 *Id.* at 493-94.

80 *Id.*

81 *Id.* at 525.

82 Slonim, *supra* note 68, at 54.

83 2 FARRAND, RECORDS, *supra* note 70, at 500-03, 511-15, 521-29. In the event of no electoral majority, the Brearley Committee's report assigned the ultimate decision to the Senate, which would choose by ballot from among the five highest recipients of electoral votes. *Id.* at 494; *see also* RAKOVE, *supra* note 67, at 264. The Convention, fearful of executive dependence on the Senate, ultimately decided to place that responsibility in the House, where each state's delegation would have one vote. "This had the twofold advantage of preserving the political compromise among the states while 'lessening the aristocratic influence of the Senate.'" *Id.* at 265 (quoting statement of Mason, 2 FARRAND, RECORDS, *supra* note 70, at 527).

84 *See* Kirby, *supra* note 8, at 502 ("The point simply did not occur to [the Framers]."). It is interesting to note (but not very helpful) that the language of Article II, Section 1, as it appears in the Constitution today, is slightly different than the language proposed by the Brearley Committee and first agreed to by the Framers. The Brearley language required appointment "in such manner as *its* Legislature may direct." 2 FARRAND, RECORDS, *supra* note 70, at 497 (emphasis added). A committee of style subsequently replaced "its Legislature" with "the legislature thereof." *Id.* at 597. Presumably, the committee of style thought the change had no substantive effect. *See id.*

85 THE FEDERALIST NO. 68, at 457 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

86 Address of James Wilson in the Pennsylvania Convention (Dec. 11, 1787), *in* 3 FARRAND, RECORDS, *supra* note 70, at 166 ("The manner of appointing the President ... is not objected to, therefore I shall say little on that point."); 2 ELLIOT'S DEBATES 511 (Jonathon Elliot ed., 1836).

87 *See* 2 ELLIOT'S DEBATES, *supra* note 86, at 511-12 (statement of Wilson) (explaining how Article II resolved difficult problems of executive dependence on the national legislature); 4 ELLIOT'S DEBATES, *supra* note 86, at 304, 315 (statements of Pinckney) (explaining how the Electoral College "rendered undue influence almost impossible"); *Id.* at 122 (statement of Davie) (explaining that having the President chosen by "electors appointed by the people" made him "perfectly independent of [the Senators]"); 2 ELLIOT'S DEBATES, *supra* note 86, at 512 (statement of Wilson) (explaining that popular election extended to the whole Union would be impracticable); 3 ELLIOT'S DEBATES, *supra* note 86, at 494 (statement of Madison) (explaining that popular election might be "impracticable" because of difficulties arising from "the extent and population of the states," but that people choosing electors "can be done with ease and convenience, and will render the choice more judicious").

88 *See* 3 ELLIOT'S DEBATES, *supra* note 86, at 491-93 (statement of Grayson) (arguing that a candidate could "easily purchase" two electoral votes and make it into the list of the top five recipients, and, from there, if he was the favorite of "the seven Eastern States," become President); *id.* at 493 (statement of Mason) (arguing that Grayson's scenario "will almost constantly happen"); *id.* at 495 (statement of Madison) (pointing out that Grayson, in making his "extravagant calculation" of "Eastern States" hegemony, had "been obliged to associate North Carolina and Georgia with the five smallest Northern States").

89 *See generally* TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804, at 22 (1994).

90 THE FEDERALIST NO. 68, *supra* note 85, at 460 ("[T]he people of each state shall choose a number of persons as electors, equal to the number of senators and representatives of such state in the national government.").

91 *See* 2 ELLIOT'S DEBATES, *supra* note 86, at 145 (statement of Thacher in the Massachusetts convention) ("The President is chosen by the electors, who are appointed by the people."); 3 ELLIOT'S DEBATES, *supra* note 86, at 494 (statement of Madison in the Virginia convention) ("[T]he people choose the electors."); *id.* at 486 (statement of Governeur Randolph in the Virginia convention) ("The electors must be elected by the people at large."); 4 ELLIOT'S DEBATES, *supra* note 86, at 122 (statement of Davie in the North Carolina convention) ("[The President] is chosen by the electors appointed by the people."); *id.* at 304 (statement of Pinckney in the South Carolina convention) ("[The President] is to be elected by the people, through the medium of electors chosen particularly for that purpose.").

92 *See* 2 ELLIOT'S DEBATES, *supra* note 86, at 166-67 (statement of Rev. Stillman in the Massachusetts convention) ("The President and senators are to be chosen by the interposition of the legislatures of the several states, who are the representatives and guardians of the people," while the "representatives in Congress are to be chosen ... by the people of the several states."); 3 ELLIOT'S DEBATES, *supra* note 86, at 488 (statement of James Monroe in the Virginia convention) ("[The President] is to be elected by electors, in a manner perfectly dissatisfactory to my mind. I believe that he will owe his election, in fact, to the state governments, and not to the people at large.").

93 2 ELLIOT'S DEBATES, *supra* note 86, at 512 (statement of Wilson in Pennsylvania convention); *see also id.* at 127 (statement of Bowdoin in the Massachusetts convention) ("[The President is chosen] by delegates, to be expressly chosen for the purpose, in such manner as the different legislatures may direct.").

94 The following exchange at the North Carolina ratifying convention clearly demonstrates the uncertainty that attended the language of the Elector Appointment Clause:

> Gov. JOHNSTON expressed doubts with respect to the persons by whom the electors were to be appointed. Some, he said, were of opinion that the people at large were to choose them, and others thought the state legislatures were to appoint them.
>
> Mr. IREDELL was of the opinion that it could not be done with propriety by the state legislatures, because, as they were to direct the manner of appointing, a law would look very awkward, which should say, "They gave the power of such appointments to themselves."
>
> Mr. MACLAINE thought the state legislatures might direct the electors to be chosen in what manner they thought proper, and they might direct it to be done by the people at large.
>
> Mr. DAVIE was of opinion, that it was left to the wisdom of the legislatures to direct their election in whatever manner they thought proper.

4 ELLIOT'S DEBATES, *supra* note 86, at 105.

95 1 FARRAND, RECORDS, *supra* note 70, at 68-69. Wilson felt that experience in New York and Massachusetts "shewed that an election of the first magistrate by the people at large, was both a convenient & successful mode." He wished to derive both branches of the legislature and the executive from the people "in order to make them as independent as possible of each other, as well as of the States." *Id.*

96 *Id.* at 80.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 81.

104 *Id.*

105 2 FARRAND, RECORDS, *supra* note 70, at 22.

106 *Id.* at 32.

107 Slonim, *supra* note 68, at 42.

108 "[T]he improbability of a general concurrence of the people in favor of any one man." 2 FARRAND, RECORDS, *supra* note 70, at 55-56.

109 *Id.* at 56.

110 *Id.*

111 *Id.* at 56-57. Madison believed that the "one difficulty ... of a serious nature attending an immediate choice by the people" was the power imbalance it would create. "The right of suffrage," he stated, "was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes." *Id.*

112 RAKOVE, *supra* note 67, at 259-60.

113 2 FARRAND, RECORDS, *supra* note 70, at 56 (emphasis added).

114 *Id.* at 57.

115 *Id.* (emphasis added).

116 *Id.*

117 *Id.*

118 *Id.* at 58. Gerry also suggested that "the electors proposed by Mr. E. should be 25 in number, and allotted [specifically to the different states]." *Id.*

119 *Id.* ("The part relating to the ratio in which the States sd. chuse electors was postponed nem. con.").

120 *Id.* at 95; Slonim, *supra* note 68, at 44; *see also* RAKOVE, *supra* note 67, at 260 ("[S]ome delegates questioned the inconvenience and expense of gathering electors from different states ....").

121 2 FARRAND, RECORDS, *supra* note 70, at 99.

122 *Id.* at 100.

123 *Id.*

124 *Id.* at 101.

125 *Id.*

126 *Id.*

127 *See* Slonim, *supra* note 68, at 44-45. At this point, an exasperated Wilson proposed an idea that he had not yet "digested": that the Executive be elected for six years "by a small number, not more than 15 of the Natl Legislature, to be drawn from it, not by ballot, but by lot." 2 FARRAND, RECORDS, *supra* note 70, at 103.

128 *See, e.g.*, 2 FARRAND, RECORDS, *supra* note 70, at 109-11 (statement of Madison) (reviewing various proposals); *id.* at 118-20 (statement of Mason) (same). Madison mentioned at one point during this period of debate that he would be satisfied with "appointment by Electors chosen by the people." *Id.* at 110. South Carolina's Pierce Butler said at another that he favored "election by Electors chosen by the Legislatures of the States." *Id.* at 112.

129 *Id.* at 403-04.

130 The Committee of Detail named the national executive "The President of the United States" in the beginning of August. Slonim, *supra* note 68, at 48-49.

131 2 FARRAND, RECORDS, *supra* note 70, at 404.

132 *Id.*

133 *Id.*

134 *Id.*

135 *See* Slonim, *supra* note 68, at 50-51.

136 *See id.* at 51; 2 FARRAND, RECORDS, *supra* note 70, at 481. The members of the committee were Nicholas Gilman (New Hampshire), Rufus King (Massachusetts), Roger Sherman (Connecticut), David Brearley (New Jersey), Gouverneur Morris (Pennsylvania), John Dickinson (Delaware), Daniel Carrol (Maryland), James Madison (Virginia), Hugh Williamson (North Carolina), Pierce Butler (South Carolina), and Abraham Baldwin (Georgia). *Id.*

137 *See* Slonim, *supra* note 68, at 51; 2 FARRAND, RECORDS, *supra* note 70, at 493-94.

138 2 FARRAND, RECORDS, *supra* note 70, at 497.

139 *Id.* at 55-56 (suggestion of King); *id.* at 110 (suggestion of Madison); *id.* at 404 (suggestion of Morris); *see also* 1 FARRAND, RECORDS, *supra* note 70, at 80 (suggestion of Wilson).

140 2 FARRAND, RECORDS, *supra* note 70, at 57 (suggestion of Gerry).

141 *Id.* (suggestion of Elseworth).

142 *Id.* at 112 (suggestion of Butler).

143 *See* 1 FARRAND, RECORDS, *supra* note 70, at 80; 2 FARRAND, RECORDS, *supra* note 70, at 57.

144 1 FARRAND, RECORDS, *supra* note 70, at 80.

145 2 FARRAND, RECORDS, *supra* note 70, at 57.

146 *Id.*

147 *See* U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof ...."), *amended by* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof ....").

148 THE FEDERALIST NO. 62, at 416 (James Madison) (Jacob E. Cooke ed., 1961); *see also* RAKOVE, *supra* note 67, at 62 (describing the reasoning at the Convention). Gerry's concerns do not appear to have played a role in the ratifying conventions but they did apparently resurface immediately after the Founding, when state legislatures had to decide what to do with the Elector Appointment Clause. For instance, on November 6, 1788, William Heath made a speech in the Massachusetts General Court advocating the popular election of presidential electors. *See* William Heath's Speech Supporting Popular Election of Presidential Electors (Nov. 6, 1788), *in* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 485-86. He recited the federalism objection to popular election of Electors: "it is said that the general government may become a consolidated government, and that to prevent this we ought to throw as much weight as possible into the scale of the legislature in order to secure the state sovereignty." *Id.* at 486.

149 THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

150 The 1874 Senate Report quoted by the Supreme Court in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395, at 9 (1874)), for instance, contended that the power conferred by Article II on state legislatures "cannot be

taken from them or modified by their state constitutions any more than can their power to elect senators of the United States." *See also* POSNER, *supra* note 7, at 154 (comparing Article II to Article I, Section 3). Similarly, the Supreme Court suggested that a state legislature's independent Article V ratification power was not unlike its independent Article I, Section 3 power to choose Senators. *See* Hawke v. Smith, 253 U.S. 221, 227-28 (1920).

151 *See* U.S. CONST. art. II, § 1.

152 *Compare* U.S. CONST. art. I, § 3, cl. 1, *with* U.S. CONST. art. II, § 1, cl. 2.

153 U.S. ARTS. OF CONFEDERATION art. V; *cf.* U.S. CONST. art. II, § 1 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, [presidential electors].").

154 *See* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 306 n.4 ("Connecticut and Rhode Island elected their delegates to the Continental and Confederation congresses by popular nomination and election.").

155 *See supra* Part II.B.

156 Each State retained its "sovereignty, freedom and independence, and every power, jurisdiction and right" not expressly delegated to the United States Congress. U.S. ARTS. OF CONFEDERATION art. II.

157 *See* MASS. CONST. of 1780, Part the Second, ch. 4, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 21, at 105 (stating that delegates "shall, some time in the month of June, annually, be elected by the joint ballot of the senate and house of representatives assembled together in one room"); N.H. CONST. of 1784, part 2, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 21, at 355 (stating that delegates "shall some time between the first Wednesday of June, and the first Wednesday of September annually, be elected by the senate and house of representatives in their separate branches"); S.C. CONST. of 1778, art. XXII, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 472 (stating that delegates "chosen annually by the senate and house of representatives jointly, by ballot, in the house of representatives"). The Vermont Constitution of 1786 merely echoes the details of Article V of the Articles of Confederation but does not itself try to regulate the mode of selection. *See* VT. CONST. of 1786, ch. 2, § XXVII, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 21, at 503. In addition, the Georgia Constitution of 1777 apparently anticipated adoption of the Articles of Confederation and provided for election of delegates to Congress by ballot. *See* GA. CONST. of 1777, art. XVI, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 446 ("The continental delegates shall be appointed annually by ballot, and shall have a right to sit, debate, and vote in the house of assembly, and be deemed a part thereof, subject, however, to the regulations contained in the twelfth article of the Confederation of the United States.").

158 *See* DEL. CONST. of 1776, art. XI, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 201 (providing that delegates "shall be chosen annually, or superseded in the mean time, by joint ballot of both houses in the general assembly"); MD. CONST. of 1776, art. XXVII, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 21, at 379 (providing that delegates "shall be chosen annually, or superseded in the mean time by the joint ballot of both Houses of Assembly"); N.Y. CONST. of 1777, art. XXX, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 21, at 177.

> The senate and assembly shall each openly nominate as many persons as shall be equal to the whole number of Delegates to be appointed; after which nomination they shall meet together, and those persons named in both lists shall be Delegates; and out of those persons whose names are not on both lists, one-half shall be chosen by the joint ballot of the senators and members of assembly so met together as aforesaid.

Id.; N.C. CONST. of 1776, art. XXXVII, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 21, at 407 (providing that delegates "shall be chosen annually by the General Assembly, by ballot"); PA. CONST. of 1776, § 11, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 280 (providing that delegates "shall be chosen by ballot by the future general assembly at their first meeting, and annually forever afterwards, as long as such representation shall

be necessary"); S.C. CONST. of 1776, art. XV, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 466 (providing that delegates shall "be chosen by the general assembly and legislative council jointly by ballot in the general assembly"); VT. CONST. of 1777, ch. 2, § X, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 21, at 491-92 (providing that delegates "shall be chosen, by ballot, by the future General Assembly, at their first meeting, and annually, forever afterward, as long as such representation shall be necessary"); VA. CONST. of 1776, *reprinted in* 10 SOURCES AND DOCUMENTS, *supra* note 21, at 54 (providing that delegates "shall be chosen annually, or superseded in the mean time, by joint ballot of both Houses of Assembly"). The two state constitutions with no such provisions were New Jersey and New Hampshire. *See* N.H. CONST. of 1776, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 21, at 342-43; N.J. CONST. of 1776, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 21, at 449-53.

159 Epstein, *supra* note 7, at 620.

160 2 FARRAND, RECORDS, *supra* note 70, at 101.

161 1 FARRAND, RECORDS, *supra* note 70, at 80.

162 2 FARRAND, RECORDS, *supra* note 70, at 55-57.

163 *Id.* at 403-04.

164 *See id.* at 57.

165 Even Ellsworth's doomed compromise, however, may not have been an accurate reflection of a willingness on the part of the delegates to settle for exclusive legislative appointment of electors. Its brief success may have been due to some ambiguity as to exactly what it meant. Although the language of the resolution appears to give no role to the people in selecting electors, there is evidence that at least some of the Framers did not see it as inconsistent with popular election of electors. One week after Ellsworth's resolution was adopted, subsequent to its reconsideration and rejection, Madison recorded Mason as remembering the following: "[i]t has been proposed that the election should be made by Electors *chosen by the people* for that purpose. This was at first agreed to: But on further consideration has been rejected." *Id.* at 119 (emphasis added).

166 *See id.* at 403-04.

167 U.S. CONST. art. II, § 1.

168 *See* GA. CONST. of 1789, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 452-55; PA. CONST. of 1790, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 286-95; S.C. CONST. of 1790, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 476-82.

169 *See* GA. CONST. of 1777, art. XVI, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 446; PA. CONST. of 1776, Plan or Frame of Government, § 11, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 280; S.C. CONST. of 1778, art. XXII, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 472.

170 *See* KY. CONST. of 1792, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 21, at 142-51; TENN. CONST. of 1796, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 21, at 141-50; VT. CONST. of 1793, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 21, at 507-14.

171 DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 213.

172 GA. CONST. of 1789, amend. II (adopted 1795), *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 457.

173 *See* GA. CONST. of 1798, art. IV, § 2, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 464.

> All elections by the general assembly shall be by joint ballot of both branches of the legislature; and when the senate and house of representatives unite for the purpose of electing, they shall meet in the representative chamber, and the president of the senate shall in such cases preside, receive the ballots, and declare the person or persons elected.
>
> *Id.*

174 KY. CONST. of 1799, art. VI, § 16, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 21, at 160.

175 *See* MD. CONST. of 1776, art. XIV (adopted 1810), *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 21, at 387.

> [E]very free white male citizen ... shall have a right of suffrage ... in the election ... for electors of the President and Vice-President of the United States, for Representatives of this State in the Congress of the United States, for delegates to the general assembly of this State, electors of the senate, and sheriffs.
>
> *Id.*

176 *See generally* Smiley v. Holm, 285 U.S. 355, 368-69 (1932).

177 Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *see also* Epstein, *supra* note 7, at 620 (arguing that Article II "reads like a strict liability provision" in which the legislature "directs" the manner of appointment, "and all other actors within the [state] system have to stay within the confines of that directive").

178 MASS. CONST. of 1780, Part the Second, ch. 1, § 1, art. II, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 21, at 96.

179 *Id.*

180 *Id.*

181 House and Senate Proceedings (Nov. 20, 1788), *in* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 506-07.

182 *Id.* at 507.

183 The General Court could not agree on the manner of choosing Senators, so no Article I, Section 4 law on that subject was presented to Governor Hancock in 1788. *See* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 511-12.

184 N.Y. CONST. of 1777, art. III, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 21, at 172.

185 *Id.* The legislature could override the veto with a two-thirds vote of both houses. If the Council of Revision did not take action on a bill within ten days, the bill became law. *Id.*

186 *See* Assembly and Senate Proceedings (Jan. 24, 1789), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 344.

187 *Id.*

188 Council of Revision Proceedings (Jan. 27, 1789), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 346.

189 *See id.*

190 *See* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 197.

191 *See* Assembly and Senate Proceedings (July 13, 1789), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 534-37. The bill provided that each house was to nominate two persons for the position of Senator. *See* Bill for the Election of Senators (July 13, 1789), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 537. If there were no common nominations, the Senate was to choose one of the nominees of the Assembly, and the Assembly was to choose one of the nominees of the Senate. *Id.* If the houses nominated the same two persons, they were elected. *Id.* If the houses agreed on only one person, then he was elected, and the other Senator would be chosen by concurrent resolution of both houses. *Id.*

192 Council of Revision Proceedings (July 15, 1789), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 538-39.

193 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 513.

194 It is a mere coincidence that New York and Massachusetts were also the two states which had veto mechanisms. New Hampshire also debated whether electors were to be appointed jointly or concurrently, but the debate is not well preserved. *See* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 815-16 (noting that "[t]he House proposed that the Senate and House meet in joint session, but the Senate insisted upon voting separately"); Excerpt of the Autobiography of William Plumer, *in* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 823-24 (arguing that the "House had no authority to compel the Senate to a joint ballot without their previous consent").

195 Joint Committee Report (Nov. 4, 1788), *in* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 481.

196 MASS. CONST. of 1780, Part the Second, ch. 4, *in* 5 SOURCES AND DOCUMENTS, *supra* note 21, at 105.

197 Newspaper Report of the House Proceedings on Friday, 7 November (Nov. 8, 1788), *in* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 489.

198 *Id.*

199 *Id.*

200 Newspaper Report of House Proceedings on Wednesday, A.M., 19 November (Nov. 22, 1788), *in* 1 FIRST FEDERAL ELECTIONS, *supra* note 1, at 497.

201 *Id.* at 497-98.

202 *Id.* at 498.

203 *See* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 217.

204 *See* Assembly Debates (Dec. 17, 1788) (statement of Mr. Harrison), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 223-24 ("The powers which either house has derived from the constitution, I regard as a *sacred trust*, which they are not at liberty to resign, but on the contrary are bound to exercise for the benefit of their constituents.").

205 *See* Assembly Debates (Jan. 2, 1789) (statement of Mr. Harrison), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 272.

> [I]n order therefore to satisfy the words of the [federal constitution], the election must be by both houses of the legislature, and therefore whatever mode shall be adopted that may deprive one branch of that election is repugnant to the new constitution, because it is necessary that every branch of the legislature should concur in the act.
>
> *Id.*

206 *See* N.Y. CONST. of 1777, art. XXX, *reprinted in* 7 FIRST FEDERAL ELECTIONS, *supra* note 1, at 177.

> The senate and assembly shall each openly nominate as many persons as shall be equal to the whole number of Delegates to be appointed; after which nomination they shall meet together, and those persons named in both lists shall be Delegates; and out of those persons whose names are not on both lists, one-half shall be chosen by the joint ballot of the senators and members of assembly so met together as aforesaid.
>
> *Id.*

207 *See* Assembly Debates (Dec. 17, 1788), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 226 (statement of Mr. Lansing) ("Let us then adhere to what the constitution says; it declares that the two houses shall nominate, and if they differ, a joint ballot must determine; we have therefore no discretion on the subject."); Assembly Debates (Dec. 17, 1788) (statement of Mr. Jones concerning appointment of Senators), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 228 ("I trust every member will think I was right, and that [the law for appointing Senators] ought to be formed as near the constitution of our own state as that of the United States would admit."); *A Federal Republican*, N.Y. J. (Jan. 1, 1789), *reprinted in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 264.

> Every legislature then are left to exercise their discretion on this head subject to such rules and restrictions as their own constitutions provide, if any exists. The case then with respect to the legislature of New-York, stands thus: The new constitution commits to their discretion the manner in which they shall exercise the right of electing senators, but their own constitution directs how this discretion shall be used, in the article providing for the election of delegates.
>
> *Id.*

208 *See* Assembly Debates (Dec. 17, 1788) (statement of Mr. Livingston), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 227 ("[O]ur constitution contemplated only the choice of the delegates who were to represent us [in the Congress of the Confederation].").

209 *See* Joint Conference Committee Debates (Jan. 5, 1789) (statement of Mr. Livingston), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 287.

> [T]he legislature must by law prescribe the mode or manner in which the *legislative body* is to elect senators for the Congress—that mode is a matter of pure discretion, independent of any rule in the state constitution, and ought to be so

regulated that each branch shall have its due weight, that the will of the people may be respected, who have conferred equal powers on the one and the other.

Id.

210 *See* Assembly Debates (Jan. 2, 1789) (statement of Mr. Harrison), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 270 ("The constitution does not in pointed terms settle the mode; had this been the case, there could not have been a necessity for the present deliberation."); *see also* Joint Conference Committee Debates (Jan. 5, 1789), *in* 3 FIRST FEDERAL ELECTIONS, *supra* note 1, at 281 (statement of Mr. L'Hommedieu concerning the Senate's opinion).

This constitution, which being the last act of the people, is paramount to any law or constitution of the state in those points in which their provisions vary, directs, that the choice of senators shall be made by the legislature of the state, which legislature, by the constitution of this state, is formed by the assembly and the senate, which senate and assembly, by the same constitution, altho' unequal in numbers, have equal powers, and a negative on each other in every case, except when it is otherwise directed by the same constitution.

Id.

211 Richard Posner states that his version of the super-strong Article II rationale is supported by the existing cases on point. *See* POSNER, *supra* note 7, at 156. This is incorrect not only because the cases are actually split (at best), *see infra* Part III.C. and Part III.D., but also because the cases he refers to are all state court cases dealing with state constitutions, not federal court cases dealing with state courts. *See* Kirby, *supra* note 8, at 504 (summarizing the cases to which Posner refers). It is hard to see how state court decisions can establish a precedent for federal court superintendence over state court interpretation. The fact is that no federal court has ever used Article II in the manner suggested by Posner.

212 The sole exception appears to be *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948), in which the Nebraska Supreme Court determined that a state statute precluded nomination of candidates for elector not affiliated with any party. That construction did not create constitutional difficulty, the court argued, because the state constitutional guarantee of "free" elections "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States." *Id.* at 286-87 (quoting the "holding" of McPherson v. Blacker, 146 U.S. 1 (1892)). A similar case out of Kansas, *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936), should not be read to support the independent legislature doctrine. *See id.* at 912 ("The manner selected by the Legislature may not be set aside by the courts simply because the effect is to limit the number of persons whose names may appear as candidates."). *But see* Kirby, *supra* note 8, at 504 (suggesting that *Parsons* should be read that way).

213 *See, e.g.*, Opinion of the Judges, 37 Vt. 665, 667 (1864) (discussing constitutional provision that certain towns "may hold elections therein") (quoting VT. CONST. of 1793/6, ch. II, § 7, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 21, at 509); Chase v. Miller, 41 Pa. 403, 418 (1862), *available at* 1862 WL 5002, at *12 (discussing constitutional provision granting certain class of citizens right to vote "*in the election district where he offers to vote*") (quoting PA. CONST. of 1838, art. III, § 1, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 299).

214 *See* R.I. CONST. of 1842, amend. IV (adopted Aug. 1864), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1613 (Benjamin Perley Poore ed., Burt Franklin 2d ed., 1972) (1924).

Electors of this State, who, in time of war, are absent from the State, in the actual military service of the United States, being otherwise qualified, shall have a right to vote in all elections in the State for electors of President and Vice-President of the United States, Representatives in Congress, and general officers of the State.

Id.; see also In re Opinion to the Governor, 102 A. 913, 914 (R.I. 1918) (holding that state constitutional amendment was required to grant absentees the right to vote and that constitutional language "Representatives in Congress" in Amendment IV meant only United States Representatives and not United States Senators).

215 *See, e.g.*, *In re* Opinion of the Justices, 44 N.H. 633 (1863), *available at* 1863 WL 1558, at *1 (describing New Hampshire soldier-voting law); H.R. REP. NO. 39-13, at 1 (1866) (setting forth Michigan soldier-voting law).

216 13 Mich. 127, 149 (1865) (Christiancy, J.), *available at* 1865 WL 2088, at *13; *see also Chase*, 41 Pa. at 427-28, *available at* 1862 WL 5002, at *20.

> A good deal has been said about the hardship of depriving so meritorious a class of voters as our volunteer soldiers of the right of voting .... To voluntarily surrender the comforts of home, and friends, and business, and to encounter the privations of the camp and the perils of war, for the purpose of vindicating the constitution and laws of the country, is indeed a signal sacrifice to make for the public good ....
>
> *Id.*

217 *See, e.g.*, Bourland v. Hildreth, 26 Cal. 161 (1864), *available at* 1864 WL 724; Opinion of the Judges, 30 Conn. 591 (1862), *available at* 1862 WL 941; *Twitchell*, 13 Mich. at 148, *available at* 1865 WL 2088, at *12; *In re Opinion of the Justices*, 44 N.H. 633, *available at* 1863 WL 1558; *Chase*, 41 Pa. 403, *available at* 1862 WL 5002.

218 *Twitchell*, 13 Mich. at 148 (Campbell, J.), *available at* 1865 WL 2088, at *12; *see also id.* at 149 (Christiancy, J.), *available at* 1865 WL 2088, at *13 ("[I]n approaching so grave a question at such a time, it is our duty, as judges, to guard with great vigilance against the effects of all such excitements, and of all extraneous considerations upon our own minds, that we may decide the question as one purely of constitutional law."); *Bourland*, 26 Cal. at 213, *available at* 1864 WL 724, at *213 ("If [the constitution disfranchises soldiers], however we may regret it as individuals, we have no power to prevent it as Judges."); *Chase*, 41 Pa. at 428, *available at* 1862 WL 5002, at *20 ("Whilst such men fight for the constitution, they do not expect judges to sap and mine it by judicial constructions.").

219 *See* Morrison v. Springer, 15 Iowa 304 (1864), *available at* 1863 WL 215; Lehman v. McBride, 15 Ohio St. 573 (1863), *available at* 1863 WL 56; State *ex rel.* Chandler v. Main, 16 Wis. 422 (1863), *available at* 1863 WL 1067.

220 *Chandler*, 16 Wis. at 447, *available at* 1863 WL 1067, at *12.

221 *See* Opinion of the Judges, 37 Vt. 665 (1864).

222 *Id.* at 666.

223 *Id.* at 676.

224 *Id.* at 676-78.

225 *Id.* at 676.

226 *Id.*

227 *Id.* at 678.

228 "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2.

229 *Opinion of the Judges*, 37 Vt. at 676-77.

230 *See* Opinion of the Justices, 45 N.H. 595, 607 (1864), *available at* 1864 WL 1585, at *10. ("[The Vermont court's] opinion we regard as directly in point ....").

231 *Id.* at 597, *available at* 1864 WL 1585, at *2 (emphasis added).

232 *Id.* at 598; *see* 1864 WL 1585, at *3 ("[E]xcept so far as the power of the legislature over the subject has been limited and taken away by the constitution of this State or of the United States.").

233 *Id.* at 599, *available at* 1864 WL 1585, at *4.

234 *Id.* at 601, *available at* 1864 WL 1585, at *6.

235 *Id.* at 599, *available at* 1864 WL 1585, at *4.

236 The court rejected the argument that the "qualifications" provision of Article I, Section 2 made the state constitution applicable to voting by absentee soldiers for Representatives. *See id.* at 601-03, *available at* 1864 WL 1585, at *6-8. The *place* of voting for Representatives, unlike "age, fixed residence, property and other such like qualifications," was not a "qualification" determined with reference to the state constitution. *Id.* at 602, *available at* 1864 WL 1585, at *7. In 1921, the court revisited this question and expressed doubt about its initial conclusion. *See In re* Opinion of the Justices, 80 N.H. 595 (1921), *available at* 1921 N.H. LEXIS 79 (refusing to pre-approve act that authorized voters absent from municipality to vote for Representatives and Senators, while approving same with respect to voting for presidential electors).

237 *Opinion of the Justices*, 45 N.H. at 599-604, *available at* 1864 WL 1585, at *4-9.

238 *See In re* Opinion of the Justices, 44 N.H. 633 (1863), *available at* 1863 WL 1558.

239 H.R. MISC. DOC. NO. 39-10 (1865).

240 *Id.* at 1.

241 *Id.* at 2. Trowbridge and Baldwin stipulated to these facts. *See id.*

242 *See id.*

243 *Id.* at 3.

244 U.S. CONST. art. I, § 5 ("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.").

245 H.R. REP. NO. 39-13, at 1 (1866).

246 *Id.* at 3.

247 *See* H.R. REP. NO. 39-14 (1866).

248 *See* ROWELL, *supra* note 59, at 201.

249 The less remarkable proposition that legislatures enjoyed independence when prescribing the manner of choosing *Senators* was hinted at in a contemporaneous Senate report. *See* Report of Senate Committee on the Judiciary Concerning Election of John P. Stockton, *in* S. DOC. NO. 11, at 323 (1903) ("The constitution of New Jersey does not prescribe the manner of choosing United States Senators; as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the legislature ...."). The Senate, however, rejected the conclusions of that report. *See id.* at 327-28.

250 13 Mich. 127 (1865), *available at* 1865 WL 2088.

251 H.R. REP. NO. 39-13, at 2 (1866).

252 *Id.*

253 *Id.* (emphasis in original).

254 BLACK'S LAW DICTIONARY 555 (7th ed. 1999) ("By or in that name.").

255 H.R. REP. NO. 39-13, at 2.

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

261 Most ridiculously, the report notes that Article I, Section 2 of the Constitution provides that electors for Representatives "shall have the qualifications requisite for the most *numerous branch of the State legislature*." Then, it asks, "[d]id anybody ever hear of a constitutional convention, in the history of this country, composed of two houses?" *Id.* Similarly, the report argues that it would be absurd to think that a "constitutional convention" could elect a Senator under Article

I, Section 3, appoint electors under Article II, consent to sale of land to the United States under Article I, Section 8, or apply to Congress for protection against domestic violence under Article IV, Section 4. *Id.* at 2-3.

262 *Id.* at 3.

263 *Id.*

264 *Id.*

265 *Id.*

266 *Id.*

267 *See id.*

268 *Id.* In addition, the report rejected the argument, also rejected in the Vermont and New Hampshire soldier-voting cases, *see* Opinion of the Judges, 37 Vt. 665, 677 (1864); Opinion of the Justices, 45 N.H. 595, 596 (1864), *available at* 1864 WL 1585, at *6-9, that the "place" of holding the election for a Representative may be prescribed by a state constitution as an electoral "qualification" under Article I, Section 2. H.R. REP. NO. 39-13, at 3. The report did not dispute that a state constitution could prescribe elector qualifications "to the exclusion of the legislature," but concluded that Article I, Section 4 placed "[c]ontrol over the place of voting" in the legislature by "unmistakable language." *Id.* Such control, "however disguised by names or circumlocution of words," could not "be transferred to another department of government." *Id.*

269 H.R. REP. NO. 39-14, at 2 (1866).

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.* at 2-3.

274 *Id.* at 3.

275 *Id.*

276 *Id.*

277 *Id.*

278 *See id.*

279 *Id.*

280 *Id.* at 3-4.

281 *See id.* at 4.

282 H.R. REP. NO. 37-4 (1861).

283 *Id.* at 1.

284 *Id.* at 2 (quoting OR. CONST. of 1857, art. II, § 14, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 207).

285 *Id.* at 1, 3.

286 *Id.* at 1.

287 *Id.*

288 *Id.*

289 *Id.* at 1-2.

290 *Id.*

291 *Id.* at 2-3.

292 *Id.* (emphasis added).

293 *See* ROWELL, *supra* note 59, at 172. In the House debate over this contested election, a supporter of Thayer claimed that under the Federal Constitution, only the legislature or Congress could fix the time for an election. *See id.; see also* H.R. REP. NO. 39-14, at 4 (1866). The author of the committee's report, Massachusetts Representative Dawes (who, ironically, would later sign on to the majority report in the *Baldwin* case), rejected that contention, arguing that "the words of the Constitution, 'by the legislature thereof,' meant *by the people, through any constituted authority*." ROWELL, *supra* note 59, at 172 (emphasis added).

294 *See* ROWELL, *supra* note 59, at 124.

295 *Id.*

296 *See id.*

297 H.R. DOC. NO. 29-7, at 1-2 (1845).

298 *See* ROWELL, *supra* note 59, at 125; *see also* H.R. REP. NO. 39-14, at 4.

299 *See* ROWELL, *supra* note 59, at 125.

300 H.R. REP. NO. 39-14, at 3. The minority report also argued that even if the Michigan Constitution did not constrain its legislature, the act was still unconstitutional. First, the report argued that the Federal Constitution prohibited state legislatures from prescribing any places of voting outside of the state. *See id.* at 5. Second, the report argued that the act in question, which merely gave soldiers the right to vote wherever they happened to be, did not in fact prescribe a *place* at all. *Id.*

301 *Id.*

302 *See generally* H.R. REP. NO. 39-14.

303 146 U.S. 1 (1892).

304 *See id.* at 4-5. Two large districts were superimposed over the existing congressional districts. Each large district would elect one presidential elector, as would each congressional district. *See id.*

305 *See id.* at 24.

306 *See id.* at 24-25.

307 *Id.* at 36.

308 *Id.* at 27. The Court also explained that "from the formation of the government until now the practical construction of [Article II, Section 1] has conceded plenary power to the state legislatures in the matter of the appointment of electors." *Id.* at 35.

309 *Id.* at 36.

310 *Id.*

311 *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 75-76 (2000) (recognizing that *McPherson* does not address the same question presented by the Florida Supreme Court's reliance on the Florida Constitution).

312 *McPherson*, 146 U.S. at 25.

313 *Id.*

314 *Compare* Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 76-77 (per curiam) (quoting *McPherson*, 146 U.S. at 25, for the proposition that there may be limits on "the extent to which the Florida Constitution could, consistent with [Article II, Section 1, Clause 2], 'circumscribe the legislative power'"), *with* Bush v. Gore 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

> [W]e stated over 100 years ago in [*McPherson*, 146 U.S. at 25,] that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the constitution of the State."
>
> *Id.* (alteration in original).

315 *McPherson*, 146 U.S. at 25.

316 *See id.* at 33-34.

317 *Id.* at 34-35.

318 *See id.* (quoting S. REP. NO. 43-395, at 9 (1874)).

319 *Id.* at 35 (quoting S. REP. NO. 43-395, at 9).

320 This particular passage was not cited in either *Bush I* or *Bush II*.

321 *See* S. REP. NO. 43-395. Morton submitted his report in May. *See* HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 92 (1897). A short debate on the proposal took place the following January. Morton's statements in the debate closely track the contents of his report. *See* 43 CONG. REC. 627 (1875). Under Morton's proposed amendment, each state would have been divided into a number of districts equal to their Congressional delegation. S. REP. NO. 43-395, at 2. The candidate receiving the highest number of votes in a district would receive one presidential vote. *Id.* The candidate receiving the highest number of votes in a State would receive two presidential votes from the state at large. *Id.* Whichever candidate received the highest number of presidential votes would win. *Id.* Congress would "have power to provide for holding and conducting the elections ... and to establish tribunals for the decision of such elections as may be contested." *Id.; see also* AMES, *supra*, at 92.

322 H.R. REP. NO. 39-14 (1866).

323 *See* AMES, *supra* note 321, at 92.

324 *Id.*

325 S. REP. NO. 43-395, at 20.

326 Patrick G. Williams, *Oliver Perry Morton, in* 15 AMERICAN NATIONAL BIOGRAPHY 957 (John A. Garraty & Mark C. Carnes eds., 1999).

327 S. REP. NO. 43-395, at 4. Morton gives only one example of a potential "election error." He warns that "[w]hile nobody would mistake the name of Grant or Greeley, changes in the names on the long list of electors may occur from errors in printing or fraud sufficient to reverse the vote of a State." *Id.*

328 *Id.* at 9.

329 *Id.*

330 In his oral presentation to the Senate in January 1875, Morton, apparently paraphrasing his Report, reiterated his contention that state constitutions were powerless to constrain the capriciousness of state legislatures. *See* 43 CONG. REC. 627 (1875) (statement of Sen. Morton).

331 S. REP. NO. 43-395, at 9; *see also* 43 CONG. REC. 627 (statement of Sen. Morton).

332 S. REP. NO. 43-395, at 9.

333 Morton's proposal, and one like it in the House of Representatives, were never "brought to a vote, the general opinion being that the greatest danger lay in the matter of the electoral count." AMES, *supra* note 321, at 93. He "introduced the same amendment in the next Congress, but no action was taken beyond its reference." *Id.* (citations omitted).

334 *Id.* ("[Morton] accurately forecasted the contested election of 1876.").

335 *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 106 (2001) ("Given that this report was issued eighty years after Article II's enactment and accompanied a piece of legislation that apparently was never enacted, how much weight ought it to be given?").

336 *See* PA. CONST. of 1873, art. VIII, § 17, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 325 ("The trial and determination of contested elections of electors of President and Vice-President ... shall be by the courts of law.").

337 *See* COLO. CONST. of 1876, schedule, § 19, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 21, at 93.

> The general assembly shall, at their first session ... provide, by act or joint resolution, for the appointment by said general assembly of electors in the electoral college; and such joint resolution, or the bill for such enactment, may be passed without being printed, or referred to any committee, or read on more than one day in either house, and shall take effect immediately after the concurrence of the two houses therein; and the approval of the governor thereto shall not be necessary.
>
> *Id.*

338 *Id.* at § 20, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 93 ("The general assembly shall provide that after the year one thousand eight hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.").

339 McPherson v. Blacker, 146 U.S. 1, 33-34 (1892).

340 State *ex rel.* Schrader v. Polley, 127 N.W. 848, 851 (S.D. 1910); *see also In re* Opinion to the Governor, 102 A. 913, 914 (R.I. 1918) (implicitly rejecting an Article I, Section 4 independent legislature doctrine and indicating that a state constitutional amendment would be required to extend the right to vote for United States Senators to absentee soldiers).

341 *See Schrader*, 127 N.W. at 850-52 (citing H.R. REP. NO. 39-14 (1866)).

342 *Id.* at 851. Although the South Dakota court knew "that contested congressional election cases are not always decided from a judicial standpoint," it did "not hesitate to accept the legal principles advanced by [a congressional election committee] *where they appear to be based on logical reason*." *Id.* at 851-52 (emphasis added).

343 *In re* Opinion of the Justices, 107 A. 705, 705-06 (Me. 1919); *see also* State *ex rel.* Hawke v. Myers, 4 N.E.2d 397, 398 (Ohio 1936) (rejecting constitutional challenge to ballot law for electors in part because there was "no provision in the Ohio Constitution limiting the exercise of [the legislature's Article II] power"). *But see* State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286 (Neb. 1948) (stating that the independence of Article II legislatures precluded argument that statute which prohibited nomination of candidates for presidential elector not affiliated with any party violated state constitutional guarantee that "[a]ll elections shall be free"). It should also be noted that in 1921 the Supreme Court of New Hampshire advised the New Hampshire legislature that, based on that court's ambiguously grounded Civil War soldier-voting precedent (discussed *supra*, Part III.A.2.), an absentee voter law unconstitutional with respect to state elections would be upheld with respect to presidential elections, and perhaps Congressional elections. *See In re* Opinion of the Justices, 80 N.H. 595, 605 (1921), *available at* 1921 N.H. LEXIS 79, at *21-23.

344 285 U.S. 355, 373-74 (1932). The Court reversed the high court of Minnesota, which had held to the contrary. *See* Smiley v. Holm, 238 N.W. 494 (Minn. 1931), *aff'd on reconsideration*, 238 N.W. 792 (Minn. 1931). The Minnesota court had argued that the Article V independent legislature rule of *Hawke v. Smith* governed its decision, *see id.* at 499, completely ignoring the Supreme Court's admonition in *Hawke* that Article I, Section 4 "legislative action is entirely different" from Article V action. Hawke v. Smith, 253 U.S. 221, 230-31 (1920). The high courts of Missouri and New York, by contrast, had found that the distinction made in *Hawke* precluded independent legislatures under Article I, Section 4. *See* State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 537 (Mo. 1932), *aff'd*, 285 U.S. 380 (1932); Koenig v. Flynn, 179 N.E. 705, 707-08 (N.Y. 1932), *aff'd*, 285 U.S. 375 (1932).

345 *See* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691 (Ky. 1944). The Supreme Court of Minnesota did adopt the Article I, Section 4 version of the doctrine in 1931, *see Smiley*, 238 N.W. at 494, but was reversed by the United States Supreme Court in *Smiley*, 285 U.S. 355.

346 *O'Connell*, 181 S.W.2d at 692 (citation omitted).

347 *Smiley*, 285 U.S. at 363.

348 *O'Connell*, 181 S.W.2d at 694.

349 127 N.W. 848 (S.D. 1910).

350 *In re* Opinion of the Justices, 107 A. 705 (Me. 1919).

351 *O'Connell*, 181 S.W.2d at 695.

352 *Id.*

353 *Id.*

354 *See id.* (quoting Annotation, *Election: Validity, Construction, and Effect of Absentee Voters Law*, 14 A.L.R. 1256, 1257 (1921)).

355 H.R. REP. NO. 39-13 (1866).

356 Opinion of the Justices, 45 N.H. 595 (1864), *available at* 1864 WL 1585.

357 *In re* Opinion of the Judges, 37 Vt. 665 (1864).

358 *See O'Connell*, 181 S.W.2d at 695.

359 *Id.* at 696.

360 *Id.* In 1962, a strikingly similar democratic sentiment led James C. Kirby, Jr., the Chief Counsel to the Senate Judiciary Subcommittee on Constitutional Amendments, to argue that Article II legislatures can ignore substantive state constitutional limitations. *See* Kirby, *supra* note 8, at 500-01 (arguing that state legislatures can deal with the problem of "outmoded residence qualifications" that disfranchise "[m]illions of mobile American voters" by simple legislation rather than the "generally cumbersome procedure of constitutional amendment"); *see also* Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down durational residency requirements). In defense of the super-strong independent legislature doctrine, Richard Posner cites Kirby's article as support for the proposition that while "Article II does not regulate the process by which state legislation is enacted and validated, any more than it precludes interpretation," it does regulate the actions of the state judiciary once the elector appointment law "is duly enacted, upheld, and interpreted (so far as interpretation is necessary to fill gaps and dispel ambiguities)." POSNER, *supra* note 7, at 111 n.39. Kirby's article does not, in fact, support that proposition. Kirby simply adopts the strange distinction made by the Kentucky court in *O'Connell*, a decision which Kirby describes as "especially well-reasoned": "a legislature must function 'in the method prescribed by the State Constitution,' but [once] the legislature functions in the prescribed manner, 'the scope of its enactment' is not also limited." Kirby, *supra* note 8, at 504 (citing *O'Connell*, 181 S.W.2d at 694).

361 Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

362 H.R. REP. NO. 39-14 (1866).

363 McPherson v. Blacker, 146 U.S. 1, 7 (1892).

364 *O'Connell*, 181 S.W.2d at 692.

365 *See generally id.*; H.R. REP. NO. 39-14.

366 As Justice Scalia recently remarked about the propriety of formally amending the Constitution with the Nineteenth Amendment, "[w]hy let five out of nine lawyers decide when the time has come to give women the [right to] vote?" Asseo, *supra* note 65; *see also* BORK, *supra* note 63, at 167 (rejecting the notion that the Constitution "keeps sprouting new heads in accordance with current intellectual and moral fashion").

367 *See* POSNER, *supra* note 7, at 154 ("We need not break our shovels trying to excavate the original intent behind the choice of the word 'Legislature' in the 'Manner directed' clause. One thing courts do all the time is find contemporary functions for old legal categories, pouring new legal wine into old wineskins.").

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REVISITING THE HISTORY OF THE INDEPENDENT STATE LEGISLATURE DOCTRINE

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***447** In hopes of legitimizing the independent state legislature doctrine, its proponents have recently made two claims with respect to history, which this Article refers to as the Substance/Procedure Thesis and the Prevailing View Thesis. The former admits that the original understanding was that state "legislatures" promulgating election law pursuant to the Elector Appointment and Elections Clauses are required to comply with state constitutionally-mandated "procedural" lawmaking requirements (such as a potential gubernatorial veto), but asserts that they were otherwise understood to be independent of "substantive" state constitutional restraints. The latter asserts that the independent state legislature doctrine was the "prevailing view" during the nineteenth century (before it was abandoned in the twentieth century).

This Article debunks the Substance/Procedure Thesis. Previously unreviewed historical evidence, including that arising from a review of the 1776 drafting history of the predecessor language of Article V of the Articles of Confederation, confirms that the Founding generation understood that "legislatures" would be subject to substantive state constitutional restrictions as well as constitutionally-mandated lawmaking procedures. The evidence shows that the Framers of the Elector Appointment and Elections Clauses--including in particular John Dickinson and James Madison--expected that state constitutions would impose substantive limitations on "legislatures." The evidence also demonstrates that the ***448** Framers' subjective expectations were shared by other members of the Founding generation. State constitutions adopted in the years immediately following the Founding contained substantive restrictions on election law that, although they did not explicitly refer to federal elections (as did the Delaware constitution of 1792), were understood to apply to all elections, including federal elections.

This Article also debunks the Prevailing View Thesis. It cannot be sustained on any objective view of the evidence. A review of every state constitution adopted during the 1800s reveals that both explicit and non-explicit limitations on "legislatures" were widespread before, during, and after the Civil War. On the other hand, apart from the House of Representatives' contested election case of *Baldwin v. Trowbridge*, the doctrine was little more than a lawyer argument episodically invoked in House contested election cases or state courts, without prevailing in either forum. Suggestions to the contrary are based on mischaracterizations of the cases.

Finally, this Article argues that the episodic invocations of the doctrine that did occur in the nineteenth century are irrelevant under any form of argument from history relevant to constitutional interpretation. In particular, *Baldwin v. Trowbridge* should not be treated as if it were judicial precedent--and not only because it has been overtaken by subsequent Supreme Court decisions. In deciding contested election cases in the late nineteenth century, and particularly in the 1860s, the House of Representatives acted in a demonstrably non-judicial manner. Courts should not afford its decisions respect under the doctrine of stare decisis.

I. INTRODUCTION

Twenty years ago, I wrote an article about a then-obscure aspect of the contested 2000 presidential election.[1] In the course of reaching their decision in favor of George W. Bush, the Justices of the Supreme Court observed that the Elector Appointment Clause of the Constitution[2] assigns the power to direct the manner in which a state appoints its presidential electors to the "legislature" of the state.[3] The Court raised the possibility that there was a limit on the extent to which a state constitution could ***449** circumscribe a "legislature's" exercise of this power.[4] Three Justices went further and argued that the legislative handiwork of such a "legislature" was entitled to stricter adherence by state courts than ordinary state legislation.[5] In my article, I gave these arguments what I intended to be a pejorative name--the "independent state legislature doctrine" (the Doctrine)[6] -- and examined whether that doctrine had any basis in history. I concluded that the Founding generation's original understanding was contrary to the Doctrine,[7] but explained that the Doctrine had, in fact, emerged for a time during the Civil War and subsequently when it was used to disregard state constitutional place-of-voting restrictions that would have prevented soldiers in the field from voting.[8] I assumed that my article and the Doctrine would quickly fade into history.

The Doctrine has not faded into history but roared back out of history into the present. In the 2020 federal elections, the Doctrine became the predicate for a number of lawsuits complaining about this or that aspect of a state's administration of the presidential and congressional elections,[9] as well as the purported basis for subsequent collateral attacks on President

Biden's election, both in court [10] and out of court. [11] In the typical court ***450** case, the complaining party characterizes the disfavored state-imposed election practice--particularly any practice imposed by a court as mandated by a state constitution--as an unconstitutional usurpation of the "legislature's" prerogative under the Elector Appointment and/or Elections Clauses. Whether there has been a violation of either clause, and, if so, the appropriate remedy, are federal questions, meaning that the Supreme Court, not any state court, would be the final arbiter. [12] Four Justices of the Supreme Court expressed support for adopting the Doctrine, [13] though the full Court ultimately declined to take up the question. [14]

***451** As the Doctrine has re-emerged, its proponents have sought to provide various rationales for its existence. In terms of history, they have made two claims: one relating to the alleged original understanding of the Doctrine (the Substance/Procedure Thesis), and the other to the nineteenth-century history of the Doctrine (the Prevailing View Thesis).

The Substance/Procedure Thesis of the original understanding is an attempt to work around the previously accumulated evidence demonstrating that the Founding generation understood that "legislatures" were subject to their state constitutions when regulating federal elections, just like ordinary legislatures. The authors of the thesis have seized on a purported distinction between procedural lawmaking requirements arising from state constitutions (which they admit "legislatures" are required to follow) and substantive limitations (as to which they contend "legislatures" must remain free), which distinction they claim is grounded in the original understanding of the Constitution's reference to "legislatures." [15] Apart from the textual ***452** reference to "legislatures," [16] the view is derived from a perceived dearth of Founding-era state substantive constitutional limitations on federal elections [17] and speculation that this arose from a belief in the Doctrine ***453** among the Founding generation. [18] There is also a related supposition as to constitutional purpose and structure--that the use of the word "legislature" was intended to give life to some important constitutional value, under which "legislatures" must enjoy extraordinary discretion to craft the substance of the law governing federal elections, free from constitutional restraints and other checks that would ordinarily apply. [19]

The Prevailing View Thesis is an attempt to legitimize the Doctrine by characterizing certain episodes from the 1800s in which the Doctrine was invoked as evidence that the Doctrine "reflect[ed] the prevailing understanding of states, Congress, and other actors in the nineteenth century." [20] The sentiment seems to be that this alleged "prevailing view" was mistakenly discarded in the twentieth century, and should now be "revitaliz[ed]" or "resuscitate[d]" by the Supreme Court. [21] This account of the Doctrine's alleged prevalence in the nineteenth century has seeped into ***454** the academic literature. [22] It has also gained traction in more popular accounts of the controversy surrounding the 2020 presidential election. [23]

Part II revisits the original understanding of the Doctrine and debunks the Substance/Procedure Thesis. The historical evidence confirms that the Founding generation understood that "legislatures" would be subject to substantive state constitutional restrictions no less than constitutionally-mandated lawmaking procedures. [24] The evidence pertains to: (1) the Framers' original intent; (2) the broader public's original understanding; and (3) the lack of historical basis for the purpose/structure rationales offered in support of the Doctrine's extraordinary deference to "legislatures."

First, the evidence demonstrates that the Framers of the Elector Appointment and Elections Clauses intended and/or expected that state ***455** constitutions would impose substantive limitations on "legislatures." When the Framers drafted those provisions, they worked against the backdrop of their prior experience under Article V of the Articles of Confederation, which provided that delegates to Congress were to be "appointed in such manner as the legislature of each State shall direct." [25] A review of the previously unexamined 1776 drafting of Article V by John Dickinson and others, combined with a review of the state constitutional limitations that were placed on "legislatures" between 1776 and 1787, demonstrates that the intent and experience under the Articles of Confederation were always that "legislatures" referred to in that clause would be defined by, and subject to, their state constitutions. [26]

In 1787, the members of the committees that drafted the Elector Appointment and Elections Clauses were familiar with this prior understanding of "legislatures." Many had been personally involved in drafting the Articles of Confederation or the state constitutional provisions that regulated "legislatures." If they had intended to switch from a regime of dependent "legislatures" to a regime of independent "legislatures"--and there is no evidence they did--it is beyond implausible that they would have done so by using slight variations on the "legislature" language that was widely understood to create dependent "legislatures." [27]

The fact that these Framers expected state constitutions to continue to control "legislatures" under the new Constitution is confirmed by two salient, but previously overlooked, points of post-Founding history, one involving John Dickinson and the second James Madison. [28] Dickinson was the original drafter of the "legislature" language in 1776, and, at the Philadelphia Convention, he served on the Committee of Unfinished Parts (a/k/a the Brearley Committee), which generated the Elector Appointment Clause. After the Founding, he returned to Delaware and became the president of the Delaware constitutional convention that convened in late 1791 and produced a new constitution for the state in early 1792. That constitution was flatly inconsistent with what we now call the independent legislature doctrine as it expressly regulated the way in which the state's ***456** "legislature" might prescribe the manner of electing the state's representatives to Congress. [29]

Like Dickinson, Madison served on the Committee of Unfinished Parts, but his opportunity to help create a new state constitution for his state did not come until 1830. In that year, Virginia's constitutional convention decided to constitutionally limit the way in which its "legislature" might apportion the state's congressional seats, requiring that apportionment be based on the number of free persons plus "three-fifths of all other persons." [30] Although this provision was also flatly inconsistent with what we now call the independent legislature doctrine, Madison voted in favor of it (as did John Marshall and several other famous Virginians).

Second, the Framers' subjective view was shared by other members of the Founding generation, and this is demonstrated by more than just the existence of the Delaware constitution of 1792. Previous scholarship (including my own) overlooked the fact that several state constitutions adopted from 1789 to 1803 contained substantive restrictions on election law that, although they did not explicitly refer to federal elections like the Delaware constitution of 1792, were understood by the Founding generation to apply to all elections held in the state, including federal elections. For example, Pennsylvania's constitution of 1790 provided that "[a]ll elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*." [31] The existence of such non-explicit substantive limitations further contravenes the Substance/Procedure Thesis of the original understanding. [32]

Third, the historical record contradicts the notion that the Founding generation saw any "structural" reason to give these "legislatures" an exemption from substantive regulation by state constitutions or freedom ***457** from the normal checks and balances of state government. They did not perceive anything special or unique about either the role that "legislatures" were to play in the constitutional design, the nature of "time, place, and manner" legislation, or the threat of court interference with such legislation. [33]

Part III revisits the nineteenth-century history of the Doctrine and debunks the Prevailing View Thesis. That thesis inexplicably disregards the many restraints on "legislatures" that Americans included in their state constitutions during the nineteenth century. A review of every state constitution adopted during that century reveals that both explicit and non-explicit limitations on "legislatures" were widespread before, during, and after the Civil War. Just a few examples of constitutions that imposed explicit limitations on "legislatures" are the Maryland constitution of 1810, which gave free white males the right to vote, by ballot, in presidential and congressional elections; [34] Iowa's constitution of 1846, which precluded the "legislature" from creating congressional districts that ignored the integrity of counties; [35] Connecticut's 1864 amendment to its constitution of 1818, which ensured that soldiers outside the state could vote in presidential and congressional elections; [36] South Carolina's constitution of 1868, which provided that "Presidential electors shall be elected by the people"; [37] and Pennsylvania's constitution of 1873, which provided that the trial and determination of contested presidential elections "shall be by the courts of law." [38] The most frequent non-explicit limitation that state constitutions ***458** imposed on "legislatures" (throughout the nineteenth century) was the requirement that "all elections" be either "by ballot" or "*viva voce*." [39]

The Prevailing View Thesis emphasizes the 1866 House of Representatives contested election case of *Baldwin v. Trowbridge*, as if the adoption of the Doctrine in that case was the rule in the nineteenth century, not the exception. [40] However, this disregards that, prior to *Baldwin*, the House had twice rejected the Doctrine (once in 1850 and again in 1861). *Baldwin* was a flip-flop. After *Baldwin*, the Doctrine merely existed as an argument that was sometimes invoked in House contested election cases or state courts, without prevailing in either forum. Over time, the Doctrine was rejected by courts and ignored by the House. To the extent the Prevailing View Thesis suggests otherwise, it is based on mischaracterizations of the House contested election and state court cases upon which it purports to rely. [41]

With the history set straight, Part IV explains why the episodic invocations of the Doctrine that did occur in the 1800s are irrelevant to interpretation of the Constitution today. The history--when accurately recounted--does not support any recognized "argument from history," such as originalism, liquidation, or gloss.[42] Nor is the nineteenth-century history of the Doctrine relevant as a source of legal precedent. It was long ago superceded by a line of Supreme Court cases that speak directly to the invalidity of the Doctrine.[43]

The only nineteenth-century invocation of the Doctrine that resembles a judicial "precedent"--the House's 1866 decision in *Baldwin*--should not be treated as precedent to be followed by a court. The historical evidence demonstrates that in the late nineteenth century, and particularly in the 1860s, the House was not operating in a judicial manner when it decided contested election cases like *Baldwin*. The House lacked any meaningful procedure for litigating and deciding these matters; the limited process that did exist was not mandatory; the House's decision-making was largely opaque, with the grounds for decision often unclear; and congressmen were hardly in a position to act like judges. The contemporaneous impression of both insiders and outsiders was that House contested election cases were ***459** rife with partisan decision-making untethered from the law. This impression is confirmed by pulling back the "judicial" curtain on the House's treatment of three issues that recurred during the 1860s: (i) application of the Incompatibility Clause to congressmen who held commissions as military officers; (ii) the effect of electoral improprieties in Missouri; and (iii) the independent state legislature doctrine. On these issues, it appears that the House's determinations depended, not on the outcome of anything resembling a judicial process, but on the partisan bona fides of the "judges" and contestants. Given the House's injudiciousness in these matters, the rationale for stare decisis-- the reasons why courts are supposed to follow precedent--would not be furthered by treating the House's decisions as precedent.[44]

II. REVISITING THE ORIGINAL UNDERSTANDING OF THE DOCTRINE

A. *Existing Scholarship Identifying Evidence of the Original Understanding*

The scholarship identifying evidence as to the Founding generation's understanding of "legislatures" begins with my 2001 article. I reviewed the debates at the Constitutional Convention and ratifying conventions pertaining to the selection of the President and found nothing suggesting an intent to create independent "legislatures,"[45] but rather expressions of hostility to giving them a decisive role in the process.[46] Moreover, I identified that the language chosen by the Framers for the Elector ***460** Appointment Clause echoed that contained in Article V of the Articles of Confederation, under which most state constitutions had been explicitly regulating "legislatures" prior to the Convention.[47] There was not the same amount of explicit state constitutional regulation of "legislatures" after the Founding, but there was some.[48] And the "legislatures" which engaged in the first exercises of power pursuant to the Elector Appointment and Elections Clauses clearly believed that they were bound by their state constitutions. They submitted "manner" regulations to the relevant veto power (where applicable),[49] and proceeded on the basis that state constitutions determined whether legislative appointments of electors and senators had to be made in joint session or concurrently.[50]

More recently, three scholars (Grace Brosofsky, Michael C. Dorf, and Laurence H. Tribe) have adduced additional evidence that Founding-era state "legislatures" understood that, when they "directed" the manner of appointing electors, they were exercising lawmaking power governed by state constitutional procedures.[51] State "legislatures" in 1788 and 1789 proceeded as if they were passing ordinary legislation subject to ordinary constitutional lawmaking requirements, not as if "directing" the manner of appointment involved some special form of extra-constitutional Article II legislation.[52] Such "manner" legislation was passed in the normal fashion in Pennsylvania, Maryland, Delaware, New Hampshire, New Jersey, South Carolina, and Virginia.[53] Interestingly, South Carolina's legislature apparently believed it necessary to enact normal legislation giving itself the power to appoint electors before actually proceeding to appoint the electors itself.[54] Moreover, in Georgia, the Governor sounded the alarm when the state legislature could not obtain a quorum to pass the necessary "manner" legislation, and the legislature attempted to go through its constitutionally-mandated multi-day lawmaking process before ultimately directly ***461** appointing the electors.[55] Similarly, New York sat out of the election altogether because its legislature could not, consistent with the state's constitutional lawmaking requirements, manage to direct the manner of appointing electors.[56] Professor Natelson has similarly pointed out that Founding-era "legislatures" prescribed "manner" legislation for congressional elections by statute rather than by something less than law.[57]

Further confirmation that "directing" the manner of appointing presidential electors was understood to require full constitutional lawmaking is provided by Bruce Ackerman and David Fontana's account of an episode arising in the 1796 presidential election. As they have recounted, Alexander Hamilton desired to cast doubt on the validity of Vermont's electors as part of a strategy to cause his preferred Federalist candidate (Thomas Pinckney of South Carolina) to prevail over the obvious Federalist candidate (John Adams). [58] Hamilton did so by spreading the false rumor that Vermont's appointment of electors had been made via a mere "Resolve of the Legislature, not a law." [59] This aspersion did not elevate Pinckney over ***462** Adams as Hamilton had hoped, but it generated a "cloud of suspicion" as to the validity of Vermont's electors until Adams's Republican opponent, Thomas Jefferson, disclaimed the rumor, explaining in a letter to James Madison that whatever had occurred must have conformed in substance with the lawmaking requirements of "the Vermont constitution." [60]

Professor Morley reviewed the debates from the Constitutional Convention and ratifying conventions concerning the Elector Appointment and Elections Clauses. [61] He concluded that these sources "do not shed light ... on whether either the Framers or the greater public intended or understood those provisions as establishing the independent state legislature doctrine," but nevertheless proceeded to argue that history somehow supports the Doctrine. [62]

Most recently, Professors Vikram Amar and Akhil Amar have delivered a comprehensive explanation of why the Doctrine is wrong as a matter of text, history, precedent, and other reasons; from their deep and well-informed knowledge of the Founding, they conclude that the Doctrine has no basis in the original understanding of the Constitution. [63]

Apart from the preceding, scholarly attention to evidence of the original understanding of these clauses has focused on concepts other than the independent state legislature doctrine. In 2010, Professor Natelson studied ***463** the original meaning of the Elections Clause, but he was focused on whether that language gives Congress the power to regulate congressional campaigns, not the possibility of an independent state legislature doctrine. [64] In 2015, several prominent historians filed an amicus brief in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, [65] but they were focused on the different question of whether an initiative-created constitutional provision giving the power of the "legislature" to an independent redistricting commission was consistent with the Elections Clause, not whether "legislatures" exercising their Elections Clause power must remain "independent" of run-of-the-mill constitutional regulation. [66] In 2021, Eliza Sweren-Becker and Michael Waldman examined the Elections Clause at the Founding, but they were focused on the original understanding of the scope of Congress's power to override "time, place, and manner" regulations prescribed by state legislatures. [67]

It is against the evidence summarized in the prior paragraphs--all of which tends to show that the original understanding was contra to the independence of "legislatures"--that proponents of the Doctrine have formulated the Substance/Procedure Thesis. That thesis concedes that "legislatures" were understood to be bound by constitutionally-required lawmaking *procedures*, but contends that they were understood to not be bound by *substantive* limitations. The following section identifies new evidence from the historical record that debunks the thesis by showing that the Founding generation understood that "legislatures" were as much subject to substantive restraints as procedural ones.

B. *The Failure of the "Substance/Procedure" Thesis of the Original Understanding*

The Substance/Procedure Thesis is incorrect. The Founding generation did not understand that "legislatures" would remain free from substantive restrictions when acting pursuant to the Elector Appointment and Elections ***464** Clauses. The historical record compels this conclusion in three ways. First, the evidence demonstrates that the Framers of these provisions, who drafted against the backdrop of their prior experience with "legislatures" under the Articles of Confederation, expected that state constitutions would impose substantive limitations on "legislatures." Second, the expectations of the Framers coincided with the original understanding of the broader Founding generation. This is evidenced by the fact that, in the years immediately following adoption of the Constitution, the Founding generation imposed a number of substantive restrictions on "legislatures," well beyond merely requiring them to follow constitutionally-mandated lawmaking procedures. And, third, the historical record contradicts the notion that the Founding generation saw any reason to treat these "legislatures" with unusual deference--that is, allow these "legislatures" to operate "independently"--because they perceived something special or unique about either the role that "legislatures" were to play in the constitutional design, the nature of "time, place, and manner" legislation, or the threat of court interference with such legislation.

1. The Framers' Intent Regarding Substantive Limitations on "Legislatures"

The following analysis of the Framers' intentions and expectations regarding substantive limitations on "legislatures" begins with their experience with "legislatures" under Article V of the Articles of Confederation, the precursor to the Elector Appointment and Elections Clauses. The analysis then turns to the Framers' decision in 1787--informed by their experience under the Articles--to adopt Article V's "legislature" language for use in the Constitution. Finally, the analysis finds confirmation of the Framers' intent that state constitutions would continue to regulate "legislatures" under the new Constitution, as they had under the Articles, in the fact that two key Framers, John Dickinson and James Madison, participated in creating new constitutions for their states that did just that.

***465 a. The Experience with "Legislatures" Under the Articles of Confederation**

Article V of the Articles of Confederation provided that "delegates [to Congress] shall be annually appointed in such manner as the legislature of each State shall direct." [68] The intent and experience under the Articles of Confederation was that "legislatures" referred to in that clause would be defined by, and subject to, their state constitutions. This is demonstrated by a review of the drafting history of Article V as well as a review of the state constitutional limitations that were placed on "legislatures" between 1776 and 1787, and then adhered to in subsequent years.

i. The Framing of Article V of the Articles of Confederation

On June 7, 1776, Richard Henry Lee proposed that Congress declare the Colonies be "free and independent States" and prepare "a plan of confederation" to "transmit[] to the respective Colonies for their consideration and approbation." [69] Congress debated his proposal on June 8. [70] Conservatives, including John Dickinson, favored the formation of the confederation before a declaration of independence, and, as a result, consideration of independence was postponed to July 1. [71]

In the meantime, on June 12, Congress formed a committee to "prepare and digest the form of a confederation to be entered into between these colonies." [72] That committee (the "confederation committee") consisted of one member from each colony. Dickinson was the representative from Pennsylvania. [73] Although there is little evidence regarding the committee's ***466** work, according to historian Merrill Jensen, Dickinson was "given the task of writing the Articles which were presented to Congress," there is "little doubt that Dickinson was dominant in the committee," and the draft ultimately presented to Congress on July 12 was "an embodiment of the views of the conservatives, and of [Dickinson's] views in particular." [74]

When Dickinson and the confederation committee began drafting, they had at their disposal the draft "Sketch of Articles of Confederation" that Ben Franklin had submitted to Congress a year before. [75] With respect to the selection of delegates to Congress, Franklin's draft provided as follows:

> Art. IV. That for the more convenient Management of general Interests, Delegates shall be annually elected in each Colony to meet in General Congress at such Time and Place as shall be agreed on in ~~each~~ the next preceding Congress. Only where particular Circumstances do not make a Deviation necessary, it is understood to be a Rule, that each succeeding Congress be held in a different Colony till the whole Number be gone through, and so in perpetual Rotation; and that accordingly the next Congress after the present shall be ~~in the~~ at Annapolis in Maryland. [76]

Other documents that are thought to have been considered by Dickinson and the committee did not touch on the issue of how delegates to Congress were to be selected. [77]

Dickinson's use of Franklin's language to frame what became Article V of the Articles of Confederation is illuminated by the three successive drafts of the articles produced by Dickinson in the summer of 1776. The first draft--believed to be a clean copy of an early Dickinson draft in the hand of Josiah Bartlett-- provided as follows:

> Art. 14th. For the more Convenient management of the General Interest, Delegates shall be Annually appointed by Each Colony to meet in General ***467** Congress in the City of Philadelphia in the Colony of Pennsylvania until otherwise ordered by Congress which meeting shall be on the first Monday of November Every year, with a power reserved in Each Colony to supersede the Deligates thereof at any time within the year and to send new Deligates in their Stead for the Remainder of the year. Each Colony shall support its own Deligates in Congress. [78]

The second draft, in Dickinson's own hand, is believed to be the draft that he used in the confederation committee in late June. It provided as follows:

> Art. [17]. For the more convenient Management of the general Interests, Delegates shall be annually appointed by Legislature of each Colony or such Branch thereof as the Colony shall authorize for that purpose, to meet in General Congress at the City of Philadelphia in the Colony of Pennsylvania [until] otherwise ordered by Congress, which Meeting shall be on the first Monday in November in every Year, with a Power reserved to those who appointed the said Delegates, to supersede them or any of them, at any Time within the Year, and to send new Delegates in their stead for the Remainder of the Year. [79]

***468** The third draft, again in Dickinson's hand, is believed to be the draft that was used to report the confederation committee's work to Congress on July 12. [80] It provided as follows:

> Art XVI. For the more convenient Management of the general Interests of the United States, Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct, ~~or such Branches thereof as the Colony shall authorize for that purpose,~~ to meet ~~in General Congress~~ at the City of Philadelphia, in the Colony of Pennsylvania, until otherwise ordered by ~~Congress~~ the United State assembled; which Meeting shall be on the first Monday of November in every Year, with a Power reserved to those who appointed the said Delegates, respectively to ~~supercede~~ recal them or any of them at any time within the Year, and to send new Delegates in their stead for the Remainder of the Year. Each Colony shall support its own Delegates in ~~Congress~~ a Meeting of the States, and while they act as Members of the Council of State, herein after mentioned. [81]

After famously arguing against independence during the debate on July 1, and absenting himself from the vote the following day, Dickinson left Philadelphia to serve in the Pennsylvania militia. [82] The alterations indicated in the text are believed to reflect changes made by Dickinson before he left, [83] and thus before the draft was read to Congress on July 12, by which time Dickinson was with his battalion in New Jersey. [84] Indeed, the document that Congress printed to reflect the first reading on July 12 (First Printed Form) incorporated the alterations. [85]

Dickinson thus brought the language close to what was finally included in Article V of the Articles of Confederation, but Congress subsequently made two additional non-stylistic changes. After Dickinson left, debate on ***469** the First Printed Form was "intermittently conducted in a committee of the whole of Congress between July 22 and August 20," [86] at which time Congress voted a second print reflecting further revisions (Second Printed Form). [87] It provided as follows:

> Art. XII. For the more convenient management of the general interests of the United States, Delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet at the city of Philadelphia, in Pennsylvania, until otherwise ordered by the United States in Congress Assembled; which meeting shall be on the first Monday in November in every year, with a power reserved to each State to recal its Delegates or any of them at any time within the year, and to send others in their stead for the remainder of the year. Each State shall support its own Delegates in a meeting of the States, and while they act as members of the Council of State, herein after mentioned. [88]

Here can be seen the two non-stylistic changes that Congress made from the First Printed Form. First, "should be annually appointed" was changed to "shall be annually appointed." [89] Second, the power to "recal" delegates was now reserved "to each State," as opposed to "those who appointed the said Delegates." [90] According to John Adams' notes of the debates on July 26, 1776, the second change occurred after Francis Hopkinson of New Jersey moved "that the power of recalling delegates be reserved to the State, not to the Assembly, because that may be changed." [91]

After the Second Printed Form (August 20, 1776), Congress delayed further consideration of the articles until April 1777 because some states were unrepresented and because the demands of the war took precedence. [92] When debate continued in April and afterwards, significant changes to the draft continued to be made, but the language of this provision relating to selection of representation did not materially change. It ultimately became ***470** Article V of the final document that Congress sent to the states for ratification in November 1777, [93] the adoption of which was not completed until March 1781. [94]

Thus, from Ben Franklin's draft to its final form, the language governing state selection of representation in Congress evolved as follows:

- "Delegates shall be annually elected in each Colony" (Franklin draft); [95] to
- "Delegates shall be Annually appointed by Each Colony," but "with a power reserved in Each Colony to supersede [and] send new Deligates" (first Dickinson draft, in Bartlett's hand); [96] to
- "Delegates shall be annually appointed by Legislature of each Colony or such Branch thereof as the Colony shall authorize for that purpose," but "with a Power reserved to those who appointed the said Delegates, to supersede ... [and] send new Delegates" (second Dickinson draft, in Dickinson's hand); [97] to
- "Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct, or such Branches thereof as the Colony shall authorize for that purpose," but "with a Power reserved to those who appointed the said Delegates, respectively to supercede [and] send new Delegates" [98] (Dickinson's third draft, before his cross-outs); to
- "Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct," but "with a Power reserved to those who appointed the said Delegates, respectively to recal them [and] send new Delegates" (Dickinson's third draft, after his ***471** cross-outs, i.e., the First Printed Form, read to Congress on July 12, 1776); [99] to
- "Delegates shall be annually appointed in such manner as the legislature of each State shall direct," but "with a power reserved to each State to recal [and] send others" (Second Printed Form and Article V as adopted). [100]

In sum, Dickinson and the confederation committee began by deciding against calling upon each colony to "elect" or "appoint" its delegates without providing them with any further instructions as to how that was to occur. They then considered whether

delegates ought to be directly "appointed by Legislature" or "Branch thereof," but decided against that as well. Instead, they decided that "the Legislature" would "direct" the "manner" in which delegates would be appointed. [101] The Framers also decided to delete language that would have provided that, instead of "the Legislature," the colony could "authorize" particular "Branches" of the legislature to direct the manner of appointment. And finally, Congress chose to reserve "to each State," instead of "those who appointed," the power to recall and replace delegates.

Several aspects of this drafting history are contrary to the notion, central to the independent state legislature doctrine, that the Framers intended for institutional "legislatures" to enjoy independence from the constraints ordinarily imposed on them. First, the confederation committee's consideration of language that would have made clear that a colony could authorize "Branches" of "the Legislature" to exercise the function instead of "the Legislature" is significant. The fact that there could have been "branches" (plural) comprising a subpart of "the Legislature," can only mean that that they were thinking of the "the Legislature" as having more than two branches, and thus in the broader sense as the entire group of governmental institutions involved in lawmaking, and not in the narrower ***472** sense of a bicameral assembly that came to dominate American discourse in the years that followed.

Indeed, there is compelling evidence that, at the time he was drafting, Dickinson would have been thinking of "the legislature," and "branches thereof," in that broader sense. In the fall of 1776, shortly after the confederation committee completed and presented its draft of the Articles of Confederation, Dickinson drafted *Essay of a Frame of Government for Pennsylvania* (*Frame*) as an alternative to the radical, unicameral constitution recently adopted by that state. [102] For Pennsylvania, Dickinson proposed that laws would be passed by the "General Court," comprised of *three* branches: an Assembly, a Senate, and an executive Council (selected from the Assembly and Senate) consisting of a Governor, Lieutenant Governor, and thirteen others. [103] The Council would have the power to "assent, dissent or propose amendments" to bills received from the Assembly or Senate. [104] Dickinson explained that "vesting the Supreme Legislature in three different bodies" in this fashion would "give maturity and precision to acts of legislation ... by preventing measures from being too much influenced by sudden passions." [105] At the same time, Dickinson hoped that "all the branches of the Legislature" would "enter into the generous contest of gaining the greatest share of approbation of [the people], by most effectually promoting their happiness." [106] Amendment of the constitution would require, among other things, "two-thirds of each branch of the Legislature." [107]

Dickinson's view was not idiosyncratic. In *Thoughts on Government* (1776), John Adams wrote about "the legislature" and "branches of the legislature" in similarly broad terms. [108] According to Gordon Wood, this document ***473** was "widely circulated among the leading Revolutionaries in several states" and was "the most influential pamphlet in the early constitution-making period." [109] In it, Adams made the case against giving "the whole power of legislation" to the "single assembly" representing the people. [110] Adams proposed a "distinct assembly," an upper house that would act as a "mediator" between "the two extreme branches of the legislature," which he identified as "that which represents the people, and that which is vested with the executive power." [111] The Assembly and the upper house would "unite" to choose a Governor who, stripped of royal prerogatives, would have "a free and independent exercise of his judgment, and be made also an integral part of the legislature." [112] Both the upper house and the Governor would have a "negative" on legislation. [113]

Nor was this broader view of "legislature" merely hypothetical. The South Carolina constitution of 1776--one of two constitutions existing when Dickinson drafted the articles--vested South Carolina's "legislative authority" in "the president and commander-in-chief, the general assembly and legislative council." [114] When in 1778 the latter branches created a new constitution vesting the "legislative authority" in "a general assembly, to consist of two distinct bodies, a senate and a house of representatives," [115] the incumbent president, John Rutledge, issued a futile veto, and then ***474** resigned. [116] Rutledge explained that the new constitution "annihilate[d] one branch of the legislature" in disregard of the fact that, in the old constitution, "the people, being at liberty to choose what form they pleased, agreed to one vesting an authority for making the laws by which they were to be bound in three branches." [117] He feared that "if we have power to lop one branch of the legislature, we may cut off either of the other branches, and suffer the legislative authority to be exercised by the remaining branch only." [118]

Under this broader view of what constituted "the legislature" and "branches thereof," the exact composition of the "legislature" that was to "direct" the manner of appointing delegates would have to be delineated by the state, either in its constitution or

by law. [119] That indefiniteness gives rise to two important conclusions about the intentions of Dickinson and his compatriots. First, for them, in 1776, there could have been no room for a "legislature" to operate independently of the state--the term had no definite meaning until it was fixed by the state. Second, it is clear the Framers did not intend, by specifying "legislature," to necessarily empower either bicameral or unicameral institutional assemblies of representatives. [120] This undermines any assumption that they thought such assemblies had some special competence with respect to directing the manner of appointment, or that they had in mind some particular "separation of powers" principle when they used the word "legislature."

The provision that Dickinson included in his draft *Frame* specifying how Pennsylvania would appoint its delegates to Congress underscores the indefiniteness of "the Legislature." Under Dickinson's *Frame*, the power was not given to what would now be considered the bicameral legislature ***475** (the Senate and Assembly) but rather to all three branches of what he referred to as the "Supreme Legislature," including the executive committee with Governor and Lieutenant Governor, which he referred to as the Council. [121] This approach contrasted with that of South Carolina's constitution of 1776, which assigned the power to choose delegates to "the general assembly and the legislative council," [122] even though the colony's "legislative authority" also included a third branch, consisting of the president. [123]

Moreover, whatever was to comprise "the Legislature" of a given state, neither the drafting history of Article V nor the resulting language gives any reason to think that the Framers intended for that institution (or institutions) to act "independently." It is apparent from the evolution of the language, which went through several iterations, that it was carefully crafted, and also perhaps "bitterly fought over," as was the rest of the draft. [124] As Committee Member Edward Rutledge wrote to John Jay on June 29, 1776, the draft had "the Vice of all [Dickinson's] Productions to a considerable Degree; I mean the Vice of Refining too much." [125] Surely, if it had been their intention, Dickinson and his colleagues would have found a more direct way to express their desire for legislative independence than just specifying it was the "legislatures" that were to direct the manner of appointing delegates.

The fact that Dickinson and his colleagues did not include--and evidently never considered including--an explicit expression of legislative independence is particularly significant because, as they drafted this language, two colonies had adopted constitutions which regulated their "legislatures" with respect to the selection of delegates to Congress. The South Carolina constitution (March 26, 1776) required delegates to be "chosen by the general assembly and legislative council, jointly by ballot, in the general assembly." [126] Similarly, the Virginia constitution (June 29, 1776) required delegates to be "chosen annually, or superseded[] in the mean ***476** time, by joint ballot of both Houses of Assembly." [127] If Dickinson's committee considered these constitutional impingements on "legislatures" to be problematic--as they would have if they were proponents of legislative independence--it is hard to explain why they did not explicitly address the problem in their drafting. And as the full Congress, and then the states, further considered Dickinson's draft before final adoption of the Articles in 1781, this backdrop of constitutional regulation of "legislatures" only increased as more state constitutions were adopted, as explained in the next section of this Article.

Finally, it is telling that Congress consciously chose, on the motion of Francis Hopkinson, to reserve the power to recall and replace delegates, not to "those who appointed" the delegates, but "to each State." This gave the "State" the power to effectively undo, and then redo, the allegedly special handiwork of the "legislature." This was inconsistent with the concept (if indeed it was a concept at the time) of some specific institutional "legislature" operating, with special expertise, independently of the state of which it was a part.

ii. Constitutional Limitations on "Legislatures" from 1776-1787

That substantive regulation of "legislatures" was expected by Dickinson and his colleagues on the confederation committee is confirmed by their subsequent actions. After completing their work, several of them returned to their home states and participated in creating state constitutions that expressly regulated the way in which "legislatures" could exercise their power to direct the manner of appointing delegates to Congress, and those regulations were subsequently followed.

Dickinson himself missed the drafting of the Pennsylvania constitution in the summer of 1776 because he was in New Jersey with the militia. [128] However, as noted previously, Dickinson's draft *Frame* for Pennsylvania, prepared in the fall of that year, would have required the three branches of the state's legislature (Council, Senate and Assembly) to "join, and by ballot to chuse

[the Delegates] annually from themselves," with the election to be conducted "in the same manner as the election of members of the ***477** Council." [129] The members of the Council were to be "chosen one after another by the Senate and Assembly jointly by ballot, from themselves." [130] Election would require two thirds of the votes, but if that could not be achieved after two ballots, then the election would be "determined by lot." [131]

Delaware's representative on the confederation committee was Thomas McKean. [132] After July 1776, McKean returned to Delaware to participate in its constitutional convention, held in August and September of 1776. [133] While McKean's later assertion that he wrote the state's first constitution "in a tavern without a book or any assistance" is likely an exaggeration, [134] he was a member of the drafting committee and there is no doubt that he played a key role, along with George Read, who had also been in Congress in July 1776. [135] The constitution they created specified that Delaware's delegates to Congress would be "chosen ... by joint ballot of both houses in the general assembly." [136]

Button Gwinnett was Georgia's representative on the confederation committee. [137] After July 1776, Gwinnett returned to Georgia and participated in the elected body which assembled in October 1776 and produced the state's first constitution, ultimately adopted on February 5, 1777. [138] Gwinnett served on the committee that drafted the constitution ***478** and appears to have played a prominent part in its drafting. [139] The constitution that he and others created specified that the "continental delegates" were to be "appointed annually by ballot," apparently by the state's unicameral legislature, the "house of assembly." [140] Notably, the constitution stated that this provision was subject to "the regulations contained in the twelfth article of the Confederation of the United States." [141] This was a reference to Article XII of the draft articles that appeared in the Second Printed Form printed by Congress on August 20, 1776, which later became Article V of the Articles of Confederation sent to the states for ratification in November 1777. [142]

New York's representative on the confederation committee was Robert R. Livingston. [143] Livingston returned to his home state of New York after July 1776 and helped draft its constitution, adopted in April 1777. [144] Livingston was appointed to the drafting committee and, along with John Jay and Gouverneur Morris, is thought to have been primarily responsible for the draft constitution. [145] The initial drafts provided that delegates would be "annually appointed by an act of the Legislature, without the nomination of the Governor, which shall originate in the ... senate but be liable as all other acts to the amendment of the general assembly below." [146] However, at the suggestion of Morris, the following elaborate provision was substituted:

> [T]he senate and assembly shall each openly nominate as many persons as shall be equal to the whole number of delegates to be appointed, after which nomination they shall meet together, and those persons named in both lists shall be delegates; and out of those persons whose names are not on both lists, one half shall be chosen by joint ballot of the senators and members of assembly so met together as aforesaid. [147]

***479** This became Article XXX of the New York constitution of 1777. [148]

Samuel Adams was the Massachusetts representative on the confederation committee. [149] At the Massachusetts constitutional convention of 1779, Adams was a member of the committee appointed to frame the constitution, and also, along with John Adams and James Bowdoin, the three-person subcommittee that did the preliminary work. [150] The resulting constitution specified that the state's delegates to Congress would be annually "elected by the joint ballot of the senate and house of representatives, assembled together in one room." [151]

This understanding that "legislatures" were dependent on state constitutions was not unique to the members of the confederation committee that framed Article V. Most of the state constitutions adopted between Independence and the adoption of the United States Constitution purported to regulate the selection of delegates to Congress. [152] This demonstrates a widespread understanding among Americans of the time that, under the Articles as drafted, "legislatures," when directing the manner of appointing delegates to Congress, were to act subject to state constitutional commands.

Lest there be any doubt about the understanding, after these constitutions were established, the credentials that "legislatures" gave to their delegates ***480** for delivery to Congress reflected that appointment had been made pursuant to the state constitutions. For example, in November 1785, the credentials of the Massachusetts delegates made clear that they had been elected "by joint Ballot of the two branches of the General Court agreeably to the Constitution." [153] The November 1785 credentials of James Monroe reflect that he was appointed by "joint ballot of both Houses," which was the method of appointment provided for in the Virginia constitution. [154] Similarly, the credentials of the New York delegates that year referred to the "[n]omination" process set forth in the New York constitution. [155]

b. The Framers' Adoption of the "Legislature" Language in Light of Their Experience Under the Articles of Confederation

The drafting history of the Elector Appointment and Elections Clauses at the constitutional convention in 1787 has been reviewed by lawyers previously. The Elector Appointment Clause emerged in September from a committee chaired by David Brearley of New Jersey (the Committee of Unfinished Parts, sometimes called the Brearley Committee), [156] and the Elections Clause emerged in August from the committee chaired by John Rutledge of South Carolina (the Committee of Detail). [157] In both instances, the language that came out of committee was adopted by the convention without any changes that are material to the present discussion. Nothing from this drafting history supports the notion that the Framers intended for "legislatures" operating pursuant to these clauses to be immune from constitutional restraint or otherwise treated differently than legislatures going about their normal legislative business. [158] However, this ***481** does not mean that the evidence of the framing is neutral as to the existence of the Doctrine. [159]

The "legislature" language adopted by the Framers for the Elector Appointment and Elections Clauses closely resembles the "legislature" language of Article V of the Articles of Confederation. [160] Each of the three clauses gave the "legislature" the responsibility to direct or prescribe the manner of appointment or election of national representatives, whether to ***482** the confederation Congress (a hybrid executive/legislature), [161] Congress (the legislature), or the Electoral College (to pick the executive). Given the textual similarities, the Framers' decision to use the "legislature" language again in the new Constitution should be viewed in light of their prior experience under the Articles. [162]

As established in the previous section, under the Articles of Confederation, it was understood that "legislatures" were normal legislatures, subject to substantive regulation by state constitutions. The Framers knew this when they gathered in 1787. For example, consider the members of the two committees who framed the Elector Appointment and Elections Clauses (the Committee of Unfinished Parts and the Committee of Detail). [163] The Committee of Unfinished Parts included both John Dickinson and Roger Sherman. In 1776, Dickinson and Sherman had worked together on the confederation committee, which produced the original "legislature" language of Article V of the Articles of Confederation. Other members of the Committee of Unfinished Parts had participated in ***483** creating the state constitutions which regulated "legislatures." This included James Madison (Virginia constitution of 1776) and Gouverneur Morris (New York constitution of 1777). Both Dickinson (in his draft *Frame* for Pennsylvania) and Morris (at the New York constitutional convention) had personally proposed specific state constitutional provisions designed to regulate "legislatures." Likewise, the Committee of Detail's members also included delegates who had participated in creating state constitutions which regulated "legislatures," specifically Edmund Randolph (Virginia constitution of 1776) and Nathaniel Gorham (Massachusetts constitution of 1780). Others on the two committees may not have had such first-hand experiences but nevertheless would have been able to observe how state constitutions had been regulating "legislatures" under the Articles of Confederation, including by having themselves been appointed to Congress prior to 1787 by state "legislatures" pursuant to state constitutional requirements. [164]

Assume for a moment that by 1787, in a departure from the past, legislative "independence" had become a concept that the Framers wanted to enshrine in the new constitution. [165] If that were the case, it is simply ***484** inconceivable that they would have attempted to incorporate this novel concept into the new constitution by using language so closely resembling that of the old constitution, under which--as they knew very well-- "legislatures" had been decidedly non-independent.

c. The Framers' Intent Implemented

The Framers' expectation that state constitutions would continue to control "legislatures" is confirmed by the involvement of both John Dickinson and James Madison in creating post-Founding state constitutions that did just that.

i. John Dickinson and the Delaware Constitution of 1792

In late 1791 and early 1792, Delaware held a constitutional convention to replace its constitution of 1776. Two veterans of the federal convention--John Dickinson and Richard Bassett--were delegates. [166] Dickinson was chosen president and, according to a leading analysis of the convention, he was its leader. [167]

Early in the convention a draft constitution emerged which contained the following provision regulating the way in which the "legislature" might prescribe the place and manner of electing members of Congress:

> The Representative, and when there shall be more than one, the Representatives of the People of this State, in Congress, shall be voted for at the same Places where Representatives in the State Legislature are voted for, and in the same Manner. [168]

***485** This provision, without alteration, was included in the final draft of the constitution adopted by the convention. [169] The existing minutes do not reflect any debate concerning this clause.

Thus, we see Dickinson making his fourth and final appearance in the history which debunks the theory that the Framers codified the independent state legislature doctrine when they referred to "legislatures" in the Constitution. In the summer of 1776, Dickinson was the original drafter of the "legislature" language used in Article V of the Articles of Confederation; in the fall of 1776, he drafted a constitution for Pennsylvania that would have substantively regulated the state "legislature" in its selection of delegates to Congress; in the summer of 1787, he was a member of the Committee of Unfinished Parts that framed the Elector Appointment Clause, incorporating the "legislature" language from the Articles; and, finally, in 1791-1792, he led the Delaware constitutional convention which adopted a provision that substantively regulated how the state's "legislature" might exercise its power under the Elections Clause.

ii. James Madison and the Virginia Constitution of 1830

More confirmation that the Framers expected state constitutions to regulate "legislatures" with respect to federal elections comes from James Madison's participation in the Virginia constitutional convention of 1829-1830. On January 12, 1830, John W. Green, a judge of the Virginia Supreme Court of Appeals, proposed that the new constitution provide that the number of congressional seats to which Virginia was entitled be apportioned "amongst the several counties, cities, boroughs and towns of the State, according to their respective numbers," and that those numbers were to be determined by "adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." [170] As John Randolph explained, the question prompted by Green's proposal was "shall the ***486** apportionment of representation which the Federal Constitution secures to the slave-holding States, be the apportionment on which members of Congress shall be elected, or shall it not?" [171] This would regulate the core of the Virginia "legislature's" power under the Elections Clause to prescribe "manner" legislation.

There was a brief debate before the convention adopted Green's proposal by a vote of 60-35. [172] James Madison was among those voting "aye," and he was joined by other notable figures, including Chief Justice John Marshall, future Associate Justice Phillip P. Barbour, and future U.S. President John Tyler. [173] Evidently, none of them were convinced by Lewis Summers, a delegate from the western part of the state. Summers--briefly invoking what we now call the independent state legislature doctrine--argued against Green's proposal on the ground that it was "unnecessary and improper, to regulate by the State

Constitution, any of the powers or duties devolved on the Legislature by the Constitution of the United States"; he did not think such power or duties could be "abridged or restrained by any act of the Convention." [174]

Although Madison did not speak on the issue--other than through his "aye" vote--his thinking may also be reflected in comments he made earlier that day on the separate issue of how much authority the Virginia legislature would have to reapportion its own membership. Madison would have preferred that the constitution prescribe "an exact and permanent rule for the apportionment" for future legislatures. [175] Instead, the convention had agreed that the legislature would be obliged to reapportion every ten years within certain "great districts" established by the constitution but expressly prohibited from reapportioning as between those "great districts." [176] ***487** Madison thought that some provision needed to be made for the latter because otherwise the people would inevitably "resort to another [constitutional] convention," for which "there seemed to be a universal wish to guard [against]." [177] Madison proposed that a supermajority of the legislature ("two-thirds of each House concurring") be given the power to reapportion every ten years "throughout the commonwealth." [178] Madison's proposal was adopted by the convention, [179] but only after surviving several attempts at amendment, including one that sought to strike the supermajority requirement on the ground that "a majority ought to govern." [180] In opposing that motion, Madison explained that "its effect would be to give the State a legislative Constitution, instead of a constitutional Legislature." [181] Madison thought that, with the two-thirds requirement baked into the constitution, "the Legislature might be safely entrusted with the task of apportionment." [182]

2. The Public's Original Understanding--Substantive Constitutional Limitations on "Legislatures" from 1789 to 1804

The Framers' expectation that "legislatures" would be subject to substantive constitutional regulation was not idiosyncratic or unique to their generation. The historical record shows that this was also the original understanding of the broader American populace that imposed state constitutional limitations on "legislatures" in the years following the drafting and adoption of the Constitution.

As explained in the previous section, Delaware's constitution of 1792 regulated its "legislature" with respect to the Elections Clause. This reflects not only the original intent of the two Framers who were present at the state constitutional convention--John Dickinson and Richard Basset--but also the original understanding of the rest of the convention's members. [183]

Prior to the Delaware convention, another express constitutional regulation of a "legislature" had been briefly considered at the Pennsylvania convention which produced that state's constitution of 1790. On February 1, 1790, Albert Gallatin proposed that Pennsylvania be "divided ***488** into districts for the purpose of electing members of the house of representatives of the United States," with the representatives "apportioned between the said districts in proportion to the number of taxable inhabitants contained in each." [184] There was no debate, and Gallatin withdrew his motion the following day without explaining why. [185]

Moreover, the explicit regulation contained in Delaware's constitution of 1792 and proposed for Pennsylvania's constitution of 1790 are not the only evidence confirming the Founding generation's understanding that state constitutions could regulate "legislatures" with respect to federal elections. Several state constitutions adopted from 1789 to 1803 contained provisions that, although they did not explicitly refer to federal elections, were understood to apply to all elections held in the state, including federal elections. The existence of these non-explicit substantive limitations further contravenes the Substance/Procedure Thesis of the original understanding. [186]

Pennsylvania's constitution of 1790 provided that "[a]ll elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*." [187] On its face, a provision relating to "all elections" would seem to apply to federal elections as well as state and local elections, and, indeed, this was the understanding. William Findley was a delegate to the Pennsylvania constitutional convention in 1789-90 and a member of the nine-member committee which reported the first draft of the constitution, which included the "All elections shall be by ballot" provision. [188] Findley ***489** later served in House of Representatives (from 1791-1799 and again from 1803-1817) [189] and was the chairman of the Committee on Elections in 1804 when that committee made a report to the House in the contested election case of John Hoge of Pennsylvania. [190] In defending the committee's report in the Hoge matter to the full House, Findley, who rightfully claimed a special "acquaint[ance]"

with the "laws and practice respecting elections" in Pennsylvania, [191] made clear that the state constitution's "all elections shall be by ballot" provision was intended to apply to congressional elections. [192]

Hoge had been elected to the House in a special election called by the Governor of Pennsylvania, pursuant to Article I, Section 2, to fill a vacancy caused by resignation. [193] Hoge's election (which occurred simultaneously with the presidential election) was challenged on the ground that the Governor had provided insufficient notice of the election and precipitated an election that lacked sufficient legal authority. [194] The committee found that there had been sufficient notice, [195] and during the floor debate, Findley explained why there was sufficient legal authority for every part of the special election that had occurred: the United States Constitution gave the Governor the authority to schedule the special election by issuing the writ, "the laws of Pennsylvania" provided for "election officers" who were to act "at all elections ... for national purposes throughout the year," and "[t]he constitution of Pennsylvania prescribe[d] the manner that citizens shall vote, by ballot." [196]

Substantially similar clauses requiring that "all elections shall be by ballot" appeared in the constitutions of Georgia (1789), Kentucky (1792), Tennessee (1796), and Ohio (1803). [197] In addition to the broadly worded ***490** language ("all elections"), there are three other good reasons to think that the drafters of these constitutions, like John Findley in Pennsylvania, made a considered choice--and meant what they said--when they specified "by ballot" as the method of voting for "all elections."

First, the choice between elections "by ballot" or "viva voce" was an important issue at the time. When James Madison identified what the Elections Clause meant by "manner" legislation, the first item on his list was "[w]hether the electors should vote by ballot or viva voce." [198] The choice could mean the difference between secret ballot elections in New England, where "elections were pretty tame affairs," and viva voce elections in the South, often characterized by a raucous, sometimes violent atmosphere, [199] in which the "voters, one by one, had to swear that they were qualified and then publicly declare the names of those they were voting for." [200] Election by ballot was more susceptible to fraud, [201] while viva voce voting, though transparent, had its own obvious issues, "especially where less wealthy men had to announce their vote in the presence of those to whom they were beholden--landlords, employers (possibly of family members), local officials with real authority." [202]

Second, the choice between ballot and viva voce voting was an actively contested issue. Only a few years after providing that "all elections" would be "by ballot," both the Georgia constitution (1798) and the Kentucky constitution (1799) switched to provide that "all elections" would be "viva voce." [203] In Kentucky, the change was spearheaded by John Breckinridge, ***491** future U.S. Attorney General under President Jefferson, who believed that "viva voce voting provided the only way for the poor man to exert his influence: only by voting aloud and seeing his name recorded could the citizen be sure his vote was correctly recorded." [204] In Vermont's 1786 constitution, all elections had been "by ballot," but now, in 1793, this was removed, such that the method of voting was no longer constitutionally mandated. [205]

Finally, this generation of constitution-makers was perfectly capable of using language that would limit such provisions to state elections. The "by ballot" clause in the Delaware constitution of 1792 did not itself apply to "all elections"; rather, it was limited to "elections of governor, senators, and representatives." [206] The ballot requirement was made applicable to congressional elections only by the separate provision (Article VIII, Section 2) requiring that congressional elections be held in the same manner as elections for state representatives. [207]

In addition to ballot/viva voce provisions, another set of "all elections" provisions that appeared in constitutions dating from this time period was the "all elections shall be free and equal" provision. Provisions such as this were included in the constitutions of Kentucky (1792 and 1799), Delaware (1792), New Hampshire (1792), Vermont (1793), and Tennessee (1796). [208] Similarly, several of these constitutions also provided that electors would, "in all cases," be "privileged from arrest" during elections, at least so long as they were innocent of treason, felony, or breach of the peace. [209]

***492** At least one other state constitution from this period contained a provision that was thought to regulate the state's "legislature" even though it did not even purport to apply to "all elections" or similar. In 1791, James Jackson contested Anthony Wayne's election (by a margin of twenty-one votes) as one of Georgia's representatives to Congress. In arguing his case to the House of Representatives, Jackson invoked the Georgia constitution of 1789. Jackson complained that although voters were to meet on election day "in the respective counties [of their residences], agreeably to the constitution," [210] in fact, three "residents

of Chatham [actually] voted in Effingham." [211] He argued that this was contrary to "the [first]section, [fourth] article of the constitution of Georgia," [212] which required that electors "have resided six months within the county." [213] In response, Wayne's counsel argued that these voters must have "had a right to vote at some place," and that there was no "fraud in a citizen who happens to be absent from his own county" voting at "any other part of the same district." [214] The House voted unanimously to unseat Wayne, [215] but split on the question of whether to seat Jackson, with the result that the seat remained vacant. [216] The argument over whether the state constitution prescribed the place of voting was one of many arguments made in the case, and it is impossible to know how the argument was received by House members; however, the point is that both contestants assumed that the state constitution was applicable, and there is no record of any member of the House saying otherwise.

As explained later in this Article, similar non-explicit substantive limitations continued to appear in state constitutions during the nineteenth ***493** century. Moreover, it is noteworthy that when disputes over the independent state legislature doctrine arose in the nineteenth century, they invariably concerned state constitutional provisions which, like those described in this section, applied to "all elections" or similar, but did not explicitly reference federal elections.

The Substance/Procedure Thesis, ignorant and/or dismissive of the history set forth here, posits that there should have been more substantive regulation of "legislatures" in state constitutions of the 1790s and speculates that the perceived dearth of such regulation occurred because the Founding generation eschewed such regulation to remain "[c]onsistent with" the independent state legislature doctrine. [217] The reality is that several of the original states simply had no constitutional activity during the decade after ratification. Virginia's constitution of 1776 remained unchanged until 1830, New Jersey's constitution of 1776 remained unchanged until 1844, New York's constitution of 1777 was first amended in 1801, and North Carolina's constitution of 1776 was first amended in 1835. Connecticut did not have a constitution until 1818, and Rhode Island did not have one until 1843. Of the states that held constitutional conventions in the decade after ratification-- Georgia (1789 and 1798), South Carolina (1790), Pennsylvania (1790), Delaware (1792), New Hampshire (1792), Kentucky (1792 and 1799), Vermont (1793), and Tennessee (1796)--all but South Carolina adopted constitutional provisions that regulated federal elections, either explicitly (Delaware) or by virtue of "all elections" provisions (the rest).

Moreover, there could be any number of other, more mundane reasons why any particular eighteenth-century constitution was not amended to place more "time, place, and manner" restrictions on federal elections. Perhaps no one thought of such provisions. Or perhaps they thought of them, but did not like them, either because of their substance or because they thought they should be implemented through ordinary legislation. Or perhaps they thought of them, and liked them, but realized that there was no political will to constitutionalize them.

For some questions, constitutionalization could have faced significant headwinds from constantly shifting political strategy in the states. For the first two presidential elections of 1789 and 1792, the manner of appointing ***494** presidential electors was "irrelevant and inconsequential because the election and re-election of George Washington were foreordained." [218] However, as Alexander Keyssar has explained, increasingly after those first elections, "states took advantage of the flexible [federal] constitutional architecture to switch procedures from one election to the next" and this "reflected more than an impulse to experiment with a new institution: electoral strategizing was clearly at work." [219] Similar strategic considerations were at work in this period when states decided whether to elect their congressional delegations at-large or by districts. [220]

3. The Ahistorical Structural Rationales Offered for the Doctrine

The Substance/Procedure Thesis also incorrectly supposes that the Framers assigned the function of prescribing federal election law to "legislatures"--with the understanding that those "legislatures" would perform that function without normal restraints--because they believed that it would promote some value important to the success of the constitutional design. Three variations on this argument are based, in turn, on some alleged attribute of (a) state legislatures; (b) "time, place, and manner" legislation; or (c) state courts. There appears to be no originalist basis for such a purpose-based or structural defense of the Doctrine.

The first variation on the structural argument arises from Chief Justice Rehnquist's comment in *Bush v. Gore* [221] that the Doctrine is grounded in a "respect for the constitutionally prescribed role of state *legislatures*." [222] Although more than twenty years have passed since then, ***495** proponents of the Doctrine have yet to articulate--let alone prove with evidence from the historical record--any reason why the Framers would have wanted to give state legislatures the ability to legislate without restraint with

respect to the manner of selecting the President and congressmen. [223] Whereas state legislatures' exclusive power to "chuse" senators was thought to facilitate "select appointment" of senators, and to protect state interests, [224] no such special competence of unrestrained legislatures for regulating federal elections has been identified. Put bluntly, any argument that unrestrained state legislatures had some special role to play is doomed once the Elector Appointment Clause and the Elections Clause are conflated. The latter provides that Congress is free to displace the work of the state legislatures, [225] so how special could the role of those state legislatures have been? At the Constitutional Convention, an effort was made to strip Congress of the power to preempt the state legislatures, but, as is well known, it was defeated after James Madison explained that it was "impossible to foresee all the abuses" that state legislatures might inflict were they given "the uncontrouled right of regulating the times places & manner of holding elections." [226]

The absence of any particular respect for the constitutional role of "legislatures" is demonstrated not only by the way that Americans imposed substantive constitutional restraints on them, but also by the way that the "legislatures" themselves willingly delegated away their own authority as "legislatures" during the early years of the Republic. Mark S. Krass has surveyed election laws passed between 1787 and 1829 in the thirteen original colonies and found that "state legislatures aggressively delegated authority to determine the times, places and manner of federal elections to local government officials." [227] For example, legislatures "allowed local election officials to pick where the polls would be located, open and close them at ***496** will, and make critical decisions about how voting would unfold." [228] It is hard to believe this would have occurred had the Founding generation believed that "legislatures" deserved special "respect" because of the role they were playing.

In lieu of identifying any reason why the Framers would have had any special "respect" for "legislatures," a second variation of the structural argument says that "time, place, and manner" law is a special kind of legislation, addressing particularly thorny issues, for which legislatures need to remain free from normal constraints. For example, when advocating for the freedom of state legislatures in the Covid election context, Justice Kavanaugh emphasized the need for legislatures to "[a]ssess[] the complicated tradeoffs involved in changing or retaining election deadlines, or other election rules." [229] In the same case, Justice Gorsuch argued that, for election law, state legislative choices must remain from interference because "[l]egislators can be held accountable," "[l]egislatures ... bring to bear the collective wisdom of the whole people," and "[l]egislatures enjoy ... resources for research and factfinding on questions of science and safety." [230] An academic version of this argument is that election law presents "local needs and exigencies" that can only be met by legislatures whose "flexibility" is not "shackle[d]" by state constitutions. [231]

The notion that election regulations should be free of the normal constitutional restraints did not originate in the Founding era. Many subjects understood to fall within the concept of "time, place, and manner" were constitutionalized during this time period. This included not only the constitutional limitations placed on federal elections after adoption of the Constitution (described earlier), but also more extensive regulation of state elections. As an example, consider elections for the lower houses of state legislatures. State constitutions adopted between 1776 and 1800 often ***497** addressed the date of election for representatives, [232] the duration of the election, [233] the method of voting, [234] the places for voting, [235] and ***498** apportionment of representation in the lower house among the state's counties, cities, or election districts. [236]

***499** Constitutionalization was an affirmative choice to wrest control of these issues from the state legislatures. For example, in South Carolina, the constitution of 1778 provided that the 1776 apportionment of representation-- which had been set by the existing legislature on an arbitrary geographic basis--would in seven years, and then every fourteen ***500** years thereafter, be reformed and done "in the most equal and just manner," according to "the particular and comparative strength and taxable property of the different parts of the [State], regard being always had to the number of white inhabitants and such taxable property." [237] However, as historian Rosemarie Zagarri explains, after the seven years passed, "the legislature [in 1785] simply ignored the constitution" and "left the previous system intact." [238] At the state's 1790 constitutional convention, the cause of reform backslid because "apportionment for the convention had been done by the same inequitable process as for the assembly." [239] Subsequently, disproportionality continued to grow, but "the legislature once again did nothing." [240] Finally, in 1808, a constitutional amendment again called for periodic reapportionment on the basis of population and taxes, predicated on a decennial census. [241] The amendment included another provision designed "[t]o avoid a repetition of the legislature's previous failure to abide by the constitution"--the constitution now directed the *governor* to conduct the required enumeration if the legislature failed to do it. [242]

The third and final variant of the structural argument focuses not on the alleged virtues of unrestrained legislatures, or the uniqueness of election law, but on the alleged vices of state courts. Chief Justice Rehnquist sought to avoid this theme in 2000, when he denied that the Doctrine was based on any "disrespect for state *courts*," [243] but in 2020 the state court reaction to COVID-19 brought it to the fore. Justice Gorsuch wrote in the Wisconsin case that "[n]othing in our founding document contemplates the kind of judicial intervention that took place here." [244] Similarly, Justice Kavanaugh wrote that "state courts do not have a blank check to rewrite state election laws for federal elections." [245] And in the Pennsylvania case, Justice Alito ***501** complained that the state court had invoked the state constitution "to make whatever rules it thought appropriate for the conduct of a fair election." [246] In their view, the Elector Appointment Clause and the Elections Clause were intended to serve as structural checks on the problem of overreaching state courts--for them, it is obvious that the use of the word "legislature" in these clauses "requires federal courts to ensure that state courts do not rewrite state election laws." [247] Otherwise, the references to "legislature" in the Constitution would be rendered "meaningless." [248] An academic version of the argument is that "the Framers' allocation of power over federal elections" to "legislatures" would be undermined if state constitutions could limit "legislatures" because then "courts--particularly state courts--would have a larger role in overseeing such elections." [249]

Here again, proponents of the Doctrine have failed to identify anything in the historical record suggesting that the Founding generation would have understood these clauses to mean that federal courts were to cabin state court interpretation of election law. Of course, the necessary inquiry would be anachronistic. At the time of the Founding, the court litigation that we ***502** see today concerning election design, such as redistricting, was just not a thing (including because judicial review was only in its infancy), and disputes over ballot-casting rules were apparently handled on the fly by sheriffs, election judges, and other local officials to whom such matters had been assigned by the legislature. [250] Moreover, as to ballot-counting disputes, the reality is that the Framers would likely have been surprised to see any courts--state or federal--much involved. For congressional elections, the Framers could not have been more clear that the "the Judge of the Elections [and] Returns" would be the House and Senate themselves, not any federal or state court. [251] For presidential elections, the Framers could not have been less clear. The Constitution did not even mandate how to appoint presidential electors, let alone make provision for resolving disputes over elections for elector, the appointment of electors, or the counting of electoral votes. [252] More broadly, as Professor Foley has demonstrated, "[t]here was no paradise at the time of the Founding in terms of handling ballot-counting disputes in important elections" as "the Founders themselves were struggling in a condition of confusion on this topic." [253]

***503 III. REVISITING THE NINETEENTH-CENTURY HISTORY OF THE DOCTRINE**

A. ***Existing Scholarship Concerning the Doctrine's History***

When reviewing the nineteenth-century history of the independent state legislature doctrine and related scholarship, it is important to distinguish between the historical version of the Doctrine and today's version of the Doctrine. Under the historical version, state courts and Congress considered declining to observe state constitutional requirements. By contrast, in today's version of the Doctrine, federal courts, in the name of protecting state "legislatures," are considering whether to assume the role of overseeing state court interpretation of state law, effectively federalizing state law pertaining to federal elections.

For the modern version of the Doctrine, there is no history to review. The first time that any federal or state court suggested that the Elector Appointment Clause or the Elections Clause alters the normal relationship between state legislatures, state courts, and federal courts was ***504** Chief Justice Rehnquist's concurrence in *Bush*. [254] This was also the first time anyone suggested that it was the job of federal courts to police the relationship between "legislatures" and state courts.

On the other hand, the anti-constitution version of the doctrine--under which state courts and Congress have considered not enforcing state constitutions-- does have a history in Congress and state courts. [255] In my 2001 article, I found that the Doctrine gained traction during the Civil War, when it emerged in a contested House election case (*Baldwin*) as a pretext for Republicans in Congress to disregard state constitutional provisions that would have deprived Union soldiers in the field of their votes because they had been outside of the state when they voted. [256] The doctrine was rejected in the early twentieth century by the U.S. Supreme Court and other courts, [257] but then re-emerged briefly during World War II when the Kentucky Supreme Court used it in the same way it had been used in the Civil War, to preserve the votes of soldiers "absent in the defense of the nation." [258]

Since 2001, other researchers have identified several additional instances from the second half of the nineteenth century in which political actors and courts invoked the historical, anti-constitution version of the doctrine.[259] In addition, Professor Muller identified an episode which occurred at the Massachusetts constitutional convention of 1820 in which Supreme Court Justice Story argued that a proposed constitutional provision requiring election of federal representatives and presidential electors by district would violate the Constitution by improperly cabining the "legislature" of the state.[260] It is from these historical data points that the Prevailing View Thesis of the Doctrine's history has been spun.

505 B.** ***The Failure of the "Prevailing View" Thesis of the Doctrine's History

No objective view of the evidence supports the thesis that the Doctrine constituted the "prevailing understanding of [the Elector and Elections Clauses] throughout the nineteenth century."[261] It was not the "prevailing understanding" either before, during, or after the Civil War. The evidence includes, but is not limited to, the explicit and non-explicit limitations on "legislatures" that were widespread throughout the 1800s, which I have identified and catalogued below after conducting a review of every state constitution adopted and/or amended during that century.

1. Constitutional Limitations on "Legislatures" in the Antebellum Period

Early nineteenth-century Americans continued to believe--as they had in the late eighteenth century--that state constitutions could properly limit legislatures acting pursuant to the Elector and Elections Clauses. This is demonstrated by several sources of evidence.

Beginning with Maryland in 1810, several state constitutions contained provisions that explicitly regulated the way states, through their "legislatures," appointed their presidential electors or elected their congressional representatives.

> • In 1810, Maryland amended its constitution to give "every free white male citizen" the right to vote in elections for presidential electors, congressmen, and certain state offices. The amendment further specified that voting in those elections would be "by ballot," not *viva voce*.[262] Notably, unlike most of the original states, Maryland never legislatively appointed its presidential electors, but always selected them by popular election, both before and after this amendment.[263]

> ***506** • In 1830, Virginia adopted a new constitution which specified the state's congressional representation "shall be apportioned as nearly as may be amongst the several counties, cities, boroughs, and towns ... according to their respective numbers," and also that those numbers shall include "three fifths of all other persons" (i.e., slaves).[264]

> • In 1831, Delaware adopted a new constitution which again provided (as had the state's constitution of 1792) that the state's congressmen would be elected "at the same places ... and in the same manner" as representatives in the state legislature.[265]

> • Florida's constitution of 1838 provided that "[r]eturns of elections for members of Congress and the general assembly shall be made to the secretary of state, in manner to be prescribed by law."[266]

• In 1842, Rhode Island adopted a constitution which provided that voting for several specified offices, including "representative[s] to Congress, shall be by ballot." [267]

• Iowa's constitutions of 1846 and 1857 provided that congressional districts consisting of more than two counties could not be "entirely separated by any county belonging to another district" and that "no county shall be divided" in forming a congressional district. [268]

***507** • California's constitution of 1850 provided that congressional districts consisting of two or more counties "shall not be separated by any county belonging to another district; and no [county] shall be divided in forming a congressional ... district." [269]

• The Virginia constitution of 1850 included the same "three-fifths" clause as its 1830 constitution as well as a requirement that the state be divided into congressional districts that "shall be formed respectively of contiguous counties, cities, and towns, be compact, and include, as nearly as may be, an equal number of the population, upon is based representation in the House of Representatives of the United States." [270]

• Oregon's constitution of 1857 provided that qualified electors could vote in "any county of a congressional district in which such electors may reside for members of Congress." [271]

Second, starting with Mississippi's constitution of 1817, it was common for new states to enter the Union with constitutions that specified the time, place, or manner of electing the state's first congressional representatives. [272] The House blessed this practice in 1850 when some members challenged the election of California's first representatives. [273] Representative Abraham Watkins Venable of North Carolina, invoking the Elections Clause, argued at length that California's election, called by its constitution "before the existence of [its] first Legislature," was "under no regulation of any Legislature as to time, place or manner, and therefore ***508** utterly void." [274] In response, Representative John Larne Robinson of Indiana pointed out the history of new states sending representatives who "were admitted to seats on this floor, without any law having been previously passed by the Legislature of such State designating the time, place, and manner of holding elections." [275] The House voted to seat the new California members by a vote of 109-59. [276]

Third, state constitutions in this period frequently contained "all elections" provisions that, by their terms, would have applied to federal elections (even though federal elections were not explicitly mentioned). For example, a non-exhaustive list of constitutions adopted by new states during this period that required "all elections" to be "by ballot" includes Ohio (1803), Louisiana (1812), Alabama (1819), Michigan (1835), Texas (1845), California (1849), and Minnesota (1857). [277] The same was true of new constitutions adopted by older states during this period, as evidenced by New York (1821) and Pennsylvania (1838). [278] In contrast, Kentucky's 1850 constitution, like its predecessor, continued to specify *viva voce* voting for all elections, which is also what the Virginia constitution of 1830 did. [279] Such "all elections" provisions regulated other aspects of elections as well. The Kentucky constitution of 1850 required "[a]ll elections by the people shall be held between the hours of six o'clock in the morning and seven o'clock in the evening," [280] while the California constitution of 1849 provided "[a] plurality of the votes given at an election shall constitute a choice, where not otherwise directed in this constitution." [281]

The broad "all elections" language was intentional. The original "all elections" proposal at the Virginia convention of 1830 would have applied ***509** only to "all elections for members of either branch of the General Assembly" and elections by the

legislature, but this was modified to "all elections in this Commonwealth." [282] By contrast, Connecticut chose to limit its by ballot requirement to "all elections of officers of the State, or members of the General Assembly." [283]

Fourth, as Professor Levitt has explained, Congress passed a law in 1845 that contemplated that when presidential electors were appointed in certain situations, it would be "in such manner as the State shall by law provide." [284] Professor Levitt found no indication in the legislative history that anyone believed this improperly circumscribed legislative power under the Elector Appointment Clause, even though "had the Constitution reserved special power to the state legislature to act outside of the legislative process in fulfilling an Article II role, the 1845 delegation to the state to act 'by law' would have been unconstitutional." [285]

Finally, in 1861, in *Shiel v. Thayer*, the House considered the independent legislature doctrine and rejected it. Oregon held its congressional election in June 1860 in accordance with its constitution, which provided that "[g]eneral elections shall be held on the first Monday of June bienn[i]ally." [286] The Democratic candidate, George Shiel, defeated the Republican candidate. However, in November of that year, at the time of the presidential election, some citizens voted for a second Democratic candidate, Andrew Thayer. Thayer argued that Shiel's election in June--held under the state constitution--was invalid, based on the independent state legislature doctrine:

> [The Elections Clause] provides that the times, places, and manner of holding elections in the several States for Representatives in Congress, shall be prescribed by the Legislature of each State. There is no provision in the Constitution[] that a constitutional convention has the power or the right to fix the times, places, and manner of holding elections for Senators and Representatives. I hold ... that this clause of the Constitution is imperative, and that a convention ... for a State has no power to fix the time and place ***510** for holding elections for Representatives and Senators, but that they must be prescribed by the Legislature of the State. [287]

Thayer also argued that the Constitution's provision for holding general elections biennially did not expressly apply to congressional elections, and, indeed, that "nowhere in the constitution of the State is there any provision for the reelection of a Representative in Congress." [288]

The Committee of Elections, in a report authored by its chairman, Henry L. Dawes of Massachusetts, unanimously recommended that Shiel be given the contested seat. [289] First, the Committee concluded that the Oregon constitution's provision for biennial "general elections" in June "was designed to embrace at least all such officers as were to be voted for by the people of the whole State, including a Representative in Congress." [290] Second, the Committee noted that the state legislature, by considering legislation that would have changed the date of the congressional election from that outlined in the constitution "seems to have believed that it had the power to [make such a change]." [291] The Committee made clear that it disagreed with the legislature. In its words, the Committee had "no doubt that the constitution of [Oregon] has fixed [the election date] beyond the control of the legislature." [292]

During the floor debate, Representative Thaddeus Stevens of Pennsylvania announced that he agreed with the Committee's conclusion that Thayer had no right to the seat, but he argued that Shiel should not get the seat either. [293] Stevens argued Shiel's election was invalid because, under the Elections Clause, "no [] power in a State[, besides the legislature,] has a right to prescribe" the time, place, and manner of a congressional election, including "the convention to frame the constitution." [294] Dawes responded that Stevens' argument flew "in the face of all the precedents of this House," [295] and that, in his view, the Elections Clause,

> ***511** [M]eant simply that [the time and place] should be fixed by the constituted authority of the State until Congress itself should fix a time for the election in all the States. As Congress has not fixed that time, it has said to every State "you may, by your constituted authorities, through whom you choose to speak in your law, fix the time." [296]

Ultimately, the House sided with Dawes and the Elections Committee. Stevens proposed a resolution that neither Shiel nor Thayer was entitled to the seat, but this motion was defeated by a vote of 77-37.[297] The House then voted to seat Shiel, though it did not record the vote tally.[298]

The Prevailing View Thesis fails to account for any of this pre-Civil War evidence. Of the many constitutional provisions which regulated "legislatures," Professor Morley mentions only the Maryland constitutional amendment of 1810, which he discounts, erroneously, as relating only to "voter qualification issues ... outside the scope of both the Elections Clause and the independent state legislature doctrine."[299] While Professor Morley notes the existence of *Shiel*, he fails to appreciate its relevance because of his mistaken belief that "[n]either the [Elections] Committee nor the [House] floor debate" considered the doctrine in that matter.[300]

***512** For this antebellum period, the Prevailing View Thesis appears to rely for support entirely on comments made at the Massachusetts constitutional convention of 1820 during a debate over whether the state constitution should require presidential electors and representatives to be chosen on a district basis.[301] Professor Morley's lead is that "Justice Joseph Story and Daniel Webster invoked the doctrine at the [convention], convincing delegates that including restrictions on congressional redistricting in the Massachusetts Constitution would violate the U.S. Constitution."[302] While there is some truth to this statement (Justice Story did invoke the doctrine), the rest is erroneous (Daniel Webster did not) or entirely speculative (the delegates had good reasons to reject the provision other than belief in the doctrine).

At the convention, the issue came up after the delegates voted to remove the outdated constitutional provision dating from 1780 which, prior to the adoption of the United States Constitution, had governed the appointment of the state's representatives to Congress.[303] At that juncture, James T. Austin (a future Attorney General of Massachusetts and the son-in-law of Elbridge Gerry) proposed a new constitutional provision that would have required representatives and electors for president and vice president to be chosen by the people on a district basis, with reapportionment after every decennial census.[304] Austin argued to the convention that election by districts was the best method, as "[i]t is only by dividing the state into small portions that there can be a fair expression of public opinion."[305] On the other hand, with larger, presumably statewide districts, "the rights of the minority are destroyed."[306]

***513** Austin wanted to constitutionalize district elections so as to "decide finally an important question" which was "continually occurring in the legislature," each time causing "some degree of embarrassment and confusion."[307] Austin undoubtedly thought Massachusetts had, since the beginning of the Republic, repeatedly switched back and forth between the legislative appointment of presidential electors and district-based elections.[308] He wanted to avoid constant "propositions ... to change the mode of election":

> [Austin explained that he] did not wish to see these propositions renewed. Important elections of themselves afforded grounds enough of excitement, without that which arose from a difference of opinion about the mode of election. The commonwealth had been at times agitated by contending parties. There was now a calm--but the storm might burst out again. Let us take advantage of the favorable moment to settle an important principle. Let it be understood that representatives and electors are to be chosen by districts. When districts are settled let it be for ten years. Let there be no room for suspicion that the mode of election is determined upon from party motives.[309]

Austin also addressed Justice Story's argument (detailed below) that the state constitution could not limit the power assigned to legislatures by the Elector Appointment Clause and the Elections Clause. Austin acknowledged that his proposed amendment would "limit [the legislature] in the manner of exercising their discretion," but he saw that as perfectly appropriate because "[t]he Legislature [is] bound to exercise all [its] powers under the direction of the [state] constitution."[310] Under constitutional first principles, "[t]he people possess the supreme power--they have a right to impose this restriction upon the Legislature, and the Legislature will have no right to question their authority."[311] Austin disagreed that limiting the ***514** discretion of the state legislature in the manner he suggested would violate the command of the United States Constitution; as he pointed out,

"the Legislature will continue to direct." [312] However, Austin conceded that it would "unquestionably be a violation" if the state constitution gave "to the Governor and Council the power of regulating the elections." [313]

Justice Story opposed Austin's proposal for two reasons. First, "it was contrary to the [C]onstitution of the United States," and, second, even if constitutional, "its adoption [would be] wholly inexpedient." [314] As to the first point--a version of the anti-constitution independent state legislature doctrine--Justice Story argued that the Elections Clause was an "express provision" for "the *manner* of choosing Representatives" for which state legislatures had "unlimited discretion .... They may provide for an election in single districts, in districts sending more than one, or by a general ticket for the whole state." [315] Similarly, the Elector Appointment Clause gave "discretion as to the choice of Electors" to "the *Legislature* thereof," which was "unlimited." [316] According to Justice Story, Austin's proposed amendment would improperly require the legislature to "surrender all discretion" in violation of its duty "to exercise its authority according to its own views of public policy and principle." [317]

Justice Story turned to his second point, the inadvisable "policy of the measure, even supposing it were constitutional." [318] He did not want a constitutional pre-commitment to "limit *us* to a particular mode of choice, leaving all the rest of the United States free to adopt any other." [319] Pre-committing to election by district, which would divide the state's power, while other states reserved the right to use a general-ticket, winner-take-all approach, would mean that, "on the most important occasions we might be ***515** deprived of all the influence to which our talents and character, and numbers, justly entitle us." [320] Justice Story warned against "bind[ing] ourselves to a mode of choice which would neutralize our votes and place us in the same situation as if we had no vote." [321]

Daniel Webster agreed with Justice Story's policy argument. [322] While Webster was in favor of election by district, for it to work, that mode required universal adoption, which was unlikely in the absence of an amendment to the United States Constitution because "it is in the interest of every state, that every other state should be restrained to District elections of Electors, and herself left free." [323] Therefore, to protect "all the just and right power of our constituents," Webster argued that Massachusetts "ought to retain the right of giving an undivided electoral vote, until others also ***516** should agree to give up the same right." [324] To do otherwise would not "entitle ourselves to much character for foresight or sagacity." [325]

The convention rejected Austin's amendment, but it did not record the vote. [326] The only three delegates who stated their position for the record on the independent legislature doctrine were Austin (who rejected the doctrine), Justice Story (who embraced it), and Webster (who declined to debate the point).

2. Constitutional Limitations on "Legislatures" During the Civil War

Because it provided a way to evade state constitutional limitations on soldier-voting in federal elections, the independent state legislature doctrine reached its high-water mark during the Civil War. However, the tide did not rise as high as the Prevailing View Thesis would have it. Even during the Civil War period, state constitutions continued to impose substantive limitations on state legislatures. Moreover, the Civil War soldier-voting cases were not nearly as strong an endorsement of the independent legislature doctrine as has been portrayed.

a. State Constitutions

When the Civil War threatened to disenfranchise Union soldiers who were absent from their home states fighting the war, several states amended their constitutions to prevent that from happening. Three of the amendments applied expressly to federal elections:

> ***517** • Connecticut amended its constitution to guarantee that any qualified voter "absent from this state" because of service in the United States military would "have the same right to vote in an election of state officers, representatives in congress, and electors of president and vice president of the United States," as he would have if he was present in the town of his residence at the time of the election. [327]

> • Maryland's new constitution of 1864 mandated that "[a]ny qualified voter ... who shall be absent ... by reason of being in the military service of the United States" was eligible to vote in the November 1864 elections, including elections "for presidential electors and for members of Congress." [328]

> • Rhode Island amended its constitution to guarantee that any qualified voter "absent from the State[] In the actual military service of the United States" would have the "right to vote in all elections in the State," including "for electors of President and Vice-President of the United States [and] Representatives in Congress." [329]

These constitutional amendments would have been unnecessary if the prevailing view in these states had been that state constitutions could not regulate federal elections.

Moreover, other states adopted soldier-voting constitutional amendments that did not contain explicit references to federal elections but were broad enough to encompass federal elections. This was so in New York, Pennsylvania, Michigan, and Kansas. [330] By contrast, Maine and ***518** Missouri's soldier-voting amendments were limited to specified state elections but apparently this was because the state constitutional obstacles to soldier-voting in those states applied only to specified state elections. [331]

West Virginia and Nevada both entered the Union during the Civil War. Both of their constitutions contained substantive limitations on how legislatures were to conduct federal elections, both explicit and implicit. West Virginia's constitution required congressional election by district and specified that each district "shall be formed of continuous counties, and be compact," [332] and that "all elections" must be conducted "by ballot." [333] Nevada's constitution specified the applicable manner of "all elections for United States Senators," including that "such elections shall be held in joint convention of both houses of the Legislature." [334] It also specified election "by ballot" in "all elections," [335] and further provided that "[a] plurality of votes given at an election by the people shall constitute a choice, where not otherwise provided by this Constitution." [336]

b. Soldier-Voting Cases

The foundation of the Prevailing View Thesis consists of the Civil War soldier-voting cases arising in New Hampshire (1864) and the House of Representatives (*Baldwin v. Trowbridge* in 1866). Professor Morley describes ***519** the New Hampshire case as "one of the nineteenth century's clearest, most emphatic endorsements" of the doctrine, [337] and the result in *Baldwin* as "powerfully support[ing]" the doctrine. [338] These matters were also credited in similar fashion by some historical commentators, [339] but not others, [340] and, more recently, Chief Justice Roberts cited *Baldwin* in his dissenting opinion in *Arizona State Legislature*. [341] In fact, the New Hampshire matter likely had nothing to do with the doctrine, and *Baldwin* was hardly as enthusiastic an endorsement as has been assumed.

i. The New Hampshire Supreme Court's Soldier-Voting Opinion

The New Hampshire Supreme Court's 1864 opinion advised the New Hampshire Senate that a soldier-voting bill allowing soldiers to vote for presidential electors and congressional representatives would be constitutional if enacted. [342] However, the opinion should not be read as an endorsement of the independent state legislature doctrine.

***520** A close examination of the New Hampshire matter reveals that no one involved identified any state constitutional provision that would even arguably conflict with the legislative proposal to permit soldiers to vote in the field for presidential elections and representatives in Congress. [343] The year before, the court had opined that there were state constitutional provisions requiring votes to be cast at certain places that would preclude absentee voting in state elections, but those provisions

applied to specifically enumerated state elections and did not, by their terms, apply to federal elections. [344] In 1864, the question that the court struggled with was whether the *federal* Constitution prohibited soldier-voting in congressional elections by specifying that voters in congressional elections "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." [345] If the state constitutional provisions requiring votes to be cast at certain places in state elections were "qualifications," then by operation of the federal Constitution they would apply to congressional elections even though those state constitutional provisions did not, by their own terms, apply to congressional elections. [346] The court ultimately concluded that the state constitutional requirements were not federal "qualifications," and therefore that the state legislature could authorize soldier-voting in the field "untrammeled by the provision of the State constitution, which requires the elector of State representatives to give his ***521** vote in the town or place wherein he resides." [347] Tellingly, the court's discussion about the potential applicability of the federal qualifications clause did not apply to presidential elections, for the simple reason that the qualifications clause does not apply to presidential elections. [348]

The conclusion that neither the New Hampshire legislature nor the New Hampshire Supreme Court believed the state constitution was irrelevant by virtue of the Doctrine is confirmed by two additional facts. First, in the 1864 soldier-voting statute, which was solely purposed to permit soldier-voting in federal elections, the legislature specified the act "shall be of no effect, but shall become inoperative and void, if a majority of the supreme court shall determine it unconstitutional." [349] This requirement is what prompted the court's review of the law's constitutionality.

Second, the legislature also went to the court to confirm the law had been passed in accordance with the state constitution's gubernatorial veto provision. Under that provision, no bill would become law unless it was either (a) approved by the governor or (b) not returned by the governor with his objections within five days after presented to him. [350] The governor argued he returned the bill with his objections within the five-day period, but the court disagreed, explaining he had blown the deadline and, in accord with the constitution, the bill had therefore become law without his approval. [351]

522 ii. The House Contested Election Case of *Baldwin v. Trowbridge

Baldwin v. Trowbridge, the contested election case arising out of Michigan's 1864 congressional election, was not as strong an endorsement of the Doctrine as has been commonly thought. [352] In fact, it is incorrect to assume (as Chief Justice Roberts did in *Arizona State Legislature* and as others have as well) that all members of the House who voted in favor of Trowbridge did so because they agreed with the Doctrine. [353]

In the election, Rowland E. Trowbridge received more votes than Augustus C. Baldwin but only when counting the soldier vote cast outside of Michigan. Soldier-voting outside the state had been authorized by the Michigan legislature, but Baldwin argued the soldier-voting statue was unconstitutional because the Michigan state constitution prohibited such voting (as the Michigan Supreme Court had recently held in a dispute over a state election). [354] The majority report of the Elections Committee, favoring Trowbridge, invoked the independent legislature doctrine and argued that the state constitutional requirement could not constrain the legislature's action in a federal election. [355] The minority report rejected the Doctrine. [356] After floor debate, a majority of the House voted in favor of ***523** Trowbridge, who retained his seat. [357]

Contrary to what has been assumed, support for the Doctrine was not "the only issue" upon which congressmen could have voted in Trowbridge's favor. [358] The majority report which advanced the Doctrine itself recognized it was not necessary to rely on the Doctrine because some House members might see no conflict between the Michigan soldier-voting law and the constitution. [359] The best example of a House member voting for Trowbridge but rejecting the Doctrine was Representative Henry Dawes, who was the chairman of the Elections Committee. Dawes rose during the floor debate to make clear that while he agreed with the committee majority that Trowbridge was entitled to his seat, he did not "concur fully in the views set forth in the report ... by which they arrive at that conclusion." [360] Dawes went on to explain that, contrary to the premise of both the majority and minority reports of the Committee, as well as the Michigan Supreme Court decision, the Michigan constitution did *not* require a voter to be "personally present" to vote. [361] Therefore, the soldier-voting law Baldwin alleged to be unconstitutional was "not in conflict with the constitution," and the "whole argument ... taken by [Baldwin and] the minority, fails." [362] Moreover, this meant the majority report's "idea that a Legislature can disregard the limitations of the State constitution" was not "necessary

for the support of this case"; thus, Dawes could vote in favor of Trowbridge retaining his seat.[363] Dawes made clear he rejected the "dangerous" doctrine articulated in the majority report and that, if he "entertained any doubt that the [Michigan soldier-voting] was constitutional," he would vote in favor of seating Baldwin.[364]

***524** Dawes was not the only Trowbridge supporter to offer an alternative to the legal rationale articulated in the majority report. Representative Trowbridge himself argued there was no conflict between the soldier-voting law and the state constitution because the constitutional provision applied "[m]anifestly to the election of officers created by that constitution, and to no others."[365] This was not a frivolous argument, if only because the constitutional provision in question did not explicitly apply to federal elections,[366] and the Michigan court decision recognizing the supposed conflict involved an election for "prosecuting attorney for the county of Washtenaw," not a federal election.[367] Representative Thomas Davis of New York explained he would be voting in favor of Trowbridge because he saw "no conflict" between the Michigan's soldier-voting statue and the Michigan constitution, though he was less clear about his reasoning than Dawes or Trowbridge.[368]

The difficulty in discerning the legal "holding" of the House's decision in *Baldwin* is highlighted by the reaction of the New York newspaper, *The World*. On February 20, 1866, *The World* decried the "utter shamelessness and illegality of the vote" in favor of Trowbridge. The paper asserted that there was "not a member of the House who voted to unseat Baldwin for any other reason than to sustain the decision of a partisan committee," and that the majority's "pretext [ual]" invocation of the independent state legislature doctrine was an "unspeakable effrontery" by "shameless partisans" that was "contrived to conceal a crime." The paper reserved special disapprobation for "Cockchafer Dawes, Chairman of the Committee," who had in "numerous cases of the same sort ... recognized the correct legal principles" but now, in *Baldwin*, exhibited "corrupt inconsistency."[369]

Six days later, having read the transcript of the debate, *The World* admitted it had done an "injustice to Mr. Dawes" by "suppos[ing] he [voted for Trowbridge] on the grounds [of the Committee's majority report authored] by Mr. Scofield." The transcript revealed "Mr. Dawes regarded the argument of Mr. Scofield as [an] absurdity." It was clear Dawes voted for ***525** Trowbridge because "he did not think the State constitution in conflict with the provisions of the soldiers' voting act of the Legislature." *The World* found this argument "just a little less preposterous" but admitted it had done "Mr. Dawes the injustice of overlooking this difference, and he is entitled to have the distinction made in his behalf."[370]

In one important respect, the majority report in *Baldwin* actually undercuts the Prevailing View Thesis. The very premise of the report's invocation of the Doctrine was the assumption that the people of Michigan, in adopting their constitution of 1850, believed it was appropriate for state constitutions to regulate federal elections.

3. Constitutional Limitations on "Legislatures" in the Post-War Period

After the Civil War, Americans continued to adopt state constitutional provisions evidencing their belief that state constitutions could properly limit "legislatures" acting pursuant to the Elector Appointment and Elections Clauses. In the wake of the soldier-voting cases, the Doctrine existed as an argument that was invoked in state courts or House contested election cases. However, the argument did not gain traction in either forum, and it faded over time, as it was rejected by courts and seemingly forgotten by the House.

a. State Constitutions

The following state constitutional provisions adopted during this time period explicitly regulated "legislatures" with respect to federal elections.

- The Alabama constitution of 1867 provided that, after each new congressional apportionment, "the General Assembly shall divide the State into as many districts as it is allowed Representatives in ***526** Congress, making such congressional districts as nearly equal in the number of inhabitants as may be."[371]

• In 1868, South Carolina's new constitution provided that "Presidential electors shall be elected by the people." [372]

• The Virginia constitution of 1870 required the state legislature to divide the state into congressional districts "which shall be formed, respectively, of contiguous counties, cities, and towns, be compact, and include, as nearly as may be, an equal number of population." [373]

• Tennessee's constitution of 1870 provided that citizens "included in any new county" established by the state would vote for members of Congress "with the county or counties from which they may have been stricken off." [374]

• In 1873, Pennsylvania adopted a new constitution, which provided that "[t]he trial and determination of contested elections of electors of President and Vice President [as well as certain state offices] shall be by the courts of law." [375]

***527** • In 1876, Colorado entered the Union with a constitution which required the state's presidential electors to be chosen by the legislature in 1876 but "by direct vote of the people" in future presidential elections. [376]

• California's constitution of 1879 regulated the manner in which the legislature could divide the state's counties and cities into congressional districts, imposing requirements of contiguousness and compactness. [377]

• In 1879, Louisiana adopted a constitution which provided that "Presidential electors and member of Congress shall be chosen or elected in the manner at the time prescribed by law." [378]

• Montana's constitution of 1889 required the legislature to divide the state into congressional districts after each apportionment by Congress. [379]

***528** • The constitutions of both South Dakota and North Dakota of 1889 provided that the state's congressmen would be "elected by the state at large" until "otherwise provided by law." [380]

• The Wyoming constitution of 1889 required the state legislature to divide the state into congressional districts, mandated congressional districts composed of two or more counties be "contiguous" and "as compact as may be," and stated "[n]o county shall be divided" in the formation of the districts. [381]

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> • In 1890, the Mississippi constitution stated the legislature "shall not elect any other than its own officers, State librarian, and United States senators" but clarified that "this section shall not prohibit the legislature from appointing presidential electors." [382]

In addition, many of the constitutions from the late nineteenth century contained "all elections" provisions, which regulated federal elections without specifically referring to them. Examples of such clauses requiring elections "by ballot" can be found in the constitutions of Virginia (1870), Pennsylvania (1873), Georgia (1868 and 1877), and Kentucky (1890). [383]

***529 b. Judicial Opinions**

For the post-War period, the Prevailing View Thesis again ignores the existence of contrary state constitutional provisions, claiming instead that the state courts which "squarely confronted" the Doctrine in the nineteenth century "invariably accepted" it. [384] This is incorrect. The cases Professor Morley cites do not support the argument, and he disregards the many cases that contravene it, in which state courts explicitly rejected the Doctrine.

Professor Morley cites three state court opinions in support of this argument. The first is the New Hampshire Supreme Court's soldier-voting opinion (1864), which, as already discussed, very likely had nothing to do with the Doctrine. His reliance on the other two cases--from Mississippi (1873) and Rhode Island (1887) [385] --is similarly misplaced.

Although Professor Morley states the Mississippi Supreme Court "applied the doctrine" in 1873, [386] that case plainly had nothing to do with the Doctrine. [387] The case concerned who had been rightfully elected treasurer of Hinds County. All the court did was reject an argument that the constitution's requirement that "all general elections ... be holden every two years" (Article IV, Section 7) was violated when the state legislature effectively required the state to hold a general election every year by designating 1871 as the first year for resumed state elections and 1872 as the first year for congressional elections resumed after the state's readmission to the Union. [388] In rejecting the argument, the court reasoned that the state constitutional requirement applied to elections for state officers, not Congress, and, in any event, both sets of elections would, in fact, be biennial. [389]

Professor Morley also mischaracterizes the 1887 matter from Rhode Island. The Doctrine was not an "essential component" of the Rhode Island Supreme Court's opinion, [390] and the law in question did not "squarely violate[]" the state constitution. [391] Rather, the state House of Representatives requested the Rhode Island Supreme Court's opinion on ***530** whether the constitution's majority vote requirement for all elections "under this constitution" [392] applied to congressional, presidential, and certain local elections, or whether such elections could be conducted on a plurality basis, as had been the practice. [393] The court advised that the majority vote requirement did not apply to any of the identified elections, explaining that elections "under this constitution" were limited to certain specified state elections "particularly provided for" in the constitution (e.g., governor, state legislature, and attorney general). [394] The court also stated the state constitution could not in any event constrain the legislature's approach by virtue of the Elections Clause and the Elector Appointment Clause. [395]

The truth of the matter is, in these and subsequent cases described below, state courts were asked to entertain--and did entertain--the potential applicability of state constitutional provisions to federal elections. Doing so would have been unnecessary if the courts were adherents of the independent state legislature doctrine.

In 1892, in *McPherson v. Blacker*, [396] the Michigan Supreme Court upheld the state legislature's decision to elect presidential electors using a district system instead of the general ticket. [397] The court not only rejected the argument that the Federal Constitution somehow precluded the district system [398] but also the argument that passage of the statute had violated the state constitutional requirement that "no law shall embrace more than one object." [399] No one suggested that the Elector Appointment Clause gave the state legislature the right to disregard the state constitutional requirement. [400]

***531** In 1910, in *State ex rel. Schrader v. Polley*, the South Dakota Supreme Court rejected the argument that a state legislature could prescribe congressional "manner" regulations without abiding by the state constitutional referendum requirement.[401] The court held, notwithstanding the use of the word "legislature" in the Elections Clause, if the state constitution "has fixed limits, the Legislature cannot transcend them, but must act within the limits prescribed, and if it goes beyond them its action is to that extent absolutely void."[402]

In 1918, the Rhode Island Supreme Court gave two advisory opinions to the state's governor relating to the 1864 state constitutional amendment that gave soldiers absent from the state the right to vote for President and Congress.[403] First, the court opined the amendment--dating from before the Seventeenth Amendment--could not be construed to give soldiers the right to vote in elections for U.S. Senators.[404] Second, the court told the Governor that, given the history of the independent state legislature doctrine, it was "impossible to predict" how the Senate, acting as the judge of its own elections, might act if a senator was elected by absent soldiers in violation of the state constitution.[405]

In 1919, the Maine Supreme Court advised the governor of Maine that an act of the state legislature giving women the right to vote for President was subject to the state constitution's referendum requirement.[406] The court rejected the independent state legislature doctrine, concluding that the Electors Clause did not give the legislation "any superiority over or independence from the organic law of the state."[407]

***532** This brings down the state court decisions to the time of the Supreme Court's 1920 decision in *Hawke v. Smith*.[408] *Hawke* was the first of several Supreme Court decisions, described in more detail below, that together rejected the Doctrine.[409]

c. House Contested Election Cases

Professor Morley is also incorrect when he argues that, in contested election cases after *Baldwin v. Trowbridge*, the House "consistently embraced and applied" the Doctrine. In reality, the Doctrine did not carry the day in any contested election case after *Baldwin*.

In the first instance the Doctrine was invoked after *Baldwin*, the House voted *against* the contestant who would have benefited from the Doctrine. In 1874, the House considered whether to seat two congressional candidates from West Virginia elected in October 1872 (pursuant to an existing state statute specifying October as the time for electing congressmen) or two others who claimed to have been elected in August 1872 (pursuant to the state's 1872 constitution, which specified August as the time for electing "all officers, executive, judicial, county, or district, required by this constitution to be elected by the people").[410] In the Elections Committee, three positions were staked out. First, the majority pointed out the new constitution did not, by its terms, purport to mandate congressional elections in August.[411] Second, Representative R.M. Speer submitted a separate opinion in which he argued that, even if the new constitution called for congressional elections in August, this would have been a violation of ***533** the state legislature's power to determine the timing of the election pursuant to the Elections Clause.[412] Speer cited *Baldwin* as well as Justice Story's arguments at the 1820 Massachusetts Constitutional Convention.[413] Third, Representative G.W. Hazeltine dissented, arguing that the state statute did not adequately prescribe an October election but that the new constitution somehow *did* prescribe an August election and "[i]t makes no difference whatever, so far as the construction of the term 'prescribe' is concerned, whether the power making the prescription be the constitutional convention or the legislature."[414] The House rejected the committee majority's view and upheld the August election allegedly conducted pursuant to the state constitution.[415] Professor Morley attempts to spin this matter as somehow supporting the Prevailing View Thesis, but the argument does not make sense.[416]

The most that can be said in favor of the Prevailing View Thesis is that, on two occasions in 1880, the contestant on whose behalf the Doctrine was invoked did not lose. First, in *Donnelly v. Washburn*, the party invoking the Doctrine prevailed by default when the House never acted. Dueling reports of the House Committee on Elections discussed a number of issues arising out of the Minnesota congressional election, including whether to count ballots that were "numbered."[417] The report in favor of the challenger, ***534** Ignatius Donnelly, argued numbered ballots should be thrown out because they vitiated secrecy, were tainted by intimidation against the Donnelly voters, and violated the state constitution's "all elections shall be by ballot" requirement

(the state's supreme court had so held).[418] The other report favored the sitting member, William Washburn. Citing *Baldwin*, this report argued it did not matter if the numbered ballots violated the Minnesota constitution because, under the Elections Clause, the constitution had no applicability to congressional elections.[419] The committee could not reach a conclusion on the matter, and the House never voted on it; as a result, Washburn retained his seat.[420]

Second, in *Iowa Contested Election Cases*, the committee majority whose recommendation later prevailed in the full House invoked the Doctrine in its report--but only in passing to rebut an irrelevant collateral argument. That majority report concluded that Iowa had correctly applied a federal "manner" statute when the state held its 1878 congressional elections in October (as required by the applicable state statute) instead of November.[421] The federal statute required congressional elections in November unless--as the committee found with respect to Iowa--this would force a state to amend its constitution with respect to the election of "State officers" if the state wanted them to be elected at the same time as ***535** congressmen.[422] For some reason, the majority felt compelled to explain that its blessing of the October date had nothing to do with what appears to be an irrelevant provision in the Iowa Constitution which had specified that the state's "first" congressional election after adoption in 1857 was to occur in the month of October.[423] As the majority explained, in determining the correct date under the federal statute, the only relevant state constitutional provision was one that (a) concerned the election of "State officers" and (b) would have to be amended in order to achieve a uniform November election date. Moreover, the constitutional provision applied only to the "first" federal election after adoption in 1857, not to an election occurring in 1878.[424] And, as if it needed another reason, the majority added "the time of electing members of Congress cannot be prescribed by the *constitution* of a State, as against an *act* of the legislature of a State or an *act* of Congress."[425]

More often during the late nineteenth century, the House considered state constitutional arguments without reference to the Doctrine, as if the Doctrine did not exist:

- In 1880, in *Curtin v. Yocum*, the House Elections Committee considered a bid to vacate Seth Yocum's election to Congress predicated on allegations that he received a number of votes from unregistered voters.[426] Both the majority report in favor of vacating the election and the minority report supporting the election made arguments based on the Pennsylvania constitution.[427] Both ***536** sides assumed constitutional requirements applicable generally to "elections" applied to congressional elections.[428]

- In 1885, in *McLean v. Broadhead*, the House Elections Committee considered the validity of Missouri's voter registration law under the Missouri constitution.[429] The majority argued that the state legislature's registration law was appropriate: "[t]he legislature, we think, had the right to go that far under the mandatory provisions of the constitution of Missouri requiring the passage of a registry law."[430] The minority argued the legislature's registration law was an "attempt to add to the qualifications of a voter" that was "obnoxious to the constitution."[431]

- In 1886, in *California Contested-Election Cases*, the House Elections Committee rejected an argument that the California legislature's "manner" statute for congressional elections was invalid because an amendment to it had not been read three times before enactment as required by the state constitution.[432] The committee explained that, per a decision of the California Supreme Court, that constitutional requirement did not apply to amendments.[433] The committee further explained that its deference to the state ***537** court's construction of its own state's constitution was in line with the past practices of the Supreme Court and the committee itself.[434]

- In 1888, in *Frank v. Glover*, the House Elections Committee rejected an argument that the Missouri voter registration statute violated the Missouri constitution.[435]

• In 1896, in *Johnston v. Stokes*, the House Elections Committee concluded that South Carolina's voter registration statute violated the South Carolina state constitution. [436]

• In 1901, in *Davison v. Gilbert*, the House Elections Committee rejected arguments that the Kentucky congressional redistricting statute violated the Kentucky constitution and was not passed in the manner required by the Kentucky constitution. [437]

• In 1919, in *Gerling v. Dunn*, the House Elections Committee rejected various arguments that the "manner and method of conducting" a congressional election had violated New York statutory and constitutional law. [438] The committee was of the view that the allegations were meritless, and also that the issues raised were better ***538** left to the legislature or "to be determined and adjudicated by the courts of New York State and not by Congress." [439]

• In 1922, in *Paul v. Harrison*, [440] the House Elections Committee found that "there was such an utter, complete and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia involving the essentials of a valid election, that ... there was no legal election in those precincts." [441]

No one in any of these cases suggested that the state constitution was irrelevant because of the independent state legislature doctrine. Professor Morley attempts to spin each of these matters as somehow supporting his argument that the Doctrine was the "prevailing view" in the nineteenth century, but, in each instance, his commentary is post-hoc lawyer argument bereft of any basis in the historical record. [442]

***539** ***

In sum, the argument that the independent state legislature doctrine was widely accepted in the late nineteenth century is belied by the evidence that the Doctrine was more often either unknown, disregarded, or rejected. In *Baldwin* in 1866, at least some Republican members of Congress justified their vote based on the Doctrine, but it is not clear how widely that view was shared among that caucus. After *Baldwin*, the Doctrine never subsequently gained traction in either the House contested election cases or state courts.

IV. THE IRRELEVANCE OF NINETEENTH-CENTURY INVOCATIONS OF THE DOCTRINE

With a proper understanding of the history, we can now ask how, if at all, the nineteen-century invocations of the Doctrine are relevant to constitutional interpretation? In other words, why are we even talking about it? Professor Balkin has noted that history often appears in legal arguments as an *enthymeme,* that is, "an argument with a suppressed premise." [443] The suppressed premise is "the theory of argument that justifies the use of history, or that makes the use of history salient and relevant." [444] Is there some unstated theory of how the Doctrine's nineteenth-century history is relevant that we should be evaluating? When the suppressed premise that allegedly "bestow[s] authority on history" is identified, it "helps us better understand how to criticize and evaluate historical arguments on their own terms," and determine whether the use of history is "good or bad, competent or incompetent." [445]

The most famous constitutional "argument from history" is originalism. However, the Doctrine's nineteenth-century history does not even tend to establish the Doctrine as the original understanding, and no one could seriously make that claim. As

Justice Thomas once explained in similar circumstances, "[a]ctions taken by a single House of Congress in ***540** 1887 ... shed little light on the original understanding of the Constitution." [446]

Is the unstated argument that emergence of the Doctrine somehow "liquidated" the meaning of the Constitution, [447] or that its subsequent cameos amounted to a "longstanding and seldom questioned practice" that now constitutes a post-Founding "gloss" on constitutional meaning? [448] If so, the argument is meritless as a factual matter. The Doctrine did not exist at the Founding, it was never subsequently the "prevailing view," it was invariably challenged when invoked, and, in the long run, it was rejected by the courts. If anything, the post-Founding history has confirmed the original understanding *against* the Doctrine.

***541** The last potentially relevant "argument from history" is stare decisis, the legal argument "for fidelity to precedent," even if it is wrong. [449] Most of the history reviewed previously concerned unsuccessful invocations of the Doctrine. The one nineteenth-century matter that somewhat resembles a judicial precedent, and is not an advisory opinion, is the House's decision in the 1866 case of *Baldwin v. Trowbridge*. However, *Baldwin* should not be followed as precedent by a court, for two reasons. First, *Baldwin* was long ago overtaken by controlling Supreme Court precedent rejecting the independent state legislature doctrine. Second, *Baldwin* was the product of a decision-making system that lacked the process and judicial integrity that normally justifies and demands reliance on the decisions of past courts under the doctrine of stare decisis.

A. *The Modern Supreme Court Precedent That Answers the Question*

Baldwin cannot serve as precedent because it has been overtaken by Supreme Court precedent. That precedent begins in 1920, in *Hawke*, in which the Court held that, under Article V, a state legislature's decision to ratify a proposed constitutional amendment did not have to be submitted to the people pursuant to the state constitution's referendum mechanism. [450] In so holding, the Court made clear that "the expression of assent or dissent to a proposed amendment" pursuant to Article V, for which "no legislative action is authorized or required," is "entirely different" than the "legislative action" of passing "manner" legislation pursuant to the Elections Clause. [451] In 1932, in *Smiley v. Holm*, [452] the Court confirmed what it suggested in *Hawke*--the Elections Clause does not confer any authority on a state legislature to enact "manner" legislation "independently ***542** of the participation of the Governor as required by the state constitution with respect to the enactment of laws." [453]

More than eighty years after *Smiley*, in *Arizona State Legislature*, the Court upheld an Arizona constitutional provision that could not be more contrary to the independent state legislature doctrine. The provision at issue--which was made part of the constitution through the citizen initiative process without any involvement of the "legislature"--"remove[d] redistricting authority from the Arizona Legislature and vest[ed] that authority in an independent commission" which is required to redistrict without any involvement of the "legislature." [454] In her opinion for the majority, Justice Ginsburg wrote, among other things, that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations ... in defiance of provisions of the State's constitution." [455]

***543** Chief Justice Roberts wrote the dissent in *Arizona State Legislature*. He acknowledged that the Court's precedent required "manner" legislation to be enacted "in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto," but emphasized that this was true only "so far as it goes." [456] He explained that there is "a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether" and that "imposing some restraints on the legislature" does not "justif[y] deposing it entirely." [457] As to the constitutionality of a variety of existing state constitutional restrictions on "legislatures," such as provisions requiring voting to be "by ballot," the Chief Justice commented that they were "well outside the scope of this case" and that "none of them purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process." [458]

Finally, in *Rucho v. Common Cause*, Chief Justice Roberts, now writing for a majority of the Court, held that partisan gerrymandering claims are not justiciable in federal court. [459] However, he took pains to point out that this holding did not "condemn complaints about [gerrymandering] to echo into a void." [460] He explained that the "States ... are actively addressing the issue on a number of fronts," and then listed specific state constitutional limitations on partisan gerrymandering by "legislatures," including the Florida Supreme Court's 2015 decision striking down the Florida "legislature's" congressional

districting plan as a violation of the Florida constitution, as well as constitutional amendments in Colorado and Michigan creating "multimember commissions that will be responsible in ***544** whole or in part for creating and approving district maps for congressional ... districts." [461]

B. *The Failure as Precedent of Nineteenth-Century House Contested Election Decisions, Including* Baldwin v. Trowbridge

The fact that the Supreme Court has rejected *Baldwin's* articulation of the Doctrine is not the end of the story. Proponents of the Doctrine have made clear that, if they were Supreme Court Justices, they would overrule *Arizona State Legislature* and ignore the *Rucho* commentary. [462] This would clear the way for them to argue that (a) pre-*Arizona State Legislature* Supreme Court cases permitting state constitutional regulation of "legislatures" never extended to constitutional regulation of the "substance" of election law (but rather only procedure), [463] and (b) the relevant precedent on the "substance" question is therefore *Baldwin v. Trowbridge*, the 1866 House contested election case which (at least in the minds of some participants) ***545** overrode a substantive state constitutional regulation as violative of the "legislature's" rights under the Elections Clause. [464]

At least some members of the Supreme Court might give precedential effect to *Baldwin v. Trowbridge*. [465] The dissenting opinion in *Arizona State Legislature*, authored by Chief Justice Roberts, would have done exactly that. [466] Extending stare decisis to a House contested election decision like *Baldwin* would be novel, [467] but commentators have suggested similar without giving it much thought. [468]

Giving precedential effect to the House's nineteenth-century decisions as if they were judicial decisions would be a mistake. The approach is based on the assumption that the House "[took] on a judicial function and act[ed] in a judicial manner" [469] when it decided these cases pursuant to its constitutionally prescribed role as "the Judge of the Elections, Returns and ***546** Qualifications of its own Members." [470] However, upon examination, the historical evidence is contrary to the assumption that the House was acting in a "judicial manner" when it considered contested elections in the late nineteenth century, particularly the 1860s. The reality was much different. Deferring to such decisions as if they were judicial precedent would not promote the goals underlying the doctrine of stare decisis. [471]

1. The Non-Judicial Character of the House's Contested Election Decisions

a. The House Contested Election Procedure

In the latter half of the nineteenth century, there were several aspects of the House's approach to deciding contested election cases that would have made it difficult for the House to act in a judicial manner.

First, the House lacked any meaningful procedure for litigating and deciding these matters. The only law governing the process was an 1851 statute which required the contestant, within thirty days after determination of the election, to give notice of "the grounds upon which he relies in the contest," and the contestee to respond within another thirty days with an answer "admitting or denying the facts alleged therein" and "stating specifically any other grounds upon which he rests the validity of his election." [472] Otherwise, the statute merely provided for document subpoenas and depositions "confined to the proof or disproof of the facts alleged or denied" and to be completed within sixty days of the answer. [473] An 1873 amendment allowed for more time and better notice for depositions, [474] and an 1887 amendment gave each contestant the right to ***547** file a "a brief of the facts and authorities relied on to establish his case," which was then provided to the Elections Committee along with a printed record of the deposition testimony adduced by the parties. [475] Beyond that, all questions of process were left to the unfettered discretion of the Elections Committee and, ultimately, the full House. There were no pre-trial proceedings, no trial, and no appeal.

Second, the limited process which did exist was not mandatory. As Israel Washburn of Maine explained on the House floor in 1858, "[t]he law of Congress of 1851 is nothing but the advice or suggestion of reasonable and intelligent and just men, as to the proper course to be taken .... It is nothing more. The law is not binding upon us." [476] Or, as Henry Dawes explained

it in 1869, each iteration of the House "could dispense with any part [of any procedure previously adopted], or the whole of it, at pleasure." [477]

> Regulated by no law and bound by no precedent, each House takes up the investigation of each case, at full liberty to pursue it in the way then deemed most expedient or just, and conscious as it proceeds that all its decisions, interlocutory as well as final, are absolutely within its own control. It is at every step a law unto itself. [478]

According to Dawes, the result was "seldom in conformity to any of the rules and forms found by experience in ordinary courts best calculated to develop facts and secure justice." [479]

Third, the House's decision-making in any given case--both as to factfinding and applying the law--was largely opaque. Sometimes, the House effectively decided in favor of the sitting member by taking no action on a matter, or simply by postponing any decision until the end of the congressional term. And when a contested election came up for a House ***548** vote, the vote was simply whether to seat the sitting member or the challenger, not whether the factual findings or legal reasoning of a particular committee report should be adopted. Only the committee members who signed the committee reports, and perhaps some others who spoke on the floor, went on the record with their reasoning. "If more than one issue [was] raised ... one can never be sure on what basis the action was predicated." [480]

Finally, congressmen were hardly in a position to act like judges. These were elected officials in the most political branch of government, tasked with adjudicating disputes that were inseparably intertwined with the spread between majority and minority parties in the House and thus the members' own political power. The Committee of Elections could perhaps have been constructed in such a way as to temper the political pressures, but this was not the case. As Dawes explained, the "committee [was] appointed by the Speaker, under the same usage which govern[ed] the selection of all the other committees," resulting in "a political committee ... infected with an incurable disease" from its inception. [481] Moreover, many congressmen did not have the time, training or inclination to act like judges. [482]

b. The Experience of Henry Dawes in the 1860s

Was the House able to overcome the headwinds of this system--in which inherently political actors reached opaque decisions with minimal ***549** procedure--to act in a "judicial manner?" The experience of Henry L. Dawes in the 1860s suggests not.

Dawes served as a Representative from Massachusetts from 1857 to 1875, and then as a Senator from 1875-1893. During the 37th through 40th Congresses (1861-1869), Dawes was the chairman of the Committee on Elections. [483] He was a Republican, and a partisan, but had a reputation for independence and fairness which he attempted to fulfill in his role as chairman of that committee. [484]

In late 1869, after moving on from his role as Elections Committee chairman, Dawes authored a paper that was read at the general meeting of the American Social Science Association in October 1869, and then later published in the Journal of Social Science. [485] The paper, entitled "The Mode of Procedure in Contested Elections," has been described as "the wail of a chairman whose hands were tied behind his back by party dictation." [486] Dawes wrote:

> All traces of a judicial character in [House contested election] proceedings are fast fading away, and the precedents are losing all sanction. Each case is coming to be a mere partisan struggle. At the dictate of party majorities the committee must fight, not follow, the law and the evidence; and he will best meet the expectations of his appointment who can put upon the record the best reasons for the course thus pursued. This tendency is so manifest to those in a situation to observe, that it has ceased to be questioned, and is now but little resisted. There is no tyranny like that of majorities, and efforts in the past to resist them, and to hold the judgments of the Committee of Elections up above the dirty pool of party politics, have encountered such bitter and unsparing denunciation, and such rebuke for treason to party fealty, that they are not likely often to be repeated. The fruit that follows such seed ***550** is too certain for doubt. The whole proceeding must sink into contempt. Self-respect, as well as legal

> attainment, will soon retire from service upon a committee required, in the name of law and under the cloak of judicial sanction, to do the work of partisans. [487]

Dawes concluded that the process had become "an engine of political parties working out their ends." [488]

What Dawes described in his paper in 1869 reflected his lived experience in contested election cases in the 1860s. In the pages that follow, this Article pulls back the curtain on the House's treatment of three issues that recurred during that decade: (i) application of the Incompatibility Clause to congressmen who held commissions as military officers, (ii) the effect of electoral improprieties in Missouri, and (iii) the independent state legislature doctrine. On these issues, it appears that the House's determinations depended, not on the outcome of anything resembling a judicial process, but on the partisan bona fides of the "judges" and contestants.

i. The Incompatibility Clause

In 1860, William Vandever was re-elected as a Republican to the 37th Congress. [489] After the war began, Vandever offered to furnish a regiment of Iowa volunteer infantry to the Union war effort, which President Lincoln accepted. [490] In September 1861, Vandever and his forces were "mustered into in the service of the United States." [491] This appointment created an issue under the Incompatibility Clause, which provides that "no person holding an office under the United States shall be a member of either House during his continuance in office." [492]

Dawes's Elections Committee, in a unanimous report, wrote that, "[h]owever much [the members of the committee] might honor Colonel Vandever for his noble conduct, they must judge his rights by the same law that is applicable to the most undeserving member of the House." [493] The Committee therefore "felt compelled to" recommended that Vandever ***551** was not entitled to his seat as of the day he was mustered into service. [494] The Committee rejected Vandever's argument that he was simply an Iowa militia officer, not an officer of the United States, not least because the argument was contrary to two House precedents. [495]

Following receipt of the committee's report in April 1862, the House voted to postpone debate until the next session of Congress, effectively allowing Vandever to continue in both offices. [496] Dawes reluctantly acceded to the postponement, noting his "apprehension" that the House's "appreciation and admiration for [Vandever's] patriotism and self-sacrifice" might lead it to "sacrifice a great important constitutional principle." [497] However, Dawes allowed that the question might better be decided closer to the end of the term "under those circumstances which will secure for it the calmest deliberation and the fairest consideration." [498]

When the matter finally came up for debate in late January 1863--with only a couple of months remaining in the Thirty-Seventh Congress--Dawes presented the report of his committee. However, Elihu Washburne, the Radical Republican from Illinois, immediately sought a further one-month postponement, ostensibly as a courtesy to Vandever, who was absent fighting in the war. [499] Dawes responded that nothing better illustrated the "incompatibility of the two offices" than the fact that Vandever could not "get a furlough from his commanding officer" in order to argue his own case in Congress. [500] Dawes insisted that it was incumbent upon the House to affirmatively address the matter without further delay, no matter how unappealing. Washburne's motion to postpone was defeated, and the House, at Dawes's urging, voted to adopt the committee's resolution against Vandever. [501] The vote in favor of the resolution against Vandever was not recorded, but the immediately preceding vote rejecting Washburne's bid to delay had been 53-74. All thirty-four participating Democrats voted to proceed along with a number of Unionists, but the seventy-four Republicans split their vote, forty-eight to delay, twenty-six to proceed. [502]

***552** But that was not the end of the matter. The next day Washburne rose again and asked the House to reconsider its prior vote against Vandever. To Dawes's surprise and dismay, the House, without any debate, reversed itself and voted 70-64 to reconsider the matter. [503] Overnight, the Republicans had found sixteen more Republican votes--nine apparently switched their votes,

seven who had not voted now did. [504] Washburne then sought to postpone reconsideration on the merits until the last day of the congressional term and attempted to prevent Dawes from even speaking to the point. [505]

When Dawes regained the floor, he was furious. He lectured his fellow Republicans that there had been "no word from anyone questioning the soundness" of the principle that prevented Vandever from holding two offices at once. "The only question upon which I find myself ... differing with my friends here is [whether] with the positive conviction in all our minds that such is the [correct principle] founded upon the strict law and the Constitution, it is of no such importance as requires us to adopt it." [506] Dawes went on to say that he had delayed bringing the matter forward for "as long as I could consistently with my duty," and acknowledged that it had been "a hard vote" for everyone, but then he asked, "[a]re we to take it back to-day because of some mysterious influence which has been set to work in the last twenty-four hours [?]" [507]

Dawes's appeal to the law and principle was unavailing. The House voted with Washburne to postpone consideration of Vandever's status as congressman until the last day of the 37th Congress (March 3, 1863), ***553** effectively mooting the matter, rejecting the Election Committee's recommendation, and avoiding any impact on Vandever's tenure as a congressman. [508] In fact, even on March 3, the last day of the term, the House did not act on the matter. [509]

This event upset Dawes. The following week, "Van," the Washington correspondent of *The Springfield Republican*, reported "rumors" that "Mr. Dawes will resign his place as chairman of the committee on elections," explaining:

> He was badly treated in the House the other day, his own political friends refusing him an opportunity to speak on the Vandever case. He was compelled to receive the help of democrats to give him his rights [to speak]. The fact is, too many of the republican members demand his services on the difficult election cases for their side, and them, after he has given them, they are not willing to give him the generous treatment to which he is entitled, whenever he disagrees with the majority of the republicans. To say the least, a man who does the party such eminent service as Mr. Dawes does at times--whenever party and principle agree--is at all times entitled to the most courteous treatment from his political friends. [510]

"Van" had special insight into what was going on, as he was D.W. Bartlett, the clerk of the Elections Committee. [511] In fact, Dawes did tender his resignation, but the House rejected it, [512] and Dawes continued as chairman of the committee. [513]

By contrast to how Vandever was treated in the 37th Congress, in the 38th Congress, the Republican majority in the House did not hesitate to apply-- indeed, relished applying--the Incompatibility Clause to a different ***554** congressmen, Francis P. Blair, Jr. As described in the next section, the difference appears to have been, in contrast to Vandever, that Blair was despised by the Radical Republicans for his conservative views and actions.

ii. Electoral Improprieties in Missouri and the Incompatibility Clause Again

Missouri's congressional election for the 38th Congress, held on November 4, 1862, generated four disputed elections, all of which came to a head in the House in the spring of 1864. In three of the cases, the candidate who was more appealing (or less loathsome) to radicals in the House had been the apparent winner and was defending his seat: (1) Benjamin F. Loan (an "increasingly radical" Unconditional Unionist who had been serving as a brigadier general in the Missouri State Militia) [514] was defending against John P. Bruce (a "conservative Democrat" and "conditional unionist"); [515] (2) John W. McClurg (Unconditional Unionist) [516] was defending against Thomas L. Price (a Democrat); [517] and (3) Austin A. King (Democrat turned Unionist) [518] was defending against James H. Birch (formerly of the "proslavery wing of the Missouri Democratic party"). [519] In the fourth case, it was the more conservative candidate, Francis P. Blair, Jr., who was defending his seat against the ***555** candidate favored by radicals, Samuel Knox, who was running as an Unconditional Unionist. [520]

Dawes's nine-member Elections Committee took up the first three cases (*Loan, McClurg*, and *King*) at the same time in March 1864, as they raised broadly similar issues of alleged interference in the elections by the state militia in favor of the more radical-

friendly candidates. [521] Although a Republican, Dawes joined all three Democrats on the committee, and one other Republican, to create a 5-4 majority in favor of nullifying all three elections. The committee minority, which would have ruled in favor of the sitting members, consisted of three Republicans and a Unionist. [522]

Dawes described the fallout from the committee vote in a letter to his wife the next day. "All of a sudden your husband's popularity here has gone," he wrote. "His vote in Com. of Elections yesterday decided a case by one majority against two of our friends in Missouri, and such a heap of indignation, vituperation and general cursing as was piled upon his poor head by our side of the House-- was perfectly terrific." [523] The Springfield Republican's "Van" reported similarly that there was a "bitter feeling among some of the radicals ... against the republicans on the committee," and that Dawes, in particular, had been "condemned [by the radicals] ... with severity," because he had voted "to send back to Missouri Loan and McClurg, radical republicans." [524]

Following the committee votes, *Loan* was the first of the three cases brought to the full House for debate, and it became a test case for the other ***556** two. The committee majority's report in *Loan*, authored not by Dawes but by New York Democrat John Ganson, pasted a series of excerpts from the challenger Bruce's evidence, credited all of it without analysis, and concluded that it amounted to "ample proof" that "a portion of the militia in certain localities," by "threats, violence, and by various modes of intimidation, so far interfered with the election as ... to render [it] a nullity." [525]

At the other pole, the minority report, authorized by Republican Charles Upson of Michigan, dismissed all of Bruce's evidence as "hearsay statements, or vague rumors, or irrelevant and immaterial evidence," none of which was believable because it came from Bruce's "partisan supporters," many of whom were "confessedly disloyal or in sympathy with [the] rebels." [526] Loan should retain his seat because, at worst, some "loyal voters" may have gotten "somewhat excited and indignant" when they saw men at the polls who had "recently been imbruing their hands in the blood of their neighbors," "destroying or plundering their property," or giving "aid and comfort to those who had been thus engaged." [527] Neither report articulated any legal standard against which to judge the disputed evidence.

During the floor debate, Upson spoke first, for the committee minority. He contrasted Dawes and the committee majority--"these croakers and complainers, these libelers of our soldiers"--with the "citizen soldiery" who prized more than anyone "the freedom of elections" and the "purity of the ballot-box." [528]

When it was Dawes's turn to speak for the committee majority, he argued that it was the House's "duty to see to it that the election of its members is *free*." [529] Dawes said that he understood the need for troops to protect elections in troubled places like Missouri, and he was "prepared to find abuses" by such troops and "look upon them as necessities." [530] However, he could not countenance the "terror created by glittering bayonets and official orders and arrests," which had "pervaded every branch of business" during the election in question. [531] Moreover, Dawes was frank that he ***557** wanted to send a broader message about the integrity of President Lincoln and the Republicans, and thereby deny a talking point to "the gentlemen on the other side." [532] By removing the Republican-favored candidate from the seat, the House would "bear testimony to the purity of purpose on the part of the Administration." [533] The purpose in having troops present was "not to secure the election of particular men, but ... [to] keep[] treason away from the life and vitals of the Republic;" it was "not to carry an election, but to secure freedom of election." [534]

After Dawes spoke, the radicals pounced. [535] Kellian Whaley from West Virginia described the committee majority's recommendation as a proposal "to ignore and disfranchise the loyal people of the border States of the South as well as two hundred thousand of their brave heroes now fighting in the field," which was especially appalling coming from Dawes, who had a "reputation for talent, but none for gunpowder." [536] Thomas Eliot from Massachusetts said that the "terror" perceived by Dawes was in his "imagination." [537] Henry Winter Davis of Maryland would not accept either "maudlin lectures from the Democratic party" nor "Puritan lectures" from Dawes, [538] and suggested that Dawes would have a tough timing explaining to his Massachusetts constituents why he had voted "to crush their friends, discredit their cause and weaken the hands of loyal men on the burning borders of the rebellion." [539]

Loan himself launched a "venomous attack" on Dawes (perhaps in part because Dawes was absent when Loan spoke). [540] Loan accused Dawes of putting Ganson up to write the majority report, instead of writing it himself, because Dawes knew the report would have to "disregard all pretense to honesty or fairness" in order to find against Loan. [541] Loan also called out Dawes for considering what was best for "the Administration" instead of "the law as applicable to the facts." [542] Loan concluded that Dawes was "[a] ***558** political guerrilla who flies a friendly flag that thereby he may the more safely and surely strike a fatal blow." [543] Did Loan later regret going too far in the heat of the moment? Apparently not, as he later had the *Globe*'s printer include a footnote in the *Globe* calling Dawes a "great liar and a dirty dog." [544]

In the end, on May 10, 1864, the House decided that Loan should retain his seat, voting 59-71 against the Election Committee's recommendation. [545] With Dawes absent, only one member of the Republican Party voted in support of the committee majority's recommendation to unseat Loan. [546] By contrast, every Democratic vote was to unseat Loan. [547]

Historian Bruce Tap summarized the press reaction to the Loan case as being "highly critical of the Republican majority's decision":

> The *New York Times* wondered why a report was needed, since the House seemed predisposed to award the seat to the sitting member. The *Missouri Republican* described the entire proceeding as a farcical event characterized by pure partisanship. Despite evidence of electoral tampering, the dominant party would not allow itself to be deprived of a seat. "A report from a regular standing committee of the House ... though based upon a full and impartial examination of all the facts, has been thrown aside by a set of drilled partisans who mock the very name of fairness." [548]

The result in *Loan* carried over to both *King* and *McClurg*. On June 1, 1864, Dawes informed the House that he and the Committee had accepted the House's decision in *Loan* as "instruction" in *King* or "at least they look upon it as a *res adjudicata*." [549] The challenger, Birch, still tried to argue his case but was shortly cut off when it was observed that "there are not a dozen ***559** gentlemen listening to this speech." [550] The sitting member, King, then spoke briefly. He focused less on the merits of the dispute than on making clear to the House that, although he was a former slaveholder and "southern man," he supported "carrying on this war vigorously" until the "traitors lay down their arms and acknowledge the supremacy of the Constitution." [551] The House took no action other than to discharge the Elections Committee from further consideration of the matter. [552] The same happened in *McClurg*, but with no debate. [553]

While the House was overruling Dawes and the Elections Committee in *Loan*, *McClurg*, and *King*, the stage was being set for a very different outcome in the fourth Missouri contested election case, *Knox v. Blair*.

By the spring of 1864, Frank Blair, a conservative Republican, was in an all-out political war with the radical wing of the party. Blair, whose prominent father was a close Lincoln adviser and whose brother was Lincoln's Postmaster General, had first "won the enmity of Republican radicals" in 1861 when he was part of the effort to have General Fremont relieved as commander of the Western Department. [554] In the November 1862 election, the radicals supported Blair's opponent, Samuel Knox, but Blair was narrowly re-elected by a small margin. [555] The 38th Congress did not begin until December 1863, and as that time approached "members of the Blair family were exploring the possibility of political realignment [and] running [Frank Blair] for Speaker on a conservative, border state platform." [556] In fact, Schuyler Colfax, aligned with the radicals, was elected Speaker, but only after the Republicans put down an attempt by the acting clerk of the House (Emerson Etheridge, a Unionist from Tennessee) to "place a conservative coalition of Democrats and border state Unionists in control of the House by invalidating the credentials of several Republican congressmen." [557] Although Blair did not come back to Washington until January 1864 [558] --after the House was organized-- Blair's "enemies ***560** accused him of plotting with the Democrats to win the speakership" through this failed conspiracy. [559]

Blair's conservative views on reconstruction and involvement in intra-party presidential politics deepened the rift between him and congressional Republicans. [560] When the Treasury Secretary, radical Samuel P. Chase, was maneuvering to supplant

President Lincoln as the party's1864 presidential candidate, Blair functioned as "'hatchet man' for the Administration." [561] On February 1, Blair unsuccessfully introduced a resolution calling for a special committee to investigate the Treasury Department's regulation of commerce with insurrectionist states. [562] On February 27, Blair followed up with a "blistering anti-Chase speech in the House that among other things charged widespread Treasury corruption in the issuance of cotton-trading permits." [563] "Many radical Republicans never forgave the Blair family for this climactic event in a series of intraparty dogfights which found the Blairs leading the conservative faction." [564]

Meanwhile, Knox's contested election case against Blair was percolating in the Elections Committee. The case turned on various alleged election improprieties, many involving soldiers, but none as alarming as those made in *Loan*, *McClurg*, and *King*. [565] The allegations were almost beside the point. As Dawes explained to his wife, "Frank is very unpopular with our people ... and they are resolved to turn him out right or wrong. I am expected by his friends to save him, and by ours to hoist him. And either way will create a storm." [566] Blair apparently had a false sense of security about the outcome of the case. He met with Dawes and the committee on March 3 and, according to his sister, showed very little concern as to the result. [567]

***561** In addition to the contested election case brought by Knox, by late April the Elections Committee had also begun considering whether Blair should be unseated for violating the Incompatibility Clause. There were indications Blair was preparing to resume his post as major general in the army, which he had resigned to take his seat in Congress. On April 25, at Dawes's urging, the House requested the President to disclose whether Blair "now holds any appointment or commission in the military service of the United States," and, if so, when Blair accepted such office and whether he was now "acting under [its] authority." [568] On April 28, President Lincoln responded that when Blair had returned from the field to resign as major general and assume his seat in the 38th Congress, the President and the Secretary of War had promised Blair that he could, at any time during the congressional session, "at his own pleasure, withdraw said resignation and return to the field." [569] Lincoln further explained to the House that Blair had, in fact, "withdrawn" his resignation on April 23 so that he could be assigned the command of a corps. [570]

The House promptly requested copies of documents relating to Blair's circumstances, which the President produced on May 2. [571] Among the documents was a letter that Lincoln had sent to Blair's brother Montgomery (the Postmaster General) in November 1863, the month before the 38th Congress began. [572] In that letter, Lincoln had made clear his preference that Frank Blair should come to Washington for commencement of the 38th Congress, "put his military commission in my hands," "take his seat," and "aid to organize a House of Representatives which will really support the government in the war." [573] Lincoln continued: "If the result shall be the election of [Blair] as Speaker, let him serve in that position; if not, let him retake his commission and return to the army." [574] The revelation of Blair's "secret arrangement" with the President, "by which he was Member of ***562** Congress or Major-General, whichever he wished," only increased the radicals' suspicion of Blair. [575]

On May 5, Dawes reported to the House that the Elections Committee had voted in favor of Knox and against Blair. [576] As in the recent *Loan* case, Dawes was again in a majority recommending that a sitting member be ejected from his seat because of election improprieties in Missouri. However, this time the sitting member was the conservative (and increasingly unpopular) Blair instead of the radical Loan, and the committee members re-aligned themselves accordingly. Dawes was now joined by all of the committee Republicans instead of the committee Democrats. [577] The committee Republicans who had recently discounted all of the evidence of election improprieties in Missouri when used against Loan now credited such evidence when used against Blair, while the committee Democrats who had credited such evidence when used against Loan, now rejected it when used against Blair. [578]

The partisan split in the committee continued when the matter was perfunctorily debated in the full House on June 10. Dawes briefly recapitulated the majority report. [579] The radicals who had excoriated Dawes a few weeks previously for suggesting that Loan be unseated were now silent. Indeed, not a single Republican spoke in defense of Blair. Democrat James S. Brown from Wisconsin (a member of the Elections Committee) pretended that he would "not undertake to interfere with [Republicans'] decision" to decide a contested election case based on "minor divisions which they have among themselves," before briefly criticizing the majority's decision to shift the burden of proof onto Blair to prove the validity of the disputed votes. [580] Brown concluded by wondering aloud what "strange prejudice must have influenced the minds of the majority," and suggesting that the

committee had improperly decided to unseat Blair on the basis of the contested election instead of the dual office-holder issue because the former resulted in the seat being awarded to Knox, while the ***563** latter would have resulted in a new election in which voters would get to decide who their new representative would be.[581] Another one of the Committee's Democrats, John Ganson of New York, made a show of refusing to argue the merits of the matter because he had been forewarned that the Republican "side of the House had already made up its mind, before any discussion was had, that the sitting member was not entitled to his seat," and Ganson had "too much respect for [him]self" to participate in such a phony debate.[582]

The final vote was 82-32 against Blair, and he did not get the support of a single Republican.[583] In a companion vote to decide whether Knox was now entitled to the seat, every Republican vote was in favor of Knox, and every Democratic vote was against him.[584] Dawes wrote to his wife: "Frank Blair was *executed* in the House ... and I was obliged to perform the ceremony. I hope the Missouri Radicals will now let me be."[585]

Just a few days later, on June 13, Dawes and the Elections Committee issued a second, seemingly redundant report against Blair.[586] The committee again called for Blair to be dis-entitled from the seat, but now on the basis of the incompatible office issue.[587] On this issue, the House adopted the committee's recommendation without any debate or recorded vote.[588] The specific violation that the committee found was not the obvious one presented by Blair's recent resumption of duties as a major general. Instead, the committee found that Blair had disqualified himself from ever assuming his seat in Congress by not resigning his position in the army until January 1864, which was a few weeks after the 38th Congress convened in December 1863.[589] Evidently, the Republican majority had ***564** overcome the squeamishness they had in the prior Congress about enforcing the Incompatibility Clause (when the Representative holding an incompatible office had been Colonel Vandever instead of Blair).[590]

Even then, the Republicans in Congress were not done with Blair. By basing his disqualification from Congress on his failure to resign the military office before the Congress began--instead of his recent resumption of the military office--the Committee avoided any acknowledgement that he was entitled to resume the military office. This made it possible for spiteful Republicans in the Senate to pile on. In a report dated June 15, the Senate Judiciary Committee concluded that Blair could not even resume his military office. They found that Blair had given up that office, irrevocably, when he resigned in order to take his seat in Congress.[591] Per historian Allan Bogue, the Republicans had "worked out their own formula of double jeopardy for Frank Blair."[592]

The House's treatment of Blair was far from the judicial application of law to facts. Rather, in the words of one historian, the Elections Committee was used "to punish a recalcitrant member of the dominant party."[593] More than one newspaper described a radical republican "war" against Blair.[594] It was clear that Blair had "no advocates and defenders among the republicans, his friends belonging exclusively to the opposition."[595] Simultaneous with Blair's ejection from the House, the Republican convention met in Baltimore and voted overwhelmingly to exclude the conservative (pro-Blair) delegation from Missouri in favor of the radical (anti-Blair) delegation.[596] The *New York Herald* observed, "the exclusion of ***565** his delegation from the Baltimore Convention, and his own exclusion from Congress by republican votes, indicates that [Blair] has been formally read out of the republican party."[597]

iii. The Independent State Legislature Doctrine

When the House of the 39th Congress took up *Baldwin v. Trowbridge* in early 1866, Dawes faced several competing considerations. Politically, the preferred outcome for Dawes and his fellow Republicans was clear, for two reinforcing reasons. First, the sitting member (Trowbridge) was a Republican, while his opponent (Baldwin) was a Democrat. Ruling against Trowbridge would effectively decrease the Republican majority by two. Second, Trowbridge's margin of victory arose from the Michigan soldier vote, so undoing his victory as requested by Baldwin would be tantamount to disenfranchising the soldiers, which would have been anathema to any politician, but particularly Republicans in the wake of the Civil War.

Legally speaking, however, there was no clear path for Dawes to rule in Trowbridge's favor. Trowbridge was arguing that the Michigan constitution's place of voting provision was neutered by the independent state legislature doctrine, and, alternatively, that the provision was never intended to apply to federal elections because it did not expressly mention them. But five years

earlier, Dawes had authored the Election Committee's unanimous report in *Shiel*. [598] In that case, Dawes had not only rejected the independent state legislature doctrine, but had also insisted that the Oregon constitution's "general election" provision (which like the Michigan constitution did not mention federal elections) was intended to govern federal elections. [599] Moreover, a third potential legal path to supporting Trowbridge, saying that the Michigan constitutional provision did not prevent soldier-voting, was seemingly foreclosed by the fact that the Michigan Supreme Court had held that it *did* prevent soldier-voting. [600]

Dawes ultimately decided to vote in favor of Trowbridge on the ground that the Michigan Supreme Court had gotten it wrong--the Michigan ***566** constitution did *not* prevent soldier-voting. [601] This allowed Dawes to maintain a principled stand against the independent state legislature doctrine and in favor of applying non-explicit state constitutional provisions to federal elections. Representative Marshall of Illinois attempted to call out Dawes on how he could disregard the Michigan Supreme Court's interpretation of its own constitution, but unfortunately cut Dawes off before Dawes could attempt to explain himself on that point. [602]

Dawes was not the only Republican who had voted against Thaddeus Stevens's invocation of the independent legislature doctrine in *Shiel*. Nine of the Republicans who had voted with Dawes in *Shiel* were still in Congress five years later and participated when the House decided Baldwin, and every one of them now supported Trowbridge. [603] Other than Dawes, only three of them explained their positions, but each of those three now affirmatively embraced the independent legislature doctrine on the floor of the House, with little or no regard for reconciling that embrace with their prior vote in *Shiel*.

Of the three who explained themselves, the most bald-faced was perhaps Trowbridge himself, the Michigan contestee who was defending his seat. In *Shiel*, Trowbridge had voted "nay" when Thaddeus Stevens argued that Shiel's election was invalid because the time of his election had been set by the Oregon constitutional convention, not, as required by the Elections Clause, the state legislature. [604] Now, with his own congressional seat on the line, Trowbridge made the same argument that Stevens had made:

> Can language be plainer than this? The constitution of the State is not the Legislature of the State. The people, in convention by delegated forming their State constitution, are not the Legislature of the State. And I claim that under ***567** this clause of the Constitution of the United States no power in the State had any right to touch this subject at all except "the Legislature thereof." [605]

Trowbridge claimed that he voted differently in *Shiel* because in that case the state legislature had performed its plenary role under the Elections Clause by "accept[ing] and acquiesc[ing]" to the constitutional provision and "pass[ing] no conflicting law." [606]

Fernando Cortez Beaman of Michigan was another Republican who had voted against the independent state legislature doctrine in *Shiel*. [607] Now, in *Baldwin*, he carried the torch for Trowbridge, his fellow Michigander, explaining that "when [the] framers used the word Legislature, they meant by that term precisely what it imports," in "no latitudinarian sense," and that it would do "great injustice to their intelligence and discrimination to suppose that when they used the word Legislature, they intended to imply constitutional convention, or people of the State." [608] Beaman--who conveniently made no reference to his contrary vote in *Shiel*--claimed that he was "not aware of any respectable writer or authority who [had] ever doubted" his construction of the Elections Clause. [609]

The third Republican in this group--Samuel Shellabarger of Ohio [610] -- argued that it was incorrect to say that the state legislature was "overrid [ing]" the state constitution "because the provision of the Federal Constitutions names the Legislatures of the States simply as the mere instrumentality for fixing the places for elections of Federal officers." [611]

The other Republicans who had voted against the Stevens resolution, but now voted in favor Trowbridge, did not explain the basis for their votes. Therefore, we can only speculate as to whether, and on what basis, they reconciled their support of Trowbridge with their past vote in *Shiel*.

***568** The final vote in *Baldwin* was 30-108.[612] All of the Democratic votes were for Baldwin, and all of the Republican votes were for Trowbridge.[613] By contrast, in 1861 when the House rejected Thaddeus Stevens' invocation of the Doctrine in *Shiel*, the Democrats had voted along party lines but the Republicans split their vote roughly in half.[614] Given the voting reversals and the positional flip-flopping, it is hard not to conclude that the difference in outcomes resulted from the fact that, in *Shiel*, the House was deciding whether to kick a Democrat out of his seat--leaving it open--whereas, in *Baldwin*, the House was deciding whether to replace a Republican with a Democrat. Moreover, it is equally hard to believe that the partisan break-down of the vote in *Baldwin* reflected genuinely held legal views that were 100% correlated with a member's partisan affiliation. Rather, what happened in *Baldwin* appears to be something approaching "tribal partisanship."[615]

The press perceived lawless partisanship. After the Elections Committee voted in favor of Trowbridge, *The World* reported that, although "justice and equity were on Mr. Baldwin's side," he "was a Democrat, and the committee went with their party" on a "strict party vote";[616] the same paper later called the full House's vote an "illegal act" that was "justifiable by nothing better than an unscrupulous party necessity."[617] *The Crisis* noted simply that "of course the Democrat was ousted and the Abolitionist retained by a strict party vote."[618] The *New York Atlas* reported that although Baldwin was "the legally elected representative," Trowbridge was "a disciple of ***569** Thad[deus] Stevens," and "for that reason only, he is thrust into Mr. Baldwin's seat."[619] The *Pittsfield Sun* was more sarcastic, reporting that the Elections Committee, led by Henry Dawes (Pittsfield's own representative), was "acting as a 'Committee for Increasing the Radical Majority in the House by all means, fair or foul,"' and "merely carrying out the directions of the Radical leader in the House, Thad[deus] Stevens, and endeavoring to thwart the wishes of President Johnson."[620] The opposing, Republican, viewpoint was articulated by the *Detroit Tribune*, which noted that "[e]very person voting for Mr. Baldwin belonged to the Democratic Party, and would, of course, vote for him law or no law."[621] The sense of partisan hypocrisy was heightened in *Baldwin* because it concerned soldier-voting: the Republican House majority's decision to count the votes of Michigan soldiers appeared at odds with the prior decision of Republican judges on the Michigan Supreme Court that the soldier-voting law was unconstitutional,[622] and because support for soldier-voting broke along party lines.[623]

The newspaper references to Thaddeus Stevens are notable. Stevens had invoked the independent legislature doctrine in *Shiel* in hopes of denying either Democrat the seat in question.[624] At about the time of *Baldwin*, he ***570** was heard to remark, in relation to another contested election case that unseated a Democrat, that "[t]his question may seem to some gentlemen to be a small matter, but in view of thick-coming events, *one vote may prove to be of great value here*."[625] This resonates with an oft-repeated anecdote about Stevens. In his autobiography, George F. Hoar recounted that Stevens, upon entering an Election Committee hearing, asked a Republican colleague "what was the point in the case," and was told that there was "not much point to it" because both contestants were "damned scoundrels." Stevens responded, "Well ... which is the Republican damned scoundrel? I want to go for the Republican damned scoundrel."[626] Carl Schurz recounted the same anecdote in his autobiography, though in his version the contestants were "rascals" instead of "scoundrels."[627] According to Schurz, Stevens made the comment "not in jest, but with perfect seriousness," as Stevens "would have seated Beelzebub in preference to the angel Gabriel, had he believed Beelzebub to be more certain than Gabriel to aid him in beating [President Johnson's] reconstruction policy."[628]

c. Other Experiences and Perceptions

The partisanship that Dawes experienced in the 1860s and described in his 1869 paper was also experienced by subsequent congressional leaders. In 1890, the incumbent Speaker of the House, Republican Thomas B. Reed of Maine, authored an article that appeared in *The North American Review*.[629] Reed was more circumspect than Dawes, but similarly saw "but little to restrain partisanship," complaining that contested election decisions "invariably increase[d] the majority of the party which organizes the House" and that there was "probably ... not a single instance ... where the minority was increased."[630] He concluded that the process as it then existed "is ***571** unsatisfactory in results, unjust to members and contestants, and fails to secure the representation which the people have chosen."[631]

In 1895, Republican Samuel W. McCall from Massachusetts, the chairman of one of the three elections committees then in existence, authored a report in support of a bill that would have had the federal courts determine, subject to reversal by the House,

who were the prima facie members of the House. [632] McCall's report complained that the House's system for deciding contested elections "barely maintains the form of a judicial inquiry" and is "thoroughly tainted with the grossest partisanship." [633] McCall continued:

> There can be no question in the mind of anyone who carefully considers the recent history of contests in this House that they are generally decided on partisan grounds. The members of the majority of a committee and also of the House will be found voting, usually, on one side and the members of the minority on the other. That side is right which has the most votes, and the record of the last ten Congresses, which shows that 45 seats have been taken from the minority, and substantially none from the majority, is conclusive evidence that the decision is made by numbers and not according to law and justice. [634]

McCall submitted a similar report in 1896. [635]

Congressmen's epigrams and anecdotes exhibit that it was conventional wisdom that House contested election cases were decide on a partisan basis. When Massachusetts Congressman George D. Robinson was asked what were "party questions," he reportedly responded, "I know of none except election cases." [636] Similarly, Speaker Reed is said to have quipped that "[t]he House never divides on strictly partisan lines except when it is acting judicially." [637] John H. Rogers, a Democratic Representative from Arkansas, provoked laughter in the House when he said he would only ***572** support a resolution to publish an updated digest of contested election cases if it also mandated that anyone in the future who ventured to cite one of the digested cases "as either an authority, argument, or a precedent" would be "put in the penitentiary for the term of his natural life." [638]

The House was also perceived by outsiders to be deciding contested elections on a partisan basis. In October 1868, the Secretary of the Navy, Gideon Welles, wrote in his diary that there were "villainous plans to cheat Representatives clearly and fairly elected by the Democrats out of their seats. Dawes and company will be ready to help the fraud, as they have lent themselves to great rascalities in the present Congress. They are destroying public confidence in popular government." [639] An 1873 guide to the "practical workings of affairs at Washington" explained that elected members of the minority party "not unfrequently" found their seats contested by an opponent "in sympathy with the party in power." [640] After being "startled by a report from the Committee on Elections that they are not entitled to their seats," such members were then unseated, "not because Congress wishes to enforce the will of the people sending Representatives to Washington, but because it wishes to secure one more vote for the party in power." [641] And when a case was "too clear to be decided on mere party grounds," the same result was accomplished by delaying until the close of the session, "thus really excluding the rightfully chosen Member from his seat." [642] Examples of the public perceiving partisanship in specific cases decided during the 1860s are set forth in the previous discussion of the experience of Henry Dawes during those years.

d. Quantitative Analysis by Jeffrey A. Jenkins

Scholars have sought to confirm, through statistical analysis, whether the House acted in as partisan a manner as the other evidence suggests it did. The most recent effort was by Jeffrey A. Jenkins, who in 2004 reviewed all 601 contested elections cases in the House from 1789 to 2002. [643] Jenkins found that, in the cases involving a majority party candidate against the candidate of another party, the majority party candidate won only slightly ***573** more than half the decisions (50.2%). [644] But Jenkins argues that this statistic alone [645] is misleading because that population likely includes not only cases that are "ripe for partisan activity," but also a large number of "frivolous" cases brought by majority party candidates who believed that they would be awarded a seat "simply by virtue of their majority party affiliation," which were easily rejected by the Committee on Elections or the House. [646] At the same time, "only serious cases will be brought by minority party candidates." [647] All of this would result in an overall majority win rate that, without further analysis, would understate partisan influence.

Jenkins developed several strategies to effectively "weed out" the "frivolous" cases and focus on those that were more "ripe for partisan activity." First, Jenkins excluded the cases in which the House Committee on Elections was unanimous, i.e., he

included only those cases in which the committee "split." [648] In those "split-committee" cases, the majority party candidate won nearly 70% of the decisions. [649]

As a second strategy, Jenkins focused on the subset of cases in which the House's decision resulted in a contestant unseating a contestee (a "flip"), noting that "it is one thing for a majority to allow a minority member to retain his or her seat, while it is quite another for the majority to unseat one ***574** of its own in favor of a member of the minority." [650] He found that in 85.8% of the cases in which a contestee was unseated, the contestant who convinced the House to "flip" the seat was a member of the majority party. [651]

As a third strategy, Jenkins focused on those cases in which the result was determined by a roll call vote, as opposed to voice vote or the House taking no action. [652] Jenkins found that 87.0% of the elections determined by roll call votes involved "party votes," in which "at least 50 percent of one major party opposed at least 50 percent of the other major party." [653] Moreover, 17.1% of the roll call votes involved "perfectly-aligned party votes," in which "all voting members of one party oppose all voting members of the other party." [654] Jenkins reported that results in the period 1861-1899 were "even more extreme" and supported the conclusion that it was a "particularly partisan era": 94.6% of the roll call votes in that period involved "party votes," and 20.7% involved "perfectly-aligned party vote[s]." [655]

Finally, Jenkins applied three models to assess individual vote choices in the roll call votes: a partisan model (member votes with majority of his party); an ideological model (member votes according to two "ideological 'scores"'); and a naive model (member votes with the "winning" side). [656] He found that the party model and the ideological model were about equally good at predicting voting (with the party model and the ideological model correctly classifying 92.7% and 93.4% of individual roll call votes, respectively) and significantly better than the naive model (which correctly classified 65.3% of votes). [657]

***575 2. The Inapplicability of Stare Decisis to House Contested Election Decisions**

In sum, the House's approach to deciding contested elections in the late nineteenth century was characterized by partisan decision-making and a deficit of legal process. Because of this, it would make little intuitive sense for a court to follow the House's decisions as if they were judicial precedent. Justice Ginsburg had this intuition in *Arizona State Legislature*, where she wrote that, given the evidently partisan result in *Baldwin*, [658] and the House's apparent disregard of its own precedent in reaching that result, it was "not a disposition that should attract this Court's reliance." [659] Her conclusion in this regard was perhaps "deeply undertheorized," [660] but the distance between her intuition and theory is not great. The intuition arises from a disconnect between the House's un-judicious decision-making process in these cases and the goals underlying the doctrine of stare decisis. The doctrine's purposes--the reasons why court are supposed to follow precedent--would not be furthered by treating the House's historical decisions as precedent.

Most fundamentally, following precedent is thought to "contribute[] to the actual and perceived integrity of the judicial process." [661] However, the House's decision-making in these cases--both actual and as perceived--was overtly partisan. It is hard to see how following precedent set through such a system would give society "faith in the even-handed administration ***576** of justice" or support an impression that courts are providing that "serene and impartial uniformity which is the essence of the idea of law." [662]

Moreover, stare decisis is also supposed to promote the "predictable, and consistent development of legal principles, foster[] reliance on judicial decisions," [663] and "expedite[] the work of the courts by preventing the constant reconsideration of settled questions." [664] The belief that following precedent will further these goals, is based on certain presumptions, often unstated, about both the court that generated the precedent--to which decision-making is effectively being outsourced [665] --and the precedent itself. Those presumptions are invalid with respect to the House's late nineteenth-century approach to contested election cases.

First, stare decisis presumes that the precedent-generating court had, in common with the precedent-receiving court, certain features conducive to good decision-making, such that the precedent can serve as a "secure foundation" [666] on which to

build. [667] However, the House system for ***577** deciding contested election cases did not have these features. [668] The decision-makers in the House did not hold judicial offices which impelled them to impartiality. [669] To the contrary, House members held the most political of all federal positions, and operated within party structures, with none of the "institutional guarant[ees] against repercussions or retaliations" enjoyed by judges. [670] Nor were the House decision-makers part of a judicial culture--involving "[t]he training of the judge ... coupled with what is styled the judicial temperament" [671] --that, at its best, inspires in judges in a "deep-felt need, duty, and responsibility for bringing out [just] result[s]" [672] that are "founded in the law rather than in the proclivities of ***578** individuals." [673] Moreover, there is little reason to think that House members approached their decision-making--as courts generally do--with the understanding that "the context for seeing and discussing the question to be decided [was] to be set by and in a body of legal doctrine," [674] i.e., precedent, [675] to be worked with "only by way of a limited number of recognized correct [doctrinal] techniques." [676] And House members--who did not have to explain the basis or reasoning for their decisions--did not act with the "discipline imposed on decision-making by the knowledge that [their] decision [would] function as precedent." [677] Thus, unlike judges, they were not "pushed to a form of neutrality" in which they would have to "articulat[e] standards that [they were] willing to live with in the future." [678]

Second, stare decisis presumes that the decisions of the precedent-generating court, even if in some sense wrong or incorrect, will at least come in the form of an opinion--a written precedent--which memorializes the basis for the decision, including the operative facts and the controlling law. ***579** The House, however, did not provide as much; it simply voted up or down, if it voted at all. The committee reports were more like legal briefs than judicial decisions. Obviously, the efficiency goal of stare decisis is not served if the precedent-receiving court has no reasonably discernible precedent to follow. [679] Similarly, the goal of protecting reliance interests is not served if the original decision did not give society any reasonably discernible precedent to follow. [680]

V. CONCLUSION

The Constitution provides that a state's "legislature" is to "direct the manner" in which the state appoints its presidential electors and "prescribe the time, place, and manner" in which the state is to hold congressional elections. Does this language mean that the "legislature" is to make election law subject to (1) the state constitutional restraints and inter-branch checks and balances that normally apply to legislatures, or (2) the constitutionally-mandated lawmaking procedures that normally apply to legislatures, but not any substantive constitutional limitations or too much inter-branch interference? I believe that the former interpretation is the natural reading ***580** of the text, and it is supported by precedent. [681] However, others apparently disagree and would overrule the precedent. [682]

By looking to history, originalism promises a neutral way to choose between competing interpretations of the Constitution. Part II of this Article revisited the Founding generation's original understanding of the Elector Appointment and Elections Clauses. The history demonstrates beyond cavil that the Founding generation understood that "legislatures" would operate as normal legislatures, not independent legislatures, with respect to both procedure and substance. Part III of this Article revisited the nineteenth-century history of the Doctrine and debunked the notion that the Doctrine ever became the "prevailing view" after the Founding--in truth, the Doctrine never amounted to much of anything. And, finally, Part IV of this Article demonstrated that the invocations of the Doctrine that occurred episodically in the nineteenth century are irrelevant under any form of recognized constitutional interpretation. [683]

***581** Sometime soon, the burden of deciding this question will fall on the Justices of the Supreme Court. In Robert Penn Warren's *All the King's Men*, the protagonist, Jack Burden, a student of American history, imagines for a time that his conduct is dictated by "the Great Twitch," the "pulse in the blood and the twitch of the nerve, like a dead frog's leg in the experiment when the electric current goes through." [684] The Great Twitch meant that "nobody had any responsibility for anything," and it relieved Burden, "because it meant that he could not be called guilty of anything." [685] This Article demonstrates that there is no Great Twitch--sparked by the electric current of originalism or some other argument from history--which commands the independent state legislature doctrine. No history, from the Founding or subsequently, relieves us of the burden of making sense of our Constitution in light of our nation's complicated past and ongoing aspirations, including our desire to continue democratic self-government. We all live, like Burden, with "the agony of will." [686] And so the Justices of ***582** the Supreme Court must

sometime soon, as they always have and always will, "go into the convulsion of the world, out of history into history and the awful responsibility of Time." [687]

Footnotes

a1 The author is a 2001 graduate of the NYU School of Law and admitted to the bar of the State of New York. Please do not attribute the author's views to any other person or organization.

1 Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

2 U.S. CONST. art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, [presidential electors].").

3 Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 77 (2000) (per curiam).

4 *Id.*

5 Bush v. Gore, 531 U.S. 98, 112-15 (2000) (Rehnquist, C.J., concurring).

6 Smith, *supra* note 1, at 732; *see also* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1039 (2000) (discussing "independent legislatures" under Article V of the Constitution). The Doctrine would perhaps better be described as a theory aspiring to be a doctrine.

7 Smith, *supra* note 1, at 743-64.

8 *Id.* at 764-83.

9 *See generally* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 77 (2021) (cataloguing lawsuits). The Doctrine is now said to apply to Congressional elections as well as presidential elections by virtue of the Elections Clause, which, similar to the Elector Appointment Clause, provides that the state "legislatures" are to prescribe the rules for Congressional elections. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

10 *See* Mot. for Leave to File Bill of Compl., Bill of Compl., at 1, Texas v. Pennsylvania, No. 220155 (U.S., Dec. 7, 2020) (alleging that "government officials" in Georgia, Michigan, Wisconsin, and Pennsylvania "usurped their legislatures' authority and unconstitutionally revised their state's election statutes" in violation of the Elector Appointment Clause).

11 *See* 167 CONG. REC. H75, 77-78 (daily ed. Jan. 6, 2021) (remarks of Rep. Stephen Scalise) ("[N]owhere in Article II, Section 1 does it give the secretary of state ... that ability; nowhere does it give the Governor that ability; nowhere does it give a court that ability. It exclusively gives that ability to the legislatures."); *id.* at 78 (alleging that, in some states, "the Democratic Party has gone in and selectively gone around this process"); *id.* (the Supreme Court "chose to punt" but "[w]e don't have that luxury today" and must "fix this" and "restore integrity to the election process"); *see also* Carol D. Leonnig & Philip Rucker, *Audio: Trump Says He Spoke to a "Loving Crowd" at Jan. 6 Rally*, WASH. POST, at 03:22 (July 21, 2021, 10:48 PM), https://www.washingtonpost.com/politics/2021/07/21/trump-interview-i-alone-can-

fix-it/ [https://perma.cc/6QMQ-JYTS] (audio recording of Donald J. Trump, Mar. 31, 2021) ("The legislatures of the states did not approve all of the things that were done for those elections. And under the Constitution of the United States, they have to do that."); *id.* at 5:52 (arguing that a state's presidential election should be "sent back" when "the legislature ... did not approve those vast changes [concerning] hours, days, when to vote" but rather "it was all done [by] local politicians and local judges").

12 By contrast, the attempt to prevent President Biden's election in Congress on January 6, 2021, would have had Vice President Pence be the "ultimate arbiter" of the validity of electoral votes and reject some of Biden's votes on the ground that they were tainted by alleged violations of the independent state legislature doctrine and/or "fraud." Matthew A. Seligman, *The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes*, at 2 (Oct. 1, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020 [https://perma.cc/2SFV-CCUR]. The thinking is reflected in John Eastman's shocking memorandum of early January 2021, a copy of which is included as an appendix to Seligman's article. Seligman concludes that "[e]very major tool of constitutional interpretation shows that the theory [that the Vice President has the power to reject electoral votes] is, without question, legally incorrect." *Id.* at 31.

13 Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (reflecting statement of Justice Alito); Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay); *id.* at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay); *Degraffenreid*, 141 S. Ct. at 732-33 (Thomas, J., dissenting); *id.* at 738 (Alito, J., dissenting). In 2022, the Doctrine was unsuccessfully used to seek interim Supreme Court relief against state court involvement in North Carolina and Pennsylvania congressional redistricting following the 2020 census. *See* Toth v. Chapman, No. 21A457, 2022 WL 667924, at *1 (Mar. 7, 2022) (reflecting order denying injunction in Pennsylvania case); Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (reflecting order denying stay in North Carolina case). In the North Carolina case, Justices Alito, Thomas, and Gorsuch dissented from the denial of interim relief and expressed further support for the Doctrine. *See id.* at 1090 (Alito, J., dissenting from denial of stay) ("[The Elections Clause] specifies a particular organ of a state government, and we must take that language seriously."). Justice Kavanaugh concurred in the denial of the stay but agreed with the dissenting Justices that "the Court should grant certiorari in an appropriate case." *Id.* at 1089 (Kavanaugh, J., concurring in denial of stay).

14 *See Degraffenreid*, 141 S. Ct. at 732 (denying petition for writ of certiorari). We have good reason to worry about how the Doctrine's patina of legitimacy might operate lawlessly, outside of court, even without being blessed by the Supreme Court. *See* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3926381 [https://perma.cc/BNV8-ZAWF] (explaining how a legislature unhappy with the outcome of an election could "send in an alternative slate of electors based upon this supposed technicality" and could do so "even if there was no good reason to believe that state courts or state election officials meaningfully deviated from the intent of the legislature in running a presidential election").

15 *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 93 (2020) [hereinafter Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*] (concluding that the independent state legislature doctrine, as modified by the substance/procedure distinction, is "faithful to both the text and structure of the U.S. Constitution" and "furthers many of the Framers' goals concerning federal elections"); *id.* at 27 (absence of discussion of the Doctrine at the founding "does not change either the original public meaning of that language or the reasonable implications that may be drawn from it"); *see also* Mike Rappaport, *What Does the Constitution Mean by a State Legislature?*, LAW & LIBERTY (Apr. 19, 2021) [hereinafter Rappaport, LAW & LIBERTY], https://lawliberty.org/what-does-the-constitution-mean-by-a-state-legislature/ [https://perma.cc/EQS5-GHRQ] (arguing that if a "legislature" is enacting an election law, then it "use[s] its normal process for passage of a law," but for substantive limitations the state constitution "cannot override the state legislature"; this "original meaning makes sense, can be understood, and places strict limits on how the Constitution applies to state legislatures in some extremely important cases"). The blog of the Center for the Study of Constitutional Originalism at the University of San Diego School of Law has featured posts on this issue by three originalist scholars, each of which posited a different original understanding. In the first, Professor Rappaport, the director of that center, repeated the substance/procedure argument he made in the aforementioned *Law & Liberty* article.

See Mike Rappaport, *What Does the Constitution Mean by a State Legislature?*, THE ORIGINALISM BLOG (May 3, 2021), https://originalismblog.typepad.com/the-originalism-blog/2021/05/what-does-the-constitution-mean-by-a-state-legislaturemike-rappaport.html [https://perma.cc/5L4Q-KLPY]. In the second, Rob Natelson, in a guest post, argued that neither substantive nor procedural regulations apply--if there are "irregularities" in a presidential election, then the state legislatures can respond as "independent assemblies," without regard to "their constitutions or other institutions," by investigating the "irregularities" and either "call[ing] a re-vote for presidential electors" or "choos[ing] the electors themselves," in all cases without the involvement of any governor. Rob Natelson, *On "Federal Functions," the 2020 Presidential Election, the Necessary and Proper Clause, and Our Constitutional Law Courses*, THE ORIGINALISM BLOG (Feb. 18, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/02/on-federal-functions-the-2020-presidential-election-the-necessary-and-proper-clause-and-our-constitu.html [https://perma.cc/664J-7GXD]. In a subsequent post, Professor Michael Ramsey, a member of that center, offered a third, entirely different view of the original understanding which, unlike the other two, appears consistent with the historical evidence summarized in this Article. *See* Michael Ramsey, *Helen White & Cameron Kistler on Originalism and Meaning of State Legislatures*, THE ORIGINALISM BLOG (Mar. 6, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/03/helen-white-cameron-kistler-on-originalism-and-meaning-of-state-legislaturesmichael-ramsey.html [https://perma.cc/KAP3-KT3V] ("[T]here's nothing remarkable about the proposition that early post-ratification state constitutions contained provisions regulating federal elections" because "it seems likely to me that this language was understood to give power to the legislatures of the states, acting pursuant to their (state) constitutional procedures").

16 According to Professor Rappaport, the Doctrine and the substance/procedure distinction are correct because the Constitution "means what it says." Rappaport, LAW & LIBERTY, *supra* note 15. Similarly, Professor Morley refers to the Doctrine as the "plain-meaning interpretation of 'Legislature.'" Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 22; *id.* at 89 (concluding that the Doctrine is "solidly grounded in the Constitution's plain text"). Oddly, this literal approach focuses on the noun "legislature" to the exclusion of the verbs "direct" and "prescribe," even though the latter words are the ones that specify the action that either is, or is not, subject to normal constraints.

17 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38 ("Neither the state constitutions adopted immediately after the U.S Constitution's ratification, nor those of new states that joined the Union in the 1790s, contained provisions relating to federal elections."). Others have invoked the substance/procedure distinction while remaining agnostic as to whether it constitutes the original understanding. It appears that the distinction was first articulated in the World War II soldier-voting case, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), as a way to distinguish Supreme Court precedent. In reaching its decision ensuring that "the youth of our native State" who were "absent in the defense of the nation" would be permitted to vote, the Kentucky Court of Appeals reasoned that, while Supreme Court precedents made clear that a "legislature" must "function in the method prescribed by the State Constitution in directing the times, places, and manner" of elections, it "does not necessarily follow" that "the scope of its enactment on the indicated subjects is also limited by the provisions of the State Constitution." *Id.* at 692-94. Some commentators later approvingly cited the substance/procedure distinction drawn by *O'Connell*, while claiming that limited evidence of original intent is not to the contrary. *See* James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) (making substance/procedure distinction, citing *O'Connell*, 181 S.W.2d at 694); *id.* at 501 ("[A] reading of the debates in the Constitutional Convention and State Ratifying Conventions is of little assistance."); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 111 n.39 (Dennis J. Hutchinson et al. eds., 2001) (making substance/procedure distinction, citing Kirby, *supra*, at 500-04); *id.* at 217-18 (conceding that the Doctrine is "a meaning very likely unintended by the Constitution's framers"). *See also* Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 834 (2002) ("The distinction between substance and procedure--however creaky it may be in other contexts--serves well here ....") (citing Kirby, *supra*, at 503-04).

18 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38 (suggesting that the Founding generation did not impose substantive constitutional restrains on "legislatures," but "left the matter to the plenary discretion" of the legislatures, because that was "[c]onsistent with the Elections Clause and Presidential Electors Clause").

19 Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (referring to "respect for the constitutionally prescribed role of state *legislatures*"); Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (citing U.S. CONST. art. I, § 4, cl. 1) ("The Constitution provides that state legislatures--not federal judges, not state judges, not state governors, not other state officials--bear primary responsibility for setting elections rules."); *id.* at 34-35 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) (referring to "the important federal judicial role in reviewing state courts about state law in a federal Presidential election"); Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 35 (arguing that "the independent state legislature doctrine is most faithful to the Constitution's underlying logic and structure").

20 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 1 ("Throughout [the nineteenth century], the doctrine was consistently applied across a broad range of circumstances.").

21 *Id.* at 10, 14. This account of the history has been presented to the Supreme Court as accurate. *See* Brief of Amicus Curiae Honest Elections Project in Support of Petitioners at *1, *4-8, & *6 n.2, Berger v. North Carolina State Conference of the NAACP, No. 21-248, 2022 WL 216176 (Jan. 18, 2022) (citing Professor Morley's account twelve times).

22 *See* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 734 (2016) ("Historically, Congress also continued to turn to the independent state legislature doctrine in ensuing [litigation], and state courts would continue to believe that the legislature could trump a state constitution.") (citing Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189 (2014)); *see also* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1057 n.14 (2021) [hereinafter Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*] (describing Professor Morley as having "chronicl[ed] support in several nineteenth-century state supreme court decisions, and in several Reconstruction Congress evaluations of congressional elections") (citing Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 25-27, 41-45, 69, 91-92).

23 *See* Garrett Epps, *In Election Litigation, An Ominous Sign*, WASH. MONTHLY (Nov. 21, 2020), https://washingtonmonthly.com/2020/11/21/in-election-litigation-an-ominous-sign/ [https://perma.cc/RVS8-475R] ("There's no question that the 'independent legislature' doctrine has some historical grounding. In a detailed scholarly article published earlier this year, Michael Morley of the Florida State University School of Law traces the concept to the early years of the republic.").

24 Throughout this Article, I put the word "legislature" in quotes as shorthand to refer to a state legislature exercising its power to: (a) "direct" the "manner" of appointing presidential electors (under the Elector Appointment Clause); (b) "prescribe" the "time, place, and manner" of Congressional elections (under the Elections Cause); and/or (c) "direct" the "manner" of appointing delegates to Congress (under Article V of the Articles of Confederation). The original understanding of these provisions was not simply the original understanding of the word "legislature," in isolation, but rather, in each instance, the original understanding of the word "legislature" as the grammatical subject of a clause containing a certain lawmaking verb ("direct" or "prescribe") and the object of that verb (the "manner" of appointment or the "time, place, and manner" of election). *See* Grace Brosofsky, Michael C. Dorf, & Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors* (Sept. 25, 2020), https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view [https://perma.cc/FM8R-JXHL] (evidencing the constitutional and historical interchangeability of "directing" and "prescribing" and "lawmaking"). Questions about how a legislature might exercise other, non-legislative powers assigned to it--such as the power to "ratify" a constitutional amendment or "choose" a Senator--are governed by different constitutional clauses, in which "legislature" appears before different verbs ("ratify" or "choose") and the verbs act on different objects (an "amendment" or a "senator"). Those provisions should be interpreted in light of their different texts, purposes, history, and precedent, which I do not address in this Article.

25 U.S. ARTICLES OF CONFEDERATION of 1781, art. V.

26 *See infra* Part II.B.1.a.

27 *See infra* Part II.B.1.b.

28 *See infra* Part II.B.1.c.

29 DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 578 (Francis Newton Thorpe ed., 1909) [hereinafter 1 CONSTITUTIONS].

30 VA. CONST. of 1830, art. III, § 6, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3823 (Francis Newton Thorpe ed., 1909) [hereinafter 7 CONSTITUTIONS].

31 PA. CONST. of 1790, art. III, § 2, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3096 (Francis Newton Thorpe ed., 1909) [hereinafter 5 CONSTITUTIONS].

32 *See infra* Part II.B.2.

33 *See infra* Part II.B.3.

34 MD. CONST. of 1776, art. XIV (adopted 1810), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1705 (Francis Newton Thorpe ed., 1909) [hereinafter 3 CONSTITUTIONS].

35 IOWA CONST. of 1846, art. 3, Legis. Dep't, § 32, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1129 (Francis Newton Thorpe ed., 1909) [hereinafter 2 CONSTITUTIONS].

36 CONN. CONST. of 1818, art. XIII (adopted 1864), *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 550.

37 S.C. CONST. of 1868, art. VIII, § 9, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3298 (Francis Newton Thorpe ed., 1909) [hereinafter 6 CONSTITUTIONS].

38 PA. CONST. of 1873, art. VIII, § 17, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3140-41.

39 *See infra* Part III.B.1-3.

40 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 48 (describing *Baldwin* as the "best-known example" of the Doctrine being applied).

41 *See infra* Part III.B.1-3.

42 *See infra* Part IV.

43 *See infra* Part IV.A.

44 *See infra* Part IV.B. The evidence of injudiciousness in House contested elections during this period also suggests some wishful thinking among some about the manner in which the House might exercise its power to judge election cases if it decided to resume that function. *See* Nicholas O. Stephanopoulos, *The New Pro-Majoritarian Powers*, 109 CALIF. L. REV. 2357, 2368 (2021) (suggesting that Congress should exercise its judging powers to effectively set aside unsavory state election laws); Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1841 (2014) [hereinafter Levitt, *The Partisanship Spectrum*] (suggesting that House members are able to "forego tempting opportunities to pursue [tribal partisanship]" in contested elections); Muller, *supra* note 22, at 736 ("Evidence suggests that Congress has generally resisted raw tribal partisanship in adjudicating election contests.") (citing Levitt, *supra*, at 1840-41); JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 172 (2007) ("Members of Congress sitting in judgment should make a bona fide effort to clear their minds both of partisan loyalty and of any personal relationship with the parties to the dispute.").

45 Smith, *supra* note 1, at 743-57; *see also* Jack N. Rakove, *Presidential Selection: Electoral Fallacies*, 119 POL. SCI. Q. 21, 30 (2004) ("[I]n the absence of any recorded debate of the point, we should similarly balk at ascribing too much importance ... to the decision allowing the state legislatures to determine the mode of appointing electors.").

46 Smith, *supra* note 1, at 756.

47 *Id.* at 754-56.

48 *Id.* at 757-58.

49 *Id.* at 759-61; *see also* Nathaniel F. Rubin, Essay, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 67-69 (2021) (discussing role of gubernatorial veto under the Elector Appointment Clause).

50 Smith, *supra* note 1, at 761-64.

51 Brosofsky, Dorf, & Tribe, *supra* note 24.

52 *Id.* at 5-6.

53 *Id.* at 6-7 n.5.

54 *Id.* at 7.

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55 *Id.* at 7-8. Rhode Island and North Carolina had not yet ratified the Constitution and so did not participate in this election. Connecticut participated, but it did not have a constitution. Its legislature directly appointed electors, apparently within the bounds of its governing document ("a revised version of its colonial charter"). *Id.* at 7 n.6, 9.

56 Smith, *supra* note 1, at 761.

57 Robert G. Natelson, *Federal Functions: Execution of Powers the Constitution Grants to Persons and Entities Outside the U.S. Government*, 23 U. PA. J. CONST. L. 193, 199 n.41 (2021) [hereinafter Natelson, *Federal Functions*]. At the same time, Professor Natelson incorrectly concluded that, under the Elector Appointment Clause, "legislatures" directed the manner of appointing presidential electors by "simple resolution, without the signature of the governor, rather than by legislation," citing Massachusetts as an "example" of this occurring. *Id.* at 199 n.44; *see also* Natelson, *supra* note 15 (arguing that "legislatures" can act as "independent assemblies" in presidential elections). While it is true that Massachusetts used "resolutions" to direct the manner of appointing electors, the Massachusetts constitution required the governor to approve "resolutions" as well as bills, and this is exactly what happened with respect to the first federal elections. *See* Smith, *supra* note 1, at 759-60 (demonstrating how, in November 1788, both houses of the Massachusetts legislature presented their resolutions directing the manner of appointing electors to the governor, John Hancock, for his signature, which he gave). The Massachusetts governor's involvement in promulgating "manner" legislation is further demonstrated by an incident in 1796 in which the governor, Samuel Adams, expressed regret to the legislature for having "approved" the "resolve" they had sent him concerning how "vacancies" in presidential electors would be filled. *See* ACTS AND RESOLVES OF MASS. 1796-97, at 641-42 (Boston, Young & Minns 1896) (expressing reservations about how the resolve he approved would allow the electors to fill such vacancies).

58 Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 569 (2004).

59 *Id.* at 569, 572-75. The rumor was false because, as the archives of Vermont demonstrate, the state's 1796 electors were appointed by a "grand committee" as directed by a 1791 law that was enacted pursuant to the Vermont constitution's regular lawmaking requirements. *Id.* at 574-75. The Vermont constitution required proposed laws to be presented to the governor and council for their revision and concurrence before they became law, see VT. CONST. of 1786, ch. 2, § XVI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3757, and this requirement was followed with respect to the 1791 law directing the manner of appointing presidential electors, see MANNING J. DAUER, THE ADAMS FEDERALISTS 105-06 n.58 (1st ed. 1953) ("[T]he first law providing for choice of electors was passed on November 1, 1791, concurred in by the Governor and Council on Nov. 3, and duly became law.").

60 Ackerman & Fontana, *supra* note 58, at 575, 577 ("I cannot suppose that the Vermont constitution has been strict in requiring particular forms of expressing the legislative will.").

61 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 30-32 (discussing the Elector Appointment Clause); *id.* at 28-30 (discussing the Elections Clause).

62 *Id.* at 32. Professor Morley's latest article on the independent state legislature doctrine, published at the end of 2021, provides a helpful "descriptive taxonomy of the doctrine's possible applications, with a normative assessment of their relative merits," Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 508 (2021) [hereinafter Morley, *The Independent State Legislature Doctrine*], but does not identify any new historical evidence from the eighteenth or nineteenth centuries or otherwise engage with the contents of this Article other than describe it as providing "competing views that question the doctrine's historical foundation." Morley, *The Independent State Legislature Doctrine*, *supra*, at 536 n.279.

63 Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish* (forthcoming 2021 Supreme Court Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755 [https://perma.cc/VJ3D-WRP5].

64 Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 1 (2010).

65 Brief of Jack N. Rakove, Richard R. Beeman, Alexander Keyssar, Peter S. Onuf, & Rosemarie Zagari for Ariz. Indep. Redistricting Comm'n as Amici Curiae Supporting Appellees, Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (No. 13-1314).

66 *See* Brief of Jack N. Rakove, Richard R. Beeman, Alexander Keyssar, Peter S. Onuf, & Rosemarie Zagari for Ariz. Indep. Redistricting Comm'n as Amici Curiae Supporting Appellees at 4, 26, Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (No. 13-1314) (analyzing Election clause sufficiency as it relates to an independent redistricting commission).

67 Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 997-98 (2021).

68 U.S. ARTICLES OF CONFEDERATION of 1781, art. V.

69 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 425 (Worthington C. Ford ed., Gov't Prtg. Off. 1906) [hereinafter 5 JOURNALS OF THE CONTINENTAL CONGRESS] (footnote omitted).

70 *Id.* at 427; MERRILL JENSEN, THE ARTICLES OF CONFEDERATION, AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781, at 114 (1940).

71 JENSEN, *supra* note 70, at 114-15; 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 428-31.

72 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

73 *Id.* The journals identify the members of the confederation committee as Josiah Bartlett (New Hampshire), Sam Adams (Massachusetts), Stephen Hopkins (Rhode Island), Roger Sherman (Connecticut), Robert R. Livingston (New York), John Dickinson (Pennsylvania), Thomas McKean (Delaware), Thomas Stone (Maryland), Thomas Nelson (Virginia), Joseph Hewes (North Carolina), Edward Rutledge (South Carolina), and Button Gwinnett (Georgia). *Id.*

74 JENSEN, *supra* note 70, at 126-27.

75 *See* 4 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 252 (Paul H. Smith et al. eds., Lib. of Cong. 1979) [hereinafter 4 LETTERS OF DELEGATES] ("[T]here can be no doubt that the members of the committee began their work with a copy of Benjamin Franklin's proposed Articles of Confederation before them ....").

76 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 196 (Worthington C. Ford ed., Gov't Prtg. Off. 1905).

77 *See* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 136-38 (1979) [hereinafter THE BEGINNINGS OF NATIONAL POLITICS]

(discussing two draft confederation plans, prepared by Silas Deane and the Connecticut delegates, which pre-dated the drafts prepared by Dickinson).

78 4 LETTERS OF DELEGATES, *supra* note 75, at 241; *see also id.* at 233-50 (reprinting Bartlett's draft, with provision relating to representation at page 241); *id.* at 252 ("There is no evidence to indicate that Barlett's manuscript is anything more than a clean copy of one of Dickinson's drafts."); Rakove, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 77, at 139 n.6. In reproducing the text of Bartlett's draft, the editors of LETTERS OF DELEGATES used angle brackets and regular brackets to identify variations between the draft and the subsequent draft that was reported to Congress on July 12. *See* 4 LETTERS OF DELEGATES, *supra*, at 252 (explaining that "words appearing in Bartlett's manuscript but omitted from the committee draft are placed in angle brackets" while "words substituted in or added to the latter appear in this text in regular brackets"). I have removed the editors' notations to show just the text of the Bartlett draft.

79 4 LETTERS OF DELEGATES, *supra* note 75, at 241 (footnote omitted). This second draft (the earliest in Dickinson's hand) is reprinted in the fourth volume of LETTERS OF DELEGATES in parallel with the prior draft in Josiah Bartlett's hand, with the clause relating to representation appearing at page 241. *See id.* at 233-50 (reproducing text of drafts); *see also id.* at 251-55 (providing explanatory notes). Dickinson did not number the articles in this draft, but the editors of LETTERS OF DELEGATES marked this provision "Art. [17]." *Id.* at 241. The asterisk in the text marks a query that Dickinson wrote in the margin next to this language: "Q. How Representation in Congress to be regulated? How many shall make a Quorum, save in the [Executive?]." *Id.* at 253 n.12. The editors of LETTERS OF DELEGATES commented that it was "highly likely that this document was the basic draft Dickinson employed in committee from about June 17 to July 1, and from which he copied the committee draft reported to Congress." *Id.* at 251; *see also* RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 77, at 139 (noting that this draft "apparently served as a working copy for the committee").

80 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 546 n.1.

81 *Id.* at 549-50.

82 JANE E. CALVERT, QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON 242 (2009); DAVID L. JACOBSON, JOHN DICKINSON AND THE REVOLUTION IN PENNSYLVANIA 1764-1776, at 113-15 (1965).

83 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 546 n.1.

84 *See* 4 LETTERS OF DELEGATES, *supra* note 75, at 251-52 (explaining that "it seems unlikely that much time was devoted to [Dickinson's draft] after [July 1]" because "the independence debate preempted the attention of Congress" and Dickinson's time was dominated by "the call for the Pennsylvania militia to meet the British military threat to New York and New Jersey").

85 On July 12, "[t]he committee appointed to prepare articles of confederation brought in a draught, which was read," and then 80 copies were ordered to be printed. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 546, 555. For the resulting First Printed Form, see *id.* at 674-89 (displaying draft Article XVI at 680-81).

86 RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 77, at 139; *see also* JENSEN, *supra* note 70, at 249-50 (listing the dates which Congress debated the First Printed Form).

87 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 674-89. The Second Printed Form is set forth as such in the fifth volume of JOURNALS OF THE CONTINENTAL CONGRESS, in parallel with the First Printed Form. *See id.* at 674-89 (displaying draft Article XII at 680-81).

88 *Id.* at 680-81.

89 *Id.* at 680.

90 *Id.*

91 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1077 (Worthington C. Ford ed., Gov't Prtg. Off. 1906).

92 JENSEN, *supra* note 70, at 251; JACOBSON, *supra* note 82, at 118.

93 JENSEN, *supra* note 70, at 253. For the final draft of the Articles of Confederation, *see* 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 907-25 (Worthington C. Ford ed., Gov't Prtg. Off. 1907) [hereinafter 9 JOURNALS OF THE CONTINENTAL CONGRESS] (displaying the final draft of the Articles of Confederation).

94 JENSEN, *supra* note 70, at 238.

95 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 76, at 196.

96 4 LETTERS OF DELEGATES, *supra* note 75, at 241.

97 *Id.*

98 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 549-50.

99 *Id.*

100 *Id.* at 680-81; *see also* 9 JOURNALS OF THE CONTINENTAL CONGRESS *supra* note 93, at 909-10.

101 The move from "appointment by Legislature" to "appoint[ment] in such manner as the Legislature ... shall direct" gave the states the choice of whether to appoint their delegates to Congress through legislative appointment or by popular vote. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE, THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 264 (1988) (noting that Rhode Island and Connecticut delegates were "chosen at large by the voters").

102 CALVERT, *supra* note 82, at 255 ("In the autumn of 1776 [Dickinson] published *An Essay of a Frame of Government for Pennsylvania.*"); Robert F. Williams, *The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 PA. MAG. HIST.& BIOGRAPHY 25, 32 (1988) (noting that Dickinson "attacked" the 1776 constitution in this document but recognizing some dispute over its authorship); Paul Leicester Ford, *The Adoption of the Pennsylvania Constitution of 1776*, 10 POL. SCI. Q. 426, 453 (1895) ("In the middle of July Dickinson himself printed an *Essay of a Frame of Government for Pennsylvania* ....").

103 AN ESSAY OF A FRAME OF GOVERNMENT FOR PENNSYLVANIA 5-8 (Phila., James Humphreys, Jr. 1776) [hereinafter FRAME].

104 *Id.* at 11.

105 *Id.* at 3.

106 *Id.*

107 *Id.* at 15.

108 JOHN ADAMS, THOUGHTS ON GOVERNMENT 196 (Phila., John Dunlap 1776) [hereinafter JOHN ADAMS, THOUGHTS ON GOVERNMENT].

109 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 203 (1969) [hereinafter WOOD, THE CREATION OF THE AMERICAN REPUBLIC].

110 JOHN ADAMS, THOUGHTS ON GOVERNMENT, *supra* note 108, at 196.

111 *Id.*

112 *Id.*

113 *Id.*; *see also* Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 AM. ANTIQUARIAN SOC. 317, 336 (1980) ("Adam's theory of balance ... required that the governor in his capacity as part of the legislature should have a negative on laws that was as effective as that of the Senate or House."). Chief Justice Roberts referenced the eighteenth-century notion of a three-branch legislature in his dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 827-28 (2015) (Roberts, C.J., dissenting).

114 S.C. CONST. of 1776, art. VII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244. In 1777, the New York Constitutional Convention actually adopted a proposal that "the legislature consist of three separate and distinct branches, intending to add the governor as the third branch [and giving him] a negative on all laws passed by the senate and assembly," before reverting back to a two-house legislature at John Jay's urging. *See* CHARLES Z. LINCOLN, 1 THE CONSTITUTIONAL HISTORY OF NEW YORK 504 (1906); *see also* WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 225 (describing the debate over the proposed "incorporation of the governor as a third 'separate and distinct' branch of the legislature" and the compromise of a "separate Council of Revision of which the governor was made a member").

115 S.C. CONST. of 1778, art. II, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3248.

116 DAVID RAMSAY, 1 THE HISTORY OF THE REVOLUTION OF SOUTH CAROLINA, FROM A BRITISH PROVINCE TO AN INDEPENDENT STATE 131-32 (1785).

117 *Id.* at 133.

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118 *Id.* at 134.

119 The Framers' decision not to include the language about "Branches" could have reflected a determination that either: (a) the entire "Legislature" (not just "Branches thereof") had to be involved in directing the manner of appointment; or (b) the language was unnecessary, i.e., a colony's authority to pick which legislative "branches" would act as the "legislature" was clear without spelling it out. Either way, the state would have to delineate the institutions that would act as the "legislature."

120 It was not only that the "Legislature" could be defined as more than the two representative houses. It was conceivable that a state might choose to designate one of its two legislative houses to play the role. For example, in 1776, one of Thomas Jefferson's drafts for the Virginia constitution would have assigned the responsibility to elect delegates to the lower house of the Assembly. *See* 1 THE PAPERS OF THOMAS JEFFERSON 351 (Julian P. Boyd et al. eds., 1950) (displaying Jefferson's second draft for the Virginia constitution).

121 *See* FRAME, *supra* note 103, at 14 ("The Council, Senate and Assembly to join, and by ballot chuse annually from themselves, Delegates to represent this colony in Congress. The election to be conducted in the same manner as the election of members of the Council.").

122 S.C. CONST. of 1776, art. XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3246.

123 S.C. CONST. of 1776, art. VII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244.

124 JENSEN, *supra* note 70, at 127.

125 Letter from Edward Rutledge to John Jay (June 29, 1776), *in* 4 LETTERS OF DELEGATES, *supra* note 75, at 337, 338.

126 S.C. CONST. of 1776, art. XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3246.

127 VA. CONST. of 1776, The Constitution or Form of Government, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3817.

128 JACOBSON, *supra* note 82, at 119.

129 FRAME, *supra* note 103, at 14.

130 *Id.* at 7.

131 *Id.*

132 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

133 *See* Richard Lynch Mumford, Constitutional Development in the State of Delaware, 1776-1897, at 59-62 (June 1968) (Ph.D. dissertation, University of Delaware) (on file with author) (detailing the convention proceedings).

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134 McKean made this claim in a letter dated August 22, 1813. *See* ROBERDEAU BUCHANAN, LIFE OF THE HON. THOMAS MCKEAN 51 (1890) (quoting McKean's letter) (internal quotations omitted). Mumford explains why this claim was very likely an exaggeration. Mumford, *supra* note 133, at 57-58.

135 Mumford, *supra* note 133, at 57-59, 62.

136 DEL. CONST. of 1776, art. 11, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 564. The journal of the convention reflects that this provision of the committee draft (among others) was considered on September 18, 1776. PROCEEDINGS OF THE ASSEMBLY OF THE LOWER COUNTIES ON DELAWARE 1770-1776, OF THE CONSTITUTIONAL CONVENTION OF 1776, AND OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE 1776-1781, at 217 (Claudia A. Bushman et al. eds., 1986). The entire draft of the committee was approved on September 20, 1776. *Id.* at 219.

137 *See* 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

138 ETHEL K. WARE, A CONSTITUTIONAL HISTORY OF GEORGIA 29-31 (Columbia Univ. eds., 1967).

139 *See id.* at 30-32 ("[I]t is natural that Gwinnet should have taken a prominent part in the drafting of the Constitution.").

140 GA. CONST. of 1777, art. XVI, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 780.

141 *Id.*

142 *See* 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 680-81 (displaying Art. XII of the draft articles).

143 *Id.* at 433.

144 1 LINCOLN, *supra* note 114, at 500 ("The discussion on the proposed Constitution began on the day of its presentation, March 12, and continued until its adoption on the 20th of April.").

145 *Id.* at 490-91, 496.

146 *Id.* at 536-37.

147 *Id.* at 537.

148 N.Y. CONST. of 1777, art. XXX, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2634-35.

149 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

150 Taylor, *supra* note 113, at 326.

151 MASS. CONST. of 1780, ch. IV, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1906. The proposed Massachusetts constitution that had been rejected in 1778 contained a similar provision, specifying that delegates would be selected by

joint ballot of the Senate and House of Representatives. *See* MASSACHUSETTS, COLONY TO COMMONWEALTH 51-58 (Robert J. Taylor ed., 1961) (reflecting a copy of the failed constitution).

152 Smith, *supra* note 1, at 755; DEL. CONST. of 1776, art. 11, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 564; PA. CONST. of 1776, § 11, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3085; MD. CONST. of 1776, art. XXVII, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1695; N.C. CONST. of 1776, art. XXXVII, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2793; GA. CONST. of 1777, art. XVI, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 780; N.Y. CONST. of 1777, art. XXX, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2634; S.C. CONST. of 1778, art. XXII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3253; MASS. CONST. of 1780, ch. IV, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1906; N.H. CONST. of 1784, Part II.--The Form of Government, Delegates to Congress, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2467 (Francis Newton Thorpe ed., 1909) [hereinafter 4 CONSTITUTIONS]. These are listed earliest to latest; Gordon Wood provides the exact dates of adoption for the earlier of these constitutions. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 133.

153 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 879 (Worthington C. Ford ed., Gov't Prtg. Off. 1933); MASS. CONST. of 1780, ch. IV, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1906 (requiring delegates to be "elected by the joint ballot of the senate and house of representatives").

154 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 153, at 902; VA. CONST. of 1776, The Constitution or Form of Government, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3817 (providing delegates were to be chosen "by joint ballot of both Houses of Assembly").

155 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 153, at 880; N.Y. CONST. of 1777, art. XXX, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2634-35.

156 Smith, *supra* note 1, at 751-52; Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 31.

157 Sweren-Becker & Waldman, *supra* note 67, at 1005; Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 28-29; Natelson, *Federal Functions*, *supra* note 57, at 198-199.

158 Smith, *supra* note 1, at 777-78.

159 To the contrary, in addition to the argument in text, reasonable inferences can be drawn from the drafting history against the existence of the Doctrine. *See* Smith, *supra* note 1, at 756-57 (arguing that the drafting history suggests an aversion to giving too much power to "legislatures"). *But see* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 32 (concluding that the "histories do not shed light ... on whether either the Framers or the greater public intended or understood those provisions as establishing the independent state legislature doctrine"). *See also* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 661 (2001) (finding "no relevant legislative history").

160 *Compare* U.S. ARTICLES OF CONFEDERATION of 1781, art. V ("[D]elegates [to Congress] shall be annually appointed in such manner as the legislature of each state shall direct ...."), *with* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ....") *and* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...."). Under the Articles of Confederation, most delegates to Congress were appointed by the legislatures themselves. *See supra* note 101 (noting that only two states held popular elections for delegates). Therefore, the predominant practice with respect to the selection of delegates under the old constitution (legislative

appointment) was similar to the requirement with respect to the selection of senators under the new Constitution (legislative "choosing"). *See* U.S. CONST. art. I, § 3, cl. 1 (providing that each state's senators were to be "chosen by the Legislature thereof"). And thus it has often been said that the selection method for senators reflected that senators were to "represent[] not the people of the respective states, but the states themselves," as had delegates to Congress under the Articles of Confederation. Michael Ramsey, Missouri v. Holland *and Historical Textualism*, 73 MO. L. REV. 969, 999 (2008) [hereinafter Ramsey, Missouri v. Holland *and Historical Textualism*]. This is true, but it ignores a lot of textual differences to further say that "the selection method [for Senators] was a direct carry-over from the Articles, where the state legislatures (under [Article V]) chose their delegates to the Congress." *Id.* Textually speaking, the "direct carry-over from the Articles" was the Elector Appointment Clause, which, like its predecessor under the Articles, but unlike the new provision for "choosing" senators, gave states optionality as to the manner of appointing representatives (by providing that "legislatures" would "direct the manner" of appointment). John Dickinson recognized these distinctions when he wrote that, under the new Constitution, selection of senators would have to be made in "the same manner, in which the members of Congress are now appointed," resulting in a senate "created by the sovereignties of the several states." John Dickinson, *Fabius* II (1788), *reprinted in* FRIENDS OF THE CONSTITUTION, WRITINGS OF THE "OTHER" FEDERALISTSSSS, 1787-1788, at 61 (Colleen A. Sheehan and Gary L. McDowell, eds., 1998). On the other hand, because presidential electors were "to be appointed, as the legislature of each state may direct, the fairest, freest opening is given for each state to chuse such electors for this purpose, as shall be most signally qualified to fulfill the trust." *Id.* at 63.

161 *See* RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 77, at 383 (noting "the anomalous character of Congress," which was described by Thomas Burke as "a deliberating Executive assembly").

162 The original understanding of the Articles of Confederation can be "crucial evidence of the Constitution's meaning" when the latter borrowed language from the former. Ramsey, Missouri v. Holland *and Historical Textualism*, *supra* note 160 at 986 (arguing that the Framers "surely knew how the Articles granted treatymaking power to the Congress and how that power had been understood throughout the 1780s" and that "[t]here is no reason to suppose that [the Framers] would have used parallel language in the Constitution had they intended a wholly different effect, and every reason to suppose that they saw their language as parallel."). Making the comparison is useful for present purposes, but should not be taken as a suggestion that the nature of national representation did not change from the Articles of Confederation to the Constitution. Madison, for example, "envisioned a genuine national government, resting for its authority, not on the state governments and not even on the peoples of the several states considered separately," but rather on "an American people" who "constituted a separate and superior entity, capable of conveying to a national government an authority that would necessarily impinge on the authority of the state governments." MORGAN, *supra* note 101, at 267.

163 The Committee of Unfinished Parts consisted of Nicholas Gilman (New Hampshire), Rufus King (Massachusetts), Roger Sherman (Connecticut), David Brearley (New Jersey), Gouverneur Morris (Pennsylvania), John Dickinson (Delaware), Daniel Carrol (Maryland), James Madison (Virginia), Hugh Williamson (North Carolina), Pierce Butler (South Carolina), and Abraham Baldwin (Georgia). Madison's Notes (Aug. 31, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 475, 481 (Max Farrand ed., 1911) [hereinafter 2 RECORDS OF THE FEDERAL CONVENTION]. The Committee of Detail consisted of Edmund Randolph (Virginia), James Wilson (Pennsylvania), Oliver Ellsworth (Connecticut), John Rutledge (South Carolina), and Nathaniel Gorham (Massachusetts). Journal (July 24, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 97, 97.

164 Nine of the eleven members of the Committee of Unfinished Parts (all but Roger Sherman and David Brearley), and four of the five members of the Committee of Detail (all but Oliver Ellsworth) had been appointed to Congress in the years before 1787 by state "legislatures" that were subject to state constitutions which contained substantive regulations of "legislatures." *See* CALVIN JILLSON & RICK K. WILSON, CONGRESSIONAL DYNAMICS: STRUCTURE, COORDINATION, AND CHOICE IN THE FIRST AMERICAN CONGRESS, 1774-1789, at 330-42 (1994) ("Appendix E, Delegate Listing by Congressional Year, 1774-88.").

165 Proponents of the Doctrine have not pointed to any evidence that the Framers developed an affinity for independent "legislatures." To the contrary, the period leading up to 1787 was characterized by a growing animus towards the state legislatures. Brief of Jack N. Rakove, Richard R. Beeman, Alexander Keyssar, Peter S. Onuf, & Rosemarie Zagari

for Ariz. Indep. Redistricting Comm'n as Amici Curiae Supporting Appellees at 15, Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (No. 13-1314) (citing WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 362); *id.* at 18. Moreover, that growing mistrust of legislatures strengthened the basis for the emerging concept of judicial review of legislative overreach. *See* WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 456 (quoting May 1787 newspaper which had argued that legislative acts were subject to "scrutiny by the people, that is, by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect"). John Dickinson reflected this trend in thought. At the constitutional convention, he said that no power of judicial review ought to exist, but was "at a loss what expedient to substitute." Madison's Notes (Aug. 15, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 163, at 296, 299. However, when Dickinson subsequently advocated for adoption of the Constitution, he cited judicial review as a positive feature of the new charter. *See* John Dickinson, *Fabius* IV (1788) (explaining that the states and the people would be represented by "the federal independent judges" in "the determination of [the] constitutionality [of the laws]"), *reprinted in* FRIENDS OF THE CONSTITUTION, WRITINGS OF THE "OTHER" FEDERALISTSSSS, 1787-1788, *supra* note 160, at 219.

166 JOHN A. MUNROE, FEDERALIST DELAWARE 1775-1815, at 195 (1954); Mumford, *supra* note 133, at 121.

167 Mumford, *supra* note 133, at 114, 119. Mumford explains that Dickinson's political views "corresponded in large measure with the general tenor of changes made by the convention." *Id.* at 119.

168 MINUTES OF THE GRAND COMMITTEE OF THE WHOLE CONVENTION OF THE DELAWARE STATE WHICH COMMENCED AT DOVER, ON TUESDAY, THE TWENTY-NINTH DAY OF NOVEMBER, IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND NINETY-ONE, FOR THE PURPOSE OF REVIEWING, ALTERING, AND AMENDING THE CONSTITUTION OF THIS STATE; OR, IF THEY SEE OCCASION, FOR FORMING A NEW ONE IN STEAD THEREOF 77 (Wilmington, James Adams 1792).

169 MINUTES OF THE CONVENTION OF THE DELAWARE STATE, AT THE SECOND SESSION THEREOF, WHICH COMMENCED AT DOVER, ON TUESDAY THE TWENTY-NINTH DAY OF MAY, IN THE YEAR OF OUR LORD, ONE THOUSAND SEVEN HUNDRED AND NINETY-TWO, FOR THE PURPOSE OF REVIEWING, ALTERING, AND AMENDING THE CONSTITUTION OF THIS STATE, OR IF THEY SEE OCCASION, FOR FORMING A NEW ONE INSTEAD THEREOF 64, 101 (Wilmington, Brynberg and Andrews 1792); DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 578.

170 PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 857 (Richmond, Samuel Shepherd & Co. 1830) [hereinafter DEBATES OF THE VIRGINIA STATE CONVENTION].

171 *Id.* at 858.

172 *Id.* at 859; VA. CONST. of 1830, art. III, § 6, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3823.

173 DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 859.

174 *Id.* at 857. It appears that Summers and the other delegates were less concerned with this constitutional question than with the underlying question of whether slaves would be accounted for in representation. Summers was the only one to mention the Doctrine, and he made clear that, even if he was wrong about it, he could not vote to "consecrate" an apportionment rule "for the benefit of slave-holders, while every effort to secure the rights of the free white population in the State Legislature, was so obstinately and successfully resisted." *Id.* John Randolph was the primary responder to Summers, and he dwelled on how rejecting Green's proposal would create "a most violent presumption--almost to the

point of direction affirmation--that the [Three-Fifths Clause] of the Constitution of the United States, Virginia stands ready to give up." *Id.* at 858.

175 *Id.* at 847.

176 *Id.*; VA. CONST. of 1830, art. III, § 4, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3823.

177 DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 847.

178 *Id.*

179 VA. CONST. of 1830, art. III, § 5, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3823.

180 DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 849.

181 *Id.*

182 *Id.*

183 *See* Mumford, *supra* note 133, at 113-18 (describing the delegates to the convention).

184 THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS 373 (Harrisburg, John S. Wiestling 1825) [hereinafter PROCEEDINGS OF PENNSYLVANIA CONVENTION OF 1790].

185 *Id.* at 374.

186 In my 2001 article, I identified only some of the state constitutional provisions dating from the years following ratification that, like the revolutionary state constitutions that preceded them, purported to explicitly regulate the functioning of state legislatures. Smith, *supra* note 1, at 757-58. I identified the provision from the Delaware constitution (regulating Congressional elections), provisions in the Georgia and Kentucky constitutions (regulating elections by the state legislatures themselves, which would have included elections of presidential electors and senators), and the 1810 amendment to the Maryland constitution (regulating both Congressional and presidential elections). *Id.* at 758.

187 PA. CONST. of 1790, art. III, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3096.

188 PROCEEDINGS OF PENNSYLVANIA CONVENTION OF 1790, *supra* note 184, at 154, 158. Another member of the drafting committee was James Wilson. *Id.* at 154. As noted previously, Wilson had been part of the Committee of Detail which framed the Elections Clause at the Federal Convention in 1787.

189 *Findley, William 1741-1821*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/F000124 [https://perma.cc/N6Y9-9CKX].

190 14 ANNALS OF CONG. 841 (1804).

191 *Id.*

192 *Id.* at 842.

193 U.S. CONST., art. I, § 2 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

194 14 ANNALS OF CONG. 839.

195 *Id.*

196 *Id.* at 849-50. Ultimately, the House voted in favor of Hoge, and he retained his seat. *Id.* at 857-58.

197 GA. CONST. of 1789, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789; KY. CONST. of 1792, art. III, § 2, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269; TENN. CONST. of 1796, art. III, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3418; OHIO CONST. of 1803, art. IV, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2907.

198 Madison's Notes (Aug. 9, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 163, at 230, 240.

199 MORGAN, *supra* note 101, at 183; *see* JACK N. RAKOVE, ORIGINAL MEANINGS, POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 204 (1996) ("And how, literally, were citizens to give their votes: by voicing their preference to the sheriff, who would then record their vote in a poll book, or by secret ballot; at a raucous public fete, with people gathered from miles around for the closest approximation to carnival a Protestant society could produce, or in widely separated polling places, with a decorum more suited to republican manners?").

200 Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787-1828*, 33 J. EARLY REPUBLIC 219, 234 (2013).

201 JOAN WELLS COWARD, KENTUCKY IN THE NEW REPUBLIC 143 (1979).

202 Ratcliffe, *supra* note 200, at 234.

203 GA. CONST. of 1798, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 800 ("In all elections by the people the electors shall vote viva voce until the legislature shall otherwise direct."); KY. CONST. of 1799, art. VI, § 16, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1287 ("In all elections by the people, and also by the senate and house of representatives, jointly or separately, the votes shall be personally and publicly given viva voce.").

204 COWARD, *supra* note 201, at 143.

205 *Compare* VT. CONST. of 1786, ch. 2, § XXXI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3759 ("All elections ... shall be by ballot, free and voluntary."), *with* VT. CONST. of 1793, ch. 2, § 34, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3770 ("All elections ... shall be free and voluntary.").

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206 DEL. CONST. of 1792, art. IV, § 1, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 574.

207 DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 578.

208 KY. CONST. of 1792, art. XII, § 5, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1274; KY. CONST. of 1799, art. X, § 5, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1289; DEL. CONST. of 1792, art. I, § 3, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 568; N.H. CONST. of 1792, art. XI, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2472; VT. CONST. of 1793, art. VIII, ch. 1, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3763; VT. CONST. of 1793, ch. 2, § 34, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3770; TENN. CONST. of 1796, art. XI, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3422.

209 PA. CONST. of 1790, art. III, § 3, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3096; KY. CONST. of 1792, art. III, § 3, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269; DEL. CONST. of 1792, art. IV, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 574; TENN. CONST. of 1796, art. III, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3418.

210 3 ANNALS OF CONG. 460 (1792).

211 *Id.* at 461.

212 *Id.* at 463.

213 GA. CONST. of 1789, art. IV, § 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789. The Ohio constitution of 1803 similarly provided that a qualified voter could only vote "in the county or district in which he shall actually reside at the time of the election." OH. CONST. of 1803, art. IV, § 1, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2907.

214 PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA RESPECTING THE CONTESTED ELECTION FOR THE EASTERN DISTRICT OF GEORGIA 35-36 (Phila., Parry Hall 1792).

215 3 ANNALS OF CONG. 472 (1792).

216 *Id.* at 479. Professor Foley attributes the House's unanimous removal of Wayne to "clear evidence of enough wrongdoing to affect the election's outcome," and goes on to describe the subsequent debate over whether the House had the authority to seat Jackson even though he had not been certified under state law as the winner. EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 40-43 (2016) [hereinafter BALLOT BATTLES].

217 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 38. Notably, the state constitutions of the time did not always provide clear mechanisms for amendment. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 73-75 (1998) (discussing the avenues for constitutional change available under early state constitutions).

218 Rakove, *Presidential Selection; Electoral Fallacies*, *supra* note 45; *see* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 16-17 (2020) (explaining that the states prepared for first election in the context that it was "foreordained that George Washington would win"); ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 27 (2020) ("Federalists and Anti-Federalists alike, in the fall of 1787

and the spring of 1788, may have been less focused on 'the mode of appointment of the Chief Magistrate' because they all knew that--however the electoral system actually worked-- George Washington would be their first president.").

219 KEYSSAR, *supra* note 218, at 32-34 (explaining that "a party with majority support in a state or its legislature would gain an advantage if it utilized the general ticket or had the legislature itself choose electors" but "a minority party had instrumental reasons for preferring district elections").

220 David W. Houpt, *Contested Election Laws: Representation, Elections, and Party Building in Pennsylvania, 1788-1794*, 79 PA. HIST.: J. MID-ATL. STUD. 257, 258 (2012) ("[A] review of the debates surrounding the framing of elections laws [in Pennsylvania in the 1780s and 1790s] reveals that political strategy played a decisive role in the decision to select a particular mode of electing representatives.").

221 Bush v. Gore, 531 U.S. 98 (2000).

222 *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

223 *See* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (answering "why" by stating that "the text of the Constitution requires [it]").

224 THE FEDERALIST NO. 62 (James Madison).

225 U.S. CONST. art. I, § 4 ("[B]ut the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

226 Madison's Notes (Aug. 9, 1787), *supra* note 198, at 240; *see* 1 COLLECTED WORKS OF JAMES WILSON 265-66 (Kermit L. Hall & Mark David Hall eds., 2007) (recording James Wilson explaining to the Pennsylvania ratifying convention that Congress would use the power "to correct the improper regulations of a particular state").

227 Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091 (2022) (manuscript at 16) (summarizing evidence and conclusions).

228 *Id.*

229 Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 32-33 (2020) (Kavanaugh, J., concurring).

230 *Id.* at 29 (Gorsuch, J., concurring).

231 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 32.

232 *See* S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244 ("[L]ast Monday in October ... and the day following ...."); N.J. CONST. of 1776, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2595 ("[S]econd Tuesday in October ...."); DEL. CONST. of 1776, art. 27, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 567 ("1st day of October ...."); PA. CONST. of 1776, § 9, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3084 ("[S]econd Tuesday in October ...."); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 ("[T]he first Monday of October ...."); GA. CONST. of 1777, art. II, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 778 ("[F]irst Tuesday in December ...."); VT. CONST. of 1777, ch. II, § VIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3742 ("[F]irst Tuesday of September ...."); S.C. CONST. of 1778, art. XIII,

reprinted in 6 CONSTITUTIONS, *supra* note 37, at 3251 ("[L]ast Monday in November ... and the day following ...."); MASS. CONST. of 1780, ch. I, § III, art. V, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1899 ("[I]n the month of May, ten days at least before the last Wednesday of that month."); N.H. CONST. of 1784, Part II.--The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 (setting elections annually "in the month of March"); VT. CONST. of 1786, ch. II, § VIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3755 ("[F]irst Tuesday of September ...."); GA. CONST. of 1789, art. I, § 6, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 786 ("[F]irst Monday in October, until such day of election be altered by law ...."); S.C. CONST. of 1790, art. I, § 10, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3260 ("[S]econd Monday in October ...."); PA. CONST. of 1790, art. I, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3092 ("[S]econd Tuesday of October."); DEL. CONST. of 1792, art. II, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 570 ("[F]irst Tuesday of October."); N.H. CONST. of 1792, § XII, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2477 ("[I]n the month of March ...."); KY. CONST. of 1792, art. I, § 4, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1265 ("[F]irst Tuesday in May ...."); VT. CONST. of 1793, ch. II, § 8, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3765 ("[F]irst Tuesday of September ...."); TENN. CONST. of 1796, art. I, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3415 ("[F]irst Thursday in August ...."); GA. CONST. of 1798, art. I, § 7, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 792 ("[F]irst Monday in November, until such day of election be altered by law."); KY. CONST. of 1799, art. I, § 3, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 ("[F]irst Monday in the month of August ....").

233 *See* S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244 ("[L]ast Monday in October ... and the day following ...."); MD. CONST. of 1776, art. III, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 ("[W]hole election shall be concluded in four days ...."); S.C. CONST. of 1778, art. XIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3251 ("[L]ast Monday in November ... and the day following ...."); KY. CONST. of 1792, art. I, § 4, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1265 ("[E]lections may be continued for three days, if, in the opinion of the presiding officer or officers, it shall be necessary, and no longer."); TENN. CONST. of 1796, art. I, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3415 ("[F]irst Thursday in August and terminating the succeeding day."); KY. CONST. of 1799, art. I, § 3, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 ("[P]residing officers of the several elections shall continue the same for three days, at the request of any one of the candidates.").

234 *See* DEL. CONST. of 1776, art. 27, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 567 ("[B]y ballot ...."); PA. CONST. of 1776, § 9, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3084 ("[B]y ballot ...."); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 ("[V]iva voce ...."); N.C. CONST. of 1776, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2790 ("[B]y ballot ...."); GA. CONST. of 1777, art. XIII, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 780 ("[B]y ballot, and shall be taken by two or more justices of the peace in each county, who shall provide a convenient box for receiving the said ballots: and, on closing the poll, the ballot shall be compared in public with the list of votes that have been taken, and the majority immediately declared ...."); N.Y. CONST. of 1777, art. VI, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2630 (providing for a "fair experiment" as between voting "by ballot" and "viva voce"); VT. CONST. of 1777, ch. II, §§ VIII, XXIX, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3742, 3746 ("[B]y ballot" and "[B]y ballot, free and voluntary"); MASS. CONST. of 1780, ch. I, § III, art. III, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1898 ("[C]hosen by written votes ...."); N.H. CONST. of 1784, Part II.--The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 ("[C]hosen by ballot ...."); VT. CONST. of 1786, ch. II, §§ VIII, XXXI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3755, 3759 ("[C]hosen by ballot" and "[B]y ballot, free and voluntary"); GA. CONST. of 1789, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789 ("[B]y ballot ...."); S.C. CONST. of 1790, art. I, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 ("[B]y ballot ...."); PA. CONST. of 1790, art. III, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3096 ("[B]y ballot ...."); DEL. CONST. of 1792, art. IV, § 1, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 574 ("[B]y ballot."); N.H. CONST. of 1792, § XIV, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2477 ("[B]y ballot ...."); KY. CONST. of 1792, art. III, § 2, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269 ("[B]y ballot ...."); VT. CONST. of 1793, ch. II, § 8, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3765 ("[B]y ballot ...."); TENN. CONST. of 1796, art. III, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3418 ("[B]y ballot."); GA. CONST. of 1798, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 800 ("[V]iva voce until the legislature shall otherwise direct."); KY. CONST. of 1799, art. VI, § 16, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1287 ("[V]iva voce.").

235 *See* S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3245 ("churches or church wardens" or, if none, places appointed by the general assembly); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 ("at the court-house" in the county "in which they offer to vote" or "at such other place as the Legislature shall direct"); N.H. CONST. of 1784, Part II.--The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 ("[W]ithin the town, district, parish, or place where they dwell ...."); GA. CONST. of 1789, art. IV, § 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789 ("[W]ithin the county ...."); S.C. CONST. of 1790, art. I, § 4, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 ("[I]n the election district in which he offers to give his vote ...."); KY. CONST. of 1792, art. III, § 1, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269 ("[N]o person shall be entitled to vote except in the county in which he shall actually reside at the time of the election."); KY. CONST. of 1799, art. I, § 5, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 ("[A]t the places of holding their respective courts, or in the several election precincts into which the legislature may think proper ....").

236 *See* S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3245 (assigning between four and thirty representatives to each of several named parishes and districts); VA. CONST. of 1776, The Constitution or Form of Government, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3815-16 (assigning numbers of representatives to each county and certain districts, cities, and boroughs); N.J. CONST. of 1776, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2595 (assigning one representative per county and providing that legislature could adjust "on the principles of more equal representation"); DEL. CONST. of 1776, art. 3, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 562 (providing for seven representatives per county); PA. CONST. of 1776, §§ 17-18, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3086 (requiring reapportionment every seven years based on "complete lists of taxable inhabitants" in Philadelphia and the counties; and, providing that counties could subdivide themselves into districts); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 (apportioning four delegates per county); N.C. CONST. of 1776, The Constitution, or Form of Government, &c, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2790 (assigning two representatives per county and one each for several towns);

GA. CONST. of 1777, art. IV, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 778-79 (assigning ten representatives per county except fourteen for Liberty county and one each for Glynn and Camden counties); N.Y. CONST. of 1777, arts. IV-V, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2629-30 (assigning between two and ten representatives to counties by name and providing for reapportionment after every seven years if not "justly proportioned to the number of electors in the said counties respectively"); VT. CONST. of 1777, ch. II, § XVI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3744 (assigning two representatives to each town of "eighty taxable inhabitants" and one to "each other inhabited town in this State"); S.C. CONST. of 1778, arts. XIII, XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3251-52 (assigning between three and thirty representatives to each of several named parishes and districts, but providing for reapportionment);

MASS. CONST. of 1780, ch. I, § III, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1898 (assigning one representative to "every corporate town" that had "one hundred and fifty ratable polls" and another representative for each additional two hundred and twenty-five); N.H. CONST. of 1784, Part II.-- The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 (assigning one representative to "every town, parish or place intitled to town privileges" that had "one hundred and fifty rateable male polls" and another representative for each additional three hundred); VT. CONST. of 1786, ch. II, § VIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3755 (assigning two representatives to "each town" of "eighty taxable inhabitants" and one to "each other inhabited town"); GA. CONST. of 1789, art. I, § 6, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 786 (assigning between two and five representatives to each of several named counties); S.C. CONST. of 1790, art. I, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 (assigning between one and fifteen representatives to each of several named counties); PA. CONST. of 1790, art. I, § 4, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3093 (requiring apportionment "according to the number of taxable inhabitants" as determined every seven years); DEL. CONST. of 1792, art. II, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 570 (assigning seven representatives per count until two-thirds of each branch concurs in increasing number); N.H. CONST. of 1792, § IX, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2476-77 (similar to provision in state's constitution of 1784); KY. CONST. of 1792, art. I, § 6, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1265 (providing for reapportionment every four years among the counties "according to the number of free male inhabitants"); VT. CONST. of 1793, ch. II, § 7, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3765 (showing similarities to Vermont's 1786 constitution); TENN. CONST. of 1796, art. I, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3415 (requiring reapportionment among the several counties "according to the number of taxable inhabitants in each" every seven years); GA. CONST. of 1798,

art. I, § 7, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 791-92 (requiring apportionment every seven years by county "according to their respective numbers of free white persons, including three-fifths of all the people of color" but "each county shall have at least one but not more than four members"); KY. CONST. of 1799, art. I, § 6, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 (providing that representation "shall be forever regulated and ascertained by the number of qualified electors" within counties and towns, with apportionment every four years).

237 S.C. CONST. of 1778, art. XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3252.

238 ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 48 (1987).

239 *Id.* at 50; S.C. CONST. of 1790, art. I, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 (omitting provision of 1778 constitution which had required reapportionment after seven years).

240 ZAGARRI, *supra* note 238, at 52.

241 S.C. CONST. of 1790, amendment ratified Dec. 17, 1808, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3265-66.

242 ZAGARRI, *supra* note 238, at 53 (citing S.C. CONST. of 1790, amendment ratified Dec. 17, 1808, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3266).

243 Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

244 Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring).

245 *Id.* at 34 n.1 (Kavanaugh, J., concurring).

246 Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 2 (2020) (Statement of Justice Alito).

247 *Democratic Nat'l Comm.*, 141 S. Ct. at 35 n.1 (Kavanaugh, J., concurring).

248 *Boockvar*, 141 S. Ct. at 2.

249 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 34-35. An emerging twist on the anti-court variation of the Doctrine is to restate it as a neutral separation-of-powers principle that neither favors "legislatures," disfavors courts, nor discounts the applicability of constitutional limitations on "legislatures," but rather purports to draw a line between appropriate and inappropriate levels of judicial review. In Justice Alito's March 2022 dissent from the Supreme Court's denial of interim relief in the North Carolina redistricting case, he objected that the lower court had "discern[ed] in the State Constitution a judicially enforceable prohibition of partisan gerrymandering" in a manner that had "the hallmarks of legislation." Moore v. Harper, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting). Assuming this is a workable principle, and is not simply one court disagreeing with another court, it is unclear whether the principle would draw its content from the federal conception of judicial review or the state conception, and, in either case, what vintage conception would apply. Moreover, it is also unclear why the principle would not also apply to judicial review of "manner" legislation by federal courts. Picking up on Justice Alito's dissent, Professor Michael Ramsey has argued that perhaps the Constitution uses the word "legislature" to impose on the states an eighteenth-century "classical separation of powers theory" with respect to "manner" legislation, i.e., "to give power to the legislature and *not* to parts of the state government that are *not* the legislature (most notably the state executive and the state judiciary)." *See* Michael Ramsey, *Vikram Amar on the Independent State Legislature Theory*,

THE ORIGINALISM BLOG (Mar. 17, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/03/vikram-amar-on-the-independent-state-legislature-theorymichael-ramsey.html [https://perma.cc/462U-JUVU] (arguing that "the state's distribution of power ... is subject to the specific federal constraint that the power must be exercised (as the Constitution expressly says) by the legislature").

250 *See generally* Krass, *supra* note 227 (evidencing such assignments).

251 U.S. CONST. art. I, § 5, cl. 1; *see* C.H. Rammelkamp, *Contested Congressional Elections*, 20 POL. SCI. Q. 421, 422-23 (1905) (explaining that this power was lodged with the House and the Senate because "[t]o have allowed the courts, whose officers were directly or indirectly appointed by the crown, to decide contested elections in the colonial assemblies would have invited executive interference").

252 *See* FOLEY, BALLOT BATTLES, *supra* note 216, at 7 (noting "the hole in America's ... Constitution concerning the institution for resolving a disputed presidential election").

253 *Id.* at 47; *id.* at 25 ("[T]hey had no shared understanding of what method of resolving ballot-counting controversies was more faithful to [their] fundamental commitment to republicanism."). Although the Framers could not have foreseen the degree to which courts are now involved in election law (whether that of election design, ballot-casting, or ballot-counting), it by no means follows that the anti-court variation of the Doctrine constituted the original understanding of the word "legislature." *Cf.* Rucho v. Common Cause, 139 S. Ct. 2484, 2496 (2019) (noting the role that federal and state court judicial review plays in redistricting litigation even though there was not "[any] suggestion [by the Framers] that the federal courts had a role to play" or "had ever heard of courts doing such a thing"). Moreover, speculation that "legislature" was originally understood to require states to uniformly and forever abide by a particular eighteenth-century "classical separation of powers theory," see *supra* note 249, is similarly unfounded. At the time of the Founding, it was understood that the states had varying separation-of-powers arrangements, and that they would remain unaffected by adoption of the Constitution. *See* THE FEDERALIST NO. 47 (James Madison) (clarifying that he did not wish "to be regarded as an advocate for the particular organizations of the several State governments" after surveying the variety of state constitutions in which, in different ways, "the legislative, executive, and judiciary departments are by no means totally separate and distinct"). And it was also understood that, after the Founding, states would be able to change their internal structures in ways that diverged from each other and the new federal model.

See THE FEDERALIST NO. 21 (Alexander Hamilton) (explaining why the Constitution's requirement that the United States guarantee each state a "Republican Form of Government" would be "no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode"); *see also* TARR, *supra* note 217, at 88-90 (concluding that the federal example had a limited impact on the structure of state governments in the decade after the Founding). In fact, since the Founding, there have been significant changes in state separation-of-powers arrangements. *See* Helen Hershkoff, *State Courts and the "Passive Virtue": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1885 (2001) ("Separation of powers is thus not a stable concept, even within a single state."). In particular, the power of today's state courts to engage in judicial review of state legislation is very different than what it was under the state constitutions existing at the Founding. *See* TARR, *supra*, at 72 ("The notion that judges could invalidate all governmental actions inconsistent with their interpretation of the constitution was simply unknown in the 1770s and early 1780s and would have been considered far beyond the scope of legitimate judicial power."); *see also* GORDON S. WOOD, EMPIRE OF LIBERTY 445 (2009) ("[I]t was clear by the 1780s that legislatures in America were bound by explicitly written constitutions in ways that the English Parliament was not. But it was not yet clear that the courts by themselves were able to enforce those boundaries upon the legislatures."). The Constitution is at least agnostic as to whatever changes have occurred and arguably *prohibits* the United States, including federal courts, from interfering with them. *See* Amar & Amar, *supra* note 63, at 28-29 (arguing that the Constitution "requires the federal government to respect and protect--not disregard and override-- these state choices about how to create, divide, limit, and implement lawmaking powers") (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988)); *see also* Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) ("[The Constitution] does not require a state to allocate powers among the branches of state government in the same manner in which the Constitution prescribes that allocation among the branches of the federal government.") (citing Dreyer v. Illinois, 187 U.S. 71, 84 (1902)).

254 *See* Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (arguing that any "significant departure" by a state court "presents a federal constitutional question").

255 Smith, *supra* note 1, at 764-83.

256 *Id.* at 764-75.

257 *Id.* at 779-80.

258 *See id.* at 781-83 (quoting from the World War II soldier-voting case, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944)).

259 *See* Morley, *Rethinking the Right to Vote Under State Constitutions*, *supra* note 22, at 198-204 (discussing nineteenth-century instances of the anti-constitution version being invoked); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 148-51 (2015) [hereinafter Morley, *The Intratextual Independent "Legislature" and the Elections Clause*]; Muller, *supra* note 22, at 725-33; Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 27-32.

260 *See* Muller, *supra* note 22, at 734 n.89 (describing Justice Story's argument).

261 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 93; *id.* at 38.

262 MD. CONST. of 1776, art. XIV (1810), *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1705 ("[E]very free white male citizen of this state ... shall have a right of suffrage, and shall vote, by ballot, in the election ... for electors of the President and Vice-President of the United States, for [r]epresentatives of this [s]tate in the Congress of the United States [and specified state offices].").

263 *See* KEYSSAR, *supra* note 218, at 32 (documenting the elector selection method across the states).

264 VA. CONST. of 1830, art. III, § 6, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3823.

265 DEL. CONST. of 1831, art. VII, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 595.

266 FLA. CONST. of 1838, art. VI, § 16, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 675. The exact same provision appeared in the state's 1865 constitution. FLA. CONST. of 1865, art. VI, § 12, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 697.

267 R.I. CONST. of 1842, art. VIII, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3230.

268 IOWA CONST. of 1846, art. 3, Legislative Department, § 32, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 1129 ("When a Congressional, Senatorial, or Representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a Congressional, Senatorial, or Representative district."). Iowa's constitution of 1857 contained the same provision. IOWA CONST. of 1857, art. III, Legislative Department, § 37, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 1144. Iowa's constitutional regulation of congressional districts went beyond what was required by the districting statute enacted by Congress in 1842. *See* Reapportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring states--for the first time--

to use districts of "contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative"). Michael Weingartner has noted that this provision of the Iowa constitution was the subject of a House contested election in 1850, and no one then suggested that it was irrelevant by virtue of the independent state legislature doctrine. *See* Michael Weingartner, *Liquidating the Independent State Legislature Theory* 58 (Sept. 25, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138 [https://perma.cc/4SZ5-DDSL] (discussing the 1850 contested election case of *Miller v. Thompson*); *see also* H.R. REP. NO. 31-400 (1850) (reproducing the majority and minority reports in *Miller v. Thompson*).

269 CAL. CONST. of 1849, art. IV, § 30, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 396.

270 VA. CONST. of 1850, art. IV, §§ 13-14, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3839.

271 OR. CONST. of 1857, art. II, § 17, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3002.

272 MISS. CONST. of 1817, art. VI, Schedule, § 7, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2047. Such provisions also appeared in the first constitutions of Alabama (1819), Missouri (1820), Michigan (1835), Florida (1838), Iowa (1846), Wisconsin (1848), Minnesota (1857), Oregon (1857), Kansas (1859), Nevada (1864), Nebraska (1867), Arkansas (1868), South Dakota (1889), Montana (1889), Washington (1889), Wyoming (1889), and North Dakota (1889).

273 *See* Muller, *supra* note 22, at 729 (describing House proceedings relating to the challenge).

274 CONG. GLOBE, 31st Cong., 1st Sess. 1779, 789-91, 1795, app. at 1253-55 (1850).

275 *Id.* at 1790.

276 *Id.* at 1795.

277 OH. CONST. of 1803, art. IV, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2907; LA. CONST. of 1812, art. VI, § 13, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1389; ALA. CONST. of 1819, art. III, § 7, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 99; MICH. CONST. of 1835, art. II, § 2, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 1932; TEX. CONST. of 1845, art. VII, § 6, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3560; CAL. CONST. of 1849, art. II, § 6, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 393; MINN. CONST. of 1857, art. VII, § 6, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2008.

278 N.Y. CONST. of 1821, art. II, § 4, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2643; PA. CONST. of 1838, art. III, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3108.

279 KY. CONST. of 1850, art. VIII, § 15, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1308; VA. CONST. of 1830, art. III, § 15, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3826.

280 *Id.* at § 16.

281 CAL. CONST. of 1849, art. XI, § 20, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 404.

282 DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 455-56.

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283 CONN. CONST. of 1818, art. VI, § 7, *reprinted in* 1 Constitutions, *supra* note 29, at 544.

284 Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, *supra* note 22, at 1078 (quoting Act of Jan. 23, 1845, ch. 1, 5 Stat. 721).

285 *Id.* Congress's assumption that "legislatures" had to prescribe "manner" regulation "by law" persisted after 1845. Weingartner, *supra* note 268, at 50-52.

286 OR. CONST. of 1857, art. II, § 14, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3002.

287 CONG. GLOBE, 37th Cong., 1st Sess. 353 (1861).

288 *Id.*

289 H.R. REP. NO. 37-4 at 3 (1861) (reproducing the committee's report in *Shiel v. Thayer*).

290 *Id.* at 2. This finding was bolstered by the fact that the constitution had expressly set the time for the state's first congressional election as "the first Monday in June, 1858." OR. CONST. of 1857, Schedule, § 6, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3018.

291 H.R. REP. NO. 37-4, at 3; *see* CONG. GLOBE, 37th Cong., 1st Sess. 353 (1861).

292 H.R. REP. NO. 37-4, at 3.

293 CONG. GLOBE, 37th Cong., 1st Sess. 356 (1861).

294 *Id.*

295 *Id.* at 356-57.

296 *Id.* at 356.

297 *Id.* at 357.

298 *Id.*

299 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 39 n.169. Professor Morley's comment is ignorant of the fact that the Maryland amendment explicitly regulated both the manner of appointing electors (by mandating popular elections) and the manner of electing both presidential electors and representatives (by specifying that voting in both kinds of elections would be "by ballot"). MD. CONST. of 1776, art. XIV (1810), *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1705.

300 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 52; *see id.* at 53 (incorrectly asserting that "the Elections Clause was not even discussed"); *id.* at 53 ("Had the [Elections] Clause been raised, the House would have had to explicitly grapple with its language and meaning."). References to the debate

over the doctrine in *Shiel* appear in several places in the historical record. *See* CHESTER H. ROWELL, HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901, at 172 (1901) (quoting U.S. Const. art. I, § 4, cl. 1) (recounting how "[i]n the House it was claimed [in *Shiel*] that under the Constitution of the United States the time for an election (at least after the first election) can only be fixed by the legislature or by Congress" but a "resolution based on this principle was defeated by a vote of 37 to 77" after Representative Dawes "argued that the words of the Constitution, 'by the legislature thereof,' meant by the people, through any constituted authority"); H.R. REP. NO. 39-14, at 4 (1866) (dissenting report in *Baldwin v. Trowbridge* relying on Dawes's argument during *Shiel v. Thayer*); *In re* Op. to the Governor, 103 A. 513, 515 (R.I. 1918) (referencing the debate in *Shiel v. Thayer*).

301 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38 ("As early as the Massachusetts Constitutional Convention of 1820, it was understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections."); *id.* at 39 (identifying the 1820 convention as "among the earliest examples of the independent state legislature doctrine being expressly applied" without identifying any other examples from that period).

302 *Id.* at 14. Similarly, Professor Morley says that this episode "provides a stark example of how the independent state legislature doctrine was regarded when the issue was affirmatively raised and debated." *Id.* at 40.

303 *See* JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES 57 (Bos. Daily Advertiser 1821) [hereinafter MASSACHUSETTS CONVENTION OF 1820] ("[T]he ... part of the [c]onstitution of this Commonwealth, having become inapplicable to the existing condition of ... Massachusetts, ought to be expunged therefrom.").

304 *Id.* at 57-58.

305 *Id.* at 59.

306 *Id.*

307 *Id.* at 58.

308 *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 18, 20, 22-23, 56, 58 (2020); KEYSSAR, *supra* note 218, at 32 tbl.1.1 (documenting states' historical method of electing presidential electors); *id.* at 66 ("[In 1812,] Massachusetts, continuing a dispute that had begun in 1808, found itself with a Republican senate and a Federalist lower house that could not agree on either a method of choosing electors or a map for congressional districts; in the end, an extra legislative session had to be convened to save the state from losing its electoral votes altogether.").

309 MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 59.

310 *Id.* at 58.

311 *Id.*

312 *Id.* at 61.

313 *Id.*

314 *Id.* at 59.

315 *Id.*

316 *Id.* at 60. Historian Merrill Jensen criticized "the technique of argument" employed by Justice Story and others when they argued a different point: that the pre-Constitution Congress "represented the people of the United States as a whole, not the people of the several as represented in their state governments." JENSEN, *supra* note 70, at 162. As Jensen described it, the "technique of argument" then employed by Justice Story and others was to "state their contention, or reiterate it, and by the use of italics to place undue emphasis on the portions of the documents which seemed to prove their arguments." *Id.* Jensen disparaged this as "the technique of argument used by small boys." *Id.* at 162-63.

317 MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 60.

318 *Id.*

319 *Id.*

320 *See id.* ("The direct and necessary consequence of the measure now proposed is to perpetuate our own humiliation. Why does Virginia ... choose her Electors for President by general ticket? Because she is determined that her Electors shall move in a solid column in the direction of the majority of the state.").

321 *Id.* When Justice Story later wrote his Commentaries, he revisited this debate, but focused exclusively on the policy argument, without saying anything about the independent state legislature doctrine. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1466 (1833). Noting that two states continued to elect electors by district, Justice Story wrote that he was "surprise[d]" that the approach "should not long since have been wholly abandoned." *Id.* Absent the practice of election by district "becom[ing] general throughout the Union," the problem was that "[i]n case of any party divisions in a state, [electing by district] may neutralize its whole vote, while all the other states give an unbroken electoral vote." *Id.*

322 Professor Morley incorrectly states that Daniel Webster "agreed" with Justice Story's articulation of the independent state legislature doctrine. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 40. In fact, Webster began his speech by declining "to enter into the argument on the question of our *right* to make such a provision." MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 60. Instead, it was "the *expediency* of it which had weight with him." *Id.* At most, Webster thought there was a "general inexpediency of connecting the *state* Constitution with provisions of the *national* constitution" and that it would "tend[] to no good consequence" for a state constitution to regulate a power conferred on it by another constitution. *Id.*

323 *See* MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 61. ("When we, therefore, tie up our own hands in this particular, by our own constitution, we do that, precisely, which those who wish a relative increase of *their own power*, would desire.").

324 *Id.* Justice Story and Webster met before the convention to discuss tactics to resist constitutional change. Harlow Walker Sheidley, *Preserving "The Old Fabrick": The Massachusetts Conservative Elite and the Constitutional Convention of 1820-1821*, 103 PROC. MASS. HIST. SOC'Y 114, 128 (1991). It was "not at all unusual for [them] to speak in support of each other at the climactic point of a debate." *Id.* at 134. The alliance between Justice Story and Webster has been described by Justice Story's biographer as "one of the most extraordinary in American law and politics." R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC 176 (1986).

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In 1820, while preventing Massachusetts from dividing its future electoral votes, the duo may have had their sights set on greater things. In the wake of their successes at the convention, conservatives like Justice Story and Webster "hoped to transfer their success to national politics, [with Justice Story] naively dreaming of the day when the 'popularity' Webster had earned at the convention would 'carry him ... to the presidency.'" Sheidley, *supra*, at 137 (quoting letter from Joseph Story to Jeremiah Mason (Jan. 21, 1821), *in* 1 LIFE AND LETTERS OF JOSEPH STORY 396 (William W. Story ed., 1851)).

325 MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 61.

326 *See id.* at 57, 61 ("The question was then taken on Mr. Austin's amendment and decided in the negative.").

327 CONN. CONST. of 1818, art. XIII (1864), *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 550. By its terms, the amendment was to expire "upon the termination of the present war." *Id.*

328 MD. CONST. of 1864, art. XII, § 11, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1777-78.

329 R.I. CONST. of 1842, art. IV (1864), *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3235-36.

330 *See* N.Y. CONST. of 1846, art. II, § 1, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2675 (providing "in time of war no elector in the actual military service ... shall be deprived of his vote by reason of his absence from such election district; and the [l]egislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside"); PA. CONST. of 1873, art. VIII, § 6, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3139 ("[S]uch [soldier-voters] may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election."); MICH. Const. of 1850, art. VII, § 1, *reprinted in* 4 Constitutions, *supra* note 152, at 1975 (providing "in time of war, insurrection, or rebellion, no elector shall be deprived of his right to vote by reason of his service in the army or navy at such time, in this [s]tate or the United States"); KAN. CONST. of 1859, art. 5, § 3, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 1251 ("[T]he legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this state.").

331 The requirement in Maine that electors vote "in the town or plantation where his residence is so established," applied only to electors "for Governor, Senators, and Representatives." ME. CONST. of 1819, art. II, § 1, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1649. The 1864 soldier-voting amendment was framed accordingly. *Id.* at art. II, § 4, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1649. Missouri was similar. *See* MO. CONST. of 1865, art. II, §§ 18, 21, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2198 (stating electors for "all officers, State, county, or municipal ... shall not vote elsewhere than in the election district of which he is at that time a resident," yet a "qualified voter ... absent from the place of his residen[ce] by reason of being in the volunteer army of the United States, or in the militia force of this State, in the service thereof, or of the United States, whether within or without the State, shall, without registration, be entitled to vote in any election occurring during such absence").

332 W.V. CONST. of 1863, art. XI, § 6, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4031.

333 *Id.* at art. III, § 2, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4016.

334 NEV. CONST. of 1864, art. IV, § 34, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2409.

335 *Id.* at art. II, § 5, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2405.

336 *Id.* at art. XV, § 14, *reprinted in* 4 Constitutions, *supra* note 152, at 2423.

337 Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 42.

338 *Id.* at 51.

339 *See* JOSIAH HENRY BENTON, *VOTING IN THE FIELD, A FORGOTTEN CHAPTER OF THE CIVIL WAR* 11-12 (1915) (stating the view that constitutional amendments permitting soldier-voting were required for state but not federal elections, but noting that the distinction "does not appear to have been generally recognized at the time of the Civil War"); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 599 & n.3 (2d ed. 1872) (relying on the Vermont and New Hampshire soldier-voting cases to suggest a solder-voting statute in violation of a state constitution would be valid for federal elections). Notably, the first edition of Cooley's treatise, published in 1868, had not mentioned the doctrine; rather, Cooley's understanding then was that if a state constitution required a voter to participate at the place of his residence, then "any statute permitting voters to deposit their ballots elsewhere must necessarily be void." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 600 & n.1 (1st ed. 1868). In 1880, a different Cooley treatise stated that a state legislature's statute "must control" over a conflicting state constitution. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 250-51 (1880) (citing *Baldwin* but omitting any discussion of the soldier-voting cases cited in his earlier treatise).

340 In 1875, George W. McCrary of Iowa, former chairman of the Committee on Elections (42nd Congress), published an election law treatise that included a description of the soldier-voting issue and the House of Representative's decisions in *Baldwin* and *Shiel*. *See* GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS §§ 109-111 (1875). McCrary declined to opine on whether "the reasoning in *Baldwin vs. Trowbridge* ... [was] sound or not." *Id.* at § 112.

341 Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 837-38 (2015) (Roberts, C.J., dissenting).

342 *In re* Op. of the Justs., 45 N.H. 595, 596 (1864).

343 *See generally id.* (identifying no such conflict).

344 *See In re* Op. of the Justices, 44 N.H. 633, 635-36 (1863). The state constitutional provisions that might block soldier-voting by requiring voting "within the district" or "in the town or parish wherein he dwells" were not "all elections" provisions, but rather were limited by their terms to elections for specific state officials. *See* N.H. CONST. of 1792, § XIII (providing the structure for elections for state representative), *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2477; *id.* § XXVIII (providing the structure for elections for state senators), *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2479. This opinion was similar to the opinion issued in the Vermont soldier-voting case, in which the Vermont Supreme Court found the state constitution was "entirely silent" on federal elections. *See* Op. of the Judges, 37 Vt. 665, 676 (1864). *But see* Morley, *The Independent State Legislature*, *supra* note 62, at 536 n.284. (citing, erroneously, the Vermont soldier-voting case as an example of a state court applying the doctrine).

345 Op. of the Justices, 45 N.H. at 601 (quoting U.S CONST. art. I, § 2).

346 *See id.* at 602 ("If the provisions of the [s]tate [c]onstitution make it a *qualification* of the voter for senators, within the meaning of the word *qualifications* as used in the Constitution of the United States, that the vote should be cast in the

place where the voter resides, then the legislature have not constitutional power to authorize votes for [r]epresentatives to be given in other places than those where the voters dwell.").

347 *Id.* at 605. *But see* Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 41-42 (assuming the court's "untrammeled" language was an invocation of the independent legislature doctrine).

348 *See In re* Op. of the Justs., 45 N.H. 595, 601 (posing the question of "[w]hether the Constitution of the United States authorizes the State legislature to prescribe such places for holding elections of Representatives in Congress as are provided for in this bill"). In 1921, the New Hampshire Supreme Court revisited the question of whether the state constitutional place of voting restrictions were "qualifications" and expressed doubt about the conclusion it reached in 1864. However, the court again made clear that its concern did not extend to presidential elections, for which the qualifications clause had no potential application. *See In re* Op. of the Justs., 113 A. 293, 299 (1921) ("The manner of voting prescribed by the bill is contrary to the state Constitution ... they would be valid as to the election of presidential electors; we are unable to say the provisions would be held valid as to the election of the Senators and Representatives in Congress.").

349 An Act to enable the qualified voters of this State engaged in the military service of the county to vote for electors of President and Vice President of the United States, and for Representatives in Congress, § 8, *reprinted in* LAWS OF THE STATE OF NEW HAMPSHIRE PASSED JUNE SESSION 3063 (Concord 1864). The act also required the governor "to obtain an opinion upon the constitutionality of the bill." *Id.*

350 N.H. CONST. of 1792, § XLIV, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2482.

351 *See In re* Op. of the Justs., 45 N.H. at 613-14; BENTON, *supra* note 339, at 208-12 (describing the governor's attempt to veto the bill).

352 In this section, I take at face value the legal arguments made by various congressmen explaining their votes in *Baldwin*. Later in this Article, see *infra* Part.IV.B.1.b.iii, I examine the partisan motivations at work in that and other House contested election cases from the 1860s.

353 *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 838, (Roberts, C.J., dissenting) (assuming "[t]he Committee decided, *and the full House agreed*" with the majority report's reasoning) (emphasis added). Justice Ginsburg's opinion also conflated the committee majority's report, which she described as its "ruling," with the House's vote including by describing the committee majority, as opposed to the House majority, as being "responsible for the decision." *Id.* at 818 (majority opinion). Professor Morley also assumes without basis that "[a] decisive majority of the House concluded that the Elections Clause required it to follow the state statute rather than the contrary state constitutional provision." Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 51.

354 People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127, 160 (1865).

355 *See* H.R. REP. NO. 39-13, at 3 (1866) (reproducing the majority report in *Baldwin v. Trowbridge*).

356 *See* H.R. REP. NO. 39-14, at 4-5 (1866) (reproducing the minority report in *Baldwin v. Trowbridge*). Among other things, the minority report recounted that the House had rejected the Doctrine a few years before in *Shiel v. Thayer*, and that Americans had "everywhere supposed that they had the power to fix a limitation upon the action of their legislature, in determining the times, places, and manner of holding elections for all offices." *Id.* at 3. Baldwin himself argued during debate in the House that "for three fourths of a century during which our Government has existed under the Constitution, no attempt has been made by any State Legislature, I believe, to make a distinction between the two classes of electors [one for state and for federal elections]." CONG. GLOBE, 39th Cong., 1st Sess. 827 (1866).

357 CONG. GLOBE, 39th Cong., 1st Sess. 845.

358 Morley, *Federal Elections, and State Constitutions, supra* note 15, at 51 (stating *Baldwin* involved a "direct and dispositive conflict between a state constitutional provision and a state statute regulating a federal election").

359 *See* H.R. REP. NO. 39-13, at 3 (1866) ("Now, the constitution of Michigan either fixes the place of holding the election or it does not. If it does not, there is no conflict between the law and the constitution, and the argument is at an end.").

360 CONG. GLOBE, 39th Cong., 1st Sess. 821.

361 *Id.*

362 *Id.*

363 *Id.* at 821-22.

364 *Id.* at 822. Dawes lent further support to Trowbridge by stating that the *Baldwin* majority report did not conflict with the report Dawes authored in *Shiel*. *Id.* Although Dawes's report in *Shiel* stated that a state constitution would override conflicting "manner" legislation, Dawes allowed that the language had been unnecessary because, in *Shiel*, the Oregon legislature had not passed any "manner" legislation at all, let alone conflicting "manner" legislation. *Id.* at 821.

365 *Id.* at 840.

366 MICH. CONST. of 1850, art. VII, § 1, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 1956.

367 People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127, 135 (1865).

368 CONG. GLOBE, 39th Cong., 1st Sess. 844.

369 *The Case of Representative Baldwin,* WORLD, Feb. 20, 1866, at A4.

370 *Mr. Dawes and the Case of Baldwin, of Michigan,* WORLD, Feb. 26, 1866, at A4. The newspaper in Dawes's home district in Massachusetts correctly recognized that Dawes voted with the majority "because he did not think the State constitution in conflict with the provisions of the soldiers' voting act" but was dismissive of Dawes's "no-conflict" argument and asked, "Would not Mr. Dawes be ashamed to use such *logic* as this before any Police Court in Berkshire?" *The Michigan Contested Election,* PITTSFIELD SUN, Mar. 1, 1866. I made the same mistaken assumption as *The World* in my 2001 article. *See* Smith, *supra* note 1, at 774 n.293 (reporting incorrectly that Dawes "sign [ed] on to the majority report in the *Baldwin* case").

371 ALA. CONST. of 1867, art. VIII, § 6, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 147.

372 S.C. CONST. of 1868, art. VIII, § 9, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3298.

373 VA. CONST. of 1870, art. V, § 13, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3885. This provision was similar to those contained in the Virginia constitutions of 1830 and 1850, but without the "three-fifths" clause that had appeared

in the earlier versions of the constitution. It also appeared in the Virginia constitution of 1902. VA. CONST. of 1902, art. IV, § 55, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3914.

374 TENN. CONST. of 1870, art. X, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3467.

375 PA. CONST. of 1873, art. VIII, § 17, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3140-41. When this provision was debated at the state constitutional convention in 1873, Delegate William Darlington sought to limit it to contested elections for state officers on the grounds that it was Congress, not a state court, who was supposed to address contested elections of electors and that, if courts were involved, it "would be very easy to protract the investigation and inquiry" such that "it might be put over beyond the time when [the electors] are to discharge their duties." 5 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA: CONVENED AT HARRISBURG, NOVEMBER 12, 1872; ADJOURNED NOVEMBER 27, TO MEET AT PHILADELPHIA, JANUARY 7, 1873, at 196 (Harrisburg, Benjamin Singerly 1873). Darlington's motion to limit the provision was defeated after another delegate, C.R. Buckalew, argued the Elector Appointment Clause made the appointment of electors "a subject for State regulation, and for State regulation alone"; hence, Congress had "no power over the subject of the appointment or election of electors ... the manner in which they shall be chosen, how returns shall be made, or how contests in regard to votes cast for them shall be tried." *Id.* Buckalew also argued for the adoption of such provisions in every state because in any future presidential election, a "dispute in any one State with reference to the choice of electors may precipitate the people of the United States into a revolution." *Id.* Just before the convention voted to approve the provision, a third delegate, Wayne MacVeagh, rose to explain why he was voting against it. *Id.* at 199-200. MacVeagh said he would have been "disposed to vote for it" if "the judges could have been made non-partisan," but he disapproved of giving the "entire power of [the people's] political action" into the hands of an "elective judiciary." *Id.* at 200. MacVeagh went on to argue that the Constitution was "very specific" that electors "shall be appointed in such manner as the Legislature shall appoint," and that this was because the Framers contemplated a "division of the powers of government between the legislative and the judicial branches" and sought to put the appointment power "into the legislative department as ... a political question to be kept away from the judiciary." *Id.* Samuel Wherry replied that the purpose of the proposed provision was not to "hand the political power of the government over to the judiciary" but to recognize "the principle that the right to hold office is a right to be determined by law, as any other right is to be determined." *Id.*

376 COLO. CONST. of 1876, art XIX, Schedule, §§ 19-20, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 512. For the 1876 election, the constitution specified that the legislature would provide for legislative appointment of electors "by act or joint resolution" and that "the approval of the governor thereto shall not be required." *Id.* at 512.

377 CAL. CONST. of 1879, art. IV, § 27, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 421.

378 LA. CONST. of 1879, art. 191, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1502. The same provision appeared in Louisiana's constitution of 1898. LA. CONST. of 1898, art. 206, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1566.

379 MONT. CONST. of 1889, art. VI, § 1, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2310.

380 S.D. CONST. of 1889, art. XIX, § 1, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3388; N.D. CONST. of 1889, art. 18, § 214, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2885.

381 WYO. CONST. of 1889, art. III, Apportionment, §§ 1, 3, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4126; WYO. CONST. OF 1889, art. VI, § 17, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4134 (providing that Congressional elections were part of the "general elections" to be "held on the Tuesday next following the first Monday in November of each even year.").

382 MISS. CONST. of 1890, art. iv, § 99, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2101.

383 VA. CONST. of 1870, art. III, § 2, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3876; PA. CONST. of 1873, art. VIII, § 4, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3139, 3152 (specifying other procedures as well, such as mandating that "[e]very ballot shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot"); GA. CONST. of 1868, art. II, § 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 825; GA. CONST. of 1877, art. II, § 1, par. 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 845; KY. CONST. of 1890, § 147, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1336 ("[A]ll elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited."). As Michael Weingartner has documented, when debating reconstruction legislation in 1867, several senators, including Senator Oliver P. Morton of Indiana, discussed requiring re-admitted states to include in their post-War constitutions requirements that all elections, including congressional elections, be "by ballot," without anyone suggesting this would violate the Elections Clause. Weingartner, *supra* note 268, at 53-55, 54 nn.413-414.

384 Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 45.

385 *Id.* at 42-44.

386 *Id.* at 42.

387 State v. Williams, 49 Miss. 640, 664-65 (1873).

388 *Id.* at 665-66.

389 *Id.* at 666-67.

390 Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, *supra* note 259, at 149.

391 Morley, *Rethinking the Right to Vote Under State Constitutions*, *supra* note 22, at 200.

392 R.I. CONST. of 1842, art. VIII, § 10, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3231.

393 *In re* Plurality Elections, 8 A. 881, 881 (R.I. 1887).

394 *Id.* at 883.

395 *Id.* at 882 ("We think it doubtful ... section 10 was intended to extend to elections of representatives to [C]ongress; but, if it was, to that extent it is, in our opinion, of no effect ....").

396 McPherson v. Blacker, 52 N.W. 469 (Mich. 1892), *aff'd*, 146 U.S. 1 (1892).

397 McPherson v. Blacker, 52 N.W. 469, 472 (Mich. 1892), *aff'd*, 146 U.S. 1 (1892); *see generally* Peter H. Argersinger, *Electoral Reform and Partisan Jugglery*, 119 POL. SCI. Q. 499 (2004) (describing the partisan calculations that gave rise to the Michigan legislature's adoption of the district-based system and the subsequent litigation aimed at undoing the legislation); KEYSSAR, *supra* note 218, at 141 ("What transpired was not a debate regarding the merits of different

modes of choosing electors but partisan warfare grounded in assessments of the electoral impact of abandoning the general ticket.").

398 *McPherson*, 52 N.W. at 470-73.

399 *Id.* at 470. For the state constitutional provision at issue, see MICH. CONST. of 1850, art. 4, § 20, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 1948.

400 As is now well known, in rejecting the subsequent appeal of the federal questions, the Supreme Court block-quoted from an 1874 report by Senator Oliver P. Morton, including language in the report stating that the Article II powers of state legislatures "cannot be taken from them or modified by their State constitutions." McPherson v. Blacker, 146 U.S. 1, 35 (1892); *see also* Smith, *supra* note 1, at 775-77 (describing the dicta at length). Professor Morley argues the Supreme Court "enthusiastically endorsed" the independent legislature doctrine in *McPherson*, see Morley, *Federal Elections, and State* Constitutions, *supra* note 15, at 70, but this is not supported by any reasonable reading of the case. The circumstances of Senator Morton's report have been discussed at length elsewhere, and I will not beat that dead horse any further. Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1836-37; Smith, *supra* note 1, at 777-79.

401 State *ex rel.* Schrader v. Polley, 127 N.W. 848, 849 (S.D. 1910).

402 *Id.* at 851-52.

403 R.I. CONST. of 1842, art. IV (adopted Aug. 1864), *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3235-36.

404 *In re* Op. to the Governor, 102 A. 913, 914 (R.I. 1918).

405 *In re* Op. to the Governor, 103 A. 513, 516 (R.I. 1918).

406 *In re* Op. of the Justs., 107 A. 705, 705 (Me. 1919).

407 *Id.* at 706.

408 Hawke v. Smith, 253 U.S. 221 (1920).

409 *See infra*, Part IV.A. The frequency with which state courts had occasion to apply state constitutions to "manner" legislation in the late nineteenth and early twentieth centuries should not be overstated. It is true that there were numerous cases during that era in which state courts entertained state constitutional claims in the context of *state* elections. *See* Weingartner, *supra* note 268, at 42-43, 43 n.320 (identifying such state court cases from the 1860s to the 1920s); *see also* Samuel S.-H. Wang, Richard F. Ober, Jr., & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 J. CONST. L. 203, 253-57 (2019) (identifying such state court cases from the 1910s and 1920s). However, apart from the matters that I have summarized in the text, I am not aware of any other state court matters from the 1920s or earlier in which state constitutions were applied specifically to "manner" legislation. There were a number of such cases in the 1930s (see *infra* note 453) and subsequent to the 1930s (which are summarized in the two articles cited in this footnote).

410 *See* H.R. REP. NO. 43-7, at 1 (1874) (reproducing the majority report, concurring report, and minority report in *West Virginia Contested Elections*).

411 *See id.* at 5 (reproducing the majority report and explaining that the constitutional language specifying an August election "excludes, because it does not include, Representatives in Congress, who are not 'required by this constitution to be elected by the people'").

412 *Id.* at 17 (reproducing the concurring report by Speer arguing that "The State constitution had not given to the legislature the power to say when Congressmen shall be elected, (for it did not have it to give,) and neither State constitution nor State convention could take it away").

413 *Id.*

414 *Id.* at 23; *see also id.* at 24 (reproducing the minority report by Hazeltine arguing that the "constitutional convention had authority to prescribe a time, after its ratification, for the election of Representatives").

415 *See* Muller, *supra* note 22, at 730 (citing ASHER C. HINDS, 1 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 522, at 660 (1907) [hereinafter HIND'S PRECEDENTS]). Professor Muller identified a similar matter (*Patterson v. Belford*) in which the House upheld an 1876 election held in Colorado pursuant to the state constitution. *See id.* at 730 (citing 1 HIND'S PRECEDENTS §§ 523-24, at 660-67); H.R. REP. NO. 45-15 (1877) (displaying majority and minority reports in *Patterson v. Belford*).

416 Professor Morley mischaracterizes this matter as one in which the House "expressly relied upon the [Doctrine] in resolving a dispute," Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 55, and exhibited a "general consensus" in favor of the Doctrine. *Id.* at 59. While it is certainly true that during the debate several Congressmen agreed with Representative Speer's articulation of the Doctrine, *see id.* at 57-58 (citing comments made during floor debate), that position did not carry the day, and those elected in August--as allegedly required by the new state constitution--were the ones who were seated.

417 *See* H.R. REP. NO. 46-1791, at 17-18 (1880) (reproducing committee reports in *Donnelly v. Washburn*).

418 *Id.* at 17-18 (reproducing report by Congressman Manning).

419 *Id.* at 58-59 (reproducing report by Congressman Keifer). Earlier in his career, Donnelly served three terms as a Republican member of Congress, first elected in 1862 by a margin attributed to the Minnesota soldier vote. Lynwood G. Downs, *The Soldier Vote and Minnesota Politics, 1862-65*, 26 MINN. HIST. 187, 197-98 (1945); *Donnelly, Ignatius* 1831-1901, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/D000417 [https://perma.cc/KZL7-N5LW]. In 1866, during Donnelly's second term, he voted in favor of Trowbridge in *Baldwin v. Trowbridge, 39th Congress, House, Vote 68*, VOTEVIEW, https://voteview.com/rollcall/RH0390068 [https://perma.cc/H7P7-A8RK]. Now, fourteen years later, in a contested election case to regain a seat in Congress, he found himself on the receiving end of the independent state legislature doctrine.

420 Muller, *supra* note 22, at 728. Evidence suggests that the Democratic majority in the House would have wanted to side with Donnelly (once a Republican but now a Greenbacker), over Washburn (a Republican), but Donnelly's effort before the Elections Committee was derailed at the last minute when an anonymous letter was unearthed which purported to be an attempt to bribe the chairman of the election committee (William Springer of Illinois) to vote in favor of Washburn in return for $5,000. John D. Hicks, *The Political Career of Ignatius Donnelly*, 8 MISS. VALLEY HIST. REV. 80, 99-100 (1921). Although Donnelly denied any involvement in a false flag operation, "the suspicion settled into belief that Donnelly's chief counsel had taken this dishonorable means to show Springer that Washburn was really capable of offering a bribe," with the result that Washburn held his seat. *Id.*

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421 *See* H.R. REP. NO. 46-19, at 2 (1880) (reproducing the majority and minority reports in *Iowa Contested Election Cases*).

422 *Id.* at 8-9, 17-18.

423 *Id.* at 18.

424 *Id.* at 15.

425 *Id.* at 18. Based on this last comment, Professor Morley describes *Iowa Contested Election Cases* as a matter in which the "House relied on the independent state legislature doctrine." Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 60; *see also* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, *supra* note 22, at 203 (stating that the House's decision in *Iowa Contested Election Cases* "reaffirmed" the independent state legislature doctrine). Professor Morley also identified a 1904 contested election case in which the committee report declined to address the contestants' arguments over the Doctrine because it was unnecessary to do so. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 46 n.228 (citing H.R. REP. NO. 58-1382 (1904) (reproducing the committee report in *Davis v. Sims*)).

426 *See* H.R. REP. NO. 46-345, at 1 (1880) (reproducing the majority report and minority report in *Curtin v. Yocum*).

427 *See id.* at 10 (reproducing the majority report, arguing that the election should be thrown out because Yocum's win was obtained "in violation of the constitution and mandatory statues of Pennsylvania"); *id.* at 13 (reproducing the minority report, arguing that, by virtue of the state constitution, the legislature could not "pass a registry law whereby a voter shall be deprived of suffrage, if otherwise qualified, by reason of non-registration").

428 In particular, both reports argued over the Pennsylvania constitution's requirements that "[a]ll laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the State, but no elector shall be deprived of the privilege of voting by reason of his name not being registered." PA. CONST. of 1873, art. VIII, § 7, *reprinted in* 2 JOURNAL OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA: CONVENED AT HARRISBURG, NOVEMBER 12, 1872; ADJOURNED NOVEMBER 27, TO MEET AT PHILADELPHIA, JANUARY 7, 1873, at 1322 (Harrisburg, Benjamin Singerly 1873). The House followed the minority report's recommendation in *Curtin v. Yocum*. *See* 2 HIND'S PRECEDENTS, *supra* note 415, § 941, at 223 ("[T]he minority views prevailed.").

429 *See* H.R. REP. NO. 48-2613, at 2 (1885) (reproducing the majority report and minority report in *McLean v. Broadhead*).

430 *Id.* at 4.

431 *Id.* at 14. The House did not take any action in *McLean v. Broadhead*. *See* 2 HIND'S PRECEDENTS, *supra* note 415, § 996 at 381 ("The report was not acted on by the House.").

432 *See* H.R. REP. NO. 49-2338 (1886) (reproducing committee report in *California Contested-Election Cases*).

433 *Id.* at 1-4.

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434 *Id.* at 4. The House followed the committee's recommendation in *California Contested-Election Cases*. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 46 n.226 (citing 17 CONG. REC. 4381 (1886)).

435 *See* H.R. REP. NO. 50-1887 (1888) (committee report in *Frank v. Glover*). The House followed the committee's recommendation in *Frank v. Glover*. *See* 2 HIND'S PRECEDENTS, *supra* note 415, § 1011, at 427.

436 *See* H.R. REP. NO. 54-1229 (1896) (majority report and minority report in *Johnston v. Stokes*). The House followed the committee majority's recommendation in *Johnston v. Stokes*. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 67 (citing 28 CONG. REC. 5952 (1896)). Also in 1896, the House Election Committee considered whether the Virginia constitution's secret ballot requirement was violated by certain provisions of the state's election law. *See* Weingartner, *supra* note 268, at 60 & n.448 (discussing H.R. REP. NO. 54-1473 (1896) (reproducing the majority and minority reports in *Cornett v. Swanson*)).

437 *See* H.R. REP. NO. 56-3000 (1901) (committee report in *Davison v. Gilbert*). The committee's report expressed doubt that the Elections Clause gave *Congress* the power to overrule the manner in which a state chose to divide its representation in Congress. *See id.* at 2 (arguing that Congress has only "the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself"). The full House took no action in *Davison v. Gilbert*. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 45 n.219.

438 H.R. REP. NO. 65-1074 (1919) (committee report in *Gerling v. Dunn*).

439 *Id.* at 2 ("It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution."). The House followed the committee's recommendation in *Gerling v. Dunn*. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 47 n.231 (citing 57 CONG. REC. 3578 (1919)).

440 H.R. REP. NO. 67-1101 (1922) (reproducing the majority report and minority report in *Paul v. Harrison*).

441 *Id.* at 9. The House followed the committee's recommendation in *Paul v. Harrison*. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 48 n.233 (citing 64 CONG. REC. 545-47 (1922)).

442 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 67 (describing *Curtin v. Yocum* as having "recognized and enforced [a] restriction on the [Doctrine]" that distinguishes between state constitutional limits on voter registration statutes that effectively add to voter qualifications (which Professor Morley says are permissible) and other state constitutional limitations on "manner" legislation (which Professor Morley says are impermissible)); *id.* at 46 & n.229 (suggesting that in *McLean v. Broadhead*, "rather than invoking the doctrine" to avoid the state constitutional question, the House instead decided to "simply reject[] a state constitutional challenge on the merits"); *id.* at 46 (arguing that *California Contested-Election Cases* is "[c]onsistent with" the Doctrine because it is an example of the House "enforc[ing] state constitutions' procedural requirements concerning the legislative process that legislatures had to follow," which is different than the House "declin[ing] to enforce state constitutions' substantive restrictions on the scope of legislatures' authority over federal elections"); *id.* at 46 & n.229 (suggesting that in *Frank v. Glover*, "rather than invoking the doctrine" to avoid the state constitutional question, the House instead decided to "simply reject[] a state constitutional challenge on the merits"); *id.* at 67 (describing *Johnston v. Stokes* as an instance in which the House "observed" the "limitation" that Professor Morley sees on the Doctrine, pursuant to which it would be permissible for state constitutions to constrain voter registration statutes if they effectively add voter qualifications beyond those contained in the constitution); *id.* at 46 & n.229 (arguing that *Davison v. Gilbert* is an example of the House deciding to "simply reject[] a state constitutional challenge on the merits" instead of relying

on the Doctrine); *id.* at 47-48 (characterizing *Gerling v. Dunn* as an example of how, in the twentieth century, the House "reformulated" the Doctrine into a "discretionary refusal to consider state constitutional challenges" except for "extreme cases of pervasive, structural unfairness"); *id.* at 47-48 & n.233 (characterizing *Paul v. Harrison* as an "extreme case[] of pervasive, structural unfairness" in which the House enforced state constitutional provisions).

443 Jack M. Balkin, *The New Originalism and the Uses of* History, 82 FORDHAM L. REV. 641, 664 (2013) (citing Laura Kalman, 66 FORDHAM L. REV. 87, 114 (1997)).

444 *Id.*

445 *Id.* at 666, 668.

446 United States Terms Limits, Inc. v. Thornton, 514 U.S. 779, 915 (1995) (Thomas, J., dissenting).

447 Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015) ("[A]ll agree that historical inquiries are necessary and appropriate to determine whether historical practice has 'liquidated' the meaning of otherwise vague or ambiguous constitutional provisions ...."); *see generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (exploring the historical importance of constitutional liquidation).

448 Fallon, *supra* note 447, at 1775, 1778 ("longstanding historical practice can at least sometimes constitute a 'gloss' on constitutional language"; "glosses need not necessarily originate in the near aftermath of the Founding"). Michael Weingartner argues that the nineteenth and twentieth-century history has "liquidated" the meaning of the Elector Appointment and Elections Clauses *against* the independent state legislature doctrine. Weingartner, *supra* note 268. Putting aside questions about the "exact mechanics" of liquidation theory, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49 (2019) (outlining the "harder questions" that will need to be answered if "if liquidation is to become or remain a part of constitutional interpretation today"), I would say that resort to liquidation theory is inapposite because the meaning of these clauses was clear to Americans at the Founding, at least with respect to whether laws created by "legislatures" were to be treated differently than other laws. *See id.* at 66-67 (discussing how liquidation theory can apply only when there is a "constitutional indeterminacy" remaining after "resorting to the sense in which the Constitution was accepted and ratified by the nation" (quoting James Madison) (internal quotation marks omitted)). Moreover, as explained later in the next section, the original understanding against the Doctrine has been reflected in Supreme Court precedent for about a century, such that subsequent consistent practice by other actors is not as constitutionally meaningful as it might otherwise be. *See* Joseph Blocher & Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L. J. ONLINE 1, 12 (2016) (explaining that constitutional interpretation based on historical practice is most significant in areas where judicial review is most limited, such as separation of powers, because, once the Supreme Court speaks on an issue, its "precedent is what governs--the practices no longer have the same independent significance"). Nevertheless, the historical consensus--that "manner" legislation should be treated no differently than any other legislation--is historical wisdom that should warn the Supreme Court away from disregarding the original understanding or jettisoning its own precedent. Moreover, the history is a red flag to the extent it suggests that the typical invocation of the Doctrine is motivated by base political purposes.

449 June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

450 *See* Hawke v. Smith, 253 U.S. 221, 231 (1920) (holding that a state does not have "authority to require the submission of the ratification to a referendum under the state constitution"); *see also* Leser v. Garnett, 258 U.S. 130, 136-37 (1922) (rejecting the argument that legislative ratification of the Nineteenth Amendment was invalid because of failure to comply with state constitutional requirements). In 1916, the U.S. Supreme Court had rejected arguments that Congress's own "manner" legislation could not recognize the Ohio constitutional referendum mechanism as part of the state's legislative power for purposes of creating congressional districts pursuant to the Elections Clause. Ohio ex. rel. Davis

v. Hildebrant, 241 U.S. 565, 569-70 (1916). The Court also rejected as non-justiciable the argument that the presence of a constitutional referendum requirement "causes a State ... to be not republican in form." *Id.* at 569.

451 *Hawke*, 253 U.S. at 230.

452 Smiley v. Holm, 285 U.S. 355 (1932).

453 *Smiley*, 285 U.S. at 373. In *Smiley v. Holm*, 285 U.S. 355, 373 (1932), the U.S. Supreme Court reversed the Minnesota Supreme Court, which had held, citing *Hawke*, that a state legislature prescribing "manner" regulations pursuant to the Elections Clause should enjoy the same freedom from constitutional restraint as a state legislature deciding whether to ratify a constitutional amendment pursuant to Article V. Minnesota v. Holm, 238 N.W. 494, 499 (Minn. 1931). By contrast, the highest courts of Missouri and New York had held in January 1932 that the distinction that *Hawke* drew between "assent or dissent" under Article V and "legislative action" under Article I, Section 4 precluded the argument that the Elections Clause created independent legislatures, and those decisions were affirmed by the U.S. Supreme Court at the same time it reversed in *Smiley*. State *ex. rel.* Carroll v. Becker, 45 S.W.2d 533, 537 (Mo. 1932), *aff'd*, 285 U.S. 380 (1932); Koenig v. Flynn, 179 N.E. 705, 707-08 (N.Y. 1932), *aff'd*, 285 U.S. 375 (1932); *see also* Brown v. Saunders, 166 S.E. 105, 107 (Va. 1932) (following *Smiley*). Also, just before *Smiley*, the Illinois Supreme Court had struck down that state legislature's Congressional redistricting plan as inconsistent with the requirements of "manner" legislation passed by Congress. Moran v. Bowley, 179 N.E. 526, 531 (Ill. 1932). The Illinois court added that the legislature had also violated the Illinois constitution's requirement that all elections be "free and equal" by "giving every voter a voice approximately equal to that of every other voter." *Id.* at 531-32. In response, a dissenting judge invoked the Doctrine, arguing that, because the state legislature was acting under the Elections Clause, it was "not limited by local constitutional provisions." *Id.* at 534 (DeYoung, J., dissenting).

454 Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015).

455 *Id.* at 817-18. This renders obsolete not only *Baldwin* and the other nineteenth-century invocations of the Doctrine, but also the twentieth-century court cases which relied on the Doctrine, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), and *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948). Those seeking a precedent to which we should return seem to prefer the nineteenth-century "precedent" of *Baldwin* to those more modern cases. As for the Kentucky case--the World War II soldier-voting case--it may have something to do with the Kentucky court's acceptance of the proposition that "legislature" means a state's "legislative authority," including a referendum, see *O'Connell*, 181 S.W.2d at 695, or perhaps it is because the case--which contains the first articulation of the substance/procedure distinction--highlights that the distinction did not arise at the Founding, see *supra* note 17. As for the nineteenth-century case, it is likely considered too insubstantial to serve as the precedent. *See Marsh*, 34 N.W.2d at 287 (stating that the Elector Appointment Clause made it unnecessary to consider whether a statute prohibiting nomination of candidates for elector not affiliated with any party conflicted with the state constitution's requirement that "all elections shall be free").

456 *Ariz. State Legis.*, 576 U.S. at 841 (Roberts, C.J., dissenting).

457 *Id.* ("Under the Elections Clause, 'the Legislature' is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process.").

458 *Id.* at 848.

459 Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

460 *Id.* at 2507.

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461 *Id.* (citing League of Women Voters of Florida v. Detzner, 172 So. 3d 363 (2015)). The majority in *Rucho* included all four Justices who recently expressed support for the independent legislature doctrine (Justices Thomas, Alito, Gorsuch and Kavanaugh). It is not clear how these four Justices would reconcile the *Rucho* opinion with support for the Doctrine. Derek Muller has suggested that they might attempt to draw a distinction between state courts enforcing "specific antigerrymandering or districting provision [s]" and "more open-ended state judicial involvement." Derek Muller, Rucho v. Common *Cause and a Weak Version of the Claims in the North Carolina Partisan Gerrymandering Dispute*, ELECTION L. BLOG (Mar. 8, 2022), https://electionlawblog.org/?p=128045 [https://perma.cc/9GHY-Y84L].

462 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 92 (arguing that the best "compromise approach" to implementing the Doctrine would involve the "reversal" of *Arizona State Legislature*); *id.* at 7 (dismissing *Rucho's* embrace of state constitutional limitations on gerrymandering as "dicta" that did "not consider possible objections under the U.S. Constitution"); Rappaport, LAW & LIBERTY, *supra* note 15 ("While the Supreme Court's [decision in *Arizona State Legislature*] allows states to combat gerrymandering through popular referenda and redistricting commissions, it does so in an unconstitutional manner.").

463 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 78 (arguing that Supreme Court cases before *Arizona State Legislature* merely required a legislature to "follow the legislative process set forth in its state constitution when regulating federal elections" but did not address "whether a state constitution may impose substantive limits on the content of [such] measures"); s*ee also Ariz. State Legis.*, 576 U.S. at 808, 841 (Roberts, C.J., dissenting) (acknowledging that the Court's precedent required "manner" legislation to be enacted "in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto," but emphasizing that this description of prior cases was true only "so far as it goes," and insisting that the legislature "may not be cut out of that process").

464 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 92 n.551. If the Court went down this route, it might also make the mistake of characterizing the House's decision in *Baldwin* as a reflection of the alleged nineteenth-century "prevailing view" portrayed in Professor Morley's work.

465 *See Ariz. State Legis.*, 576 U.S. at 837 (Roberts, C.J., dissenting) (citing the majority report in *Baldwin* as "precedent ... from Congress" reinforcing that "'the Legislature' refers to a representative body").

466 *Id.* Similarly, Justice Ginsburg's majority opinion cited to *Shiel v. Taylor* as precedent. *Id.* at 818-19.

467 In some cases before *Arizona State Legislature*, the Supreme Court referred to similar House contested election decisions as "precedent," but on the basis that the House's actions might reflect "the draftsmen's intent" at the Founding. *See* Powell v. McCormack, 395 U.S. 486, 547 (1969) ("[T]he precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.") (citing Myers v. United States, 272 U.S. 52, 175 (1926)); *see also* United States Term Limits, Inc. v. Thornton, 51 U.S. 779, 816-817 (1995) (emphasizing the relevance of "the first 100 years" of the House's practices, particularly its1807 debate over whether to seat William McCreery of Maryland); *id.* at 915 (Thomas, J., dissenting) (characterizing early House actions as potentially relevant to "the original understanding of the Constitution," but dismissing the relevance of more recent House actions). By contrast, in *Arizona State Legislature*, Chief Justice Roberts cited the House's decision in *Baldwin*, not as evidence of original intent, but as "precedent" in the stare decisis sense. He argued that, as the more recent precedent, *Baldwin* should control over the earlier precedent of *Shiel v. Thayer*. *See Ariz. State Legis.*, 576 U.S. at 839 (Roberts, C.J., dissenting) ("[T]o the degree that the two precedents are inconsistent, the later decision in *Baldwin* should govern.").

468 *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 51 ("[T]he precedent powerfully supports the independent state legislature doctrine."); Muller, *supra* note 22, at 736.

469 *See* Muller, *supra* note 22, at 736 ("Congress is acting as judge in these election disputes; it takes evidence, holds hearings, and issues opinions, often citing its own precedents."). Chief Justice Roberts also argued that *Baldwin* was

"precedent" because the House was "[a]cting under its authority to serve as 'Judge of the Elections, Returns and Qualifications of its own Members.'" *Ariz. State Legis.*, 576 U.S. at 837 (Roberts, C.J., dissenting) (quoting U.S. CONST. art. I, § 5, cl. 1).

470 U.S. CONST. art. I, § 5, cl. 1.

471 Chief Justice Roberts was dismissive of acknowledging partisanship in *Baldwin* because it would require one to "regard as tainted every decision in favor of a candidate from the same party as a majority of the Elections Committee." *Ariz. State Legis.*, 576 U.S. at 839 n.3.

472 An Act to prescribe the Mode of obtaining Evidence in Cases of Contested Elections, §§ 1-2, 9 Stat. 568 (1851).

473 *Id.* § 9, 9 Stat. at 570; *see also* Rammelkamp, *supra* note 251, at 423, 426; DEALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 313 (1916) ("There is neither appeal nor review."). Rammelkamp describes the pre-1851 process as "fifty years of chaotic irregularity" and quotes from an argument made in Congress when the 1851 law was debated, in which a member described the then-existing process as "the greatest of all humbugs in this age of humbugs." Rammelkamp, *supra*, at 425 (quoting CONG. GLOBE, 31st Cong., 2d Sess. 109 (1850)) (internal quotation marks omitted).

474 An Act supplemental to and amendatory of an Act entitled "An Act to prescribe the Mode of obtaining Evidence in Cases of contested Elections," 17 Stat. 408 (1873).

475 An act relating to contested elections, 24 Stat. 445 (1887).

476 CONG. GLOBE, 35th Cong., 1st Sess. 562 (1858); *see also* Rammelkamp, *supra* note 251, at 427 (describing House's view that it "may at any time constitutionally disregard both law and precedent" in deciding contested elections).

477 Henry L. Dawes, *The Mode of Procedure In Cases of Contested Elections*, 2 J. SOC. SCI. 56, 6 (1870) ("A Paper Read at the General Meeting of the American Social Science Association, at New York, October 26, 1869.").

478 *Id.* at 1; *see also* Rammelkamp, *supra* note 251, at 427 ("[T]he most that can be said for the laws regulating the procedure is that they will not be disregarded 'without good cause'."); ALEXANDER, *supra* note 473, at 322 ("[A] disposition to ignore the act has long controlled the House.") (providing examples).

479 Dawes, *supra* note 477, at 5.

480 Powell v. McCormack, 395 U.S. 486, 546 n.85 (1969) (quoting Note, *The Power of a House of Congress to Judge the Qualifications of its Members*, 81 HARV. L. REV. 673, 679 (1968) [hereinafter *The Power of a House of Congress*] (noting the difficulty in "[d]etermining the basis for a congressional action," which, "unlike a reported judicial decision, contains no statement of the reasons for the disposition," thus requiring "fall back on the debates and the committee reports")) (internal quotation marks omitted).

481 Dawes, *supra* note 477, at 11; *see also* Thomas B. Reed, *Contested Elections*, 151 N. AM. REV. 112, 114 (1890) (noting that because "the party which organizes the House ... appoints the majority of the Committee on Elections" there was "[p]robably ... not a single instance on record where the minority was increased by the decision of contested cases").

482 Reed, *supra* note 481, at 113 ("Men have no time to examine evidence, and no inclination."); *id.* at 114 (opining that House members were "utterly unqualified ... [and] utterly incapable" of acting "as 'judges and not as partisans'"), *id.*

at 115 ("[T]he incoming of an election case is a leave-of-absence for three-quarters of the House."); SAMUEL W. MCCALL, THADDEUS STEVENS 106 (1899) (opining as to "obvious impossibility" of "the semblance of judicial fairness" from a body "composed of hundreds of members, of whom many were not lawyers, and of whom also not one in twenty would ordinarily have any knowledge of the evidence"); ALEXANDER, *supra* note 473, at 326 ("[M]embers often find it physically impossible, with their other duties, to give to the many cases the study necessary to their proper disposition.").

483 *Dawes, Henry Laurens 1816-1903*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/D000148 [https://perma.cc/8K3K-S5J6].

484 Fred Herbert Nicklason, *The Early Career of Henry L. Dawes, 1816-1871*, at 291-92 (1967) (Ph.D. dissertation, Yale University) (on file with author) ("[P]artisan as [Dawes] was on many issues, the majority of his decisions [in election cases] were informed by a fairness that frequently transcended both party affiliation and personal friendship."); *see also* Bruce Tap, *"Union Men to the Polls, and Rebels to Their Holes": The Contested Election Between John P. Bruce and Benjamin F. Loan, 1862*, 46 CIV. WAR HIST. 24, 33 (2000) ("Although a Republican, [Dawes] was fiercely independent on some issues and was not afraid to challenge others within the Republican party."); *The Committee of Elections*, SPRINGFIELD DAILY REPUBLICAN, Mar. 23, 1866 (describing Dawes as "about half the time ... at loggerheads with the extremists of his party just because he won't go contrary to right").

485 Dawes, *supra* note 477, at 1.

486 Rammelkamp, *supra* note 251, at 435.

487 Dawes, *supra* note 477, at 9.

488 *Id.* at 68.

489 *Vandever, William 1817-1893*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/V000031 [https://perma.cc/9LMR-JDAA].

490 H.R. REP. NO. 37-68 (1862), at 1-2 (reproducing the committee report in *Byington v. Vandever*).

491 *Id.* at 2.

492 U.S. CONST. art. I, § 6.

493 H.R. REP. NO. 37-68, at 5.

494 *Id.*

495 *Id.* at 4.

496 CONG. GLOBE, 37th Cong., 2nd Sess. 2023 (1862).

497 *Id.* at 2022.

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498 *Id.*

499 CONG. GLOBE, 37th Cong., 3rd Sess. 404 (1863).

500 *Id.*

501 *Id.* at 404-05.

502 *37th Congress, House, Vote 433*, VOTEVIEW, https://voteview.com/rollcall/RH0370433 [https://perma.cc/6G2U-PT4E]. The fifty-three voting to delay consisted of forty-eight Republicans and five Unionists. *Id.* The seventy-four voting to proceed consisted of twenty-six Republicans, thirty-four Democrats, fourteen Unionists, two Constitutional Unionists, and one Independent Democrat. *Id.*

503 CONG. GLOBE, 37th Cong., 3rd Sess. 427-28 (1863)

504 *37th Congress, House, Vote 437*, VOTEVIEW, https://voteview.com/rollcall/RH0370437 [https://perma.cc/53TQ-GR3B]. The seventy voting to reconsider consisted of sixty-four Republicans, four Unionists, one Democrat, and one Constitutional Unionist. *Id.* The sixty-four voting against reconsideration consisted of thirty-two Democrats, seventeen Republicans, and fifteen Unionists. *Id.*

505 CONG. GLOBE, 37th Cong., 3rd Sess. 428 (1863). Washburne had "refused [Dawes] the floor at a time when, by parliamentary courtesy, he was entitled to it"; moreover, "the decision of the speaker to that effect was practically sustained by sixty of [Dawes's] republican brethren." *General News Summary*, SPRINGFIELD REPUBLICAN WEEKLY, Jan. 31, 1863.

506 CONG. GLOBE, 37th Cong., 3rd Sess. 428 (1863)

507 *Id.* Washburne feigned that he had "no desire .... to shirk any issue or any vote," that he would "very likely" vote with Dawes, but that he wanted "all the time possible to consider this great constitutional question." *Id.* at 429.

508 *Id.* at 434. The vote was 78-68 and broke along party lines similar to Washburne's vote to reconsider, with the majority of 78 consisting of 70 Republicans, six Unionists, and two Democrats. *37th Congress, House, Vote 438*, VOTEVIEW, https://voteview.com/rollcall/RH0370438 [https://perma.cc/AG2U-Y5XE]. The Springfield Republican's view was that the House, "by postponing the resolution till the last day of the session, ha[d] virtually declared that a man can hold a civil and military office at the same time." *News from Washington, Miscellaneous*, SPRINGFIELD REPUBLICAN, Jan. 24, 1863.

509 "[I]n the pressure of business on the last day of the session, it was not called up." H.R. REP. NO. 38-110 (1864) (reproducing the committee report regarding the "Military Appointment of Hon. F.P. Blair, Jr."), at 6.

510 *From Washington, Mr. Conway--Mr. Dawes,* SPRINGFIELD DAILY REPUBLICAN, Jan. 30, 1863.

511 Steven J. Arcanti, *To Secure the Party: Henry L. Dawes and the Politics of Reconstruction*, 5 HIST. J. MASS. 33, 37 n.22 (1977).

512 CONG. GLOBE, 37th Cong., 3rd Sess. 491 (1863).

513 *See id.* (recording the motion to reject the resignation of Mr. Dawes).

514 Tap, *supra* note 484, at 25, 31; *see also Loan, Benjamin Franklin 1819-1881*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/L000384 [https://perma.cc/GWS8-QR7X] (noting that Loan was elected as an Unconditional Unionist to the 38th Congress and a Republican to the 39th and 40th Congresses).

515 Tap, *supra* note 484, at 25.

516 *McClurg, Joseph Washington 1818-1900*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/M000347 [https://perma.cc/MT43-2D7P] (noting McClurg was elected as an "Unconditional Unionist" to the 38th Congress and as a "Republican" to the 39th and 40th Congresses).

517 *Price, Thomas Lawson 1809-1870*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG, https://bioguide.congress.gov/search/bio/P000532 [https://perma.cc/RL49-ENM4] (noting Price was elected as a Democrat in the 37th Congress and was a delegate to the Democratic National Convention in 1864 and 1868).

518 *King, Austin Augustus 1802-1870*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG, https://bioguide.congress.gov/search/bio/K000194 [https://perma.cc/5YFX-33Z3] (noting that while King attended the Democratic National Convention in 1860 he was elected as a Unionist to the 38th Congress).

519 Mark M. Carroll, *"All for Keeping His Own Negro Wench":* Birch v. Benton *(1858) and the Politics of Slander and Free Speech in Antebellum Missouri*, 29 LAW & HIST. REV. 835, 844-45 (2011). Birch's opponent, Austin King, exclaimed on the House floor that "God only knows" what party Birch belonged to, as "he has belonged to every party known in Missouri" and "never belonged to one but to betray it." CONG. GLOBE, 38th Cong., 1st Sess. 2649 (1864).

520 *See* ALLAN G. BOGUE, THE CONGRESSMAN'S CIVIL WAR, 94 (Robert Fogel et al. eds.,1989) ("The Missouri radicals reviled Blair for his abandonment of Fremont and supported one of their own against him when he sought reelection to the House of Representatives from the St. Louis congressional district."); *see also Knox, Samuel 1815-1905*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG, https://bioguide.congress.gov/search/bio/K000297 [https://perma.cc/B26S-W43Y] (noting that Knox contested Blair's seat as an Unconditional Unionist).

521 The contestants' allegations are reproduced in H.R. MISC. DOC. NO. 38-13, at 2-3 (1863), H.R. MISC. DOC. NO. 38-16, at 2-3 (1863), and H.R. MISC. DOC. NO. 38-20, at 1-2 (1864).

522 *See* Tap, *supra* note 484, at 33. The majority of five consisted of Dawes (Republican, Massachusetts), Portus Baxter (Republican, Vermont), Daniel Voorhees (Democrat, Indiana), John Ganson (Democrat, New York), and James Spoak Brown (Democrat, Wisconsin). The minority of four consisted of Charles Upson (Republican, Michigan), Glenni Scofield (Republican, Pennsylvania), Nathaniel Smithers (Republican, Delaware), and Green Clay Smith (Unionist, Kentucky). *Id.*

523 Nicklason, *supra* note 484, at 292 (quoting Henry Dawes to Electa Dawes, Mar. 3, 1864) (internal quotation marks omitted).

524 *From Washington, Mr. Dawes in Trouble*, SPRINGFIELD WEEKLY REPUBLICAN, Mar. 8, 1864. Van's report also made clear that the committee had voted the same way in all "three Missouri cases," not just those involving the "radical republicans," Loan and McClurg. *Id.*

525 H.R. REP. NO. 38-44, at 6-26, 29 (1864) (reproducing the majority report in *Bruce v. Loan* setting forth snippets of Bruce's evidence).

526 *Id.* at 43 (reproducing the minority report in *Bruce v. Loan*).

527 *Id.* at 44.

528 CONG. GLOBE, 38th Cong., 1st Sess. 2163 (1864).

529 *Id.* at 2167.

530 *Id.*

531 *Id.*

532 *Id.* at 2167.

533 *Id.*

534 *Id.* at 2167-68

535 *See* Nicklason, *supra* note 484, at 293 ("In the Loan case partisan Republicans severely differed with Dawes. Evading the issues, they attacked him directly.").

536 CONG. GLOBE, 38th Cong., 1st Sess. 2169 (1864).

537 *Id.* at 2186.

538 *Id.* at 2191.

539 *Id.* at 2189.

540 Tap, *supra* note 484, at 37; Nicklason, *supra* note 484, at 293-94.

541 CONG. GLOBE, 38th Cong., 1st Sess. 2211.

542 *Id.* at 2212.

543 *Id.*

544 *Id.* at 2212, 2360.

545 *Id.* at 2214.

546 *38th Congress, House, Vote 255*, VOTEVIEW, https://voteview.com/rollcall/RH0380255 [https://perma.cc/B5XY-EBEA]. As Dawes was absent, the sole Republican vote was from Porteus Baxter of Maine, who was on the Elections Committee and had provided Dawes with the second Republican vote in committee. *Id.* The fifty-nine "yea" votes consisted of Baxter, forty-nine Democrats, four Unconditional Unionists, and five Unionists. *Id.* The seventy-one "nay" votes consisted of sixty-one Republicans, two Independent Republicans, and eight Unconditional Unionists. *Id.*

547 *Id.*

548 Tap, *supra* note 484, at 38 (alteration in original).

549 CONG. GLOBE, 38th Cong., 1st Sess. 2639.

550 *Id.* at 2640-45.

551 *Id.* at 2649.

552 *Id.* at 2650.

553 *Id.* at 2881.

554 BOGUE, *supra* note 520, at 93.

555 *Id.* at 94.

556 Herman Belz, *The Etheridge Conspiracy of 1863: A Projected Conservative Coup*, 36 J. SOUTHERN HIST. 549, 552 (1970).

557 *Id.* at 549.

558 WILLIAM E. PARRISH, FRANK BLAIR: LINCOLN'S CONSERVATIVE 186 (1998).

559 BOGUE, *supra* note 520, at 94.

560 *See id.* at 93-98 (describing the growing rift); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 714-715 (1988) [hereinafter MCPHERSON, BATTLE CRY OF FREEDOM]; Nicklason, *supra* note 484, at 296 ("[Blair] gave wide publicity to his conservative views on reconstruction and to his opposition to Salmon P. Chase, a prominent radical contender with Lincoln for the Republican presidential candidacy.").

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561 MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 560, at 714 (1988).

562 BOGUE, *supra* note 520, at 94.

563 MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 560, at 714.

564 *Id.* at 714-15.

565 *See* H.R. MISC. DOC. NO. 38-15 (1863) (reproducing Knox's allegations); H.R. REP. NO. 38-66 (1864).

566 Nicklason, *supra* note 484, at 297 (quoting Henry Dawes to Electa Dawes, Mar. 21, 1864) (internal quotation marks omitted).

567 PARRISH, *supra* note 558, at 191, 195-96.

568 CONG. GLOBE, 38th Cong., 1st Sess. 1859-60 (1864); H.R. EX. DOC. NO. 38-77, at 1 (1864).

569 H.R. EX. DOC. NO. 38-77, at 1 (1864).

570 *Id.* In fact, when Lincoln in late April ordered the War Department to give Blair command of a corps in Sherman's army, he was initially told by Adjutant General E.D. Townsend that Blair could not resume his military office because he had previously resigned it. However, Lincoln persisted, whereupon Townsend proposed that, based on precedent, Blair could "withdraw" his resignation. PARRISH, *supra* note 558, at 192-93.

571 H.R. EX. DOC. NO. 38-80, at 7 (1864).

572 *Id.* at 1-2.

573 *Id.* at 2.

574 *Id.* (reproducing a letter from Abraham Lincoln to Montgomery Blair, Nov. 2, 1863).

575 *Our Washington Correspondence*, NATIONAL ANTI-SLAVERY STANDARD, May 14, 1864 (reporting that "the feeling against Frank Blair [in the House] intensified" after he delivered "a most violent attack upon Mr. Chase and the Radicals of Missouri" and that revelation of his "secret arrangement" with the President "had added to his unpopularity").

576 H.R. REP. NO. 38-66 (1864) (reproducing the majority and minority reports in *Knox v. Blair*).

577 *Id.*

578 *Id.*

579 CONG. GLOBE, 38th Cong., 1st Sess. 2856-57 (1864).

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580 *Id.* at 2858.

581 *Id.* ("[T]he committee, instead of ... vacating the seat and referring the matter back to the people, have attempted to deprive the people of St. Louis of the right of electing their own member, and by the action of the House to substitute a member who never received a majority of the votes of that district.").

582 *Id.*

583 *38th Congress, House, Vote 327*, VOTEVIEW, https://voteview.com/rollcall/RH0380327 [https://perma.cc/77JL-DYGR].

584 *38th Congress, House, Vote 328*, VOTEVIEW, https://voteview.com/rollcall/RH0380328 [https://perma.cc/8XN2-BNPS].

585 Nicklason, *supra* note 484, at 298 (quoting Henry Dawes to Electa Dawes, June 11, 1864) (internal quotation marks omitted).

586 H.R. REP. NO. 38-110, at 1 (1864).

587 H.R. REP. NO. 38-110, at 1-3 (reproducing the committee report regarding the "Military Appointment of Hon. F.P. Blair, Jr.").

588 CONG. GLOBE, 38th Cong., 1st Sess. 3389 (1864).

589 H.R. REP. NO. 38-110, at 10.

590 *See supra* Part IV.B.1.b.i.

591 SEN. REP. NO. 38-84, at 3 (1864).

592 BOGUE, *supra* note 520, at 99-100. As Bogue notes, Lincoln "found no reason to accept the Congressional position" and Blair "did not retire from the army until well after the Thirty-eighth Congress had adjourned for the last time." *Id.*

593 Tap, *supra* note 484, at 33 n.19.

594 *Our Washington Correspondence*, BOSTON HERALD, May 5, 1864 ("A decided war is being inaugurated against Frank Blair. The House Election Committee will report against his seat in the House, and the Senate Military Committee are questioning the validity of his Major Generalship."); *News from Washington, The Blair Case Ended*, WORLD, June 11, 1864 ("The war on the Blair interest achieved a decided success to-day. In the House, General Frank Blair was ousted from his seat, it being declared by the committee and the House that he held it illegally. In the Senate, it was decided by the Judiciary Committee at the same time, that his commission in the army was illegal and void.").

595 *News from Washington*, NEW YORK HERALD, June 11, 1864.

596 PARRISH, *supra* note 558, at 197; *see also* MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 560, at 717 ("[W]ith the president's covert sanction the convention made a gesture of conciliation to radicals by seating an anti-Blair delegation from Missouri which cast a token ballot for Grant before changing its vote to make Lincoln's nomination unanimous.").

597 *News from Washington*, NEW YORK HERALD, June 11, 1864.

598 *See supra* Part III.B.1; H.R. REP. NO. 37-4 (1861) (reproducing the committee's report in *Shiel v. Thayer*).

599 H.R. REP. NO. 37-4 (1861).

600 People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127 (1865).

601 *See supra* Part III.B.2.b.ii; CONG. GLOBE, 39th Cong., 1st Sess. 821 (1866).

602 CONG. GLOBE, 39th Cong., 1st Sess. 822 (1866).

603 *Compare 37th Congress, House, Vote 40*, VOTEVIEW, https://voteview.com/rollcall/RH0370040 [https://perma.cc/RH8F-HSAK] (showing the *Shiel* vote), *with 39th Congress, House, Vote 68*, VOTEVIEW, https://voteview.com/rollcall/RH0390068 [https://perma.cc/5EB6-TDB5] (reproducing the *Baldwin* vote). The nine Congressmen who voted against the Stevens resolution in *Shiel* in the 37th Congress but later supported Trowbridge in the 39th Congress were: John Bassett Alley (Massachusetts), Portus Baxter (Vermont), Samuel Beaman (Michigan), Henry Dawes (Massachusetts), Thomas Dawes Eliot (Massachusetts), Rowland Trowbridge (Michigan), John Rice (Maine), Samuel Shellabarger (Ohio), and Elihu Washburne (Illinois). *Id.*

604 CONG. GLOBE, 37th Cong., 1st Sess. 356 (1861) (reflecting Stevens arguing that Shiel's election was invalid because the Elections Clause "prevents any action" by a state constitutional convention by "expressly provid [ing] who shall fix the times and places of holding elections for Members of Congress"); *id.* at 357 (reflecting Trowbridge's "nay" vote against Stevens's resolution).

605 CONG. GLOBE, 39th Cong., 1st Sess. 840.

606 *Id.* Dawes had opened the door to Trowbridge's argument by admitting that the absence of a "conflicting law" was a distinction between the two cases, though Dawes maintained that it was a distinction without a difference because in no event could a legislature prescribe a time for an election in conflict with the time set forth in the state constitution. *Id.* at 821.

607 CONG. GLOBE, 37th Cong., 1st Sess. 357 (1861) (recording Beaman's "nay" vote against the Stevens resolution in *Shiel*).

608 CONG. GLOBE, 39th Cong., 1st Sess. 817.

609 *Id.*

610 CONG. GLOBE, 37th Cong., 1st Sess. 357 (documenting Shellbarger's "nay" vote against the Stevens resolution in *Shiel*).

611 CONG. GLOBE, 39th Cong., 1st Sess. 845.

612 *39th Congress, House, Vote 68*, VOTEVIEW, https://voteview.com/rollcall/RH0390068 [https://perma.cc/78FG-TMN6].

613 *Id.*

614 *37th Congress, House, Vote 40*, VOTEVIEW, https://voteview.com/rollcall/RH0370040 [https://perma.cc/5XS8-KCJW].

615 *See* Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1798 (explaining "tribal partisanship" as politicians' favoring of policies purely because they benefit other members of their own party or harm political opponents).

616 *The Contested Seats*, WORLD, Feb. 1, 1866, at 6. Another paper complained that the committee was "going to give the seat to Trowbridge, [R]epublican, against Baldwin, Democrat" even though Baldwin "had a clear majority excluding the illegal soldier vote," because "[p]arty with [the Republicans] is above law." *Party Above Law,* DAILY E. ARGUS, Feb. 15, 1866.

617 *The Case of Representative Baldwin*, WORLD, Feb. 20, 1866, at 4. Similarly, the NORWICH AURORA called the House's decision "a gross violation of law ... committed to enable the republican claimant to retain his seat." *Depriving Democratic Representatives of Their Seats,* NORWICH AURORA, Mar. 3, 1866. *The Patriot* concluded that "[n]othing, really, seems to be too mean, despicable and unlawful for modern 'Republicans' to perform." PATRIOT, Feb. 19, 1866.

618 *News of the Week, Congressional Proceedings*, CRISIS, Feb. 21, 1866.

619 *The Michigan Contested Election*, N.Y. ATLAS, Feb. 17, 1866, at 4.

620 *The Unseating of Mr. Voorhees*, PITTSFIELD SUN, Mar. 15, 1866.

621 *The Michigan Contested Election Case Decided*, DETROIT TRIB., Feb. 27, 1866 ("If there was any voting blindly and from partisan motives, it must have been on the Democratic side ...."). The *Springfield Republican* made a similar point. *See The Committee of Elections,* SPRINGFIELD DAILY REPUBLICAN, Mar. 23, 1866 ("But it is amusing to hear the allegation that the republicans on the committee are actuated by their party feeling solely" when the Democrats cannot name "a single case in this Congress where the democratic members of the committee have voted with the republicans[.]").

622 The House's alleged disregard of the Michigan Supreme Court's decision in *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865), was frequently cited as evidence that the Republican majority was acting in an egregiously partisan manner. *See The Case of Representative Baldwin*, WORLD, Feb. 20, 1866 (noting that the House Republicans disregarded the court's decision even though "the Supreme Judges are all Republicans" and had been "unanimous with but one exception ...."); *A Strange Decision,* TIMES-PICAYUNE, Feb. 27, 1866 ("It is well to observe that the Supreme Court of Michigan--which decided the vote to be unconstitutional--is composed of Republicans ...."); *Congress Wiping Out States*, CRISIS, Mar. 28, 1866 (stressing that the court was "composed of Republican Judges").

623 *See* DONALD S. INBODY, THE SOLDIER VOTE: WAR, POLITICS, AND THE BALLOT IN AMERICA 14 (2016) ("[T]he debate ... always fell along political party lines. Republicans, assuming that soldiers would vote for Abraham Lincoln and the Republican Party, were in favor of such measures, while Democrats opposed the measures on the same assumption. Throughout the war, northern state legislatures that were dominated by Republicans passed soldier absentee voting of some sort while legislatures dominated by Democrats did not.")

624 CONG. GLOBE, 37th Cong., 1st Sess. 356 (1861).

625 *The Unseating of Mr. Voorhees*, *supra* note 620.

626 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 268 (1903). According to Hoar, up until the time that he served on the Committee on Elections under the chairmanship of George W. McCrary, election cases were "determined entirely by party feeling," as "[w]henever there was a plausible reason for making a contest the dominant party in the House almost always awarded the seat to the man of its own side." *Id.* However, when Hoar was on the committee, it "determined to settle all the questions before it as they would if they were judges in a court of justice." *Id.* Hoar himself claimed to have acted "with the same freedom from bias or prejudice with which it would have been my duty ... if I had been sitting on the Bench of the Supreme Court of the United States." *Id.* at 269.

627 3 CARL SCHURZ, THE REMINISCENCES OF CARL SCHURZ 1863-69, at 216 (1908).

628 *Id.*; *see also* MCCALL, *supra* note 482, at 107 (recounting a version of this anecdote).

629 Reed, *supra* note 481, at 112.

630 *Id.* at 114-15.

631 *Id.* at 117.

632 Rammelkamp, *supra* note 251, at 439-40.

633 H.R. REP. NO. 53-1669, at 2 (1895).

634 *Id.* at 3-4.

635 H.R. REP. NO. 54-2234, at 2-3 (1896) (quoting from the 1895 report); *see also* Rammelkamp, *supra* note 251, at 435 (arguing that these reports were not "partisan denunciations made in the heat of a debate" but rather "frank confessions of wrong-doing ... [by] a Republican committee twice officially confessing to a Republic Congress").

636 ALEXANDER, *supra* note 473, at 323.

637 ROBERT LUCE, LEGISLATIVE ASSEMBLIES: THEIR FRAMEWORK, MAKE-UP, CHARACTER, CHARACTERISTICS, HABITS, AND MANNERS 203 (1924).

638 22 CONG. REC. 2199 (1891).

639 3 GIDEON WELLES, DIARY OF GIDEON WELLES 460 (1911).

640 EDWARD WINSLOW MARTIN, BEHIND THE SCENES IN WASHINGTON 7, 201-02 (1873).

641 *Id.* at 202.

642 *Id.*

643 Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUD. AM. POL. DEV. 112, 120 (2004).

644 *Id.* at 120. Jenkins excluded from this population the cases in which neither candidate was awarded the seat (because the seat was vacated), qualifications cases (in which there was no contestant in the case), and cases in which the contestee and the contestant were from the same majority party. *See id.* at 120 n.46 (listing the bases for exclusion of cases from the analysis).

645 Although the entire point of Jenkins's analysis was that this 50.2% majority win percentage, alone, does not reflect the degree of partisanship in these decisions, legal scholars have cited that number, alone, as evidence that House members "forego tempting opportunities to pursue [tribal partisanship]" in contested elections, without noting Jenkins's further analysis to the contrary. Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1840-41. Professor Levitt notes that there is "no justiciable rule precluding a partisan majority of the House ... from simply unseating opposition winners" and the "structure of the House is certainly designed to promote majoritarian action." *Id.* at 1840. He argues, therefore, that "rules and structure alone would suggest that 601 cases should favor the majority party's claimant," but, "in fact, only 50.2 percent of the decisions favored the majority party candidate." *Id.* (citing Jenkins, *supra* note 643, at 120). Professor Muller cites Professor Levitt for the proposition that "[e]vidence suggests that Congress has generally resisted raw tribal partisanship in adjudicating election contests." Muller, *supra* note 22, at 736. Both Levitt and Muller do, however, acknowledge partisanship in House election contests in the late nineteenth century. *See* Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1840 (suggesting the inherent structure of the House fosters partisanship); Muller, *supra*, at 736 n.104.

646 *See* Jenkins, *supra* note 643, at 120-21 (noting that, "in fact, majority party claimants *do* contest at a significantly higher rate, bringing 72 percent of all cases").

647 *Id.* at 121.

648 *Id.*

649 *Id.*

650 *Id.* Overall, Jenkins determined that for the entire period he studied, the contestee retained his seat in 67.7% of the cases, the contestant won in 21.3% of the cases, and the seat was vacated in 11% of the cases. *See id.* at 120 (displaying table of outcome statistics in contested election cases). Challengers were more successful during the late nineteenth century 1861-1899 (winning 28.7% of the time) than they were in the Antebelllum period (winning 22.4% of the time); they were least successful in the twentieth century (winning only 10.8% of the time). *See id.* (reporting outcomes in contested election cases broken down by time period).

651 *Id.* at 121.

652 *Id.* at 121-23.

653 *Id.* at 123.

654 *Id.*

655 *Id.*

656 *Id.* at 123-25.

657 *Id.* at 124.

658 Justice Ginsburg perceived that the Elections Committee had voted in a partisan manner, even though she mistakenly believed that one of the two Democrats on the Elections Committee (William Radford of New York) voted in favor of Trowbridge. *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818 (2015) (stating that "all but one" of the committee who voted for Trowbridge was a Republican). Radford's name did not appear on the minority report along with the other Democrat on the committee (S.S. Marshall of Illinois), see H.R. REP. NO. 39-14, at 5 (1866) (indicating Marshall's signature but not Radford's), but as the *Congressional Globe* makes clear, Radford intended for his name to be on the minority report, see CONG. GLOBE, 39th Cong., 1st Sess. 819 (1866), and he voted against Trowbridge along with every other Democrat who voted, see *id.* at 845.

659 *Ariz. State Legis.*, 576 U.S. at 819. In dissent, Chief Justice Roberts responded that *Baldwin v. Trowbridge* could not be "dismissed as an act of partisanship" without similarly dismissing "every decision in favor of a candidate from the same party as a majority of the Elections Committee." *Id.* at 839 n.3 (Roberts, C.J., dissenting).

660 Muller, *supra* note 22, at 736.

661 Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citing Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986)); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (explaining stare decisis as the foundation for why the public views the judiciary "as a source of impersonal and reasoned judgments"); *see also* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368-70 (1988) (emphasizing the principles of certainty, reliance, equality, and efficiency as justifications for following precedent).

662 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34-36 (1921) ("Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts ... the method of philosophy must remain the organon of the courts if chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is the essence of the idea of law.").

663 *Payne*, 501 U.S. at 827.

664 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652 (1999) (summarizing the policies supporting adherence to precedent as "economy, stability, and legitimacy"); *see also* CARDOZO, *supra* note 662, at 149 ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

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665 Maltz, *supra* note 661, at 371-72 (noting view that "*stare decisis* simply transfers plenary decision making authority from ... the contemporary judge [to] the predecessor judge who generated the relevant precedent"); *see also* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) ("Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others.").

666 CARDOZO, *supra* note 662, at 149; *see also* Easterbrook, *supra* note 665, at 422-23 (presuming that precedent will have been produced by "generations of judges wrestling with hard questions" allowing "each judge to build on the wisdom of others"); J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS § 594, at 541 (1879) (presuming that the precedent-generating court will supply "certain fixed land marks approaching correctness though not infallibly perfect").

667 Normally, both the precedent-generating institution and the precedent-receiving institution are courts in the same legal system, and it is reasonable to assume that the earlier court had the same decision-making features as the later court. However, even in that context, there have been instances in which judges or commentators have challenged the presumption by arguing, for example, that "extraordinary pressures on the courts that rendered particular rulings should undermine those rulings' claims to adherence." Fallon, *supra* note 447, at 1791 (identifying instances of such arguments). Of course, in some circumstances, a precedent-receiving court can overrule a bad precedent, though it is difficult to define when such circumstances are present. *See* Easterbrook, *supra* note 665, at 424 ("Doctrines with sufficiently bad pedigrees or sufficiently bad effects must go, but this is argument by weasel word--how bad is bad enough?"). To say that some precedent will be overturned is different than saying that the precedent-generating court's decision should never have qualified as precedent in the first place because of some deficiency in that court's decision-making process.

668 The House process was similar to a court process to the extent it involved lawyering. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 19 (1960) (acknowledging that in the court process, the "personnel are all trained and in the main rather experienced lawyers"); *id.* at 29 ("Issues [are] limited, sharpened, and phrased in advance."); *id.* at 29-30 (pointing out that courts rely on "adversary argument by counsel").

669 *See id.* at 46 (remarking how holding judicial office instills impartiality and the "doggedness with which it presses upon the officeholder a demand to be selfless"); *see also id.* at 46 (explaining that judicial office requires "not a passive but a positive and active attitude: the judge must be *seeking*, as best he can, to see the matter fairly, and with an eye not to the litigants merely, but to All-of-Us as well"). In *Powell v. McCormack*, the Supreme Court recognized that the absence of this feature was one reason why historical decisions by the House were of "quite limited" value in determining original intent. *See* Powell v. McCormack, 395 U.S. 486, 546 n.85 (1969) ("Unlike a court, which is presumed to be disinterested, in an exclusion case the concerned house [of Congress] is in effect a party to the controversy that it must adjudicate. Consequently, some members may be inclined to vote for exclusion though they strongly doubt its constitutionality.") (quoting *The Power of a House of Congress*, *supra* note 480, at 679).

670 LLEWELLYN, *supra* note 668, at 32 (noting the feature of "judicial security" against "repercussions or retaliations because some person or persons may dislike the decision or find it wrong" and how this helps "eliminat[e] the incidence of fear or hope or secret favor").

671 CARDOZO, *supra* note 662, at 176 ("The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions.").

672 LLEWELLYN, *supra* note 668, at 23; *see id.* at 24 ("The deciding is done under an ideology which in older days amounted to a faith that there is and can be only one single right answer. This underlies such ideas as 'finding the law' and 'the true' rule, and 'the' just decision. I refer not merely to a manner of writing the opinion but to a frame of thought and to an emotional attitude in the labor of bringing forth a decision. Even judges who know with their minds that varying answers would be legally permissible will be found with a strong urge to feel that one alone among them must be *the* right one.").

673 Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986) ("[The doctrine of stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.").

674 LLEWELLYN, *supra* note 668, at 20 (elaborating on the understanding among judges "that where there is no real room for doubt, that body [of doctrine] is to control the deciding; that where there is real room for doubt, that body of doctrine is nonetheless to guide the deciding; and that even when there is deep trouble, the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine").

675 Stated differently, there is a presumption that the precedent-generating courts themselves felt bound to conform their decisions to precedent, and that this was beneficial to their decision-making. Being subject "to the test of congruence with the conclusions of those confronting the same problem" reduces "idiosyncratic conclusions" and "increases both the chance of the court's being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges." Easterbrook, *supra* note 665, at 423.

676 LLEWELLYN, *supra* note 668, at 21.

677 Daniel A. Farber, *The Rule of Law and the Law of Precedents,* 90 MINN. L. REV. 1173, 1779 (2006) ("In deciding a particular case, a judge must provide reasons that will have precedential effect on later cases (both in the same court and in lower courts). Thus, the judge is pushed to a form of neutrality--not the neutrality of being value-free, but the neutrality of articulating standards that one is willing to live with in the future."); *see also The Power of a House of Congress*, *supra* note 480, at 679 (explaining that "it may be unrealistic to suppose that many Congressmen seriously concern themselves with abstract and unresolved constitutional issues in the first place" and that "the likelihood of effective judicial review [of Congressional decisions] has undoubtedly been regarded a remote possibility").

678 Farber, *supra* note 677, at 1180. Llewellyn also emphasized the salutary effect of the "felt pressure or even compulsion" to issue a published opinion "which tells any interested person what the cause is and why the decision--under the authorities--is right, and perhaps why it is wise." LLEWELLYN, *supra* note 668, at 26. He argued that this instilled in the court issuing the opinion a "due measure of caution by way of contemplation of effects ahead." *Id.*

679 *See* Powell v. McCormack, 395 U.S. 486, 546 n.85 (1969) ("Determining the basis for a congressional action is itself difficult; since a congressional action unlike a reported judicial decision, contains no statement of the reasons for the disposition, one must fall back on the debates and the committee reports. If more than one issue is raised in the debates, one can never be sure on what basis the action was predicated.") (quoting *The Power of a House of Congress*, *supra* note 480, at 679).

680 If the House were a foreign court, it is unlikely that its judgments in these matters would be respected by a court in the United States. Under the common law and state statutes, a domestic court may not recognize a foreign court's judgment if the judgment was rendered "under a judicial system that does not provide impartial tribunals and procedures compatible with due process of law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987); s*ee also* Ronald A. Brand, *Federal Judicial Center International Litigation Guide, Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 510 (2013) (explaining that this mandatory ground for non-recognition is also contained in the 1962 and 2005 versions of the Uniform Foreign Money-Judgments Recognition Act). Examples of evidence that could support a non-recognition conclusion as to a judicial system include evidence that "judgments are rendered on the basis of political decisions rather than the rule of law," Uniform Foreign-Country Money Judgments Recognition Act § 4 cmt. 12 (2005), or "[e]vidence that the judiciary was dominated by the political branches of government or by an opposing litigant," RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

681 By focusing in this Article on the Doctrine's lack of historical support, I do not mean to suggest that the Doctrine has any good basis in text, precedent, or other considerations. Others have addressed those topics better than I ever could, including in the recent *tour de force* by Dean Vikram Amar and Professor Akhil Amar. Amar & Amar *supra* note 63. For a

recent analysis of how the Doctrine presumes without basis that state "legislatures" intend to evade state constitutions, as well as the potentially unforeseen consequences of the Doctrine, see Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322 [https://perma.cc/7MZ6-HRJP]. For a pithy explanation of why the non-originalist rationales offered in support of the Doctrine are nonsense, see Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041062 [https://perma.cc/W3E7-HF6H]. For confirmation that the Doctrine would be a twenty-first century departure from not only the Founding but almost all prior historical practice, see Weingartner, *supra* note 268.

682 One can reject the Doctrine without endorsing the result in *Arizona State Legislature*, in which the Supreme Court upheld the Arizona constitution's assignment of the re-districting function to an independent commission that operates without any involvement of the "legislature." It is one thing to confidently say that a "legislature" must operate within the constraints set by its constitution (as I do here), but it is quite another to say that the constitution need not involve the "legislature" at all (as the Court did in *Arizona State Legislature*). *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 848 (2015) (Roberts, C.J., dissenting) (arguing the line is crossed when there is "an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process").

683 Mostly, the Doctrine as presently conceived by certain Justices would simply serve as a vehicle for the Supreme Court to overrule disfavored state court interpretations of state law. *See* Moore v. Harper, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from denial of stay) ("[T]here must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections.") However, at other times, interest in the Doctrine may be giving expression to a legitimate concern about mid-election state manipulation of federal election law. However, the Doctrine is a spectacularly overbroad tool to address that concern. It sweeps within its purview any alleged departure from the handiwork of the "legislature," irrespective of whether it occurs long before, shortly before, or during the election, and irrespective of its effect on voters and candidates who actually have an interest in the election. Instead of enforcing "respect" for "legislatures," we should be focusing on how mid-election changes in law may affect the constitutional rights of people by creating fundamental unfairness and/or detrimental reliance in elections. *See generally* Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U.L. REV. 691 (2001) (analyzing how courts have dealt with such issues). Some have suggested that the Elector Appointment and Elections Clauses can be read as a federal policy against mid-election "new law," apparently even when no person's constitutional rights have been violated. *See* Michael L. Wells and Jeffry Netter, *Article II and the Florida Election Case: A Public Choice Perspective*, 61 Md. L. Rev. 711, 722 (2002) (arguing that the Elector Appointment Clause is "the appropriate vehicle for applying the "'rules-of-the-game norm"'). If so, it should be done without grafting onto those clauses the Doctrine and its inapposite fetishization of "legislatures," disparagement of state courts, and disregard of state constitutions. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1932-34 (2003) (explaining that, if the Elector Appointment Clause is interpreted to allow the Supreme Court to determine whether there has been a "material" change in state law governing presidential elections, the "'Independent Legislature' grounded separation of the state election-law context from its state-court judicial interpretation does little or no work"); Amar & Amar *supra* note 63, at 56-57 (explaining that any federal interest in avoiding state manipulation of federal election law would "constrain not just state courts but also elected state legislatures and other state governmental entities"). And great care would need to be taken in defining what would constitute a "material" change in law, lest, as in 2020, every alleged "irregularity" in a state's election administration give rise to a claim that the Constitution has been violated. *See id.* at 60 (suggesting what might constitute a sufficiently egregious change-in-law to justify federal court intervention).

684 ROBERT PENN WARREN, ALL THE KING'S MEN 466 (1946).

685 *Id.* at 656-57.

686 *Id.* at 657.

687 *Id.* at 661.

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ERADICATING BUSH-LEAGUE ARGUMENTS ROOT AND BRANCH: THE ARTICLE II INDEPENDENT-STATE-LEGISLATURE NOTION AND RELATED RUBBISH

The biggest news of October Term 2020 was what *didn't* happen: In the run-up to, and aftermath of, yet another tight and hard-fought presidential election, the Supreme Court declined to double down on some of the worst aspects of the execrable *Bush v. Gore*[1] opinions of twenty years ago.

But a close look at the Term reveals that there was a brief moment of genuine constitutional peril, a week when it seemed quite possible that the Court might once again--as it did in 2000--besmirch itself and plunge the country into a jurisprudential abyss.

In the days preceding the election of 2020, a veritable carnival of litigants-- let's call them *Bush*-Leaguers--teed up several cases based on a seemingly plausible but ultimately preposterous constitutional ***2** theory that had won the support of three notable justices back in 2000. Echoing the Rehnquist-Scalia-Thomas concurrence in *Bush v. Gore*, the 2020 *Bush*-Leaguers correctly noted that Article II permits each state to use its "legislature" to decide how that state's presidential electors are to be chosen. From this correct starting point, *Bush*-Leaguers quickly careened off course, claiming that state courts could not properly tweak state voting laws to bring these laws into alignment with state constitutions (as construed by these state-court jurists). Perilously, four justices at various points in the autumn of 2020 appeared to fall for this beguiling *Bush*-League idea--an idea often referred to as the "Independent State Legislature" (ISL) theory. None of the other five justices came close to explaining all the reasons--and there are several--why this theory fails.

In what follows, we show why *Bush*-League arguments were wrong twenty years ago; how they were shown to be wrong by sound scholarship in the ensuing years; and why they are even more wrong today, thanks to recent and dispositive Supreme Court case law. All sensible constitutionalists--whether on the Court or off it, whether originalists or precedentalists, whether left or right of center-- should bury *Bush*.

Wealso aim to demonstrate that the errors and evils of *Bush v. Gore* went far beyond the ISL ideas at the heart of the Rehnquist-Scalia-Thomas concurrence. *Bush* was wrong in just about every way that it is possible for a case to be wrong. If ever there were a bad seed, *Bush* was it. The recent efforts to revive and rehabilitate *Bush*'s reputation are thus genuine cause for jurisprudential concern--even alarm. We urge today's Court to make a sharp and clean break with *Bush* as soon as possible, and to do so well before the next contested presidential election, which may be quite harrowing enough without any monkey business from the Court.

I. THE BAD SEED IN A NUTSHELL

The *Bush v. Gore* litigation in 2000 went through several rounds, but the most momentous ruling occurred on December 12, 2000. That day, a majority of the Court held that the ongoing recounting of votes in various Florida counties, as overseen by the Florida Supreme Court, violated the Equal Protection Clause because this recount was proceeding in different ways and under different standards throughout the state. Rather than remanding the matter to the Florida courts to devise recounting procedures that would satisfy the *Bush* Court's newly ***3** minted equal protection rules, a majority consisting of five Republican-appointed justices ended the vote recounting and thus guaranteed that Republican candidate George W. Bush would become the President.

Within hours, notable scholars came out swinging, condemning the *Bush* Court's decision in the strongest possible terms on a wide range of issues implicated by the case. [2]

Were these scholars right to do so? And why does any of this matter today?

As we shall show, the early and harsh critics were indeed right. (We take pride that we ourselves were among them.) And all this matters because the Constitution matters, because our constitutional culture matters, and because elections matter. The entire American constitutional project is imperiled if judges, lawyers, law professors, law students, lay opinion leaders, and the citizenry more generally grossly misunderstand first principles of American constitutional law and American democracy. And strong post-decision criticism was particularly important back in late 2000 and early 2001 because the Court had rushed into the case at breakneck speed, without the usual deliberative timetable enabling scholarly expertise to guide the Court predecision, via amicus briefs and the like.

True, some prominent conservative scholars tried to push back against the early and harsh critics of *Bush*. [3] But until 2020, the harsh ***4** critics' view had become increasingly orthodox among scholars of all stripes and, seemingly, among the justices themselves. Court insiders reported that several current and retired justices had come to view the case with profound embarrassment. Many conservative legal academics began to admit, quietly, that the case reeks. In a 2015 *Time* magazine survey of constitutional scholars, *Bush v. Gore* was repeatedly condemned as one of the worst decisions of the previous half-century. Perhaps most telling of all, no majority opinion of the Court had ever cited the case with approval. [4]

Many sophisticated commentators thus had good reason to think that *Bush v. Gore* had been quietly plowed under. Perhaps the time was not yet ripe for loud judicial denunciation of the case, à la *Dred Scott* [5] and *Plessy*. [6] But surely, many thought, *Bush* was viewed by polite society and by the justices themselves as an embarrassing judicial fart that we could all pretend not to hear or smell.

Alas, in 2020, it became clear that *Bush* has in fact not been laid to rest in our constitutional culture. There are powerful efforts afoot to revive certain aspects of this misbegotten ruling. And thus it becomes imperative to explain--once more, with feeling--just how wrong the case was, in so many ways. [7]

For starters, the *Bush* Court's overeager decision to jump into the electoral college controversy itself ran counter to text, structure, precedent, and prudence.

The Constitution's text expressly makes each congressional house the "judge" of elections to its own chamber. [8] And for analogous reasons, the Constitution's text also makes Congress (though not the vice president individually!) the ultimate arbiter of contested electoral votes for the presidency. [9]

***5** The underlying structural logic here is emphatically democratic. The Constitution creates a democratic pyramid in which earlier-mentioned and more directly democratic institutions form the popularly legitimated building blocks supporting later-mentioned and rather more elitist institutions. The Preamble comes first, making clear to all that the Constitution itself derives from a special popular mandate--from We, the People, directly, as embodied in special ad hoc conventions selected in uniquely democratic fashion. [10] In 1787-88, more folk were legally allowed to vote on how they and their posterity would be governed than had ever been allowed to vote on anything, anywhere, in the entirety of human history. [11] Next, Article I structures a democratic legislature in which the first-mentioned House consists of members chosen directly by voters--a clear break with the pre-existing Congress under the Articles of Confederation. Article II structures the ensuing tier of the democratic pyramid. That Article envisions a president who is not, strictly speaking, directly elected, but whose indirect selection will be initiated by a process that will likely involve ordinary voters, and will be ultimately certified by Congress meeting in special joint session. Finally, Article III at the narrow apex of the pyramid provides that federal judges and justices will be chosen by a rather less directly democratic process, via presidential nomination and Senate confirmation.

The obvious architecture of this grand structure is that presidents should pick justices, but justices should not pick presidents. When justices do the picking, the democratic pyramid is improperly inverted; smaller, less democratic building blocks are dangerously bearing too much weight, and the entire democratic edifice is at risk of toppling.

In all closely contested presidential elections prior to *Bush v. Gore*--1800-01, 1824-25, and 1876-77--Congress, not the Court, decided the matter, and rightly so. The idea that the Supreme Court should have thrust itself into any of these electoral college contests would have seemed bizarre to the jurists and statesmen of those eras. [12]

Having impetuously and arrogantly decided to leap onto center stage rather than wait in the wings--God forbid that Congress be allowed ***6** to play the lead role prescribed by text, structure, and tradition!--the *Bush* Court at a minimum should have acted in either a stately or lawyerly fashion (ideally, both). Alas, the Court's actions flunked both the demands of statecraft and the demands of law.

As a matter of pure pragmatism and putting aside all legal niceties, [13] the best argument for Supreme Court intervention was that America in late 2000 was deeply and closely divided. The country needed a wise, unifying, and respected decision-maker--a Hercules, a Solomon, a bevy of Platonic guardians-- to save the day.

In late 2000 the incoming House and Senate were themselves set to be narrowly and sharply divided. Although the (legally irrelevant) national popular vote clearly favored Gore, the (juridically decisive) national electoral vote would come down to a single raucous and fractious state. As Florida would go, so would go the nation, legally. Alas, the Florida popular vote was a statistical dead heat. [14] Someone needed to step forward to lead the country. Who better than America's most trusted branch post-Watergate and post-Vietnam-- namely, the federal judiciary?

But if this was the best pragmatic and realpolitik reason for judicial intervention, the Court should have offered America a unanimous or nearly unanimous decision, in the tradition of *Brown* [15] and the *Nixon Tapes Case*. [16] If such a consensus decision seemed achievable when the *Bush* Court initially decided to jump onstage, but later became unlikely as the justices examined matters more closely, a truly wise Court would have stepped back by dismissing the writ of certiorari as improvidently granted.

The least statesmanlike resolution of all was what the *Bush* Court eventually gave the country: a final line-up that was not merely closely and sharply divided, but partisan in the ugliest imaginable way. The five justices most praised by candidate Bush in the preceding months aimed to stop the recount and crown him king, while the four justices ***7** most lauded by candidate Gore aimed to continue a recount in which he seemed to have the momentum.

In fact, upon close inspection, the five justices in the majority didn't really agree among themselves, although they pretended to do so for appearance's sake. Two justices sincerely (but erroneously) believed in one theory (equal protection), while three other justices embraced a different--and almost logically inconsistent--theory (Article II ISL). The only thing that truly united the narrow majority of the Court (all Republican appointees) was that the recounting must stop and the Republican candidate must win.

None of the foregoing pragmatic criticisms would be decisive if the legal arguments advanced by the majority justices actually held water. Alas, what the *Bush* Court said and did was lawless in the extreme.

The equal protection argument sincerely endorsed by two justices in the majority (O'Connor and Kennedy) and by a third justice who opposed ending the recount (Souter) was not only wrong, but also almost self-refuting. The recount was in fact designed to mitigate some of the most glaring racial and class inequalities of the initial count itself; the judicially supervised recount ordered by the Florida Supreme Court was more truly equal than Florida's initial, wildly uneven, and less judicially supervised tally. True equality argued for continuing the recount, not squelching it.

Plus, the O'Connor-Kennedy opinion (technically, a per curiam) had almost no precedential support or precedential logic backward or forward. Looking backward, we find no prior Court ruling remotely close on its facts. Looking forward, the *Bush* justices themselves openly announced that the case should not set a precedent for later cases. [17] The ruling was thus pure ad hocery--a judicial train ticket good for one day only. And few believe that if the parties were reversed, the same justices would have done for Gore what they did for Bush. Viewed in this light, the decision was the very antithesis of neutral principles.

And on the issue of remedy, the *Bush* Court also bungled badly. The justices refused to allow the Florida courts to continue the recount: Time was up, said the Supremes. In fact it wasn't, and the Florida Supreme Court should have been the one to decide, under state law, whether it was more important for Florida to get the recount done fast or done right.

***8** Nor does the *Bush* equal protection argument fare any better if viewed through the lens of originalism. The Fourteenth Amendment's Equal Protection Clause was emphatically designed as a rule regulating civil rights, and was universally understood at the time of its drafting and ratification as utterly inapplicable to political rights such as voting. The clause speaks of "persons" as pointedly distinct from "citizens." Indeed, it was particularly aimed to elaborate the rights of aliens--paradigmatic nonvoters, as a rule. [18]

Of course, in most situations, this originalist point might seem a pedantic quibble, because almost all of the countless Supreme Court cases relying on the Equal Protection Clause to protect voting rights can be justified under a different clause, the Article IV provision guaranteeing each state a proper republican form of government. [19] But this Article IV clause is inapt in presidential elections, which are governed by an entirely different matrix of constitutional provisions in which strict voting equality need not be the rule. For example, under the express terms of Article II, a state legislature could (if permitted by its state constitution [20]) directly pick electors even if that legislature were controlled by a party that lost the statewide popular vote in the most recent election.

Which takes us straight to the Article II ISL argument endorsed by three other *Bush* justices--Chief Justice Rehnquist and Justices Scalia and Thomas, whom we shall call the *Bush* three. This argument was actually even more self-refuting than was the equal protection argument, whose obvious flaws it was designed to sidestep. The *Bush* three failed to understand (or even acknowledge) that a state legislature is properly defined and bounded by the state constitution that gives the legislature life. When state jurists attend to the state constitution in interpreting state election statutes, these judges are enforcing Article II, not undermining it. Even if a state constitution somehow does not apply *of its own force*, it nevertheless applies whenever a state legislature prior to a presidential Election Day has *chosen to incorporate* state constitutional principles into its state legislative schema for presidential elections, as the Florida legislature plainly had chosen to do prior to Election Day, 2000. This is a right and choice permitted to ***9** states and their legislatures by Article II itself. By disregarding this elemental and elementary point, the *Bush* three thus violated the very Article they were claiming to champion. Their argument not only fails, it implodes. It self-contradicts.

To make matters worse, it is extremely hard to believe *both* the equal protection and the Article II argument, as the three concurring justices purported to do. [21] Without their willingness to join the equal protection argument, even as they held their noses, there would have been no single opinion of the Court. Even inexpert journalists in the moment would have seen in a flash that a majority of the Court had in fact rejected each of the only two arguments put forth by Bush's lawyers for ending the recount. Only three justices truly believed in the equal protection argument: O'Connor, Kennedy, and Souter (and of course Souter thought the recounting should continue). And only three justices (Rehnquist, Scalia, and Thomas) truly believed in the Article II argument.

II. WADING INTO THE WEEDS

A closer look at *Bush v. Gore* makes all this more clear. [22]

A. EQUAL PROTECTION

The Bush lawyers' theory of equal protection focused on claims of disuniformity in the judicially monitored recount process. But these claims needed to be considered against the backdrop of the disuniformity of *the original counting*: Different counties used different ways of generating the initial count that the *Bush* Court effectively reinstated when it ended the recount.

Given the flaws of the original count, the *Bush* Court's equal protection argument gets it exactly backward. The late November and ***10** early December 2000 recount monitored by Florida judges had *fewer* equality glitches than the initial, less-monitored counts on Election Day and shortly thereafter. The recount aimed to correct some of the most glaring inequalities of the original count.

Concretely, nonwhite voters were roughly *ten times* as likely not to have their votes correctly counted as were white voters--and this in a former slave state, a former Confederate state, a former segregationist state, a state with a sorry history of open and avowed racial disenfranchisement late into the twentieth century. [23] True, the recount was imperfect (as are most things in life),

but the recount's imperfections were not systematically racist, as were some of the structural inequalities in the initial count.[24] In many ways, the recount process unfolding under the Florida Supreme Court represented the last best chance to *reduce* and judicially *remedy* the inequalities, inaccuracies, and disenfranchisements that had tainted the initial counting process.

Some of the problems that seemed to surface in initial and intermediate stages of the recount might well have been cured by later corrective action from state judges, had these judges been allowed to proceed without interference from the U.S. Supreme Court, and with Congress waiting in the wings as the ultimate monitor and constitutionally mandated final judge.

Alternatively, the U.S. Supremes might have identified their specific concerns about the unfolding recount and sent the matter back to state courts with guidelines for a still-better recount process. Instead, by abruptly demanding an end to the recount process--NOW!--the *Bush* Court simply froze in place inequalities of the same sort, and of a greater extent and more racially imbalanced nature, than the inequalities the Court claimed to care about. According to the *Bush* per curiam,

> [T]he standards for accepting or rejecting contested ballots might vary not only from county to county but within a single county from one recount team to another .... A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the ***11** counting process .... This is not a process with sufficient guarantees of equal treatment.[25]

But if the Florida recount was constitutionally flawed, why wasn't the initial Florida count--which the Court's judgment in effect reinstated--even more flawed? The initial count, we must remember, featured highly uneven standards from county to county. Different counties used different ballots (including the infamous butterfly ballot), and even counties using the same ballot used different interpretive standards in counting them. This happened not just in Florida, but across the country. Were all these elections unconstitutional?

The idea that the Constitution requires absolute perfection and uniformity of standards in counting and/or recounting ballots is novel, to put it gently. For decades, if not centuries, American voters have been asked to put their "X" marks in boxes next to candidate names, and human umpires have had to judge if the "X" is close enough to the box to count. On Election Day, different umpires officiating in different precincts have always called slightly different strike zones. If these judgments are made in good faith and within a small zone of close calls, why are they unconstitutional? And if they are unconstitutional, then every election America has ever had was unconstitutional.

Regardless of what the U.S. Supremes may themselves have thought at the time, it was a mistake to believe that the Florida recount process was proceeding in some especially bad-faith manner that should have caused that process to be viewed with more suspicion than the initial counting process, which occurred without much judicial oversight. The *Bush* Court claimed that its newfangled equality principles applied only to judicially supervised state recounts, and not necessarily to other aspects of the electoral system.[26] But the Court gave no reason for this absurdly ad hoc limitation. The key facts of the case cut precisely against the per curiam: Generally speaking, cheating is *less* likely when judges and special masters--and the eyes of the world--are watching a recount unfold; and a court with a statewide mandate could help mitigate inequalities across different parts of the state. True, in a recount it might ***12** at times be foreseeable that a particular ruling might tend to favor a given candidate, but this is also true of various rulings made during or even before initial counting.

Critics of the recount, both on and off the Supreme Court, were far too quick to think they had somehow established smoking-gun evidence of foul play-- *"Aha!"*--whenever they pointed to certain changes in counting protocols over time or certain variations across space. True, various Florida counties in the past had not counted dimpled chads. But the Florida Supreme Court had not blessed this past practice, and no uniform anti-dimple rule applied in the many sister states that, like Florida, affirmed the primacy of voter intent.[27]

Facts matter. If, for example, certain precincts in 2000 had particularly high rates of dimples or other mechanical undercounts, that might well be evidence of chad buildup or machine deterioration over the years. A strict anti-dimple rule that made sense in 1990 might not have been sensible a decade later, given older machines, more buildup, and a higher incidence of machine undercounts.

So too, the chad rule in precincts with short lines might not sensibly apply to precincts with much longer lines, where some voters may have felt a special need to vote fast so that others could take their turns. If the rates of dimpled chads or other undercounts were especially high in precincts where lines were longest and voters were most hurried (or were especially elderly and frail, or especially unlikely to understand English-language instructions about the proper use of punch-card styluses), it might well make sense to treat dimples in those precincts as particularly likely to reflect genuine attempted votes rather than intentional nonvotes. [28]

These sorts of issues could not have been easily addressed in each precinct on Election Day itself. But, they were just the sort of problems that a statewide court might have been able to sensibly address with an adequate factual background developed in the very process of recounting, a process in which fine-grained data about the precinct-by-precinct (and even machine-by-machine) distribution of each sort of voting problem would become available. The *Bush* Court, however, short-circuited the whole recount and remedy process, privileging the less accurate, less inclusive, and more discriminatory initial counting ***13** process--and privileging that highly unequal process in the name of equality, no less!

As previously noted, the *Bush* Court per curiam failed to cite even a single case that, on its facts, came close to supporting the majority's analysis and result. To be sure, we can find lots of forceful voting equality language in the Supreme Court's pre-*Bush* case law. But these cases were mainly about citizens simply being denied the right to vote (typically on race or class lines) or being assigned formally unequal voting power, with some (typically white) districts being overrepresented at the expense of other (typically black) districts.

The Equal Protection Clause was, first and foremost, designed to remedy the inequalities heaped upon blacks in America. The Fifteenth Amendment extended this civil-rights idea by prohibiting race discrimination with respect to the vote. Yet state governments in the former Confederacy, including the Florida government, mocked these rules for most of the twentieth century. For decades, most American blacks were simply not allowed to vote. When Congress finally acted to even things up with the Voting Rights Act of 1965, inequality persisted as a practical matter. In Florida, for example, black precincts in 2000 typically had much glitchier voting machines, which generated undercounts *many times* the rate of wealthier (white) precincts with sleek voting technology. [29] In raw numbers, this sizable inequality vastly exceeded the picayune discrepancies magnified by the *Bush* Court. Poor maintenance of voting machines, chad buildup, long voting lines in poor precincts--these were some of the real ballot inequalities in Florida 2000.

Accordingly, those who were the most serious about real equality, as envisioned by the architects of Reconstruction, persuasively argued that the government should not ignore the very large and racially nonrandom voting-machine skew. Rather, the government should do its best to minimize and remedy that skew, albeit imperfectly, via manual recounts. Even if such recounts were not required by equality, certainly they were not prohibited by equality. [30] In fixating on the small glitches of the recount rather than on the large and systemic defects of the machines, the *Bush* Court majority turned a blind eye to the real inequalities staring them in the face, piously attributing the problems to ***14** "voter error" (as opposed to outdated and seriously flawed machines) and inviting "legislative bodies" to fix the mess for future elections. [31]

B. ARTICLE II ISL

In his concurring opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, declared that by straying from the text of the election law adopted by the Florida legislature, the Florida Supreme Court had violated Article II, Section 1, Clause 2 of the Federal Constitution. That clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors. For these three justices, [32] the key word here is *legislature*. The U.S. Constitution says that the state legislature can make the rules about how presidential electors are to be chosen. And, the argument runs, if the state judiciary deviates from those rules, the Federal Constitution itself authorizes federal judges to step in to protect the state legislature's federally guaranteed role. Under this Article II "independent-state-legislature" (ISL) reading, the Federal Constitution empowers each state legislature to discharge the legislature's Article II powers and duties independent from--and unencumbered by--the state constitution and the state judiciary interpreting that constitution.

In 2000, this ISL theory first arose in a lawsuit filed in state court as *Palm Beach County Canvassing Board v. Harris*, an earlier round of the *Bush* recount litigation. [33] In a unanimous decision handed down in late November 2000, the Florida Supreme

Court openly referred to its decades-long tradition of construing the Florida election statutes in light of the Florida Constitution when it ordered the state official responsible for certifying election results to accept manually recounted ballots returned by county boards of election past a statutory deadline. In particular, the Florida justices stressed the right to vote as expressed in the Florida Constitution's Declaration of Rights:

> Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote .... Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express ***15** his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right. [34]

For this reason, the Florida Supreme Court declared that provisions of the Florida Election Code for presidential elections were valid only if the provisions "impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the state constitution. [35] On December 4, 2000, in *Bush v. Palm Beach County Canvassing Board* (which came to be known as *Bush I*) the U.S. Supreme Court unanimously vacated the Florida Supreme Court's ruling and remanded to the state court for more explanation. [36] The *Bush I* Court had granted review to address, inter alia, the following question:

> [W]hether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day ... changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner of selection under Article II, § 1, clause 2 of the United States Constitution. [37]

Media attention and the parties' briefing in that first Supreme Court foray focused extensively on the Article II questions. [38] The oral argument in the first Supreme Court hearing also zeroed in on whether the Florida Supreme Court had "made" law and thereby deprived the Florida legislature of its prerogatives, in violation of Article II.

Because the basis of the Florida Supreme Court's initial ruling was not entirely clear, the U.S. Supreme Court ended up resolving *Bush I* without ruling at all on the merits of the Article II question. As the *Bush I* Court put it, "there is considerable uncertainty as to the precise ground for the [Florida Supreme Court's] decision .... This is sufficient reason for us to decline at this time to review the federal questions asserted to be present." [39] Accordingly, the *Bush I* Court merely remanded the case for clarification by the state judiciary.

***16** As part of its remand in *Bush I*, the Court foreshadowed events to come in the more (in)famous *Bush II* by quoting from an 1892 case, *McPherson v. Blacker*, on the meaning of Article II:

> Although we did not address the same question petitioner raises here, in *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), we said: "[Article II, § 1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence, the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot itself be held to operate as a limitation on that power. [40]

Article II and the offhand meaning given to it in *Blacker* made a return appearance in the second--and dispositive--Supreme Court go-around in the Florida matter, in the concurring opinion by the *Bush* three. In the immediate aftermath of *Bush*, several notable conservative scholars praised the *Bush* three's Article II ISL argument. [41]

Alas, many other scholars at the time and in the ensuing years allowed the ISL argument to fly under the radar screen. The ISL theory did not clearly command five votes in *Bush*; [42] and, as we have already seen, *Bush* said and did *so many* other troubling

things requiring careful ***17** refutation. So why bother with an argument that did not receive five square votes in *Bush* and has never received five votes in any later case?

Bother we must today, because an entire generation of young conservatives in the Federalist Society and similar circles [43] have been taught to parrot and admire the *Bush* three's ideas. As we argued long ago (and in some instances even before the 2000 election), [44] and as we shall argue again today, the *Bush* three's ideas were truly fake news--erroneous and outlandish on Day One. But these memes, unfortunately, have in recent years apparently gone viral in various right-leaning legal circles. Many young conservatives were evidently *Bush*-League activists and *Bush*-League law clerks in OT 2020. So bother we must today because one of the *Bush* three now sits as the Court's most senior justice, and an extremely influential justice at that. Bother we must because this Justice, Clarence Thomas, quite evidently continues to subscribe to the sincere but misguided ideas he embraced back in 2000. And bother we must because there are now at least two members of the current Court beyond Justice Thomas who seem to agree with the original *Bush* three.

Thus, we now stress--because it matters--that the Rehnquist/Scalia/Thomas ISL theory flew in the face of: (1) original constitutional understandings; (2) definitive actions by state legislatures themselves (the very bodies ISL claims to care about); and (3) the best reading of Supreme Court case law circa 2000.

1. *Originalism--Text, History, Structure*. ISL theory comes in two parts. First, it claims that under Article II (and also, apparently, under the companion language of Article I, governing congressional elections [45]) each state legislature enjoys a federal right to have its enactments relating to election logistics fully implemented notwithstanding any conflicts between its enactments and the state constitution that creates and bounds the legislature itself. Second, ISL says that, if any ***18** state constitutional limits do in any way constrain a given state legislature, *federal* courts must decide what those limits are, and how best to interpret state election statutes. Prominent believers in ISL are coy about whether their approach means *de novo* review by federal judges, or instead federal review with some (limited) deference to state judicial and executive interpretations. But make no mistake: either way it does not mean business as usual, in which federal courts almost invariably accept state law as pronounced by state adjudicatory entities.

Both halves of this "we-must-protect-the-state-legislatures" theory are, as an originalist matter, not just lawless--that is, not grounded in the law--but actually law-defying. They stand lawful federalism on its head. The theory invokes constitutional provisions designed to protect states against federal interference (including interference from federal courts) and instead uses these provisions to disrespect both the wishes of the state peoples who create, empower, and limit their legislatures, and the wishes of the elected legislatures themselves. The theory gives near carte blanche to *federal* judges, when the key point of Article II's election language (and the companion language of Article I) was to empower *states*.

Let's start with constitutional text: Articles I and II do create powers and duties on the part of the "Legislature" of each state. [46] But what, precisely, is a state "legislature" for these purposes? One aspect of this question is definitional: who must or can be counted as a "legislature?" Can a "legislature" include a veto-pen-wielding governor? Can it consist of an independent agency, or the people themselves engaged in direct democracy via initiatives and town meetings? Another aspect is whether the "legislature," however defined, can override state constitutional directives on how elections must be run. [47]

***19** Remarkably, the *Bush* three advocates of ISL offered nothing-- *nothing!*--to suggest that anyone at the Founding would have understood state "legislature" to mean a free-floating body untethered to the state constitution. Or, a body whose legislative work-product would be free from state court jurisdiction and instead subject largely or wholly to federal judicial interpretation.

In fact, the public meaning of state "legislature" was clear and well accepted at the Founding: A state's "legislature" was not just an entity created to represent the people; it was an entity *created and constrained by the state constitution*.

The adoption of new, republican state constitutions up and down the American continent was a truly transcendent achievement in the late 1770s, acclaimed and revered by Americans everywhere. These new state constitutions were the very heart and soul, legally, of the American revolution. [48] These state constitutions were universally understood as creations of the American people themselves. So of course state constitutions were understood as supreme over state legislatures at the Founding! And of course state courts could--and did--enforce these state higher laws against state legislatures themselves. Notable state judicial

review under state constitutions in fact predated the Philadelphia Convention, *Federalist No. 78*, and *Marbury v. Madison*.[49] Indeed, state constitutions formed the basic template for the Federal Constitution itself in 1787-88.[50]

The clear language and logic of the Article VI Supremacy Clause emphatically confirmed the general supremacy of state constitutions over mere state statutes, in the very same breath that the document similarly affirmed the supremacy of the Federal Constitution over mere federal statutes. The Clause textually enumerated five types of law, and in every instance, the *textual* order of each type of law tracked its *lexical* order, from highest law to lowest law: The U.S. Constitution came first, then federal statutes, then federal treaties, then state constitutions, then state statutes. *In that order, both textually and legally*: "[1] This Constitution, and [2] the Laws of the United States which shall be made in Pursuance thereof; and [3] all Treaties made, or which shall be made, under the Authority of the United States, shall be the ***20** supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in [4] the Constitution or [5] Laws of any State to the Contrary notwithstanding."[51]

An analogy here will drive the point home.[52] The Appointments Clause states: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[53] Imagine that Congress passed a law vesting appointment power for an assistant Attorney General in the Attorney General, the head of the Justice Department. Would sensible interpreters argue that the President does not have the right to require that his Attorney General refrain from appointing person X as assistant Attorney General? No, even though the Constitution clearly distinguishes here between the "President" and "Heads of Departments." Most everyone would concede presidential power to cabin Attorney General power here and would not read the reference to "Heads of Departments" to mean "Independent Heads of Departments." IHD theory--to coin a phrase--makes no sense because there exists a backdrop understanding of unitary executive power over executive department heads. The president is his underlings' master, their superior.

So too, as a backdrop principle, state peoples and state constitutions are masters of state legislatures.[54] Thus we should not read the words of Article II, Section 1 (or the similar words of Article I, Section 4, for that matter) as excluding control by state peoples and state constitutions. Since the Revolution, every state legislature has been defined and circumscribed, both procedurally (e.g., *What counts as a quorum? Is the governor involved in legislation?*) and substantively (e.g., *What rights must the legislature respect?*) by its state constitution, which in turn emanates from the people of each state. When a state legislature violates the procedural or substantive state constitutional limitations upon it, it is no longer operating as a true state legislature for these purposes.

***21** The matter is really no different from what Chief Justice John Marshall said in *Marbury v. Madison* and what Alexander Hamilton said before that in the *Federalist No. 78*, and what the Constitution itself said even earlier in the Article VI Supremacy Clause and elsewhere: When *Congress* enacts an unconstitutional bill, its actions simply cease to have the force of law. The same first principles hold true when a state legislature enacts a bill violative of its state constitution.

In this regard, consider Article I, Section 4, which vests backup power to regulate various aspects of congressional elections in "the Congress." No sober person would suggest that this provision vests final substantive power in Congress to do things forbidden by other parts of the Federal Constitution itself, a Constitution that indeed creates and bounds Congress. Imagine, for example, a Congressional statute proclaiming John Smith by name as ineligible to run for Congress, in obvious violation of the spirit of the Article I, Section 9 ban on federal bills of attainder.[55] Or imagine a Congressional statute proclaiming Catholics ineligible, in plain contravention on the Article VI ban on federal religious tests,[56] to say nothing of the later First Amendment. No one would seriously suggest that federal courts lack power to interpret federal statutes regulating congressional elections with an eye toward harmonizing those statutes with constitutional rights. Nor would anyone deny that Congress has in fact deputized federal courts to perform these very functions.

All this is of course true for every provision of Article I that vests power in Congress. But the point is particularly sharp when we juxtapose "the Congress" and "the Legislature" of "each state" in Article I, Section 4. If the *federal* Congress is quite obviously not independent of the *Federal* Constitution, why should anyone think that the *state* legislature in this very same clause is somehow independent of its *state* constitution?

Indeed, at the Founding, the "legislatures" of each state to which Articles I and II refer were, as a general matter, far from free agents. Voters in many states claimed the power to formally "instruct" their state representatives and thus legally bind them on specific issues. The right to instruct had appeared explicitly in the constitutions of at least ***22** five states, namely,

the Pennsylvania and North Carolina Constitutions of 1776, the Vermont Constitutions of 1777 and 1786, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784. [57]

Founding-era state legislatures were not independent sovereign entities; they were then, and state legislatures remain today, delegatees of the sovereign power of the people. That is why the devices of instruction, recall, referendum, and initiative (to say nothing of judicial review) do not improperly invade the powers of state legislatures, but instead operate as mechanisms that further define the scope of state legislatures' legitimate authority. The Tenth Amendment preserves broad power of the people of the states to shape governments in whatever ways they want, and the Guarantee Clause of Article IV generally requires the federal government to respect and protect--not disregard and override--these state choices about how to create, divide, limit, and implement lawmaking powers. [58]

Early practice under the new Federal Constitution provides still further reason to reject the *Bush* three's ISL ideas. Four of the six state constitutions that were adopted or revised in the Constitution's earliest years of operation--George Washington's first term--regulated the manner of federal elections, and in so doing cabined the power of the state legislature. The Delaware Constitution of 1792 explicitly required that voters elect congressional representatives "at the same places" and "in the same manner" as state representatives. Three other state constitutions--Georgia's in 1789, Pennsylvania's in 1790, and Kentucky's in 1792--required "all elections" to be "by ballot" rather than *viva voce*. Though congressional and presidential elections were not specified as such, these provisions by their express terms applied to *all elections*--popular elections for statewide offices, to be sure, but also biennial elections for federal House members and any popular elections for presidential electors that might be held in the future. Early statesmen read these provisions to mean just what ***23** they said. [59] These post-1789 state constitutions built squarely on strong pre-1787 precedents. Article V of the Articles of Confederation expressly provided that "delegates [to the Confederation Congress] shall be annually appointed in such manner as the *legislature* [emphasis added] of each State shall direct." But all three of the most relevant state constitutions in the Confederation era nonetheless directly and expressly regulated how state legislatures had to act in the appointment of Confederation Congressmen: state legislatures in these key states were emphatically NOT independent. Thus, the 1778 South Carolina Constitution required state lawmakers to choose Confederation Congressmen "by ballot"; the Massachusetts Constitution of 1780 specified the month and manner in which the legislature had to appoint these Congressmen (June, meeting in joint session in one room); and the New Hampshire Constitution of 1784 prescribed the timing of legislative action and the qualifications of eligible Congressional delegations, among other things. Not only did these state constitutions mandate various specific procedures and substantive constraints that state legislatures had to follow when picking Congressmen, but these constitutions also mandated that the legislatures themselves do the picking. (Note that the Articles, standing alone, allowed state legislatures--if permitted by their state constitutions!--to provide for popular election; in two states, Connecticut and Rhode Island, the legislature by law in fact opted to give a role to the voters themselves.) [60]

***24** All told, more than half of the eleven states that ratified the Constitution in 1787-88 thus had state constitutions that expressly regulated state legislatures in the context of federal elections in the 1780s and early 1790s. All these states acted in ways precisely contrary to modern ISL theory. [61] On the other side of the ledger, modern ISL theorists have identified no strong and specific evidence from *any* of the remaining states indicating that constitution-makers affirmatively embraced ISL ideas. In these states, the issue simply may not have arisen; or constitution-makers may have preferred, for reasons of pure policy, to leave their state legislatures untrammeled in regards to federal elections.

In addition, at least two early states that provided for vetoes for general legislative action employed such veto provisions in the process by which federal election rules were made. In Massachusetts, bills regulating federal elections were not considered by the legislative houses alone but were presented to--and subject to disapproval by--the governor. And in New York, such bills were subjected to a council of review that included not only the governor, but also members of the state judiciary. [62]

***25** Thus, the Constitution in both Articles I and II takes state legislative bodies as it finds them, subject to pre-existing control by the people of each state--the ultimate masters of state legislatures--and the state constitutional limits that those people create. [63] And of course the Constitution also plainly recognizes the general role of state courts as the last word on the meaning of state law, including state constitutions, even when those constitutions constrain state legislatures.

To see all this one final way, let us return to the key text of Article II. If, for all the reasons we have identified, the term "legislature" cannot mean "independent legislature," why is it there? The most obvious explanation relates to efficiency and expense. The Framers knew that each of the thirteen then-existing states had an ordinary standing legislature, and Article II created a simple, inexpensive, and self-executing default that, *unless a future state constitution specified otherwise by creating*

a special ad hoc legislative body or process, the state's ordinary pre-existing state legislature would be the body to adopt federal election regulations. And, to repeat, nothing in the Federal Constitution suggests that the *ordinary* state legislature would have federal carte blanche to act in *extraordinary* ways contrary to the general rules limiting the legislature in the very state constitution that created and bounded that legislature.

In 1787, state appointment practice varied widely under then-existing state constitutions. In some states, legislatures had wide appointment authority; in other states, executives played a larger role alongside others (often, council members).[64] Also, within a given state, different appointment rules sometimes applied to different appointments. In the absence of Article II's mention of "legislature," it thus might have been unclear in some states who was to play the default role in directing the manner of appointment of the Federal Constitution's newly created presidential electors. Going forward, however, Article II's text rather plainly gave each state, via any future state constitution or state constitutional amendment it might adopt, broad authority.[65] A future state ***26** constitution could thus directly regulate the elector-appointment process itself in whole or in part; create a special legislative body or legislative process to do the regulation; and/or continue to allow the ordinary legislature to direct electoral appointment, even allowing the legislature to make appointments itself[66]--all subject to whatever general rules that future state constitution might provide. That is why, textually, Article II empowers "Each State" *as such* to "appoint" electors and says merely that the state legislature "may"--not "shall" or "must"--"direct" the "Manner" of appointment. With all this in mind, the reader should now re-read the words of Article II, with our emphasis added: "Each *State shall* appoint, in such a Manner as the *Legislature* thereof *may* direct ...."

2. *State Legislative Practice*. A second and entirely distinct refutation of *Bush*-Leaguers is equally devastating: Even if state constitutions somehow do not apply *of their own force*, they would almost always apply because they have been *incorporated by reference* by the state legislature itself--a key argument nowhere addressed by *Bush*-Leaguers on or off the Court.

Undeniably, even if each state legislature were somehow free to ignore the state constitution that creates and bounds it, each state legislature could *choose* to abide by its state constitution and to invite state courts to enforce the provisions of that constitution as the basic backdrop of all election-law statutes. In fact, each state legislature, including Florida's, generally has so chosen, at least implicitly. This simple fact also guts the second part of the *Bush* three's ISL argument--namely, that *federal* courts must protect the *state* legislatures. State legislatures have already indicated whom they want to protect their interests: *state* adjudicatory bodies.

Notice, importantly, that Articles I and II do not say that state legislatures should be the final word on all aspects of federal elections, but only that state legislatures shall (Article I) or may (Article II) lay out the "manner" of holding federal elections. But the manner of (s)election of officials may certainly involve other branches; surely a state legislature may properly enlist state agencies[67] and state courts to put ***27** the state legislature's plan into effect. And that is exactly what state legislatures have done in almost all states in almost all elections. In dialogue with state courts over the years, *and mindful of the accountability to state electorates and constituencies that state judges have (and that federal judges lack)*, state legislatures have chosen to incorporate into state statutes state constitutional norms and state judicial involvement, in both federal and state elections, to vindicate those norms. Especially in light of the historical links between state legislatures and state judicial bodies,[68] it is implausible to think that state legislatures have chosen to have federal, rather than state, judges decide what state statutes mean.[69]

One big reason state legislatures have consistently involved state courts and state constitutions in federal elections is the practical need to align state and federal voting systems. As a rule, voters use a unified ballot and participate in a unified election schema--when to vote, where to vote, how to vote--to elect candidates in both systems.

To see this point clearly, consider a thought experiment in which the Florida Supreme Court in 2000 had, in response to that fateful remand in *Bush I*, said the following quite clearly and several days before the Supreme Court impulsively jumped back into the fray in *Bush II*:[70]

> Just as Article II of the U.S. Constitution permits the Florida legislature to direct the process of selecting presidential electors, Article II of course also allows the Florida legislature, if it chooses, to cabin its own power in light of our state constitution, and to delegate the last word to resolve and manage disputed presidential elections in Florida to the Florida judiciary. We hereby hold that the Florida legislature has done just that by deputizing

us, the Florida judiciary, to construe the Florida statutes and regulations regarding presidential elections against the backdrop of the Florida Constitution.

***28** Indeed, the Florida legislature has empowered us, the Florida judiciary, to equitably adjust and modify the sometimes hypertechnical and confusing maze of election regulations and code provisions so as to bring the letter of election law into harmony with the spirit and grand principles of the state constitution.

As our longstanding case law makes clear, the Florida Constitution emphatically affirms the people's right to vote and right to have every lawful vote reflecting a clearly discernable voter intent counted equally. We need not decide today whether, in a presidential election, the Florida Constitution applies *of its own force*. Rather, we hold that the Florida Constitution applies simply because the Florida legislature has *chosen to make it applicable* and has deputized us to vindicate its spirit in presidential elections here in Florida.

This legislative power is not merely consistent with Article II; it derives from Article II. In general, no federal court (not even the U.S. Supreme Court!) may lawfully intervene to "protect" the Florida legislature from the Florida courts in the name of Article II, for any such federal court intervention would itself violate the very principle of Article II being asserted. To repeat: pursuant to Article II, the Florida legislature has designated the Florida judiciary as its chosen deputy in this matter.

Doubtless Article II would have been satisfied had the Florida election statute explicitly stated that "every provision of this presidential election code should be construed or judicially revised to conform to the letter and spirit of the right to vote under the Florida Constitution's Declaration of Rights, as that Declaration has been and will continue to be definitively construed by the Florida judiciary." We believe--and so hold--that the Florida statute has done just that in substance, albeit in different words.

Here is why: *The Florida Election Code rules for presidential elections are the same as the Florida Election Code rules for other elections, including state elections for state positions*. It is absolutely clear that the Florida Constitution does apply to these other elections. It is equally clear that this Court--the Florida Supreme Court--is broadly empowered to protect the fundamental state constitutional right to vote in these state elections, even if protecting that right may require this Court to go beyond and behind the strict and at times hypertechnical words of the statutes and regulations. Unless the state legislature clearly indicates otherwise--*and it has never done so*--the same interpretive principles concerning the importance of the right to vote and the authority of Florida judges to construe all rules and regulations against the backdrop of that right apply to presidential elections as well.

For example, if a voter were to use an ink pen rather than a lead pencil to fill in the oval bubble that appeared next to a candidate's name on a printed ballot, longstanding Florida case law makes it clear that this pen mark would ordinarily constitute a valid vote, even if the instructions told voters to use number two pencils when marking their ballots. Given that pen marks on a particular ballot should be counted in an election for state representative, or for any other state, local, or federal official, *surely the presidential-election section of the ballot should be handled the same way*. It would be odd ***29** indeed--absent a very clear legislative indication to the contrary--to count pen marks everywhere else on this ballot and yet refuse to count virtually identical pen marks in the presidential-election section of the very same ballot.

The takeaway here is that unless the state legislature speaks clearly to the contrary, it is most sensible to assume that the legislature wants the *entire* ballot and the *entire* election process to be governed by the same basic rules. Since the state-election parts of the ballot are undeniably controlled by the state constitution operating of its own force, the federal election parts of the ballot should be controlled by the state constitution *because state legislatures have chosen to create unified ballots, with unified electoral timetables and unified electoral logistics and unified electoral implementation.*

Even before the Constitution was ratified, leading Federalists predicted that states would do just that, and publicized this fact as a great systemic virtue of the document's envisioned model of cooperative federalism. Thus, Alexander Hamilton concluded his *Federalist No. 61* by extolling "the convenience" of enabling states to "hav[e] the elections for their own governments and for the national government" on the same date and, presumably, in the same manner.

In any event, if there be any fair doubt about whether in a given instance the legislature of state X did in fact mean to incorporate state constitutional norms, this fair doubt is to be resolved by the state supreme court, which is of course the definitive expounder of the meaning of state law. [71]

***30** For this reason, exercise--even significant exercise--of state judicial power vindicates rather than violates the choice made by the state legislature. To be sure, whenever a legislature provides for judicial enforcement of its work, there is always a risk that courts might err in discerning the best meaning of statutes. But as long as state courts are truly acting as courts and doing what they usually do and have usually done [72] --expounding state law in good faith--there is no basis for officious federal court involvement in discerning, much less federal court de novo second-guessing of, the "real" meaning of state election law.

3. *Pre-Bush* Precedent. What about the cryptic language in *Blacker* [73] mentioned in *Bush I* and relied on by the *Bush II* opinions? Does/did *Blacker* truly support the daft notion that, at least for Article II (and perhaps Article I?) purposes, state legislatures somehow float independently of and outside the very state constitutions that created and bounded them? Actually, *Blacker*'s dictum, fairly read, says very little about the "independence" of state legislatures in these settings.

On its facts, *Blacker* did not in any way involve a conflict between what a state constitution said or a state people wanted, on the one hand, and what the elected legislature preferred, on the other. Instead, the question in *Blacker* was whether the legislature's chosen method of selecting electors by means of district-by-district (as opposed to statewide) election was permissible under Article II. The *Blacker* Court quite correctly upheld the legislature's choice in this regard. There was never ***31** any claim that the legislature's enactment conflicted with, or needed to be harmonized with, the state constitution. The only question was whether what the legislature chose was permissible under the *Federal* Constitution. [74] Nor did the case in any way involve an ostensible conflict between the wishes of the legislature and the views of the state judiciary. As such, the case on its facts had nothing--*nothing!*--to do with the ISL theory.

True, the *Blacker* opinion did mention and purport to rely on an 1874 report written by Senator Perry Morton of Indiana that contained the following sentences:

> This power [to appoint Electors] is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated. [75]

But Morton cited no historical authority for his assertion, which, as we have seen, ran counter to much of what was said and done at the Founding. What's more, the *Blacker* Court itself cast strong doubt on the ISL idea when it elsewhere stated in the opinion that "[t]he legislative power is the supreme authority *except as limited by the constitution of the State*." [76] This part of *Blacker* was never quoted, much less explained, by the majority or concurring opinions in the *Bush* litigation.

In any event, if the case for ISL is to be built on Supreme Court authority, twentieth-century decisions--decisions post-*Blacker*--strongly undercut the *Bush* three.

Consider first the 1916 case of *Ohio ex rel. Davis v. Hildebrant*. [77] Ohio's state constitution included a provision that legislative power was vested ***32** not only in the state legislature, but also "in the people[,] in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly." [78] The Ohio General Assembly passed a redistricting act for congressional elections, and enough persons petitioned for the measure to be subject to voter approval through a referendum. In that referendum, voters rejected the redistricting act. In *Hildebrant*, the Supreme Court squarely rejected ISL as applied to Article I, which authorizes state legislatures to regulate congressional elections. The *Hildebrant* Court held that "the referendum constituted *a part of the state constitution* and laws and was contained within *the legislative power* and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the state was yet valid and operative, is conclusively established to be wanting in merit." [79] In other words, a state legislature under Article I is not independent of its state constitution, but is rather bound by it. And, we would add, the same holds true for Article II. Article I's rules for state legislative regulation of congressional elections are structurally and intratextually akin to Article II's rules for state legislative regulation of presidential elections. [80]

Consider next the 1932 case of *Smiley v. Holm*. [81] The two houses of the Minnesota state legislature had passed a bill dividing the state into nine new congressional districts following a decennial census, but the bill was returned by the governor without his approval. The Minnesota legislature took the position that under Article I, section 4 of the Federal Constitution, the governor's approval was not necessary for the redistricting measure to go into effect. The U.S. Supreme Court disagreed, ruling that ordinarily "the exercise of the authority [to regulate congressional elections] must be in accordance with the method which the State has prescribed for legislative enactments." [82] Because normal laws in Minnesota were subject to gubernatorial veto under the state ***33** constitution, the redistricting measure returned by the governor could not be effective.

Together, *Hildebrant* and *Smiley* put the lie to ISL in its strong form. The "legislature" in Article I means "legislative process" as structured by state constitution. And what is sauce for Article I should also be sauce for Article II.

The *Bush* three concurrence championing ISL ideology simply ignored all this (just as the concurrence ignored Founding-era understandings and expectations, and state legislative practice), making no mention whatsoever of *Hildebrant* and *Smiley*.

III. BUSH-PRUNING: POST-2000 CASE LAW

Post-*Bush* cases have built squarely upon *Smiley* and *Hildebrant* and have authorized state constitutions to displace state legislatures altogether in certain aspects of congressional elections covered by Article I. In these cases, even conservative justices have directly rejected the *Bush* three's ISL ideas, at least for Article I (and thus, we would argue, for Article II as well). These cases make even more clear that the Federal Constitution in general takes state legislatures as it finds them, subject to state constitutional limitations--limitations that state courts are empowered to enforce.

In 2015, the Court decided a landmark case, *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*. [83] The *AIRC* Court ruled that Article I allowed the people of Arizona, via their state constitution, to do congressional redistricting through an independent redistricting commission created by a popular initiative--a commission not controlled by the ordinary state legislature.

Poetically, Arizona voters had passed the initiative in question--Proposition 106--in November 2000, the very same day as the presidential election that led to *Bush*. [84] Arizona's legislature argued that ***34** Article I prevented the state from giving the power to draw congressional districts to an entity distinct from the ordinary state legislature itself.

In rejecting this ISL argument, the *AIRC* majority opinion penned by Justice Ginsburg relied extensively on *Hildebrant* and *Smiley*, and in the process strongly undercut the ISL logic of the *Bush* three. One alumnus of the *Bush* majority actually joined the Court's opinion, albeit a justice who had never squarely endorsed the *Bush* concurrence: Anthony Kennedy.

The *AIRC* majority opinion made emphatically clear that when the U.S. Constitution refers to a state "Legislature" in the context of a provision calling for state lawmaking, [85] the word "Legislature" means a state lawmaking process *as prescribed by the state constitution*. It's hard to imagine language that more plainly repudiates the core ISL idea than the wording used by the

AIRC Court: *"Nothing in [Article I] instructs, nor has this Court ever held, that a state legislature may [regulate] the ... manner of holding federal elections in defiance of provisions of the State's constitution."* [86]

If "Legislature" in Article I means "legislature free to do what it wants unconstrained by state constitutions," *AIRC* could not have come out the way it did. Full stop. And, we hasten to repeat, what is sauce for Article I's rules about state legislative regulation of congressional ***35** elections should be sauce for Article II's rules about state legislative regulation of presidential elections.

AIRC was a 5-4 ruling, decided over the dissents of the Court's conservative wing. But in 2019, *AIRC* was embraced by all the Court's conservatives in a case about partisan gerrymandering of congressional districts, *Rucho v. Common Cause*. [87]

Chief Justice Roberts, who had dissented in *AIRC*, wrote for the majority in *Rucho*. In direct opposition to ISL theory, the Chief Justice's opinion blessed state constitutional constraints enforced by state courts against state legislatures in congressional elections. This opinion directly built upon *AIRC*'s key holding by pointing approvingly to measures in Michigan and Colorado that were in all relevant respects identical to the Arizona initiative measure at issue in *AIRC*. The opinion also blessed anti-ISL developments in Florida, of all places!

The Chief Justice's remarkable language is worth savoring: "[We do] not condone excessive partisan gerrymandering. Nor does our conclusion [to limit the federal judicial role in controversies over congressional gerrymandering] condemn complaints about districting to echo into a void. The States ... are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015) ... [And] in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6." [88]

Note that this passage expressly mentioned that Michigan's and Colorado's constitutional provisions applied not just to state legislative districting, but also to congressional districting under Article I. Note also that this key passage expressly endorsed both the right of ***36** the Florida Constitution to constrain the Florida legislature, and the right of the Florida Supreme Court to interpret and implement that state constitution--even to the point of invalidating an enactment of the Florida state legislature. This *Rucho* passage was thus a square repudiation of ISL--both prongs. And much of this passage was, to repeat, all about federal elections in *Florida* as regulated by the *Florida Supreme Court* using the *Florida Constitution* to trump the *Florida legislature*. Take that, *Bush* three! Justices Thomas, Alito, Gorsuch, and Kavanaugh all joined this passage in full.

This brings us back to our key intratextual claim [89] that Article I and Article II are in this respect *in parimateria*. If ISL is wrong for Article I, as *AIRC* and *Rucho* make clear it is, it is also wrong for Article II.

Consider once again the relevant texts. Article I, Section 4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...." We could reorder this language (without changing its meaning) to say: "The Legislature of each State shall prescribe the manner of electing members of Congress." Article II, Section 2 says: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to the Electoral College] ...." We could likewise reorder this language (also without changing its meaning) to say: "The Legislature of each State may direct the manner of appointing members of the electoral college." When we lay the two reformulations side-by-side, the similarity is obvious and overwhelming: "The Legislature of each State shall prescribe the manner of electing members of Congress" and "The Legislature of each State may direct the manner of appointing members of the electoral college." [90]

IV. THE BITTER FRUIT OF THE POISONOUS BUSH

Given all this, we were, we confess, surprised and dismayed when we saw the Article II ISL theory sprouting up again like a stubborn weed in the weeks leading into the 2020 presidential election.

***37** On October 26, a week before the election, Justice Kavanaugh weighed in, ominously. The case, *Democratic National Committee v. Wisconsin State Legislature*, involved a lower *federal* court's invocation of the Fourteenth Amendment's right-to-vote principles to enjoin Wisconsin from enforcing its state election laws. [91] Kavanaugh joined four other justices in chiding the district court for intervening in an election so close to the voting date. But then, in a startling footnote, he added:

> A *federal court*'s alteration of state election laws such as Wisconsin's differs in some respects from a *state court*'s (or state agency's) alteration of state election laws. That said, under the U. S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States "in such Manner as the *Legislature* thereof may direct." §1, cl. 2 (emphasis added). The text of Article II means that "the clearly expressed intent of the legislature must prevail" and that a state court may not depart from the state election code enacted by the legislature. *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *see Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76-78 (2000) (per curiam); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). In a Presidential election, in other words, a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring). As Chief Justice Rehnquist explained in *Bush v. Gore*, the important federal judicial role in reviewing state-court decisions about state law in a federal Presidential election "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.* at 115. The dissent here questions why the federal courts would have a role in that kind of case. *Post* at 45, n.6 (opinion of Kagan, J.). The answer to that question, as the unanimous Court stated in *Bush v. Palm Beach County Canvassing Bd.*, and as Chief Justice Rehnquist persuasively [!!!] explained in *Bush v. Gore*, is that the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws. [92]

Two days later, three other justices joined the fray in *Republican Party of Pennsylvania v. Boockvar*. [93] In this case, Pennsylvania Republican ***38** *Bush*-Leaguers directly invoked the Article II ISL theory to ask the Roberts Court to step in to undo rulings by the Pennsylvania Supreme Court tweaking the date by which mail-in ballots needed to be sent in.

The state supreme court had acted to accommodate the state constitutional right to vote in the face of COVID. The state statutes facially required all mail-in ballots to be *received* by 8 PM on Election Day, but the state supreme court ruled, long before Election Day, that the state constitution allowed votes to be counted provided they were *post-marked* by Election Day and received no later than three days thereafter. Part of the logic was that a hard-to-predict-in-advance COVID spike on or just before Election Day might make it impossible or dangerous for some voters who had been planning to vote in person to do so as planned, and that a relaxed mail-in deadline would better vindicate the fundamental right to vote enshrined in the state constitution.

As applied to elections directly and undeniably governed by the state constitution--for example, state legislative elections--this tweaking was uncontrovertibly within the proper sphere of the state justices. And the state legislature had given no indication in its statutes that different deadlines and procedures should apply to federal elections. Thus the state legislature implicitly incorporated the state constitution into its unified general election laws and implicitly invited the state courts to play their traditional election role for all parts of the election, even if federal elections strictly speaking somehow fell outside the ambit of the state constitution operating of its own force. [94] And of course, *AIRC* and *Rucho*, to say nothing of *Hildebrandt* and *Smiley*, gave additional strong support to what the Pennsylvania Supreme Court had done. Under the logic of these cases, the state constitution did indeed apply of its own force even to congressional and presidential elections.

Yet Justice Alito, joined by Justices Thomas and Gorsuch (but not, notably, by Justice Kavanaugh) condemned the Pennsylvania Supreme Court and urged his colleagues to leap onstage, in a re-enactment of *Bush v. Gore*. Justice Alito's embrace of the *Bush* three's Article II ISL theory was emphatic and unrepentant:

> ***39** The Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office. *See* Art. I, §4, cl. 1; Art. II, §1, cl. 2; *Bush v.*

> *Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam) .... It would be highly desirable to issue a ruling on the constitutionality of the State Supreme Court's decision before the election. That question has national importance, *and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.* See *Art. I, §4, cl. 1; Art. II, §1, cl. 2. For these reasons, the question presented by the Pennsylvania Supreme Court's decision calls out for review by this Court--as both the State Republican and Democratic Parties agreed when the former applied for a stay.* [95]

What is perhaps most astonishing is that none of the four current justices (just one shy of the number needed to blow up presidential elections yet again) who invoked the ISL notion carefully engaged the manifold and manifest problems with the theory. No history, no discussion of state legislative practice, and no awareness, even, of the incorporation-by-reference argument, which provides its own distinct, sufficient, and devastating refutation of *Bush*-League ideology. No originalist or structural explanation for why Article II would ever single out one state lawmaking institution and immunize it from the state constitutional definitions and constraints to which it would ordinarily be subject. And no close analysis of cases such as *Hildebrandt*, *Smiley*, *AIRC*, and *Rucho*. Instead, Justice Kavanaugh cited *Bush I*--the Palm Beach County case--as if it had made law, even though the Court specifically "decline[d] at th[at] time to review the federal questions asserted to be present." [96] And, unfathomably, neither Kavanaugh nor ***40** Alito even mentioned much less distinguished *AIRC* or the subsequent *Rucho* case embracing *AIRC*. [97]

Nor did Justice Kagan, who wrote a dissent in the Wisconsin case [98] joined by Justices Breyer and Sotomayor, set her colleagues straight with the requisite clarity and detail. All Justice Kagan said was:

> At the same time that Justice Kavanaugh defends this stance by decrying a "federal-judges-know-best vision of election administration," he calls for *more* federal court involvement in "reviewing state-court decisions about state [election] law." It is hard to know how to reconcile those two views about the federal judiciary's role in voting-rights cases. Contrary to Justice Kavanaugh's attempted explanation, neither the text of the Elections Clause nor our precedent interpreting it leads to his inconstant approach. *See Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576U.S. 787, 817-818 (2015); *Smiley v. Holm*, 285 U.S. 355, 372 (1932). [99]

***41** Bench memo to Justice Kagan: The key point is not merely that neither the constitutional text nor the Court's precedents *lead to* Justice Kavanaugh's approach. The point is that text and precedent emphatically *reject and refute* Justice Kavanaugh's approach. One would think that as multiple justices seemed to be on the verge of replaying the *Bush v. Gore* nightmare, there would have been a greater sense of urgency and a more robust explanation of just how jurisprudentially wrongheaded that would be. [100]

And what shall we say about recent commentators who are trying to bring ISL back to life? Professor Michael Morley--perhaps the most energetic scholar in this camp--has asserted that the "text of the Constitution[] [and] the history of the Elections Clause and Presidential Electors Clause ... strongly support the ... interpretation[ ] [under which] only a state's institutional legislature ... may regulate federal elections." [101] Alas, he has offered no persuasive textual or structural analysis, and his history comes almost entirely from decades that are either far too late or far too early--far too late to carry much originalist weight and far too early to have strong precedential weight given more recent and definitive Supreme Court case law (*Hildebrant*, *Smiley*, *AIRC*, and *Rucho*). [102]

***42** Morley's treatment of recent precedent also falls short (to put it mildly). He has said that *Bush I* "is perhaps the most important ruling stemming from the 2000 election concerning the independent state legislature doctrine." [103] In fact, as previously noted, the justices in that case chose not to reach the merits of *any* question, stating explicitly that "[we] decline ... to review the federal questions asserted to be present" in the cert petition. [104] Morley has gone on to assert that the Court

in that case "concluded" that "[c]ertain parts of the Florida Supreme Court's opinion ... incorrectly suggested that the Florida Constitution might [permissibly] limit the legislature's authority to regulate presidential elections." [105] Wrong again. To repeat: the *Bush I* Court did not "conclude" *anything*.

Morley has also claimed the *Bush I* Court "vacated ... and remanded so that the Florida Supreme Court could reconsider the issue exclusively under the Florida Election Code, without allowing the state constitution to influence its interpretation." [106] The Court gave no such direction on remand; it said only that "there is considerable uncertainty as to the precise grounds for the [lower court] decision" and that "[t]his is sufficient reason for us to decline at this time to review the federal questions asserted to be present." [107] So the only (implicit) direction on remand was for the state court to be more clear in the bases for its decisions.

Indeed, if a unanimous Court in *Bush I* had held what Professor Morley and various careless justices in recent months have said it held, how is it that just two weeks later, in *Bush v. Gore*, a more full-throated articulation of the same proposition--that state constitutions cannot cabin state legislatures in this arena--garnered the votes of only three justices and was explicitly rejected by four? [108]

***43 V. MAINTAINING FEDERALISM'S GARDEN**

The axiom that state courts rather than federal courts are the ultimate interpreters of state law comes not just from both the Federal Constitution's deep structure and the watershed Supreme Court case of *Erie Railroad Co. v. Tompkins*, [109] but also from a landmark ruling over a century earlier, *Green v. Lessee of Neal*. [110] In *Green*, the Marshall Court made clear that when state courts construe state statutes, those interpretations of state legislative enactments must be respected by federal courts. [111] For decades upon decades, when federal judges have ***44** confronted particularly sensitive state-law questions, these judges have generally understood that they must either follow the lead of state court rulings on point (if such guidance is available) or (if not) certify state-law questions to state courts. Federal courts are not allowed to simply ignore state supreme courts and decide for themselves what state law is or ought to be.

True, state courts might at times misinterpret state constitutions. *But so might federal judges--and indeed, they are generally more likely to do so*. Also, state legislatures have vastly more control over state courts than they do over, say, Justices Gorsuch, Thomas, and Alito (who are not remotely experts on the meaning of fifty state constitutions, to put it mildly).

Does all this mean that federal courts have absolutely no meaningful part in adjudicating disputes concerning federal elections? Certainly not. What it does mean is that federal courts need to leave *state* law to *state* courts and stay focused on enforcing *federal* rights and *federal* policies. In general, there is no Article I or Article II federal right or federal policy that confers special powers or protections upon elected state legislatures vis-à-vis other institutions of state government. Relatedly, there is no substantive federal value, in either Article I or Article II, demanding emphatically literal (or narrow) adherence to the text of state legislative enactments.

In other words, there is in this domain no general federal interest in implementing any particular intra-state separation-of-powers regime or any specific textual interpretative methodology. Instead, whatever federal rights and policies that federal courts can be helpful in enforcing must come ***45** either from other parts of the Constitution, or, importantly, from Congress, which has been given a role in both congressional and presidential elections.

As to the Federal Constitution, certainly the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments confer rights that states must respect, under penalty of federal-court enforcement. But state respect for these rights has nothing to do with intrastate separation-of-powers. State legislatures, state courts, state agencies, and the people of states acting via direct democracy all must respect the values underlying these landmark Amendments.

True, some provisions of the Constitution, unlike Articles I and II, use specific language that reflects specific historical concerns with some state governmental institutions vis-à-vis others. For example, Section 2 of the Seventeenth Amendment, in a single sentence, pointedly differentiates between the legislatures and executive authorities of states, and confers appointment powers only on the latter. [112] The special concern over malapportionment (and the racial discrimination it often reflected) weighed on the proponents of direct election for U.S. Senators and generated an express Seventeenth Amendment preference for governors

over state legislatures in filling Senate vacancies. (Governors, elected statewide, were generally immune from gerrymandering and malapportionment. [113]) But no comparable pointed linguistic contrast between a state legislature and other state organs--much less between a state legislature and the state constitution that creates it-- exists ***46** in Articles I and II; nor, it is crucial to add, is there any history to support such distinctions.

In addition to these formal constitutional provisions, the structural principle of federal supremacy could, under certain circumstances, trigger federal scrutiny of state constitutional rules that treat federal-election matters worse than analogous state-election matters. Under *Testa v. Katt* [114] and related cases, state courts cannot disrespect federal claims by excluding them without explanation from state courts while allowing analogous state-law claims. So too, unexplained differential treatment of federal and state voting rules might warrant federal judicial inquiry. Oftentimes there may be innocent explanations, [115] but differential treatment could in some settings suggest problematic disrespect. Once again, the applicable principles would of course constrain all state entities and types of law alike: legislatures, courts, commissions, statutes, initiatives, and constitutions.

As for federal statutes, some may create substantive entitlements that states need to respect and federal courts need to enforce. For example, if Congress were to provide that congressional district lines must be drawn without regard to political partisanship, or with an eye toward remedying historical racial discrimination, those edicts would have to be followed by state districting entities. But again, this would be true whether the state districting entity were the elected legislature or an independent citizen commission or a state court for that matter. Relatedly, the federal statute would of course constrain not just ordinary state statutes, but also state constitutions.

Other federal statutes focus not on substance but on timing: Members of Congress and presidential electors are to be selected/appointed on the federal Election Day. [116] That does not mean that their identity must be known by 11:59 PM on Election Night, but it does mean that the antecedent facts--who voted for whom--have to be locked into place on or before Election Day. Prior to the holding of an election, a state has broad federally approved power to tinker with its election administration regime without running afoul of Congress's designation ***47** of an Election Day. [117] But after Election Day, a state cannot reject its pre-election system simply because, say, the state now knows how close the election is and wants to use its newfound leverage as a decisive swing state to induce the candidates to bid for the state's good will. Such gamesmanship would frustrate the very reason Congress requires states to lock into a system of selection ex ante. Here, too, the relevant rules constrain not just state courts but also elected state legislatures and other state governmental entities. [118]

From one angle, state courts are akin to the ballot-counting machines or in-person vote counters themselves; the courts are a relatively ministerial part of the apparatus for determining who validly voted, and for whom. Just as a machine or an individual election official seeks to recognize a valid vote from an invalid one, a judge may do the same thing, albeit at a more categorical level. Provided, of course, that judicial involvement was built into the system that was in place as of Election Day. If it wasn't, then involving the courts could potentially be seen as violating Congress's timeline for making decisions about who is elected ***48** and appointed; judges, no less than other actors, could be tempted to play games to extort candidates.

But what about the fact that judges, unlike machines, have political biases? Potential bias by judges is present in any setting, and yet we don't as a general matter say that fact forecloses courts from performing their general dispute-resolution and norm-declaration roles throughout our legal system. As long as state judges in congressional-election or presidential-election disputes are engaged in the same kinds of judicial processes and doing the same kinds of interpretive things they have done historically under state law in resolving state election contests, federal courts should defer to state court understandings of state statutory and constitutional law principles.

The bar for finding that a state court has failed this rule-of-law test is thus quite high, just as it is in other areas that remain the domain of pure state law. [119] Not only would the evidence of improper intent by state-court judges need to be compelling before such a finding were made; but also, the precise federal right or policy being infringed by such manipulation would need to be clearly and specifically identified by a second-guessing federal court. If the asserted federal value is simply a due-process concern for regularity and predictability in elections, the state-law interpretations in question would have to be truly outlandish (no less so for federal than state contests) before they would create a substantial federal question.

Torecap: The test cannot be whether a state supreme court is suitably "textualist," as various Supreme Court *Bush*-Leaguers might seek to define textualism. The Supreme Court itself is not now and never has been relentlessly textualist, even as some careless justices now threaten to impose such a narrow method on states in the context of federal elections. There is nothing in

the U.S. Constitution that speaks to the issue of state-court interpretive methodology over state law in general or over state law relating to federal elections in particular. (And surely there is no clear and literal federal statutory or constitutional *text* that speaks to this issue!) A given state legislature, the state people who elect that state legislature, and the spirit of that state's overarching state constitution that gave birth to and sustains that state legislature might well *prefer* a state-law jurisprudence that is more purposive, or more structural/holisitic, or more precedent-based, or more ***49** representation-reinforcing, or more democracy-promoting, or more canon-driven, than relentlessly textual. And who is the U.S. Supreme Court to dictate otherwise--*especially* if the Court purports to intermeddle in the name of the state legislature, which, by hypothesis, prefers a different interpretive method! [120]

So the proper question for the Supreme Court to ask is not "Was the state supreme court suitably *textualist*?" Nor is the proper question "Did the state legislature *explicitly* and *textually* incorporate by reference the state constitution in its federal-election-law schema?" Rather, the proper questions are "In the federal-election case at hand, was the state supreme court doing the kinds of things it has generally done in other cases (especially cases involving the same types of statutes and state constitutional provisions at issue) in years past?" and "Was the state court and/or the state constitution treating federal elections similarly to state elections?" If the answer to either question is *no*, closer Supreme Court scrutiny is warranted to determine if any genuine federal interest--which must, we repeat, be carefully identified and shown to be truly inherent in federal law--is at risk.

The various statements over the years by *Bush*-League justices and *Bush*-League scholars fall laughably short of this high bar. Casual references to the Article II (and Article I)word "legislature" and careless [121] claims that this word would be "meaningless" unless one embraces full-blown ISL ideology don't cut it. *Bush*-Leaguers have failed to identify any deep and valid federal interest grounded in historical understandings or structural values that would warrant aggressive federal judicial intrusion into the traditionally close partnership between state legislatures and state courts, both operating under the valid superintendence of state peoples and state constitutions. *Bush*-Leaguers actually do violence to the very state legislatures they claim to respect--state ***50** legislatures who live under and profess loyalty to state constitutions, who answer to state voters (as do many state judges), and who have historically closely partnered with state judges and other state officials to create integrated and unified intra-state election systems for state and federal races.

VI. GREEN SHOOTS? THE CHIEF JUSTICE AND JUSTICE KAVANAUGH

Much of our analysis thus far has reflected deep disappointment with the work-product of several members of the current and recent Court. But there are also at least two reasons for optimism.

First, Chief Justice Roberts got things just right in the October 26 Wisconsin case, where he wrote:

> [T]his case presents different issues than the applications this Court recently denied in *Scarnati v. Boockvar*, and *Republican Party of Pennsylvania v. Boockvar*. While the Pennsylvania applications implicated the authority of *state courts* to apply their *own constitutions* to election regulations, this case involves *federal* intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin. [122]

Second, Justice Kavanaugh, who in some sense planted the Court's first kernel of *Bush*-League thinking in the 2020 election cycle in the October 26 Wisconsin case, did not, two days later, join Justices Alito, Thomas, and Gorsuch in their statement that the Pennsylvania Republicans likely had a winning Article II ISL claim on the merits. [123] Why the apparent switch-in-time?

We cannot know for sure. Perhaps we may never know, even after the current justices' papers become public in the distant future. But we can say this: In between Justice Kavanaugh's unfortunate remarks in the Wisconsin case on October 26 and his admirable silence in the Pennsylvania case two days later, various legal commentators--including both of us, along with Professor and former Acting Solicitor General Neal Katyal in the *New York Times*--weighed on this issue to remind the world of the many weaknesses of ISL reasoning. [124] Also, ***51** in this very same dramatic two-day window, Amy Coney Barrett formally joined the Court: Chief Justice Roberts administered the judicial oath to Justice Barrett on the morning of October 27.

We have no way to know if the frank and timely expression of our considered views as constitutional scholars in the *Times* had any effect on Justice Kavanaugh's seeming pullback from the edge. But if our timely and *Times*-ly intervention did somehow reach Justice Kavanaugh's desk at a moment when it truly mattered, when the Court was poised on the brink of disaster, then perhaps he did exactly what every good justice should do, always: pause and revisit one's instincts in light of the expert input of scholars.

In mid-December 2000, *Bush II* did not have the benefit of extensive scholarly input. Rather, most of the *Bush* justices galloped off on their own with no real time for academics to saddle up and warn the justices that they were wildly charging the wrong way--toward a cliff. And at one key perilous moment in OT 2020, it seemed as though the current justices were about to make the same horrible mistake.

The hope that what scholars say might at times matter to the Court--even when those scholars mince no words and speak candidly as true *amici curiae*--is part of the very *raison d'être* of *The Supreme Court Review*, now in its seventh decade of publication. If (and we admit it's a big if) Justice Kavanaugh in fact is rethinking his initial position as a result of scholarly input, this switch in time would be cause for optimism. To borrow an expression that famously appeared more than a half-century ago here in the pages of *The Supreme Court Review*, it might even be an occasion for "dancing in the streets." [125]

Footnotes

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1 531 U.S. 98 (2000) (per curiam). The case is sometimes referred to as *Bush II*.

2 Jeff Rosen captioned his cover story for the *New Republic* "Disgrace" and proclaimed the Court's decision "a shabby piece of work." Jeffrey Rosen, *Disgrace*, NEW REPUBLIC (Dec. 24, 2000), https://newrepublic.com/article/70674/disgrace. In the *Los Angeles Times*, Akhil concluded by saying that he would tell his students that they must accept the Court's ruling but that they should not respect it. Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES (Dec. 17, 2000), https://www.latimes.com/archives/la-xpm-2000-dec-17-op-1126-story.html. Early scholarly articles and book chapters by distinguished constitutional scholars piled on. Jed Rubenfeld railed against the "illegality," "breathtaking indefensibility," and "wrongness" of the justices' action, proclaiming it "worse even than the notorious *Plessy*." Jed Rubenfeld, *Not as Bad as* Plessy. *Worse.*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 20, 20-21 (Bruce Ackerman ed., 2002). Jack Balkin and Bruce Ackerman were no less emphatic. *See, e.g.*, Jack M. Balkin, *Legitimacy and the 2000 Election*, *in id.* at 210, 210 (describing the Court's decision as "illegal[]"); Bruce Ackerman, *Off Balance*, *in id.* at 192, 195-96 (characterizing the Court's arguments as "preposterous" and its ultimate ruling as an "act of usurpation").

3 Sad to say, several of the most notable defenders of the indefensible were and still are closely linked in the public mind to the University of Chicago Law School, the sponsor of the very volume in which we today voice our views. *See, e.g.*, Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 13 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in id.* at 98; Richard A. Posner, Bush v. Gore: *Prolegomenon to an Assessment*, *in id.* at 165; Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

4 *See* AKHIL REED AMAR, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA 10 & 437 n.2 (rev. ed. 2018); *see also* Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015), https://time.com/4056051/worst-supreme-court-decisions.

5 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

6 Plessy v. Ferguson, 163 U.S. 537 (1896).

7 We aim today to offer readers a definitive one-stop-shop evisceration of *Bush v. Gore*--and to offer that evisceration at a moment when various forces on and off the Court seem bent on reviving the case and restoring its reputation. If, as we believe, the case truly deserves to rot in judicial hell, the legal community deserves a comprehensive statement of its most egregious faults and a full response to the various *Bush* apologists over the years.

8 U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ....").

9 *See* U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. Const. amend. XII.

10 *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY ch. 1 (2005).

11 *See id.* at 7-10 & 503-07 nn.1-12; AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840, at 225-27 (2021).

12 In 1876-77, Congress chose to involve certain individual members of the Court as adjuncts to Congress itself, not as the Supreme Court sitting as such, as happened in *Bush*.

13 *Cf.* POSNER, *supra* note 3.

14 Florida would not have been tied had it not been for the disastrous butterfly ballot used in Palm Beach county. As most honest observers understood at the time, and as later scholars have confirmed, the misleading design of this ballot caused Gore to lose thousands of votes, far more than Bush's margin of victory in the final official tally. *See, e.g.* Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793 (2001).

15 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

16 United States v. Nixon, 418 U.S. 683 (1974).

17 Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances ....").

18 *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 185-88 (2012); *see also* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

19 U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government ....').

20 On the enormous importance of this parenthetical proviso, see *infra* note 117.

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21 The more one insists on the plenary power of state legislatures under Article II to call the shots in presidential elections, the more awkward it is to also insist that the state must satisfy a super-strict system of voting equality, down to uniform microstandards for evaluating chads, regardless of the counting and recounting system established by the legislature itself. Much of the recount unevenness that the *Bush* per curiam complained about was in fact the product of a decentralized/checkerboard election system that had been devised by the state legislature pursuant to Article II--the very system the *Bush* three purported to champion, even as they also purported to join the per curiam attacking that system.

22 Some of this section borrows heavily from Akhil's 2009 Dunwody Lecture, delivered in Florida in the presence of several of the state jurists who prominently participated in the *Bush v. Gore* litigation, and first published as Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009) [hereinafter *Dunwody Lecture*].

23 *See* Laurence H. Tribe, *eroG .v hsuB: Through the Looking Glass, in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 2, at 50.

24 On the importance of effects and not merely intent in the voting context, see Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

25 531 U.S. at 106-07 (citations omitted).

26 *Id.* at 109 ("The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

27 *See, e.g.*, Delahunt v. Johnston, 671 N.E. 2d 1241 (Mass. 1996).

28 *See* Tribe, *supra* note 23, at 45-46.

29 *See id.* at 50.

30 *See* 531 U.S. at 147 (Breyer, J., dissenting).

31 531 U.S. at 103-04 (per curiam).

32 And for many subsequent scholarly apologists, such as Professors Epstein and McConnell and Judge Posner. *See supra* note 3.

33 772 So. 2d 1220 (Fla. 2000) (per curiam).

34 *Id.* at 1237 (internal footnote omitted); *see also id.* at 1239 ("[T]he right to vote is the preeminent right in the Declaration of Rights of the Florida Constitution ....").

35 *Id.* at 1236.

36 531 U.S. 70 (2000) (per curiam) (*Bush I*).

37 *Id.* at 73.

38 *E.g.* Brief for Petitioner § II, *Bush I*, 531 U.S. 70 (2000) (No. 00-836); Reply Brief of Respondents Al Gore, Jr. & Fla. Democratic Party § IV, *Bush I*, 531 U.S. 70 (2000) (No. 00-836).

39 *Bush I*, 531 U.S. at 78 (internal quotation omitted).

40 *Id.* at 76 (alteration in original).

41 *See supra* note 3.

42 The majority opinion did in one brief passage nod toward ISL:

> The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. This is the source for the statement in *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892), that the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the Framing of our Constitution. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).
>
> Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (citation omitted).

43 See, e.g., Richard L. Hasen, *Trump Is Planning a Much More Respectable Coup Next Time*, SLATE (Aug. 5, 2021), https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html; Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021), https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie.

44 *E.g.* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000); Vikram Amar & Alan Brownstein, Bush v. Gore *and Article II: Pressured Judgement Makes Dubious Law*, 48 FED. LAW. 27, 30-33 (2001); *Dunwody Lecture*, *supra* note 22.

45 For one possible difference between the words of the relevant companion clauses, see *infra* note 90.

46 U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...."); U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ....").

47 These two aspects--the first of which might be seen as broadly "procedural" and the second broadly "substantive," blur at the margins. Definitionally, we might say that a "legislature" under a given state constitution is a body that includes a veto-pen-wielding governor. But of course we might also say that, definitionally, a "legislature" under that very same state constitution is a body that must allow absentee voting (even for congressional and presidential elections) or an entity that may not pick presidential electors itself or try to reserve a power to judge contested presidential elections. On this latter--and critical--point, see *infra* note 117. For a recent--and, we believe, unsuccessful--effort to posit a

sharp distinction between these two aspects, see Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021).

48 *See* Amar, *supra* note 11, at 152-62; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 46-132 (rev. ed. 1998).

49 5 U.S. (1 Cranch) 137 (1803).

50 *See* AMAR, *supra* note 11, at 186-96.

51 U.S. CONST. art. VI, cl. 2. For more on this textual and lexical ordering, and its profound implications for the status of federal treaties vis-à-vis federal statutes, see AMAR, *supra* note 10, at 302-07 (citing, among other things, John Marshall's pointed reminder in *Marbury* that the Supremacy Clause listed the Constitution first, before later-mentioned and lower-level types of law).

52 This analogy is drawn from Amar, *supra* note 44, at 1046-47.

53 U.S. CONST. art. II, § 2, cl. 2.

54 In both the ISL and IHD contexts, the backdrop historical and structural principle was also expressly textualized in the Federal Constitution itself--in the Article VI Supremacy Clause and the Article II Vesting Clause, respectively.

55 U.S. CONST. art. I, § 9, cl. 3 ("No Bill of attainder ... shall be passed.").

56 U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be Required as a Qualification To any Office or public Trust under the United States.").

57 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154 (1991).

58 *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). As Hamilton recognized, so long as it remains majoritarian and responsive to popular will, many a type of state government will generally comport with the Guarantee Clause. THE FEDERALIST NO. 21 (Alexander Hamilton); *see* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

59 *See* Del. Const. of 1792, art. VIII, § 2; GA. CONST. of 1789, art. IV, § 2; PA. CONST. of 1790, art. III, § 2; KY. CONST. of 1792, art. III, § 2. Although Kentucky in 1799 shifted gears and required in its constitution that federal and state elections be held by voice vote rather than ballot, see Ky. Const. of 1799, art. VI, § 16, this 1799 provision was every bit as inconsistent with ISL theory as its "ballot" predecessor in Kentucky's first constitution. It is worth mentioning that these provisions constrained governors as well as state legislatures, and that governors would have to obey these limits even when discharging the power conferred by Article I, section 2 to the "Executive Authority [to] issue Writs of Election to fill" House vacancies. Thus, there is no "Independent State Governor" (ISG) theory" that would apply here, and we are not aware of anyone who has even argued for one. For more on these early constitutions, see the important new work by Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022).

60 S.C. Const. of 1778, art. XXII; MA. CONST. of 1780, ch. IV; N.H. CONST. of 1784 (unnumbered clause beginning "The delegates of this state to the Congress"). A quick note on our tally: Prior to 1787, only three states--South Carolina

in 1778, Massachusetts in 1780, and New Hampshire in 1784--adopted or revised state constitutions after ratifying the Articles of Confederation, whose text was not finalized until November 1777. As noted, all three state constitutions contradict ISL theory. For more on congressional selection in Connecticut and Rhode Island under the Confederation, see Amar, *supra* note 10, at 64, 528 n.16.

61 Obviously, prior to 1787, no state constitution would have aimed to regulate Article I congressional elections and Article II presidential elections because Articles I and II did not yet exist. The U.S. Constitution did not truly commence operation until early 1789, and over the next four years, only six states revised their prior constitutions or adopted new ones: Georgia in 1789; Pennsylvania and South Carolina in 1790; and Delaware, Kentucky, and New Hampshire in 1792. As noted, Delaware quite pointedly repudiated the ISL notion; Georgia, Pennsylvania, and Kentucky also expressly did so, albeit in more general language. Adding up all the data: The three key states (South Carolina, Massachusetts, and New Hampshire) that squarely rejected ISL under the Articles, when added to three more key states (Delaware, Georgia, and Pennsylvania) that squarely rejected ISL shortly after the Constitution, form a majority of the eleven states that launched the Constitution in 1789. Kentucky, which also rejected ISL early on, joined the Constitution a bit later.

62 *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 759-61 (2001). As the New York episode evidences, state judges in some places had legislative roles. Also, state legislators at times had judicial roles; several states at the Founding vested judicial duties in the upper chamber of the state legislature. The superstrict distinction that ISL proponents rely upon--a sharp delineation between state legislatures and state courts--simply did not exist at the Founding. Also, efforts by some scholars, see e.g., Saikrishna Bangalore Prakash and John Yoo, *People ≠ Legislature*, 39 HARV. J. L. & PUB. POL'Y 341 (2016), to demonstrate that the Founding generation often distinguished between the "legislature" and the "people" are largely beside the point. The ISL crowd does not come remotely close to asking, much less persuasively answering, the key analytic questions. Concretely, what specific evidence suggests that the Founders actually intended to exalt state legislatures over state constitutions and override ordinary principles of state judicial review? How does any of this square with Revolutionary ideology celebrating state constitutions, or with widespread early state constitutional practice flatly contrary to ISL? How can it truly be that state legislatures cannot *if they choose* enlist state courts in administering federal elections? And shouldn't at least some weight be given to a century of clear Supreme Court precedent (along with two centuries of actual state constitutional practice!) rejecting broad ISL claims?

63 *See* Amar & Brownstein, *supra* note 44, at 31.

64 *See generally* WOOD, *supra* note 48, at 148-150, 407, 433-35, 452.

65 So too, Article IV's Republican Government Clause guaranteed each state its existing governmental system while allowing future republican reforms of that system at the state constitutional level. *See supra* note 58.

66 This is to be distinguished from the federal legislature, which of course lacks comparable appointments power under other parts of Article II.

67 But compare Justice Gorsuch's provocative remarks (joined by Justice Alito) in a pre-election case brought by North Carolina Republicans challenging a ruling by the North Carolina State Board of Elections. The Justice relied on his own plain-meaning textualist analysis of the North Carolina state constitution, pooh-poohing the idea that he should seek out definitive state court rulings or otherwise "rifl[e] through state law." Based on his own two-sentence(!) glance at, and his own confident interpretation of, the state constitution, he expressed strong doubt that "the North Carolina General Assembly could delegate its Elections Clause authority to other officials." Moore v. Circosta, 141 S. Ct. 46 (2020) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief). In earlier cases, Justice Gorsuch has been a prominent advocate for a robust nondelegation doctrine for federal lawmaking. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting). In *Moore*, he evidently tried to use a variant of ISL ideology to move toward imposing a strict nondelegation vision on state governments in the context of federal elections.

68 *See supra* note 62.

69 *See* Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 680-81 (2001).

70 For an earlier version of this idea, see *Dunwody Lecture, supra* note 22, at 953-56.

71 The incorporation of state constitutional norms thus need not be explicit--or at least there is no proper warrant for the U.S. Supreme Court to demand explicitness if state courts think otherwise. There is no general federal common law of state statutory interpretation--no general requirement, for example, that state statutory interpretation must be "textualist," even if the U.S. Supreme Court were to embrace "textualism" (whatever that might mean) as its own general approach to federal statutory interpretation. Federal courts should in general not dictate to state courts how they should construe state law in a situation in which federal law, properly understood, is utterly indifferent--that is, a situation in which either interpretation of a fairly disputable substantive state law at issue fully vindicates all relevant federal-law interests. For more discussion and elaboration, see *infra* Section V.

To view the matter from another angle, let us concede, arguendo, that questions concerning the "true" meaning of state congressional and presidential election laws are, technically, federal questions under Articles I and II, respectively. Even so, the desired functional uniformity to be achieved in most situations (as exemplified by Florida in 2000) is not uniformity *across* states (to be accomplished by the U.S. Supreme Court's promulgation of one-size-fits all rules of interpretation of state election statutes), but rather uniformity *within* each state. The functional and structural idea is for each state that so desires to have a tolerably uniform election scheme harmonizing its rules for state candidates and its rules for federal candidates--that is, congressional and presidential candidates. (So too, the original Constitution aimed to harmonize voter-eligibility law for state assembly races with voter-eligibility rules for congressional contests.) Where federal law aims to piggyback on state-law systems so as to achieve state-desired intrastate uniformity as opposed to interstate uniformity, federal courts should adjudicate formal federal-question cases by copying state courts. *See generally* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957). We suspect that this point would have been far more clear to all observers in 2000 had Florida's election involved razor-thin contested races for various state offices implicating the exact same chad/voter intent/etc. issues as did the razor-thin presidential contest that same day. Alas, because only the presidential contest was a statistical toss-up, many commentators and justices wrongly saw the dispute as a uniquely federal matter warranting an unduly robust role for the nine eminences on One First Street.

Finally, note that in states whose written laws, whether statutory or constitutional or both, permissibly aim to regulate federal elections somewhat differently from state elections, *see infra* note 84, state supreme court expositions of these state laws should generally be conclusive for federal courts for the simple reason that Articles I and II were designed to give states leeway here, and state courts are of course key components of states. Federal courts are not. *See infra* note 79.

72 *See infra* Section V.

73 McPherson v. Blacker, 146 U.S. 1 (1892).

74 *See* Schapiro, *supra* note 69, at 669.

75 *See Blacker*, 146 U.S. at 35 (quoting S. Rep. No. 43-395, at 9 (1874)). Important developments over the ensuing decades undermined Morton's overconfident and conclusory claims about the Senate. As we have explained elsewhere, the famous Oregon Plan, enacted by ordinary voters prior to the Seventeenth Amendment, did in fact use that state's direct lawmaking process to constrain state legislative selection of United States Senators, see Amar, *supra* note 44, at 1068-71; Amar, *supra* note 10, at 411, 615 n.17.

76 146 U.S. at 25 (emphasis added); *see also supra* text accompanying note 40 (quoting cryptic *Blacker* comment that "the legislative power of appointment could not have been successfully questioned *in the absence of any provision in the state constitution* in that regard") (emphasis added).

77 241 U.S. 565 (1916).

78 *Id.* at 566.

79 *Id.* at 568 (emphasis added). The *Hildebrant* Court also made crystal clear, contra ISL ideology, that the U.S. Supreme Court should generally consider state supreme court interpretations of state election laws as dispositive: "As to the state power ... it is obvious that the decision below [of the state supreme court] is conclusive on the subject ...." *Id.* at 567-68.

80 On the use--and importance--of intratextualism in constitutional interpretation, see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). For an interesting wrinkle on the kindred electoral clauses of Articles I and II see *infra* note 90.

81 285 U.S. 355 (1932).

82 *Id.* at 367.

83 576 U.S. 787 (2015) (*AIRC*).

84 Poetic, too, is the implicit reminder here that presidential Election Day is also state-law Election Day; the two electoral systems are tightly integrated in virtually every state--a key consideration that ISL ideologues fail to appreciate. *See supra* note 71. Quoting Hamilton's *Federalist No. 61*, the *AIRC* majority itself drew attention to the "convenience" of allowing each state to unify and harmonize the timing and manner of its state and federal elections. 576 U.S. at 819. Of course, the majority also recognized that states have the legitimate discretion to manage state and federal elections differently. 576 U.S. at 819 n.25.

85 The Court distinguished the issue at hand from situations in which the Constitution authorizes state legislatures to perform functions different from fashioning general regulatory policy--as when Article V gives state legislatures a role in ratifying federal constitutional amendments, and Article I (pre-Seventeenth Amendment) gave state legislatures the power to pick U.S. Senators. *Cf.* Hawke v. Smith, 253 U.S. 221 (1920); Leser v. Garnett, 258 U.S. 130 (1922). For an argument that even some of these cases and settings do not support ISL, see Amar, *supra* note 44.

86 576 U.S. at 817-18 (emphasis added). *AIRC* arguably went beyond *Hildebrandt* and *Smiley* insofar as the Arizona Constitution displaced rather than supplemented the elected legislature's power. But if the Arizona Constitution could permissibly have left districting in the hands of the elected legislature while prescribing the criteria the legislature had to use down to the last jot and tittle, the state constitution should also be allowed to create a new body--like the Independent Redistricting Commission--and effectively designate that new body the relevant state "legislature" for districting purposes. Similarly, state courts should be federally permitted not merely to veto unconstitutional congressional district maps drawn by state legislatures, but also to draw congressional district maps themselves to remedy state legislative lapses. *See* Vikram David Amar, *Concluding Thoughts on the Invocation of the Independent-State-Legislature (ISL) Theory in the North Carolina Emergency Relief Application at the Supreme Court: Part Six in a Series*, JUSTIA.COM (Mar. 14, 2022), viewable at: https://verdict.justia.com/2022/03/14/concluding-thoughts-on-the-invocation-of-the-independent-state-legislature-isl-theory-in-the-north-carolina-emergency-relief-application-at-the-supreme-court-part-six-in-a-series.

87 139 S. Ct. 2484 (2019).

88 *Id.* at 2507. For two recent state supreme court cases invalidating the state legislature's congressional district map (as well as its state-legislative district map) as violative of the state constitution (as construed, of course, by the state supreme court itself), see *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); and *Harper v. Hall*, No. 413 PA 21, 2022 WL 496215 (N.C. Feb. 14, 2022). Relying on, inter alia, *Rucho*, *Smiley*, and *AIRC*, *Harper* explicitly rejected the ISL argument raised by the North Carolina Republicans. *See Harper*, 2022 WL 496215, at *41-42.

89 The *AIRC* dissenters themselves explicitly embraced the notion that the term "Legislature" at various points in the Constitution should be informed, intratextually, by the interpretation that word has been given elsewhere in the document. 576 U.S. at 829 (Roberts, C.J., dissenting) (citing Amar, *supra* note 80). For a similar thought, see *Chiafalo v. Washington*, 140 S. Ct. 2316, 2329-31 (2020) (Thomas, J., concurring).

90 If anything, the language of Article II is less legislature-centric. The technical subject of the key sentence is the "State," not the legislature, and the legislature "may" (rather than "shall") direct the "manner" of (s)election. *See supra* text accompanying notes 65-66.

91 141 S. Ct. 28 (2020) (mem.).

92 *Id.* at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) (citations cleaned).

93 141 S. Ct. 1 (2020) (mem.).

94 To repeat, the ultimate decision about what Pennsylvania's election law did and did not mean, implicitly and explicitly, is a decision reserved to the Supreme Court of Pennsylvania, not the Supreme Court of the United States. *See supra* notes 71, 79; *infra* Section V.

95 141 S. Ct. at 1-2 (statement of Alito, J.) (emphasis added) (citations cleaned). Although due allowance should be made for impassioned judicial rhetoric, Justice Alito's claim that an ISL reading is necessary to avoid rendering the relevant constitutional text "meaningless," is flatly wrong. *See supra* text accompanying notes 64-66. Once it is seen that this rhetorical claim is, strictly speaking, false, the claim loses all legal and logical force. Contrary to Justice Alito's assertion, both ISL and non-ISL readings of the text make the clause *meaningful*, although the two readings attribute quite different meanings to the words. The question, then, is simply this: Which reading is more sound as a matter of text, founding history and ideology, structure, precedent, and so on?

96 531 U.S. 70, 78 (2000) (per curiam). Justice Alito was more coy in his citation to *Bush I*, but the implication was the same.

97 In early 2021, after the 2020 election craziness had subsided and President Biden was safely in office, Justice Thomas--one of the original *Bush* three, it will be recalled--expressly doubled down on the discredited ISL theory, and indeed cited the *Bush* three's concurrence with evident approval:

> Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding "the clearly expressed intent of the legislature." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring).
>
> Republican Party v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (mem.) (Thomas, J., dissenting from the denial of certiorari) (citations cleaned). In a separate dissent from the denial of certiorari in the same case, Justice Alito, joined by Justice Gorsuch (but not, we note again, by Justice Kavanaugh), also continued to cast his lot with ISL. In doing

so, he expressly repeated his troubling *Boockvar* language, and cited not to the *Bush* three concurrence but the *Bush I* ruling--the *Palm Beach* case:

> The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election .... *see also Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

141 S. Ct. at 738 (Alito, J., joined by Gorsuch, J., dissenting from the denial of certiorari) (citations cleaned). On the plain error of the "meaningless" meme, see *supra* note 95.

On the certworthiness of the issue presented in *Degraffenreid*, we actually agree with these three dissenters: The Court should indeed grant review on the contentions raised there. But, we hasten to add, the Court should do so precisely to repudiate once and for all the specious ISL claims featured in these dissenting opinions.

98 Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020) (mem.).

99 *Id.* at 47 n.7 (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting) (alterations in original) (cleaned up).

100 As this Article was going to press, Republican ISL advocates in North Carolina and Pennsylvania sought Supreme Court aid in a pair of cases involving state court decisions remedying state constitutional violations by state legislatures in congressional districting. The Court declined to get involved, but in the North Carolina case, *Moore v. Harper*, 142 S.Ct. 289 (2022), Justice Alito, joined by Justices Thomas and Gorsuch (but not Justice Kavanaugh), dissented. Yet again, these three Justices voiced at least provisional agreement with ISL, claiming that the text of Article I could have empowered "each state" but instead empowered the "legislature thereof." Of course, as we have noted, Article II does explicitly empower "each state." For a sharp critique of the *Moore* dissent on this point and others, see Amar, *supra* note 86.

101 Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions* 15 (Oct. 30, 2020), https://ssrn.com/abstractp3530136 (posted draft on file with authors).

102 None of Morley's material involves any clear ruling by the U.S. Supreme Court itself (if we put to one side, as we should, the opaque dicta of McPherson v. Blacker, 146 U.S. 1, 37-39 (1892)). At best, we think that Morley has interestingly but irrelevantly shown that some nonauthoritative folks have at some post-Founding times said some unpersuasive things. We should also make clear that we ourselves have not carefully double-checked all of Morley's proffered evidence post-Founding and pre-*Bush*. Given that we find various claims he has made about both the Founding and the *Bush* litigation highly problematic, we caution future scholars against relying uncritically on Morley's other assertions. And although we ourselves have not comprehensively canvassed past and current state constitutions, a recent and extraordinarily detailed piece by Hayward Smith is now bringing to light *dozens* of state constitutions over the years that have regulated congressional and/or presidential elections in ways that squarely contradict ISL ideology. *See* Smith, *supra* note 62. Morley's work has apparently overlooked tons of evidence that Smith is now uncovering.

103 Morley, *supra* note 101, at 64.

104 531 U.S. 70, 78 (2000) (per curiam).

105 Morley, *supra* note 101, at 60.

106 *Id.* at 61.

107 531 U.S. at 78.

108 The four objectors were, of course, Justices Stevens, Ginsburg, Breyer, and Souter. Note that in response to criticism by Vikram, Morley later recanted, in the final published versions of his works, some of the most untenable claims that we have cited in this section.

109 304 U.S. 64 (1938).

110 31 U.S. (6 Pet.) 293 (1832).

111 The matter is of course different if there exists a federal right that depends on whether a state-law interest exists. In these situations, in which state law is logically antecedent to a federal right, a state court cannot be allowed to manipulate the antecedent state-law issue, especially when the dependent downstream federal right is a right against the state itself. For example, if a state court could simply say, however implausibly, that no valid contract was ever made at TimeTunder state law, and if federal courts could never second guess that implausible claim (by carefully examining state case law as of Time T), the Article I, § 10 Contracts Clause could easily become a dead letter. So too, if a state court simply denies that a state-law property interest was created at Time T, a federal court must be able to say otherwise in order to protect the Fifth Amendment just-compensation right as incorporated against states by the Fourteenth Amendment. *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816);Ward v. Love Cty., 253U.S. 17 (1920); HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM CH. V (Richard H. Fallon, Jr. et al., eds., 7th ed. 2015). In the ISL context, however, there is no dependent federal right at stake.

Cf. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003). Whereas the text, history, and structure of the Seventeenth Amendment do evidence a real federal interest in protecting state governors from their (often malapportioned and gerrymandered) state legislatures in the context of Senate vacancies--see *infra* text accompanying notes 112-113--Professor Monaghan does not identify anything truly comparable in Article II aiming to protect state legislatures from state courts in the context of presidential elections. Monaghan rightly worries about willful or bad-faith state courts that rewrite state laws retroactively in ways that threaten various federally protected interests, such as those implicated by the Contracts Clause and the Takings Clause. In these contexts, careful Supreme Court oversight of state-court rulings is warranted. But a general across-the-board rule-of-law concern about possible state judicial willfulness or bad faith cannot allow the U.S. Supreme Court to transmogrify any alleged misinterpretation of state law into a substantial federal question. Otherwise, all state-law rulings would become federal-law issues--goodbye, federalism!

Importantly, Monaghan only fleetingly mentions the main issues at the heart of ISL: whether state constitutions in presidential elections apply either of their own force or simply because state legislatures have chosen to incorporate them into unified state election laws. (Monaghan discusses the former theory in two pages--1929-30--and the latter issue not at all.)

Indeed, Monaghan's rule-of-law concern that state courts might change the rules retroactively under the guise of mere interpretation is essentially orthogonal to the ISL debate. His discussion of the propriety of the *Bush* II concurring opinion explicitly takes as its starting point the assumption that the concurring justices' ISL understanding of Article II is correct as a matter of text, history, structure and judicial precedent--an assumption the present article thoroughly debunks. And even applying Monaghan's approach on its own terms to the Florida 2000 situation, we note that long before *Bush v. Gore*, Florida state courts had made clear that the state constitution (as they had construed it and would continue to construe it) applied to, constrained, and supplemented state election statutes promulgated by the state legislature. What's more, on the substantive merits of the voting-law disputes in Florida in 2000--the importance of voter intent, and the need to construe voting law liberally in favor of expansive voting rights, regardless of statutory technicalities and administrative glitches--what the Florida Supreme Court was trying to do in the *Bush v. Gore* litigation was utterly consistent with what that court had been doing for decades. *See, e.g.*, Palm Beach Cnty Canvassing Bd. v. Harris, 772 So. 2d 1220, 1227-28 (Fla. 2000) (per curiam) ("Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases .... 'By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right'"--a right guaranteed by "'[o]ur federal and state constitutions."')

(quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)). Monaghan does not so much as mention *Boardman*; nor does he analyze any other pre-2000 Florida voting cases. The court that in fact retroactively changed the rules and changed its stripes--the court that willfully rewrote the law while claiming merely to interpret earlier constitutional texts and prior precedents--was the U.S. Supreme Court, not the Florida Supreme Court. *See Dunwody Lecture, supra* note 22.

112 U.S. Const. amend. XVII, § 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."); *see* Vikram David Amar, *Are Statutes Constraining Gubernational Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 HASTINGS CONST. L.Q. 727. (2008).

113 For elaboration on the precise text of and specific history surrounding the Seventeenth Amendment in this regard, see Amar, *supra* note 112. Consider also the Electoral College. Unlike state legislatures, presidential Electors did not pre-exist the federal Constitution. Unlike state legislatures, presidential Electors were not ordinary creatures of state constitutions, but rather acted as specially created federal functionaries of a certain sort, pointedly designed to be formally independent in key respects--federally required to meet simultaneously in many different spots on one (and only one) day and federally required to vote by secret ballot. *See* Vikram David Amar, *A Backward- and Forward-Looking Assessment of the Supreme Court's "Faithless Elector" Cases: Part One in a Two-Part Series*, JUSTIA.COM (July 14, 2020), viewable at: https://verdict.justia.com/2020/07/14/a-backward-and-forward-looking-assessment-of-the-supreme-courts-faithless-elector-cases.

114 330 U.S. 386 (1947).

115 *See* 576 U.S. 787, 819 n.25 (2015) (*AIRC*) ("A State may choose to regulate state and national elections differently, which is its prerogative under the [Election] Clause. *E.g.*, Ind. Code § 3-3-2-2 (creating backup commission for congressional but not state legislative districts).").

116 3 U.S.C. § 1.

117 Note, however, that a state constitution, as definitively construed by the state supreme court, might well constrain the choices of the state legislature long before Election Day. In some states, the state constitution might well prevent the legislature from itself choosing presidential electors. That is, the constitution, best read, might require that ordinary voters must choose the electors. *See, e.g.*, COLO. CONST. § 20 ("The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.").

So, too, a state constitution might well be best read to prevent a state legislature from trying to make itself the "judge" of a contested presidential vote within the state. Such an effort might violate state constitutional separation-of-powers provisions vesting general adjudicatory power in such cases in the regular state courts and not the state legislature. *See, e.g.*, PA. CONST. art. VII, § 13 ("The trial and determination of contested elections of electors of President and Vice-President, [along with various state offices,] shall be by the courts of law ....").

The scenarios herein envisioned--attempted power-grabs by state legislatures in the upcoming presidential-election derby--are not outlandish hypotheticals. There are movements now afoot in various right-wing circles to empower red-tilting state legislatures in states that have bluish-purple presidential electorates--Arizona, Georgia, Wisconsin, Virginia, Pennsylvania, and Michigan, to name some of the most obvious jurisdictions. It is not hyperbole to suggest that the outcome of the next presidential election--and even, perhaps, the fate of the world--could pivot on the technical questions at the heart of this footnote and this Article more generally.

118 And federal officials, for that matter. For an eye-popping account of shenanigans by one Senator in 2020, see *Inside Ted Cruz's Last-Ditch Battle to Keep Trump in Power*, WASH. POST (Mar. 28, 2022), https://www.washingtonpost.com/politics/2022/03/28/ted-cruz-john-eastman-jan6-committee/. We shall not today explore in any detail the many wrinkles

of the Electoral Count Act. A quick word, however, is warranted on the Act's provision empowering state legislatures to play a post-election role in the event a state holds an election that "fail[s] to make a choice." 3 U.S.C. § 2. A *failed* election, within the meaning of this statute, is certainly not the same thing as merely a *close and hotly contested* election. *See Dunwody Lecture*, *supra* note 22, at 959-60.

119 For situations beyond the "domain of pure state law"--situations where federal rights and interests depend on or intertwine with state law--see *supra* note 111.

120 Suppose a state presidential-election statute says X at time T_1, and is then interpreted by the state supreme court at time T_2 to mean Y (which is rather close to X and in fact best captures the spirit of X, but does undeniably deviate from the strict letter of X). If the state legislature at time T_3 modifies other aspects of the presidential-election statute but leaves intact the X/Y provision, whose T_2 judicial gloss the state legislature quite likes at T_3, would *Bush*-Leaguers on the U.S. Supreme Court truly be faithful to the state legislature--the very state legislature the *Bush*-Leaguers claim to care so much about--if they insist the state law really means X and not Y? Even though this is emphatically not how the U.S. Supreme Court itself goes about federal statutory interpretation, as a general matter? (Statutory precedent routinely--indeed, almost always--trumps textual plain meaning for federal statutes at issue in the U.S. Supreme Court.)

121 And demonstrably wrong, see *supra* note 95.

122 Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring in denial of application to vacate stay).

123 *See supra* text accompanying notes 91-95; *see also* note 100.

124 Akhil Reed Amar, Vikram David Amar, and Neal Kumar Katyal, *The Supreme Court Should Not Muck Around in State Election Laws*, N.Y. TIMES (Oct. 28, 2020), https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections-state-law.html. This piece went online in the wee hours of the 28th.

125 Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn, quoting Motown, regarding a case all about the *New York Times*).

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Gaping Gaps in the History of the Independent State Legislature Doctrine: McPherson v. Blacker, Usurpation, and the Right of the People to Choose Their President.

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Mr. Bohnhorst and Prof. Soifer are coauthors of Mark Bohnhorst, Reed Hundt, Kate E. Morrow and Aviam Soifer, "Presidential Election Reform: A Current National Imperative," 26 Lewis & Clark Law Review 437 (2022); and of Mark Bohnhorst and Aviam Soifer, "Look to the 14th Amendment to check GOP efforts to subvert popular vote, The Hill, Dec. 19, 2021.

In this article, Prof. Fitzgerald has primary responsibility for sections discussing post-Civil War history; Mr. Bohnhorst and Prof. Soifer have primary responsibility for the remainder.

Abstract:

The so-called Independent State Legislature Doctrine (ISLD) was the jurisprudential heart of the effort by former President Trump and allies to overturn the 2020 presidential election and was featured in the briefs in *Texas v. Pennsylvania*. The idea that state legislatures might have power to intervene against the popular vote for the Electoral College helped animate the January 6, 2021 attack on the Capitol.

Frighteningly, at the end of its last Term, the Supreme Court accepted review of a North Carolina case (Moore v. Harper) in which Republican Party legislators invoke the ISLD doctrine to contend that state legislators are at liberty to create entirely partisan congressional districts, freed from constraints in the North Carolina Constitution as interpreted by the state's judiciary.[1] A decision in favor of these legislators would directly implicate their parallel power to reject or ignore any state's popular vote for President.

[1] The question posed by the North Carolina Republican legislators about which the Court granted *certiorari* is "Whether a State's judicial branch may nullify the regulations governing the 'Manner of

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The ILSD theory rests on dubious dicta in McPherson v. Blacker (1892). McPherson concluded that "plenary power" over the appointment of presidential electors was "conceded" to state legislatures through "practical construction" of the Constitution. Yet, the Court excluded, with almost surgical precision, extensive historical evidence that shows that the legislative election of electors was not intended by the Framers nor by those who ratified the Constitution. Further, such legislative election authority was vigorously contested whenever it mattered—in the presidential elections in 1800, 1812, and 1824—and was soon thereafter abandoned in the face of the claim that this doctrine was a "usurpation."[2] The doctrine was more emphatically rejected following the Civil War, including through Section 2 of the Fourteenth Amendment. Nonetheless, Bush v. Gore repeated McPherson's historical amnesia and provoked a doctrine that directly threatens such core democratic values as state court authority to interpret state constitutions and the power of the people to elect the President of the United States.

Introduction

In December 2020, the State of Texas, supported by some 17 other states represented by Republican Attorneys General, asked the United States Supreme Court to intervene in the presidential election and to send the question of whose electors should be appointed to various state legislatures.[3] Their claim was grounded primarily on a legal theory derived from an 1892 Supreme Court decision, McPherson v. Blacker [4] (which had nothing to do with legislatures choosing electors). It also invoked an 1874 Senate Report[5] (on which no action was ever taken) and some *dicta* in Bush v. Gore.[6]

Central to this claim was the Court's lengthy review of the history of presidential elections in McPherson v. Blacker, which ended with the conclusion that the "practical construction" of the U.S. Constitution had "conceded" "plenary power" over appointment of presidential electors to the state legislatures.[7] It is easy to assume that Chief Justice Fuller's opinion for the unanimous McPherson Court was essentially accurate, at least in in its broad outlines of the historical record. Demonstrably, it was not. Missing was extensive evidence showing that the Framers intended the people to elect the presidential electors.[8] Also entirely absent was any mention of the heated controversies in 1800 and from 1824-26 over the constitutionality of such legislative election.[9] Overlooked as well was the post-Civil War era, during which the doctrine of legislative election was repudiated in multiple ways, not least through formal

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holding elections for Senators and Representatives. . . prescribed by the Legislature thereof,' U.S. CONST art. I, sec. 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a 'fair' or 'free' election." Docket No. 21-1271 (June 30, 2022).

[2] "Usurpation" may be used in an objective sense and does not necessarily entail ill motive or personal advantage. John Adams wrote in 1781 that power obtained without consent is "usurpation." John Adams, Principles of Law and Government (London: J. Murray, 1781) 38-39. Likewise, in 1826 a unanimous committee of the U.S. Senate wrote that state legislatures that took upon themselves the power to elect presidential electors, without delegation from and consent of the people, became "mere usurpers." 19th Cong., 1st Sess., S. Rep. 22 6-7, 16; 2 Reg. Deb. Appendix, 122, 126 (hereafter, "S. Rep. 19-22").

[3] State of Texas, "Brief in Support of Motion for Leave to File," *Texas v. Pennsylvania*, No. 22O155, Dec. 7, 2020, 16, 21-22, 25.

[4] 146 U.S. 1 (1892). The specific question in McPherson was whether the U.S. Constitution required a particular type of popular election.

[5] S.Rep. 43-395; *supra*, notes 102-112 and accompanying text.

[6] Bush v. Gore, 531 U.S. 98, 104 (2000), *supra* note 139 and accompanying text.

[7] McPherson, 146 U.S. 28-35.

[8] *Infra*, notes 18-47 and accompanying text.

[9] *Infra*, notes 83-93, 102-138 and accompanying text.

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government actions. These included a resolution of a South Carolina constitutional convention, as well as state statutes, state constitutions, federal statutes, and a gubernatorial veto and, most significantly, in the explicit text of the Fourteenth Amendment to the United States Constitution.[10]

McPherson's once-over-lightly, highly selective historical survey has taken on a significant life of its own, but *McPherson* itself was fundamentally an easy case, and its pernicious after-life has had nothing to do with what was actually decided. The controversy in *McPherson* arose when Michigan Democrats changed the election law as they temporarily controlled state government after the 1890 election. The change was from one system of popular election of electors to another—from the prevailing winner-take-all system to a district system. The purpose was to dilute Michigan's normally Republican vote in the electoral college.[11]

The Republicans sued, claiming that Article II should be interpreted to require a general ticket, winner-take-all popular election. They also claimed that Section 2 of the Fourteenth Amendment was intended to incorporate the winner-take-all system, which by 1866 had become the rule in every state.[12] The history of the electoral college undermined their Article II argument, however. From the Founding to the day the case was argued, no one had ever interpreted the original Constitution to require general ticket elections, and district systems had been used extensively throughout the country in the nation's first decades.[13] Furthermore, in the drafting and ratification of the Fourteenth Amendment, there was not even a hint that it was intended to incorporate a particular type of popular election for President.[14] While McPherson got those portions of the history right, it entirely left out one important aspect of the history of presidential elections—the growing, and ultimately successful, nationwide opposition to state legislatures choosing presidential electors, and the arguments that animated that opposition.

This article presents an overview of the significant constitutional and legal history that McPherson omitted. It thereby fills major gaps in the McPherson Court's narrative.

The Founding

A. The Constitutional Convention

McPherson discussed the Constitutional Convention in one long paragraph, which included a scattershot listing of proposals made and rejected and a partial list of proponents of three main presidential election alternatives: popular election, election by Congress, and election by state legislatures.[15] The Court then declared that, "The final result seems to have reconciled contrariety of

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[10] Infra notes 161-213 and accompanying text.

[11] For the political and legal context of *McPherson*, see Alexander Keyssar, Why Do We Still Have the Electoral College? (2020) 131-138 (hereafter, Keyssar, Electoral College).

[12] Id., 137.

[13] McPherson, 146 U.S. 28-35.

[14] Making of Modern Law , U.S. Supreme Court Records and Briefs, 1832-1978, McPherson v. Blacker Transcript of Record with Supplemental Pleading, Brief of Otto Kirchner, 43 ("to the counsel for plaintiff in error belongs the distinguished honor of having made this astounding claim for the first time since the adoption of the Fourteenth Amendment").

[15] McPherson, 146 U.S. 28. The Court listed four delegates it identified as having supported something other than popular election. Two were Luther Martin, who walked out of the Constitutional Convention, and Elbridge Gerry, who refused to sign the Constitution and who was subsequently not elected to the Massachusetts ratifying convention. Although Gerry was allowed to attend to provide facts, he walked out of the state convention when he was not allowed to make speeches, and he was forced into a run-off election for a seat in the House of Representatives largely because of charges that he was an enemy of

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views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action"[16] or through some form of popular election. To the contrary, it is clear from the extant records of the Constitutional Convention that the Framers did not agree that state legislatures would choose the presidential electors.

The view that the people should be as directly involved as possible in electing the president was emphatically expressed throughout the Convention and it prevailed. It was supported not only by leading figures such as James Wilson, Gouverneur Morris and Alexander Hamilton[17]—all mentioned in McPherson[18]--but also by James Madison, whom the Court omitted. By contrast, the idea that state legislatures might elect the president was entertained for only one week in July. It was then decisively rejected and was never raised again.[19]

Some delegates certainly had qualms about the popular election of the president, and a few were particularly averse to election by the people at large.[20] Yet no one disputed the central principle, close to the core ideology of the American Revolution, that legitimate government requires consent of the governed.[21] In addition, the behavior of the states and state legislatures under the Articles of

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the Constitution. Edward J. Larson and Michael P. Winship, The Constitutional Convention: A Narrative History from the Notes of James Madison (2005) 172, 169; The Documentary History of the First Federal Elections 1788-1790 (hereafter "DHFFE")(Merrill Jensen, et.al, eds), v. 1 (1976) 437, 749, 642-655. (Volumes 2 and 3 are edited by Gordon DenBoerr.) The other two delegates mentioned by the Court who at some point proposed something other than popular election were Oliver Ellsworth and Roger Sherman, both of Connecticut. Yet, on August 24, Connecticut and four other states voted explicitly for popular election—that is, election by electors chosen by the people of each state. Max Farrand, ed., 2 The Records of the Federal Convention of 1787, 4 vols. (New Haven: Yale University Press, 1966) 397, 399 (Farrand 2: 397, 399). Because Connecticut had three delegates, at least one, and possibly both Ellsworth and Sherman changed their minds and voted for popular election of electors.

[16] 146 U.S. 28.

[17] Hamilton's proposal for district-based popular election of electors was part of a long speech delivered on June 18, 1787, but it was not incorporated into a motion. The speech is set out in Madison's Notes, but Hamilton's proposals are not mentioned in the Journal of the Convention. Farrand 1: 283-93 (Madison's Notes); 281 (Journal). McPherson cited only the Journal.

[18] 146 U.S. 28.

[19] For the discussion in July, *infra* notes 30-40 and accompanying text. For the discussion in June, *infra* notes 26-28 and accompanying text. For the discussion in August, *infra* notes 41-42 and accompanying text. For the discussion in September, *infra* notes 43-47 and accompanying text.

[20] Alan Johnson, The Electoral College, 1st Ed., 13-20 (2018).

[21] This founding principle was articulated earlier by James Wilson in an essay written (but not published) in 1768. Wilson argued that not only the Stamp Act, but Parliament's exercise of any political power over the colonies, was illegitimate. He derived this principle from Scottish Enlightenment thinking with roots that were 200 years old. Thomas E. Ricks, First Principles (2020), 52-58. Wilson's 1768 essay was published in 1774 to great acclaim and it appears to have been the foundation for the most famous passages in the Declaration of Independence. Jesse Wegman, Let the People Pick the President: The Case for Abolishing the Electoral College (2020) 45-47. In 1781 John Adams reiterated that exercise of power without consent is usurpation. Adams, Principles of Law and Politics, *supra*, note 1.
One possible exception was South Carolina delegate Charles Pinckney, who was one of the most active supporters of slavery, (Larson, *supra* note 15, 174, "extremely active role . . . as a nationalist and protector of slavery. . . ") Pinckney wrote to James Madison on March 28, 1789 disparaging the nation's founding principles: "Are you not convinced that the theoretical nonsense of an election of the members of Congress by the people in the first instance, is clearly and practically wrong. . . and that the Legislatures (of the States) are the only proper judges of who ought to be elected." Pinckney proposed on June 6, 1787

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Confederation remained an overriding concern. James Madison, for example, in an April 1787 private memorandum, "Vices of the Political System of the United States," attributed seven of eleven substantial vices in need of change directly to states and state legislatures.[22] He identified an eighth vice: in many states the Articles had received only legislative sanction, undermining the force of federal law and threatening disunion.[23] Negative assessments of state legislatures appeared throughout Madison's Notes of the Constitutional Convention;[24] in much of the correspondence sent by the delegates during the Convention; and in many of their arguments that followed.[25]

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that the state legislatures, not the people, elect members of the lower house of Congress. Farrand 1 : 130-131, 137, 142, 143, 145, 147. Pinckney's motion was defeated, 8 states to 3; numerous delegates emphasized the importance of the people electing directly at least one house of the national legislature. 1 Farrand: 130-131 (Journal), 132-136 (Wilson, Mason, Madison, Dickinson)(Madison's notes). At the end of his life, reflecting back on Pinckney's proposal, Madison referred to popular election for the House as "the corner-stone of the fabric" of the Constitution. Farrand 3 : 532 (1834), 535 (1835).

At the beginning of the Convention, on May 29, 1787, Pinckney submitted a plan for a constitution; the document has been lost to history. Three versions exist—two created at or immediately after the Convention, and one published over thirty years later, in 1819, as part of publication of the Journal of the Convention. Pinckney's June 6 motion and March 28, 1789 letter directly contradict the version published in 1819. The 1819 version cast Pinckney as a proponent of popular election to the House, but clearly he was not. This core discrepancy, with innumerable others, establishes that the 1819 version is not what was submitted to the Convention on May 29, 1787. Id., 502-506, 479-482, 531-532; 534-537, 595-609.

Despite the overwhelming evidence, Petitioners in Moore v. Harper treat the 1819 version as if it were the document Pinckney submitted. Pet.Br., Moore v. Harper, 15 (arguing that the phrase "each State shall prescribe" in the 1819 version shows that the earliest reference to regulation of congressional elections assigned the power to "*each state as a whole*." (emphasis in original)). Yet regulation of congressional elections was not mentioned in the iterations written during or immediately after the convention, and almost certainly it similarly was not part of Pinckney's May 29, 1787 proposal. DHRC, 1:246 (version in the hand of James Wilson); Farrand 3: 595-601 (pamphlet published shortly after the Constitutional Convention). See also Larson, *supra* note 15, 174 ("Not a modest man, Pinckney later claimed that he was the most influential delegate at the Convention.")

[22] James Madison, Writings, (Jack N. Rakove, ed.) 69-80 (1999). He listed a twelfth vice but did not elaborate on it.

[23] *Ibid.*

[24] The McPherson history did not refer to Madison's notes, which Madison kept secret during his lifetime, but which were published by Congress in 1840. McPherson cited Elliot's Debates (1836), and thus did not incorporate Madison's Notes. The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, in Four Volumes, 2d. Edition (1836), Jonathan Elliott, ed. (hereafter Elliot's Debates). Mary Sarah Bilder's award-winning reexamination of Madison's notes does not cast doubt on Madison's description of the electoral college debate. Mary Sarah Bilder, Madison's Hand 117-20 (2015)(mentioning the debate between July 19 and July 25; the debates about presidential selection after August 21 are not mentioned). Bilder stated that the topic of the executive had not particularly interested Madison at the Convention. Id. at 164. Madison's Notes regarding the electoral college are consistent with Hamilton's essays in The Federalist and with the Journal of the Convention; they are independently corroborated in part by John Dickenson. *Infra,* note 45. Bilder shows that the version of the Notes from August 21 onward actually was written two years later, presumably based on rough notes Madison made at the time. Bilder, *supra,* 141-43. Significant speeches by Gouverneur Morris from August 24 and September 4 largely repeated points he and others had made prior to August 21. While Madison had a heavy load of

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James Wilson introduced the idea of using electors chosen by the people early in the Convention. On June 1 Wilson said that he favored direct election by the people at large, at least in theory; but George Mason said that although he also favored popular election in principle, election by the people at large was utterly impractical.[26] The next day, Wilson proposed dividing the states into districts in which the people would elect one elector, with the electors then electing the president.[27] Thus was the Electoral College concept born. Later in June, Alexander Hamilton also proposed a district-based system through which the people would choose electors.[28]

Throughout the Convention, the primary alternative to some form of popular election was election by the national legislature.[29] For only a very brief time, the Convention entertained the idea that

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committee work after August 21, his Notes about the electoral college included the work of a committee on which Madison served, with language that Dickenson reported Madison had drafted. *Infra*, notes 20-24 and accompanying text.

[25] North Carolina delegate Richard Spaight wrote to future Supreme Court Justice James Iredell on August 12, 1787: "There is no man of reflection, who has maturely considered. . . the tyrannical and unjust proceedings of most of the State governments. . . but must sincerely wish for a strong and efficient National Government." Griffith J. McRee, ed., Life and Correspondence of James Iredell (1857-58) v. 2, 168. McPherson mentioned Connecticut's Oliver Ellsworth, a future Supreme Court Chief Justice, as favoring election by the state legislatures. Yet Ellsworth wrote a series of arguments supporting ratification titled "Letters of a Landowner," in which he excoriated Elbridge Gerry's and George Mason's published attacks on the Constitution and Luther Martin's defense of Gerry—Letters IV through VI and 10 (unpublished). And Ellsworth praised the Convention's decision to establish ratification through conventions of delegates elected by the people rather than through state legislatures. Letters I and II. The choice, he stated, demonstrated "honesty and patriotism." State legislators had often "provided well for themselves" and might resist change; the Framers' choice meant that "the artifice of a small number cannot negative a vast majority of the people;" and "[t]his danger was foreseen by the Federal Convention." (Letter I). He added, "Men who have lucrative and influential state offices. . .will be tempted to oppose" the Constitution," (Letter II), and that, "Even state assemblies may have their madness and passion." In Rhode Island. Ellsworth noted, "a desperate junto are governing, contrary to the sense of a great majority of the people. It may be the case in any other state. . ." if "the ignorance or rashness of the state assemblies, in a fit of jealousy, should deny you this sacred right [the right to elect members of the House of Representatives]." (Letter IV).

[26] Farrand 1: 68-69.

[27] Farrand 1: 77, 80.

[28] Farrand 1: 283-93.

[29] The electoral college "represented a compromise between those who favored selection by Congress and those who insisted that such a process had fatal flaws." Keyssar, Electoral College, 25. The debate over election by the national legislature lasted throughout the Convention. The "Virginia Plan" and the "New Jersey/Patterson Plan" were introduced in June. Each featured election by the national legislature. Farrand 1: 62-29 (Va. Plan, June 1); 1: 242-47 (Patterson/New Jersey Plan, June 15). Election by the national legislature was discussed and/or approved on June 13 (Farrand 1: 225-26, 230, 236); July 17 (Farrand 2: 22, 24, 29-32; state legislatures and election by the people rejected); July 19 (Farrand 2: 55-57; 60-64—national legislature rejected in favor of state legislature); July 24 (Farrand 2: 97-98; 99-106—state legislature rejected in favor of national legislature); July 25 (Farrand 2: 107-115—popular election also discussed); and July 26 (Farrand 2: 116, 118-21).
In August, the Committee of Detail's draft of the Constitution provided for election by the national legislature (August 6, Farrand 2: 185). Election by the national legislature again was discussed on August 7 (Farrand 2: 196-97) and August 24 (Farrand 2: 397, 399, 402-04). In early September, the Committee of Eleven settled on a system of electors elected by the people in preference to an election by the national legislature. *Infra*, note 45 and accompanying text. On September 4, Edmund Randolph and Charles

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the state legislatures might be involved directly in electing the president.[30] On July 17, Luther Martin proposed that state legislatures choose electors, who would then elect the president.[31] Martin did not provide any details, and his proposal was soundly defeated, with only two votes in favor.[32] Two days later, however, Oliver Ellsworth renewed the proposal that the president be chosen by electors appointed by state legislatures. He proposed an allocation scheme that allowed a maximum of three electors—which, as Madison pointed out the following day, would greatly favor small states. The Convention approved the general idea of state legislatures appointing electors on July 19 but left the allocation scheme for another day.[33]

Four days later, the Convention debated a related but separate question concerning what role state legislatures should play in forming the national government. Adopting a view that was shared by Madison and James Wilson, the Convention decided that the Constitution should be ratified by the people—through single-purpose conventions—and not by state legislatures.[34] Edmund Randolph agreed that state legislatures should not be chosen to ratify, noting that they were often influenced by local "demagogues."[35] Having squarely rejected a role for state legislatures in bringing the national government into existence, the Convention voted to reconsider the proposal that the executive be appointed by electors chosen by the state legislatures the following day.[36]

Thus, on July 24, the idea that state legislators would choose electors was rejected—at the time, in favor of selection by the national legislature.[37] The Convention debated the idea that state legislatures might be involved in choosing the President one final time, the next day, and it was never mentioned again. James Madison explained his opposition.[38] There were many reasons, he said, but foremost was the state legislatures' propensity to support "pernicious" schemes. Madison feared a cabal of state

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Pinckney "wished for a particular explanation" for changing the mode of election from election by the national legislature. (Farrand 2: 500). On September 5, Charles Pinckney and John Rutledge of South Carolina criticized the Electoral College system and moved to return to election by the national legislature, but this was supported by only two states. Farrand 2: 507-08, 513.

The electoral college as adopted incorporated two elements from proposals for election by the national legislature. First, each state's vote is equal to the number of its Representative and Senators—the same as under an election by the legislature through a joint ballot, which had been agreed to on August 24. (Farrand 2: 397, 399, 402-03.) Second, any contingent election takes place in Congress (in the House), with each State having one vote—a system that some smaller states supported in the debate over election by the national legislature. (E.g., Farrand 2: 196-97; 2: 402-03.)

[30] *Infra*, notes 31-39 and accompanying text.

[31] Farrand 2: 22, 24, 32.

[32] *Ibid.*

[33] Farrand 2: 50-51, 57-59, 63 (Madison's comments the following day). Given Ellsworth's harsh appraisal of state legislatures (*see* note 25, *supra*), his idea might be best interpreted as pro-small state rather than as a pro-state legislature measure.

[34] Farrand 2: 103-04.

[35] *Ibid.* Madison had written to Jefferson and Randolph in March and April 1787, stressing the importance of ratification by the people. Writings, *supra* note 22, 64 (Jefferson), 839 (Randolph)(the people "*acting in their original & sovereign character*")(emphasis in original). Wilson strongly supported this same principle. Wegman, *supra* note 21, 44, 48, 51.

[36] Farrand 2: 85-86, 95.

[37] There was considerable discussion of how to ameliorate the danger of executive-legislative intrigue Farrand 2: 97-106.

[38] Farrand 2: 110.

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legislatures who could make the president subservient to their will.[39] He also made the affirmative case for electors chosen by the people. His central point was that electors chosen to perform a single act would not be subject to any cabal and to the kind of corruption that marked the proceedings of legislatures.[40]

In sum, between July 23 and 25, leading figures at the Convention used terms such as "pernicious" and "demagogues" in reference to state legislatures. The Convention reconsidered and voted down for the last time the idea that state legislatures might be directly involved in electing the President.

When the Convention next took up Article II on August 24, only two proposals were under serious consideration—election by the national legislature or election by electors chosen by the people.[41] Election by electors lost by only one vote.[42] Many delegates continued to have serious objections to election by the national legislature, however, and on September 4, the "Committee of Eleven"[43] recommended election by electors. On September 6, the Convention formally agreed.[44] John Dickinson, a member of that committee, later recalled that he joined a gathering at which committee members had been considering election by the national legislature. Dickinson wrote that he persuaded the committee to adopt election by electors chosen by the people; he stressed that, because the Constitution established a President who would have great powers to be exercised directly upon the people, the people must be involved as directly as possible in choosing the President.[45]

When asked for an explanation of the change from election by the national legislature to election by electors on September 4, Gouverneur Morris gave the following reasons (among others): (i) the danger of intrigue and faction; (ii) that no one was satisfied with appointment by the legislature; (iii) that "many were anxious for an immediate choice by the people"; (iv) the "indispensable necessity" of maintaining the independence of the executive; (v) that the "great evil of cabal" was thereby avoided; and (vi) that "it would be impossible to corrupt them."[46] Finally, on September 12, in discussing an amendment that changed the super majority required to override a veto from ¾ to 2/3, James Madison explained that when ¾ had been agreed to, the President was to be elected by Congress for seven years, but this had changed. "He is now to be elected by the people and for four years,"[47] Madison declared.

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[39] *Ibid*. A leading proponent of the Independent State Legislature Doctrine, Michael T. Morley, has overlooked both the debate on July 25 and the votes and debate on August 24. Michael T. Morley, "The Independent State Legislature Doctrine, Federal Elections, and State Constitutions," 55 Georgia Law Review 1, 31 (2021)(stating that after the July 24 vote further debate was postponed until the "Committee of Eleven" was formed, at the end of August).

[40] Farrand 2: 110. Madison's concerns apply equally to state and national legislatures.

[41] Farrand 2: 397, 399, 401-404.

[42] Farrand 2: 402, 404. On July 25, Madison had said that three alternatives remained for consideration: election by the national legislature, election by the people at large, and election by electors chosen by the people. Farrand 2: 110-111. Election by the people at large was decisively rejected earlier in the day on August 24. Farrand 2: 402.

[43] The Committee was comprised of one member from each state in attendance. It included leading proponents of popular election—James Madison, Gouverneur Morris, James Dickinson, and Rufus King. Seven of the eleven members had either spoken favorably about popular election on the floor or were from states that had voted in favor of popular election on August 24.

[44] Farrand 2: 493-94, 497-98 (Sept. 4); 517, 520, 525 (Sept. 6).

[45] John Dickinson to George Logan, Jan. 16, 1802, in The Constitutional Sources Project, http://www.consource.org/documents/john-dickinson-to-george-logan-1802-1-16/

[46] Farrand 2:500. Clearly, these were also sound reasons to have the people, not the state legislatures, choose the electors.

[47] Farrand 2:586.

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McPherson, despite its purported historical garb, actually ignored James Madison's Notes of the Convention,[48] as well as Madison's comments on and management of the issue of presidential elections. Nor did the Court consider the chronology of what was decided and when it was decided.[49] Chief Justice Fuller instead buried such details within the anodyne conclusion that "the final result seems to have reconciled contrariety of views," which apparently included the positions of those who had spoken in favor of election by state legislatures.[50] Actually, however, after July 25, no one suggested that the state legislatures might "appoint directly by joint ballot or concurrent separate action."[51] Any reconciliation was between those who supported election by the national legislature and those who supported election by the people.[52]

B. Ratification

The debates over ratification of the Constitution—which the *McPherson* Court also ignored—confirm that those who ratified the Constitution in 1788 understood that the people were to elect the electors. James Wilson, a devoted supporter of popular election, set the tone with a widely reprinted October 6, 1787 speech.[53] Four days later, even a leading anti-Federalist pamphlet by a "Federal Farmer" conceded that the method for selecting the president was satisfactory.[54] Convention delegate General Charles Cotesworth Pinckney told the South Carolina legislature on January 18, 1788, that "[the President] is to be elected by the people, through the medium of electors chosen particularly for that purpose."[55] Further, the *Federalist Papers* stated repeatedly that the people would elect the electors. In *Federalist* 68, for example, Hamilton so stated and, in *Federalist* 59, Hamilton wrote that allowing legislatures to choose Senators was a "necessary evil" that should not be extended. At the state ratifying conventions, supporters of the Constitution, including those who had been Convention delegates, said time after time that the people were to choose the electors.[56] Hardly anyone contended otherwise.

The rejection of the proposal that state legislatures have authority to choose presidential electors is clear from the full record of the Constitutional Convention, and this is confirmed through the

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[48] *See* note 111, *infra*, for Madison's observation that "faint and refracted rays" (those of the Journal of the Convention) may lead to error that would be avoided by "more competent lights" (presumably those of Madison's own notes). *Cf.,* Larson and Winship, The Constitutional Convention, *supra* note 15, 163, 171-72 ("inestimable value of Madison's notes"); cf. Ricks, *supra* note 9, 197, quoting fellow delegate William Pierce, "'What is very remarkable, every person seems to acknowledge his greatness. . . . In the management of every great question he evidently took the lead.'").

[49] McPherson, 146 U.S. 28.

[50] *Ibid.*

[51] *Supra* note 29; notes 41-47 and accompanying text.

[52] *Supra* note 29; notes 26-28 and 38-47 and accompanying text.

[53] For Wilson's philosophy and role in the Convention and ratification debates, *see* Wegman, *supra, n*ote 21, 48-52, 57, 61-64, 67-70, 74, 76-78. The focus of Wilson's October 6 speech was to rebut claims that the Constitution would lead to the demise of state governments.

[54] John D. Kaminski, et al, eds., The Documentary History of the Ratification of the Constitution Digital Edition (hereafter, "DHRC")(University of Virginia Press, 2009) 2:170, 19:222.

[55] DHRC, 27:148.

[56] DHRC, 10:1367 (Edmund Randolph); 10:1368, 1376-77 (James Madison); Elliot's Debates 4:58 (William Davie: "How is he created? By electors appointed by the people under the direction of the state legislatures—by a union of the interest of the people and the state governments."); Johnson, *supra* note 20, 77-78 (Wilson) ("as nearly home to the people as is practicable; with the approbation of the state legislatures, the people may elect with only one remove."). After eleven states had ratified, North Carolina Governor Samuel Johnston said in his state's unsuccessful ratification convention that some people believed the state legislatures could select electors. *Infra* notes 142-144 and accompanying text.

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ratification debates. Yet, the constitutional text promulgated in 1787 is ambiguous. (It also includes an embarrassing omission).[57] Article II, Sec. 1 does not specifically require that the people elect presidential electors.[58] Admittedly, the text itself also does not specifically prohibit the legislatures from electing electors.[59] In the decades that followed, an interpretation developed that holds that, in a republican form of government, the sovereign is the people and that, unless the sovereign delegates its powers, the powers are retained. McPherson's brief overview of that history overlooked all that and is seriously misleading at best.

The Elections of 1788 and 1800: Debates in the States About Election by the Legislature.

The McPherson Court devoted five paragraphs to the four presidential elections held between 1788 and 1800.[60] The Court detailed the variety of systems used, which included election by state legislatures in many states. Chief Justice Fuller initially said of these four elections: "No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt. . ."[61] But the Court was clearly mistaken. Substantial questions arose in the very first election, as we shall see; and the court got the election of 1800 exactly backwards—the constitutionality of legislative choice was a major issue.[62]

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[57] Art. II. sec. 1, cl. 2 provides in part: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors. . ." The phrase "Legislature thereof" was added in the final version, drafted by the Committee of Style. Four of the five members supported popular election of electors (Madison, King, Morris, and Hamilton), and most of the final document was written by Gouverneur Morris (Larson, *supra* note 15, 173), one of the most prominent advocates of popular election. Clause 2 specifies further that the "state," and not the "legislature," is to appoint. In addition, clause 4 refers to the date for "chusing" electors. Thus, electors are both chosen and appointed. The specific role for the state legislatures appears to relate only to the "appointment" of the chosen electors.
The meaning of "appoint" was litigated during the 1877 Electoral Commission proceedings. Rutherford B Hayes's position, which prevailed, was that appointment refers to the final step or steps in the elective process. It was said that appointment is an action that occurs after votes have been cast, canvassed, and certified. Argument of George McCrary, PROCEEDINGS OF THE ELECTORAL COMMISSION AND OF THE TWO HOUSES OF CONGRESS IN JOINT MEETING RELATIVE TO THE COUNT OF ELECTORAL VOTES CAST DECEMBER 6, 1876, FOR THE PRESIDENTIAL TERM COMMENCING MARCH 4, 1877, 65-66, at https://archive.org/details/electoralcount00washrich/page/n5/mode/2up ("Electoral Commission Proceedings"). *McPherson* itself stated that the term "appoint" refers to "the result" of the election. McPherson, 146 U.S. 27.
The version of clause 4 reported to the Constitutional Convention on September 4, and approved on September 6, provided that Congress may determine "the manner of certifying and transmitting their [the electors'] votes." Farrand 2:529 (Sept. 6). The Committee of Style deleted this phrase, however, and the Convention approved the final language without any vote about the change. David Currie, 1 The Constitution in Congress (Chicago: University of Chicago Press, 1997) 137 ("Embarrassingly. . . we do not know why" the change was made). In any event, the Convention clearly recognized the essential difference between voters "giv[ing] their votes" on a particular date—that is, the voters choosing their preferred candidate--and the "manner of certifying" those votes, so that the winner could be appointed at a later date.

[58] Art. II. sec. 1, cl. 2 provides in part: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors. . ."

[59] *Ibid.*

[60] McPherson, 146 U.S. 29-32.

[61] McPherson, 146 U.S. 29.

[62] *Infra*, notes 63-76 and accompanying text.

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In 1788 most states had, at most, a minimal debate over the mode of choosing electors. Everyone knew that George Washington would be the first president.[63] Yet in Massachusetts and New York, the manner of electing the President was hotly debated.

The Massachusetts debate unfolded in the newspapers as well as in the legislature. The *Massachusetts Centinel* of October 1 and 8, 1788, for example, set out the contrasting arguments.[64] Points in favor of election by the people included the following: (i) the national government would act directly on the people, thus the people should be involved as much as possible in electing the president; (ii) as in Massachusetts, the national executive's powers included vetoing legislation bearing on the rights and interests of the people; therefore, as in Massachusetts, the people should elect the executive; (iii) legislatures were elected to pass laws, not to elect others; and (iv) legislative election invited cabal and artifice.[65] Arguments in favor of allowing the legislature to elect included the following: (i) although some believed "state shall appoint" meant the people shall elect, the language allowed the legislature to elect; and (ii) it was "impossible" to have an election in a Commonwealth as large as Massachusetts within the time allowed.[66]

The ambiguity of Article II was a central question in the Massachusetts legislature.[67] General William Heath and Dr. Daniel Cony stressed that the rights of the people are paramount.[68] Unless the right of the people to elect had been expressly delegated elsewhere, in a republican government the people retain that right.[69] Under this view, ambiguity is to be resolved in favor of the rights of the people. Dr. Coney recalled that the Massachusetts ratifying convention adopted a resolution that the U.S. Constitution be amended to provide that any rights not delegated to the national government were retained by the State, to be exercised by the people.[70] This point foreshadowed the adoption of the Tenth Amendment, which itself became a prominent feature in subsequent debates.[71]

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[63] Washington "had long been the consensus choice for president." Keyssar, Electoral College, 28.
[64] DHFFE v. 1, *supra* note 15, 464-67.
[65] *Id., 464-65.*
[66] *Id. 466.*
[67] *See, id.*, 476-510, for records and reports of the legislative proceedings on the elections resolutions.
[68] *Id.*, 485-87.
[69] *Ibid.* Dr. Charles Jarvis made similar arguments. New York Journal, *id.* at 485. Jarvis was an ally of anti-Federalist Sam Adams. In 1796, with "an intense knot of democrats," he was a "direct heir" to Adams' political organization. Jeffrey L. Pasley, The First Presidential Contest: 1796 and the Founding of American Democracy 341 (2013).
The Massachusetts Constitution of 1780, Declaration of Rights, Art. IV, embodied the principle that all power that has not been delegated resides in the people: "The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever shall, exercise and enjoy every power, jurisdiction and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."
[70] *Id.*, 487.
[71] Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See infra*, notes 78-83 and 104 and accompanying text. *But see* Chief Justice Roberts' doubly mistaken paraphrase of the amendment's text in *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013), quoted and discussed in Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, but Not States*, 39 Seattle U. L. Rev. 78, 796-798 (2016).

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The *New York Journal* issue of November 20, 1788 reported on the debate in Massachusetts before the New York debate began.[72] The New York debate then identified a fundamental flaw with legislative election, though it was not a flaw in the six states whose legislatures chose electors that year. In those states, the legislators had themselves been elected that same year, and therefore these freshly-minted legislators might be said to represent the will of the people in an indirect sense.[73] The same could not be said of legislators elected two, three or even four years prior to a presidential election. In New York one-fourth of the state senate was elected each year to four year terms.[74] An anti-Federalist senator rebuked the chamber for its refusal to elect on the basis of a joint ballot with the more numerous House, which was elected annually.[75] He emphasized that senators elected up to four years previously did not truly represent the wishes of the people concerning who should be elected president.[76] The Senate's position "oversets the first principle of elections by the great body or majority of the electors. . . and consequently destroys the grand principle of freedom or republicanism in our governments." [77]

The anti-Federalists, such as Sam Adams and Dr. Jarvis, prevailed in securing a Bill of Rights. The Ninth Amendment assures that the failure to enumerate a right in the Constitution "shall not be construed to deny or disparage other[] [rights] retained by the people."[78] The Tenth Amendment reserves "to the people," as well as "to the States," the "powers not delegated to the United States."[79] Together,

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[72] DHFFE v. 1, *supra* note 15, 485 ("The Constitution. . . seemed to be somewhat ambiguous, and not so full and explicit as to remove all doubts concerning the mode of appointment.")

[73] In three states, the legislatures freely chose to "direct" themselves to elect (South Carolina, New Jersey, Connecticut). In three states, the legislative choice was influenced by the compressed schedule (Georgia, Massachusetts, New Hampshire). Annual elections were required by each of these states' constitutions: South Carolina Constitution of 1778; New Jersey Constitution of 1776; Georgia Constitution of 1777; Connecticut Royal Charter of 1662, with minor modifications made in 1776 (Connecticut operated under the Charter until 1818): Massachusetts Constitution of 1780; New Hampshire Constitution of 1783. John Adams's *Thoughts on Government*, published in the Spring of 1776, was intended to induce southern states in particular to adopt written constitutions: Adams specified that elections should be annual. And it was Adams who drafted the Massachusetts 1780 Constitution, which in turn was the model for New Hampshire's 1783 Constitution.

[74] Constitution of New York, 1777, Articles X, XI.

[75] *Id.*, Article IV.

[76] DHFFE v. 3, *supra* note 15, 307-08.

[77] *Id.* . Governor George Clinton did not call the legislature into special session until December 7, 1788, which did not allow enough time for a popular election. The Senate informed the governor that it would have provided for popular election of electors had there been time. Id., 244-48. Unable to agree, the legislature defaulted on its constitutional obligation to direct the manner by which the state could cast electoral votes. It also did not elect U.S. Senators until the summer of 1789.

In Massachusetts, as well as in New York, the process for electing United States Senators under Art. I, Sec. 3 was hotly debated. Petitioners in Moore v. Harper argue, incorrectly, that in these elections it was determined that state constitutions did not constrain the legislature's exercise of authority under Art. I, Sec. 4 to prescribe the manner of electing senators. Pet.Br. at 27-28. To the contrary, in both elections it was argued that under the state's constitution the "legislature" was comprised of two chambers, each of which had a negative over the other, and in both elections the states followed that constitutionally prescribed procedure. Massachusetts rejected calls for a joint session; New York rejected a scheme in which a chamber could be forced to choose among candidates whom it did not support. 1 DHFFE 497-98, 511-512; 3 DHFFE 537-539; 513.

[78] Amendment IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[79] *Supra*, note 71. Indeed, at the Constitutional Convention Edmund Randolph had proposed both a proto-Tenth Amendment and a proto-Ninth Amendment, assuring that "the people" retained the right to form

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these amendments support the point that ambiguities about the rights and powers of the people are to be resolved in favor of the people.

In the second and third presidential elections, there was no serious discussion about the method of choosing the president.[80] In dramatic contrast, however, the presidential election of 1800 was bitterly fought, and the issues debated in 1788 and 1789 in Massachusetts and New York took center stage.[81] The unrepresentative, partisan role of state senators elected even four years previously was on display in New York and Pennsylvania, where Federalist Senates refused to pass laws allowing the people to vote in the presidential election (both states) and refused to honor the judgment the people expressed in an election that had just been held (Pennsylvania in October 1800).[82]

The constitutionality of the legislative option was a prominent issue in 1800.[83] On March 28, 1800, during the controversies in New York, U.S. Senator Charles Pinckney delivered a major speech in the U.S. Senate.[84] While appearing to acknowledge that the intent of the Convention was that the President be accountable to the people every four years,[85] Pinckney also claimed that, under the Tenth

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any type of republican government they wished, so long as it did not contravene powers delegated to the national government, and protecting rights that had not been enumerated by granting federal courts express power to invalidate state laws that violated "principles of equity and justice." Farrand 3 : 56.

[80] Again, everyone knew that George Washington would be re-elected in 1792, and political parties had not become fully institutionalized by at the time of the first Adams vs. Jefferson contest in 1796, which was a "transitional election in the truest sense." Pasley, *supra* note 69 at 308. The election featured what might be considered both cabal and demagoguery facilitated by legislative election. Alexander Hamilton schemed to have Thomas Pinckney elected President, *id*. 204-206; and state legislative choices were determined by ruling oligarchs. *Id*. 315, 391 (Delaware, "patently oligarchic"), 402 (South Carolina oligarchy favored two slave-owning candidates; the plan backfired by helping Jefferson gain the second spot over South Carolina's Thomas Pinckney).

[81] Edward J. Larson, A Magnificent Catastrophe: The Tumultuous Election of 1800, America's First Presidential Campaign (2007)(hereafter, Larson, Magnificent Catastrophe); Tadahisa Kuroda, The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804 (1994) 73-98 (hereafter, Kuroda, Origins); Alexander Keyssar, Why Do We Still Have the Electoral College? (2020) 33-41 (hereafter, Keyssar, Electoral College).

[82] In both states, the Federalists suffered devastating defeats in the ensuing elections for the state legislatures. Larson, Magnificent Catastrophe, 87-111 (NY); 206-09 (Pa). Likewise, the right of the people to vote in the presidential election became the overarching issue in the state elections in Maryland, where the Federalists were also defeated decisively. *Id*., 202-04.

[83] Keyssar, Electoral College, 35-36; Kuroda, Origins, 73.

[84] 6 Annals of Cong. 126 (March 28, 1800), *reprinted in*, Subcommittee on Compilation of Precedents, Counting Electoral Votes, H.R. Misc. Doc. 13, 44th Cong. 2nd Session (1877) (hereafter, "H. R. Misc. Doc. 44-13"). The topic of the speech was the Ross Bill, which sought to create a super-committee in Congress to adjudicate disputes about electoral votes. Within days of Pinckney's speech, the *American Citizen* began covering the Ross Bill, "which drew all kinds of political and constitutional fire. The *Republican Watch Tower* editorialized that this power derived from the people, and noted that one party consistently favored recognizing more power for constituted authorities at the expense of the people." Kuroda, Origins, 84. Charles Pinckney entered the fray in New York on April 22, 1800 with publication of his "Republican Farmer" essay by *American Citizen*, which was re-published broadly. Charles Pinckney to James Madison, Oct. 26, 1800, Founders Online, National Archives, Madison Papers (hereafter "Madison Papers") note 2 (stressed need to elect Republican legislatures). As early as May 16, 1799, Pinckney urged that others follow South Carolina's model of having the state legislature choose presidential electors. Charles Pinckney to James Madison, May 16, 1799, Madison Papers; Charles Pinckney to James Madison, September 30, 1799.

[85] H.R. Misc. Doc. 44-13, 702.

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Amendment, state legislatures had "complete," "conclusive" and "exclusive" control over how electors were chosen.[86] Whatever the Framers and ratifying states might have intended and understood, Pinckney argued that because the Constitution had not expressly forbidden legislative election, absolute power belonged to the States and their legislatures through the Tenth Amendment.[87] The amendments that the Anti-Federalists insisted upon to protect the rights of the people were now used as weapons in the hands of those who wished to deny popular rights.

On the other side of the divide, however, James Madison famously expounded on the meaning of "state" in the federal Constitution in January 1800. The Virginia Legislature, in its 1798 Resolves that attacked the Alien and Sedition Acts, had said that the Constitution was a compact among the states.[88] This appeared to support a states' rights view, but in the run-up to the 1800 election, the Virginia legislature issued a January 1800 Report (that Madison drafted) which clarified the 1798 Resolves.[89] "State," explained Madison, has many meanings. In the formation of the national government--through ratification under Article VII—the term "State" did not mean governments or legislatures; it meant "the people, in their highest sovereign capacity." Madison explained, "in that sense the Constitution was submitted to the 'States'; it was in that sense the 'States' ratified it."[90] It was only in this sense, Madison insisted, that the Constitution was a compact among the "States."[91] The Tenth Amendment, which Madison discussed in the previous paragraph, did not contradict this understanding.[92]

Underlying the 1800 debates about the constitutionality of legislative choice was the basic question of whether "State" in Article II refers to "the people" in their sovereign capacity, or whether it refers to the legislatures as organs of state government—which might or might not allow the people to vote.[93] For several decades, the controversy receded. During this Era of Good Feelings the outcome of the presidential election became a foregone conclusion.[94] As a practical matter, it did not matter what method a state used to choose its electors.

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[86] H.R. Misc. Doc. 44-13, 692, 693 ("complete and conclusive," "placed entirely with them"), 702 ("not without hopes . . . that the exclusive rights of the State legislatures will be preserved inviolate"). Cf., supra note 21, re Pinckney's value preference for state legislatures and disparagement of the rights of the people to elect their representatives as "theoretical nonsense."

[87] *Ibid.*

[88] The Virginia Resolutions were written by James Madison. The third paragraph began: "That this Assembly. . . explicitly and peremptorily. . . views the powers of the federal government, as resulting from the compact to which the states are parties. . . " Madison Papers, Virginia Resolutions, 21 December 1798.

[89] Madison Papers, The Report of 1800 [7 January] 1800, *Re* Third Resolution. Madison and Pinckney both supported Thomas Jefferson; the divide between them had to do with whether popular election was "theoretical nonsense."

[90] *Id.,* Fifth Paragraph.

[91] *Ibid.*

[92] *Id.*, Fourth Paragraph.

[93] Keyssar, Electoral College, 35-36 (disputes over meaning of "State").

[94] The exception was the election of 1812, which was fairly close. In North Carolina in 1811, the legislature repealed the law for election by districts and replaced it with a law for election by the legislature. As was the case in 1800, there was widespread outrage, and many of the legislators responsible for depriving the people of the right to vote were defeated in the subsequent election. Keyssar, Electoral College, 66; William Webb to James Madison, Dec. 17, 1812 (Library of Congress, Resource Guide to 1812 Election); 36 Annals of Cong 1910-11 (April 20, 1820)(recollection of Cong. James S. Smith: "If this be your republicanism, said they, away with it. You have deprived us of the right of exercising one of our most important political rights, and a privilege that we deem sacred; no apology will or can be received. And, sir, they displaced most of the supporters of this measure with a high hand.").

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In 1819, however. Chief Justice John Marshall's famous opinion for a unanimous court in McCulloch v. Maryland[95] weighed in on the side of "the people." Explicitly rejecting a Tenth Amendment argument,[96] the Court declared: "From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people. . . "[97] Marshall emphasized: "The government of the Union, then . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[98]

1824 to 1826: Debates in Congress and the Transformation of the Presidential Election System.

Just as McPherson's historical narrative did not mention the debates of 1800—stating that "no question was raised"—though the opposite was the case—the Court's version of history entirely omitted even more consequential later debates.[99] As the election of 1824 approached, single party domination of presidential elections gave way, and the nation's attention turned to the potentially dysfunctional machinery of the electoral college. In a paragraph that listed proposals for constitutional amendments seeking election by districts, the Court noted that similar amendments had been offered as early as 1813 and that many Congressmen had proposed election by districts in December 1823, including Senator

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[95] 17 U.S. (4 Wheat) 316 (1819). McCulloch is regarded as among the most important Supreme Court decisions. It was argued from Feb. 22-Feb. 27 and from March 1-March 3, 1819. Because of the importance of the issues, the Court dispensed with its then-usual rule that only two attorneys could argue for each side. 17 U.S. 322. For a snappy summary, see Daniel A. Farber, "The Story of McCulloch: Banking on National Power" in Constitutional Law Stories 33-67, Michael C. Dorf, ed. (2003).

[96] 17 U.S. at 402.

[97] *Id., at* 403.

[98] Id., 17 at 404-05. The question would recur in the nullification debates of 1830. Madison, who for years had followed a policy of not injecting himself into public debate, now did so. Attached to an unsigned article in *North American Review* commenting on the nullification debate in Congress was a lengthy letter from Madison to Massachusetts Congressman Edward Everett. In it, Madison explained again the manner in which the Constitution was created: "It was formed, not by the Governments of the component States. . . It was formed by the States, that is, by the people in each of the States, acting in their highest sovereign capacity. . .constituting the people thereof one people for certain purposes." North American Review, Vol. 31, no. 69, Oct. 1830, 486, 537-38. The editors of the on-line version attribute the full article to Madison, but it was written by Everett, with whom Madison had been corresponding since April 1830 regarding nullification. *See* correspondence of April 8, 11, 17 (enclosing excerpt of letter to Robert Young Haynes) and 22 (Everett urged Madison to make his views public: "Nothing more important to the country has been written since the date of the Federalist"); August 5, 20, 28, 31; September 7, 10, 28; October 7, 1830. Madison Papers. *See also* correspondence with Daniel Webster, May 24 and 27, 1830, *id.* On March 5, 1830, South Carolina Senator Robert Young Haynes, a leading proponent of nullification, sent Madison speeches that Haynes delivered in the Senate. Haynes sought Madison's agreement that the Virginia Resolutions of 1798 and the Report of 1800 supported nullification. On April 3, 1830, Madison rejected Hayne's position in a long letter that became the model for Madison's letter to Everett. Any hope that Madison's full explanation would persuade proponents of nullification to change course was dashed on July 22, 1830 when Haynes wrote that he stood by his speeches in the Senate and that he respectfully disagreed with Madison about what Madison had written in 1798 and 1800. Haynes promised an explanation in correspondence to follow, but Madison noted in 1835 that he never received the promised correspondence. Correspondence with Robert Young Haynes, March 5, April 3 and July 22, 1830, Madison Papers.

[99] McPherson, 146 U.S. 33-34.

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Thomas Hart Benton and Representative George McDuffie.[100] McPherson said only that these proposals had not been "acted upon" and then skipped from December 1823 to 1835.[101]

The Court thereby missed a crucial chapter in the story. The 1824-1826 debates scrutinized the constitutionality of legislative choice as never before, and thereby contributed directly to the transformation of the presidential election system.

The Supreme Court stated explicitly in McCulloch v. Maryland that "a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this" if the usurpation pertained to "great principles of liberty."[102] Although the issue of the peoples' right to vote in presidential elections had been significant only in the 1800 presidential election, and although legislative choices were acquiesced in without serious dispute in almost all the other elections, the concept of "consent of the governed" is undoubtedly the sort of "great principle of liberty" McCulloch declared could be contested at any time.[103] Taking a cue from the Supreme Court, Missouri Senator Thomas Hart Benton launched a frontal assault in 1824 on legislative "usurpation" of the right of the people to vote in presidential elections.

In late January and early February 1824, with new Senator Andrew Jackson sitting at the adjoining desk, Benton assailed the legislative option in a rigorous and rhetorically powerful speech.[104] He stated that the language of the Constitution, the Journal of the Convention,[105] the *Federalist Papers*, and the records of the state ratifying conventions all proved that the people are to choose the presidential electors.[106] Furthermore, allowing legislators elected 2, 3 and 4 years prior to a presidential election to decide how a state's votes should be cast flew in the face of every idea of representative government.[107] Conceding absolute power to state legislatures allows a legislature to intervene on the eve of an election to take the right of election away from the people, as happened in New Jersey in 1812.[108] With legislative election, the state legislatures themselves function as the true "electoral colleges," and that state of affairs contradicted every reason for which the electoral college had been created, Benton explained.[109] State legislatures are not single purpose bodies that meet once and disband. State legislatures are subject to and marked by all the influences of cabal, intrigue, and possible corruption that electoral colleges were meant to avoid.[110]

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[100] In confidential letters Madison supported proposals for district election of electors by the people. Madison to John Hay, Aug. 23, 1823; Madison to George McDuffie, Jan. 3, 1824, Madison Papers.
[101] McPherson, 146 U.S. 34.
[102] McCulloch, 17 U.S. 401.The issue in McCulloch was the constitutionality of a national bank. The case was about property rights and expectations, as well as Federal power, not the great principles of liberty as articulated at the Founding.
[103] *Ibid.*
[104] Annals of Cong. 18th Cong., 1st Sess. 167, 170-178; H. R. Misc. Doc. 44-13, 722, 725-28. *See infra*, notes 120-122 and accompanying text, regarding the alleged "corrupt bargain" of the 1824 election.
[105] The *Journal of the Convention* was not published until 1819. All prior debate about Article II took place in a vacuum: no one knew that the Convention had explicitly rejected election of electors by the state legislatures or that the debate at the end of the Convention was between election by the national legislature versus election by electors chosen by the people.
[106] H.R. Misc. Doc. 44-13, 724-25.
[107] *Id.*, 726.
[108] *Ibid.*
[109] *Id.*, 726-27.
[110] *Ibid.*

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The McPherson court was correct that the proposals Benton and others introduced in 1823 were not acted upon, but Benton took center stage in the Senate in 1824, and his speech excited many members of the public.[111] One notable idea, identified as a "hypothetical," was that Congress might not count the electoral votes from states that had deprived the people of the right to vote, Benton suggested.[112] Moreover, his focus on senators elected four years previously was a clear reference to New York, where changing the state's law to allow the people to vote had been an issue in the 1823 election and was again under consideration in 1824.[113] That year the New York Senate again blocked a bill to empower the people to vote in presidential elections, and, once again, the ensuing state election was an electoral bloodbath for the recalcitrant party.[114]

When Senator Benton delivered his major speech in early 1824, the laws of seven states provided for state legislatures to choose electors.[115] By February 1826, when an extended debate in the House on these issues commenced, only two states—South Carolina and Delaware—retained the practice.[116] The action of a state that changed its laws in the face of a powerful argument that legislative choice had been a usurpation from the beginning, including a thinly veiled threat that electoral votes from usurping states might not be counted, might be considered a "practical construction" implemented in the belief that legislative election was, or might be, unconstitutional.[117] The McPherson court overlooked this

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[111] Annals, 18:1, 327 ("public attention. . . excited," "some anxiety"); 363 (praising Benton's speech, suggesting it be published—along with any rebuttals—so the voters might judge; noting the problem of state legislatures making spur of the moment decisions; commenting that members of the New York legislature had been subjected to unseemly scorn for not letting the people elect); 366 (praising Benton's speech, agreeing that legislative election had been an error, but disagreeing that electoral votes might not be counted: "it is too late to oppose the exercise of this power," overlooking McCulloch); 412 ("would not be denied. . . it was the intention of the Convention. . .to give to the people the election of their Chief Magistrate"). In a confidential letter sent shortly after Benton's speech, Madison dismissed a monograph by John Taylor of Caroline that argued the Constitution is a compact among state governments, based in part on the author's proffered definitions of "state" and "people." James Madison to Robert S. Garnett, 11 February 1824, ("I do not doubt that more competent lights as to the proceedings of the Convention would have saved the distinguished Author from much error into which he may have been led by the faint or refracted rays to which he trusted.") Madison Papers.

[112] If legislative election was truly a "usurpation" never intended at the Founding, Congress could remedy the wrong directly by not counting electoral votes; a constitutional amendment would not be required. Later, Rep. Shellabarger argued for power to reject votes on February 11, 1869. Cong. Globe, 40th Cong. 3d Sess., Appendix 173 (Congress must have power not to count votes from state whose legislature usurped the rights of the people under state law). Likewise, during the Congressional debate over creation of the Electoral Commission of 1877, Mississippi Rep. John Roy Lynch said that Congress could reject electoral votes from a state that deprived a portion of its population of the right to vote in presidential elections. 5 Cong. Rec. 1025-26 (not count votes of state that violated Fifteenth Amendment and Section 2 of the Fourteenth Amendment).

[113] Lisa Thomason, Jacksonian Democracy and the Electoral College: Politics and Reform in the Method of Selecting Presidential Electors, 1824-1833, (Doctoral Thesis, 2001) 57-61 (hereafter, Thomason, Jacksonian Democracy).

[114] *Ibid.*

[115] *Id.*, Missouri at 52-53 (Benton the most influential man in state politics), New York at 57-61, Vermont at 105-06, Louisiana at 71-72, Georgia at 102, Delaware at 135-36, and South Carolina.

[116] Delaware abandoned this practice in 1831. Thomason, Jacksonian Democracy, 135-36.

[117] *See supra*, note 115. "Practical constructions" could include three changes made in 1824 and early 1825, before Benton and Jackson formed an alliance: (i) Missouri (a few months after Benton's speech), *Id.*, 52; (ii) New York (which was implicitly a subject of Benton's speech and was discussed in subsequent Senate hearings, *supra* notes 113 and 114 and accompanying text); and (iii) Vermont (which changed its

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point, hypothesizing that the changes that occurred in the 1820s could be attributed to a gradual shift of public opinion and "different views of expediency."[118] Benton's argument was not about expediency; it questioned the legitimacy of the state legislatures' exercise of power.[119]

The 1824 presidential election gave rise to its own claim that a legislature had chosen a president through a "corrupt bargain." The four-way race was determined by the House of Representatives, with Henry Clay decisively opposing Andrew Jackson, the popular favorite.[120] Soon thereafter Jackson launched his second presidential campaign with a call for a constitutional amendment.[121] Rhetoric about preventing "corrupt bargains" and "legislative usurpations" became a fixture in the pro-democracy playbook. Benton chaired a nine-member Senate committee that unanimously recommended a constitutional amendment in January 1826.[122] The Committee reported that the right of the people to elect their representatives was anchored in fundamental principles of republican government.[123] The people are the sovereigns, the committee argued, and it is only through delegation from the people that government can exercise legitimate power.[124] In practice, the only way in which the people exercise their sovereignty is through elections, and it is a mockery to declare the people are sovereign if the right to elect is denied them.[125] A legislature that appropriates the right to choose electors—without clearly delegated authority and the explicit consent of the people—becomes a "mere usurper."[126] This issue was debated for 1½ months in the House in February-April 1826, with George McDuffie leading the effort.[127]

Although the practice of legislative election was dying by 1826, and although it had few defenders in the House, the practice received a full airing. Competition between the legislature and the people over the right to vote, one member remarked, is always "a struggle between power and liberty."[128]

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law in 1824, to be effective in 1828, and which generally followed New York's lead, *id.*, 105-06. It may include two changes following the alleged "corrupt bargain" of 1825, after which Benton and Jackson joined forces to advocate for presidential election reform (*Id.*, 53): (i) Louisiana, id. 71-72 (outrage over "corrupt bargain" was great, and immediate unrest led to change); and (ii) Georgia, *id.*, 102 (law changed in early 1826 with little opposition, "both sides recognized that, without a doubt, the people would support Jackson, and Jackson supported the people's right to choose the president.")

[118] McPherson, 146 U.S. 36.

[119] Thomason found that the changes in some states—Vermont in 1824 and Delaware in 1831—were based solely on good government principles, not Jacksonian era politics. Jacksonian Democracy, 105-06, 135-36.

[120] *Id.*, 40-43.

[121] Id., 88.

[122] S. Rep. 19-22. Benton explained almost 30 years later that membership was expanded from the usual five to nine on the motion of Senator Van Buren. The members were "carefully selected" by Vice President Calhoun, "both geographically. . . and personally and politically as being friendly to the object and known to the country." Thomas Hart Benton, Thirty Years' View: or, A history of the working of the American government for thirty years, from 1820 to 1850 (1854) 78-80.

[123] S. Rep. 19-22, 6.

[124] *Id., 6, 16.*

[125] *Id., 6* ("sovereign" becomes "a title of derision"),

[126] Id., 16. In a confidential letter, James Madison commented favorably on the Senate report and on Senator Benton. Robinson Taylor to James Madison, Jan. 26, 1826; James Madison to Robinson Taylor, Jan. 30, 1826, Madison Papers.

[127] *Infra* notes 128-138 and accompanying text.

[128] Nineteenth Congress, 1st Sess., House of Representatives, 2 Gales and Seaton's Register of Debates in Congress (1825-26) in two Parts, 2 Part 2 Reg. Deb. 1901-02 (1825-26).

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A great principle of liberty was at stake; yet a principal justification for the prior practice was that it had been followed since the Founding and, for that reason, it should not be considered a "usurpation."[129]

Some defenders argued that the "right" of the states to choose the president was one of the most important powers secured to the states at the Constitutional Convention and that there was an implicit restriction on Congress' power to propose constitutional amendments that undermined the original bargain.[130] Even Massachusetts Congressman Edward Everett seemed to suggest as much, stating that slavery was a political issue and not a moral issue, and implying that the U.S. Constitution could never be amended to prohibit slavery.[131]

The few defenders of the legislative prerogative claimed that the Constitution was a compact among state governments, relied heavily on the Tenth Amendment and even purported to rely on Madison's definition of "State" in the Virginia January 1800 Report.[132] Others firmly corrected the record about Madison's views,[133] pointed to the actions by the New York and Pennsylvania state legislatures in 1800, and focused on deplorably similar actions of the New York Senate in 1824.[134] One member pointed out that if legislatures actually possessed such absolute power, they could direct that a bank president appoint the electors; but he went on to state that more realistically—and of equal danger—the "absolute power" argument meant that a legislature might seek to intervene at the last minute and take back the power to choose the electors in defiance of the will of the people, possibly leading to civil war.[135] Few tried to answer this point. An extreme view was that legislatures were meant to operate as counterweights to federal authority and that the exercise of legislative power to dictate the outcome of elections had been intended: "[W]hat might be called, violent change; that is to say, change on the eve of a depending election of President," represented "the real efficacy, and just value" of the constitutional design.[136] One defender of legislative power argued simply that under Article II a legislature could direct "any competent body of men" to choose the electors.[137]

The debate ended in 1826 without a vote on the question of legislative usurpation. A parliamentary maneuver—deployed to end debate immediately when the session degenerated into an exchange of insults—limited the vote to other resolutions.[138] By 1832 there was only one state—South

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[129] *Id.,* Part 1 1580; Part 2 1866-68.

[130] *Id.*, Part 1 1447-49. In 1869, Senator Charles Buckalew would justify his vote against the Fifteenth Amendment on this basis. *See* note 99, *infra.*

[131] *Id.*, Part 1 1570-73, 1579-80. New York Representative Michael Hoffman pointedly disagreed that the Constitution could never be amended to prohibit slavery. Id., 1868-69.

[132] *Id.,* Part 1 1501, 1521-22.

[133] *Id.,* Part 2 1891-1913, 1901-02 (Madison re "State", Federalist 45), 1904 (ratification debates).

[134] *Id.* Part 2 1896, Part 1 1400-01.The ensuing legislative election of electors in New York in 1824 was almost comical. Keyssar, Electoral College, 97: "What followed, over a period of weeks, was a labyrinthine sequence of maneuvers by all parties in both chambers, including deals made and unmade, lies, misrepresentations, dissembling, clandestine meetings, arguments over whether blank votes counted in the total, a double cross followed by a "double-double cross. . ."

[135] *Id.,* Part 1 1373-74 (Rep. George McDuffie, Feb. 15, 1826; opening the debate on his resolution for a constitutional amendment to choose electors in districts.)

[136] *Id.*, Part 1 1448-49.

[137] *Id.*, Part 2 1865-66. If this were true, it would mean a legislature could designate its senate, possibly elected four years previously, to elect the next president.

[138] *Id.*, Part 2 2003-05.. The House voted against a resolution for district-based election of electors but in favor of a resolution to eliminate one form of legislative election—i.e., to eliminate the contingent

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Carolina, the strongest proponent of nullification and, ultimately, of secession—that continued to deny its people the right to vote for electors.[139]

McPherson mentioned constitutional challenges to legislative election only at one point. The penultimate paragraph of the Court's historical review cited Joseph Story's Commentaries on the Constitution.[140] Writing in 1833, and without the benefit of Madison's notes, Story acknowledged that the question of constitutionality of legislatures directly selecting electors had been ". . .often doubted by able and ingenious minds . . ."[141] Story cited only one example of a challenge to the constitutionality of legislative election: namely, a July 28, 1788 colloquy during the first North Carolina constitutional convention in which future Supreme Court Justice James Iredell responded to a comment by North Carolina Governor Samuel Johnston.[142] Johnston said that some people thought the state legislatures might appoint the electors. Johnston's comment was the rare mention in the record of the ratification debates of the possibility that state legislatures rather than the people might elect—and it was made after eleven states had already ratified.[143] As soon as Johnson made the comment, it was contested. Iredell responded that he "was of opinion that it could not be done with propriety by state legislatures because, as they were to direct the manner of appointing, a law would look very awkward, which should say, 'They gave the power of appointment to themselves.'" [144]

Story concluded that, notwithstanding unspecified but able arguments of those who challenged election by the legislatures, the practice "has been firmly established in practice ever since the adoption of the constitution, and does not now seem to admit of controversy. . ."[145] Story's conclusory remark conflicted not only with the unanimous McCulloch decision, in which Story had joined, but also with the then-recent history.[146] McCulloch had declared that when a "great principle of liberty" is at stake, even a long-established "usurpation" can be challenged.[147] A more accurate synopsis would have been that "the practice **had been** established at the time of the adoption of the constitution through the election of 1820 (during which period, until 1819, the nation did not have the benefit of the *Journal of the Constitutional Convention*). Following the publication of that Journal and the controversies of 1824-26 (championed by able and ingenious minds) it **had been** largely abandoned."[148] To have said that would have cast a cloud over the constitutionality of South Carolina's remaining practice. This might have enflamed the nullification controversy that Story addressed—and perhaps hoped to quiet—in his extended explanation

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election in the House. That resolution was referred to a committee, but the committee could not agree on a substitute, and the matter did not proceed further.

[139] All other states had abandoned the practice. *Supra* notes 115, 117, 119.

[140] McPherson, 146 U.S. 33.

[141] Story cited 3 Elliott, Deb. 100, 101. The citation was to the first edition of Eliott's Debates, in which the North Carolina convention is set out in Volume 3. In the second edition it is in Volume 4.

[142] *Ibid.*

[143] *Supra* notes 53-56 and accompanying text.

[144] *Ibid.* Thomas Hart Benton stressed Iredell's point in his 1824 speech. Annals 18:1, 172; H.R. Misc. Doc 44-13, 725 ("direct" "always implies an address to a third party, and never to one's self"). Earlier, Constitutional Convention delegate William Davie informed the North Carolina convention that the electors were to be chosen by the people. *Supra* note 56.

[145] McPherson, 146 U.S. 33.

[146] *Supra* notes 102-138 and accompanying text.

[147] McCulloch, 17 U.S. 401.

[148] *Supra* notes 102-138 and accompanying text; Keyssar, Electoral College, 32 (chart).

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that the Union was not a "compact" among state governments but was founded instead by the people, as McCulloch explained and as James Madison emphasized in his letter to Edward Everett.[149]

1865-1877: The Repudiation of Legislative Election During Reconstruction.

Thomas Hart Benton's persistent advocacy for the rights of the people to vote in presidential elections stretched forward, directly and indirectly, all the way to Reconstruction. Building on an alliance cemented in 1825, Benton and Andrew Jackson continued to argue for presidential election reform—Jackson throughout his presidency, and Benton for years beyond that.[150] In 1840 Congress finally published James Madison's *Notes of the Constitutional Convention,*[151] and the nation could see for itself for the first time "the more competent lights" the *Notes* provided.[152] During Benton's last month in the Senate in 1851, another Tennessee populist, Representative Andrew Johnson—who took up the cause in 1845—introduced a constitutional amendment, referencing the proposal that Benton and his committee had made decades before.[153] And Benton's 1854 memoir devoted separate chapters to the efforts of 1824 and 1826 and reiterated his committee's unanimous view about legislative "usurpation."[154] As President, Andrew Johnson continued to champion the effort following the Civil War.[155]

McPherson's historical narrative noted that South Carolina chose electors through its legislature up to and including the election of 1860. It entirely omitted South Carolina's abandonment of that practice thereafter.[156] The Court's narrative also did not mention the curb on legislative power through Section 2 of the Fourteenth Amendment, proposed by Congress in 1866 and ratified by the states in 1868.[157] The Court noted that Florida had elected through its legislature in 1868, but said nothing about events in Alabama in 1868, when a bill for legislative election drew national condemnation and was vetoed.[158] The Court also noted that a section in a schedule that was part of the new state of Colorado's 1876 Constitution provided that the legislature would choose the electors that year. The justices did not turn the page to the next section, however, which provided (and still provides) that in all subsequent elections the people are to choose the presidential electors.[159]

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[149] Joseph Story, Commentaries on the Constitution (1833), Book 3, Chapter 3, Sections 306-371
[150] Keyssar, Electoral College, 111-12, 115, 116-17. Benton's 1854 memoir was itself a continuation of his argument in favor of reform. *Infra* note 155.
[151] Larson and Winship, *supra* note 15, 162.
[152] *Supra* note 111.
[153] Globe 31:2, 627.
[154] Benton, Thirty Years View, *supra* note 122, 37-41, 78-80.
[155] *Infra*, notes 161-64, 214 and accompanying text. President Johnson opposed the Fourteenth Amendment as a whole, but a compromise measure that he supported would have applied a modified Section 2 specifically to presidential elections. Joseph B. James, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984) 140. The modification would have limited Section 2 to denial of the right to vote on the basis of race or previous condition of servitude.
[156] McPherson, 146 U.S. 32-33.
[157] *Ibid.*
[158] *Id.*, 33. *Infra* notes 189-196 and accompanying text.
[159] McPherson, 146 U.S. 32-33. Colorado Constitution (1876), Schedule, Secs. 19, 20.

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The McPherson decision omitted important history about the legal, constitutional, and political history of electoral voting in 1865-69. The authors discuss that missing history in two recent articles.[160]

President Johnson and South Carolina Lead the Way.

Immediately following the Civil War, President Andrew Johnson and South Carolina removed the last vestige of legislative usurpation. In June 1865 Johnson told a contingent of prominent ex-Confederates from South Carolina that he was "going right to the people as far as I can."[161] He appointed Benjamin F. Perry as provisional governor, after having commented at a meeting with South Carolina elites that Perry was perhaps "too much a man of the people" to suit them.[162] At South Carolina's (all-white) 1865 Convention, Governor Perry proclaimed that the legislature's prior practice of choosing presidential electors had been a "gross error" and "usurpation."[163] The 1865 Convention went on to pass a resolution that the legislature provide for the people to choose the electors.[164]

In 1868 South Carolina went one step further. A second Constitutional Convention convened under Congressional Reconstruction—this time with Black suffrage and a majority of Black delegates.[165] This Convention established a special committee to investigate the effect of Section 2 of the Fourteenth Amendment,[166] South Carolina added the right to vote for presidential electors in its state constitution.[167] Congress then re-admitted South Carolina and five other southern states to the Union, subject to the fundamental condition that its constitution "shall never be amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized."[168]

The 1865 resolution of South Carolina's constitutional convention and the 1868 constitution, as well as several state statutes and the federal statute readmitting South Carolina

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[160] Michael Fitzgerald and Mark Bohnhorst, "Presidential Ballots and Reconstruction: The Last Serious Attempt at Legislatures Casting Electoral Votes," (unpublished manuscript)(on file with authors), and, less comprehensively, Mark Bohnhorst, Reed Hundt, Kate E. Morrow, and Aviam Soifer, "Presidential Election Reform: A Current National Imperative," 26 Lewis & Clark Law Review 437, 450-61 (2022)(hereafter, Bohnhorst et al., "Presidential Election Reform").

[161] Papers of Andrew Johnson (Bergeron, Ed.) Vol. 8, 280-85.

[162] *Ibid.*

[163] Convention Journal, 15. Perry wrote to Johnson several times, keeping him apprised of developments. The day before the address, Perry wrote, "I send in my message tomorrow, which is a strong one; sustaining your [Johnson's] reconstruction policy." Papers of Andrew Johnson, Vol. 9, 76, 94-95.

[164] Resolution, September 20, 1865. On October 2 James Orr, former Speaker of the House, wrote President Johnson to thank him for his recent pardon and inform him that Orr was likely to be elected Governor. He informed President Johnson that he had "little doubt" that the legislature would promptly pass the resolution. Papers of Andrew Johnson, Vol. 9, 124-25.

[165] Foner, Reconstruction: America's Unfinished Business (1988), 318.

[166] Convention Journal, 808-811.

[167] Constitution of 1868, Art. VIII, Sec. 9: "Presidential electors shall be elected by the people."

[168] United States Statutes at Large (1868) 15:72.

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to the Union, including the condition that the rights established in its constitution would not be changed—might all be accurately described as "practical constructions." They shared the view that legislative usurpation had always been an error and that the resumption of the practice would violate Section 2 of the Fourteenth Amendment. The *McPherson* Court simply ignored these developments.[169]

Section 2 of the Fourteenth Amendment and Broader Criticism of Legislative Election.

In June 1866, Congress directly addressed the ambiguity in Article II, sec. 1, when it sent the Fourteenth Amendment to the states.[170] Section 2 embodies the principle that a state may not deny eligible voters the right to vote without incurring a penalty. In fact, Section 2 specifies that, if this principle is not followed in all federal elections, specifically including presidential elections (as well as in specified state elections), the State "shall" lose representation in the House (and thus in the electoral college) on a proportionate basis.[171] The drafting history demonstrates that this was intended to address directly the possibility that state legislatures might attempt to resume their exclusionary practice, as in South Carolina's history of depriving the people of the right to vote in presidential elections.[172] Legislatures might or might not possess that power, but under Section 2 they could exercise it only at great cost.[173]

Section 2's requirements were clearly understood. Almost immediately after Congress sent the Fourteenth Amendment to the states Unionist-governed Tennessee ratified the Fourteenth Amendment and was readmitted to the Union.[174] Governor William T. Brownlow immediately set out to implement Section 2's encouragement of universal male suffrage. In an address to the Southern Loyalist Convention, Brownlow said that "enfranchising the Negro" was

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[169] McPherson, 146 U.S. 32-33.

[170] Bohnhorst *et al.*, "Presidential Election Reform," 450-53.

[171] *Ibid.*

[172] *Ibid.*, Globe 39:1, 3011, 3029, 3039-40.

[173] Bohnhorst, et al., "Presidential Election Reform," 450-53. By June 1866—after repudiation of legislative election in South Carolina the previous year—the entire nation had turned against the legislative option. Moreover, experience with the most closely analogous practice--election of U.S. Senators by state legislatures—cast a shadow over the practice of legislative election more broadly. In July 1866, within weeks of the promulgation of the Fourteenth Amendment, the Senate passed a bill to impose uniform procedures on state legislative elections of senators. The debate on the measure referred to ambitious, partisan and corrupt legislatures: legislative election was termed a "mischief, an admitted evil." Ch. 245, Statutes at Large, 39th Cong., 1st Sess., 243-44 (July 25, 1866); Globe 39:1, 3727-34.
President Johnson agreed and promptly signed the bill into law. Two years later, on July 18, 1868, Johnson proposed a constitutional amendment for popular election of Senators. He declared that no detailed explanation was required: "The objections to the election of Senators by the legislatures are so palpable that I deem it unnecessary to do more than submit the proposition for such an amendment. . ." President Andrew Johnson, Special Message to Congress, July 18, 1868. Johnson stressed the high ground of principle: election of Senators by the people is more consistent with "the genius" of the American system of government.

[174] James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment (1997) 24 (hereafter, Bond, No Easy Walk). Tennessee's action was the first and most contemporaneous "practical construction" of Section 2. Leading Nashville papers covered these developments. *Id.*, at 31.

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politically important (sixty or seventy thousand more votes "to weigh in the balance against rebelism") and that to do so was "proper and just."[175] In a message to the legislature, he pointed out that when the Fourteenth Amendment was ratified, if Tennessee did not extend suffrage to the freedmen, Tennessee's representation in the House would be reduced from nine to six.[176] Tennessee adopted universal male suffrage in February 1867.[177]

Reconstructed States Face White Supremacist Terror (July-November 1868)

Just as a sufficient number of states had ratified the Fourteenth Amendment and as southern states were being readmitted to the Union on the specific condition that the rights to vote established in their constitutions could not be eliminated or burdened, the same states faced an electoral crisis—a crisis that would lead to the last serious attempt at legislative usurpation of the right of the people to vote in a presidential election.[178] *McPherson* cited the fact that the Florida legislature chose the state's electors in 1868 but otherwise said nothing about these events.[179]

This issue intersected with Radical Reconstruction and provoked an urgent public debate in 1868, however.[180] Black suffrage briefly made the selection of presidential electors a subject of national attention.[181] Under the Military Reconstruction Acts of 1867, ten ex-Confederate states convened Republican-dominated Constitutional Conventions on the basis of equal male suffrage.[182] Most were readmitted to the Union in time for the 1868 presidential election.[183] Widespread fears that the Republican candidate, U. S. Grant, would lose helped convince Congressional Republicans to suggest drastic remedies.[184] At their instigation, Florida's new Republican government suddenly resurrected the notion of legislative appointment of presidential electors.[185] This proposal was adopted in early August 1868, obviating the need for a popular vote to take place in the face of Ku Klux Klan mobilization across the South.[186] This rapid enactment minimized public debate. The recent overwhelming voting majority for Republican Reconstruction in Florida suggested some possible legitimacy, particularly because

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[175] Id., 24.
[176] *Ibid.* A deprivation of the right to vote for president, although not an issue at the time, would have reduced Tennessee's representation in the House from nine to one.
[177] *Id.*, 25.
[178] Fitzgerald, et al., "Presidential Ballots."
[179] McPherson, 146 U.S. 33.
[180] Fitzgerald, et al., "Presidential Ballots;" *see also*, Bohnhorst el al, "Presidential Election Reform," 454-55.
[181] *Infra*, notes 184-215 and accompanying text.
[182] Foner, *supra*, note 165, at 276-77.
[183] Michael W. Fitzgerald, Splendid Failure: Postwar Reconstruction in the American South (2007), 90-91.
[184] Washington Evening Star, July 28, 1868; Hartford Courant, July 29, 1868; Washington National Intelligencer, July 30, 1868.
[185] Jerrell H. Shofner, Nor is it Over Yet: Florida in the Era of Reconstruction and Redemption in the South (1975), 204.
[186] Alan W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (1971) 47-64.

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of the ferocity of the terrorist campaign.[187] Suggestions that other southern states might follow suit in allowing legislative selection of electors provoked widespread Democratic protests and led the press to enter the fray.[188]

Alabama, as the second state to pursue legislative appointment of electors, became the primary focus.[189] At the time Florida acted, Alabama's Congressional delegation urged their Republican allies back home to act, and the Alabama legislature did so quickly.[190] Yet the newly-installed Republican governor, William Hugh Smith, hesitated. Smith was a native Alabamian who had remained loyal to the Union.[191] Nonetheless, Smith was probably the most conservative of all the southern Republican governors on racial matters. He assumed office after a disputed election in which a Democratic boycott apparently prevented enactment of the state's Reconstruction Constitution, until Congress decided otherwise.[192] Under these circumstances, outreach to the more law-abiding elements of the white opposition became Smith's priority, as he sought bipartisan legitimacy for his shaky government.[193] He thus vetoed the electoral college bill, citing its undemocratic nature. Smith noted that the bill would take the vote away from the freedmen who had just been enfranchised.[194] Smith's action won him Democratic admiration, and it largely resolved the debate within the Republican press about legislative selection of electors.[195] In practical terms, Smith's veto largely settled the issue, and

[187] William Watson Davis, The Civil War and Reconstruction in Florida (1913) 527; New York Times, August 5, 1868.
[188] New York Times, August 8, 1868; New York Tribune, August 12, 1868; Chicago Tribune, August 12, 14, 1868.
[189] Florida's bill passed on August 6, Alabama's on August 8, and Alabama's governor William H. Smith vetoed it on August 11, 1868.
[190] Congressman Thomas Haughey, et al. to Governor W. H. Smith, July 28, 1868. Gov. Smith Papers, Alabama Department of Archives and History, Montgomery, Alabama. In both Florida and Alabama, the Republican-dominated legislatures were split. Formal protests were filed in Alabama, including a protest that legislative election was never intended by the fundamental law of the land and a protest that it transgressed the principle of universal male suffrage. Similar criticisms appeared in the press. *Supra* note 190. An editorial in a leading Tennessee paper, which had followed Governor Brownlow's implementation of Section 2 of the Fourteenth Amendment, echoed the views of Andrew Jackson and Andrew Johnson. The editorial stated that the paper was certain that legislative election violated the republican principles on which the nation was founded; the newspaper also believed the measure violated Section 2 of the Fourteenth Amendment. *A Radical Juggle Foiled*, NASHVILLE UNION & DISPATCH, Aug. 11, 1868, at 2; *The Proposition to Have No Election in November*, NASHVILLE UNION & DISPATCH, Aug. 13, 1868, at 2
[191] Fitzgerald, Reconstruction in Alabama, 171.
[192] Fitzgerald, Reconstruction in Alabama, 170-71. Congress received extensive evidence of the campaign of terror and intimidation that had marked the Februrary election. Globe 40:2, 2858-2871; 2895-2904. The Senate determined that the new constitution had the support of the majority of the people, "especially" in light of "the grossest fraud and greatest terror that pervaded Alabama during that election." Globe 40:2, 2900 (Sen. Pomeroy). The House concurred in admitting Alabama. Globe 40:2, 3094, 3097.
[193] Fitzgerald, Reconstruction in Alabama, 205-06.
[194] State of Alabama, Senate Journal, 1868, August 11, 1868, 124-27.
[195] Fitzgerald *et al.*, "Presidential Ballots."

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thereafter Alabama's notion of legislative appointment of electors found few outside defenders.[196]

Yet among Smith's fellow Alabama Republicans in the legislature, including both Black and white Radicals, Smith's actions provoked some serious misgivings.[197] Any fair vote seemed impossible during the terrorist upsurge, especially after the army's profile receded following the restoration of civil rule.[198] Smith refused to organize the state militia, however. fearing that predominantly Black units would prompt a race war; he also minimized the severity of the Klan's actions in his public statements.[199] Most of the legislators resented being cast as dangerous extremists, particularly after critics leaked threats of physical resistance they had voiced during meetings in the governor's office.[200] The angry Republican leaders hit upon a solution: the new state constitution had a provision that all voters swear to respect the civil equality of all men, and to abjure violence or intimidation against voters.[201] The legislature had not yet passed implementing legislation, however. Without it, the legality of any future election could be in doubt.[202] The legislature simply adjourned without acting on the governor's veto.[203] They were not scheduled to return until November, which left open the possibility that the legislators might override Governor Smith's veto and choose the state's electors themselves, with some semblance of legal legitimacy.[204]

Alabama's impasse lasted for weeks, propelling continued national discussion of the electoral college issue well into the fall.[205] Despite all the national praise that Smith's veto received, the Alabama legislature was now in a position to frustrate an election through inaction. Republican campaign activities largely ceased because few activists or voters would risk their lives for an election that might never occur.[206] Governor Smith now faced a deteriorating situation, and he was forced to call the legislature back into session. But the Radicals in the legislature stood firm, essentially giving the governor an ultimatum.[207] They appointed a delegation to meet with President Andrew Johnson, seeking guarantees that Johnson would order the army to provide protection to the electorate. They also requested that Governor Smith accompany their delegation to Washington, and Smith complied.[208] In their meeting with the president. the Republicans did receive the public guarantees they sought, even from the generally reactionary president Andrew Johnson definitely was.[209] The legislature then

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[196] *Ibid.* For discussions of the political context of this dispute, see Michael W. Fitzgerald, Reconstruction in Alabama (2017), pp. 172-73 and chapters six and seven.
[197] Fitzgerald, *et al.*, "Presidential Ballots."
[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid.*
[201] Constitution of 1868, art. 7, sec. 4.
[202] William Warren Rogers, Jr., Reconstruction Politics in a Deep South State: Alabama 1865-1874 (2021) 90.
[203] Fitzgerald, *et al.*, "Presidential Ballots."
[204] *Ibid.*
[205] Governor Smith issued his veto on August 11, the legislature adjourned the following day, and Smith did not call the legislature back into session until mid-September.
[206] Fitzgerald, *et al.*, "Presidential Ballots."
[207] *Ibid.*
[208] Rogers, Reconstruction Politics in a Deep South State, 98.
[209] New York Times, September 30, October 7, 1868.

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passed legislation implementing the required oath, and preparations for election of Alabama's presidential electors proceeded as planned earlier.[210]

All parties benefited politically from this negotiated outcome. President Johnson sounded statesmanlike; Smith got his election; and the freedmen won a measure of army protection. That November, somewhat surprisingly, Grant carried Alabama despite Alabama's white majority and substantial Klan violence in the northern part of the state.[211] In predominantly African American areas in the central "Black Belt," voters surged to the polls in decisive numbers.[212] Even in the face of widespread Klan terrorism, the response among Republican voters mainly seemed to be persistence in holding popular elections. The extended debate over Alabama's actions, and the actual result, solidified a national consensus that legislative choice of presidential electors violated democratic norms. It also solidified the belief that something ought to be done so that this problem would never recur.[213]

A proposed "Sixteenth Amendment" to Guarantee Popular Election

On December 9, 1868, Andrew Johnson sent his final annual message to Congress.[214] For the second time in five months, Johnson asked Congress to consider a constitutional amendment regarding presidential elections. Such an amendment was introduced in the Senate the next months.[215] Popular election of the president quickly had become Democratic and Republican orthodoxy. Even in this extraordinarily partisan era. the proposed amendment was supported by members of both parties. Democratic Senator Charles Buckalew from Pennsylvania was chief author; Republican Senator Oliver P. Morton from Indiana, the chair of the relevant committee, was the other principal proponent.[216]

The Senate committee supported the amendment unanimously.[217] Sidestepping the issue of what type of popular election would be conducted, the measure simply required that

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[210] Fitzgerald, et al., "Presidential Ballots."
[211] Trelease, White Terror, 122.
[212] Fitzgerald, Reconstruction in Alabama, 188.
[213] *Infra*, notes 216-223 and accompanying text.
[214] President Andrew Johnson, Annual Address to Congress, December 8, 1868, https://millercenter.org/the-presidency/presidential-speeches/december-8-1868-fourth-annual-message-congress

[215] The proceedings and debates on the proposed Sixteenth Amendment are at: Cong.Globe, 40th Cong. 3rd Sess. (Globe: 40:3) 669-71; 674; 704; 711; 1041-44; 1224-26; 1287-92. The proposed Sixteenth Amendment is discussed in Fitzgerald, et al., "Presidential Ballots."12-16, 18.
[216] Globe 40:3, 711, 1042 (Morton); 668-71, 1043-44, 1285-89, 1291 (Buckalew).
[217] Globe 40:3, 668. The consensus about the right of the people to vote for president is reflected in the ratification history of Section 2 of the Fourteenth Amendment. While there was immense hostility in the South to the penalty feature that some considered a *de facto* enfranchisement of the freedmen, leading texts cite no evidence that anyone objected specifically to extending the right to vote to presidential elections. James E. Bond, No Easy Walk; Joseph B. James, The Ratification of the Fourteenth Amendment (1984). The consensus is also reflected in the diametrically opposed views of the chief sponsors on the central question of race. Buckalew was philosophically committed to white supremacy. William Willets Hummel, "Charles Buckalew: Democratic Statesman in a Republican Era" (U of Pittsburgh, Ph.D. dissertation), 48-53 (view that emancipation inevitably would lead to a war of extermination). Morton

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electors be elected by the people. The states would retain initial discretion to determine what form of popular election to utilize; mirroring Congress' power over congressional elections under Article I, however, Congress would have ultimate power to stipulate a uniform rule if it wished to do so. [218]

The proposal proceeded as a companion to the Fifteenth Amendment, and it was to be known as a "Sixteenth Amendment."[219] Combining the two drafts made sense. Section 2 of the Fourteenth Amendment had created what could be characterized as "indirect rights": sharp prods to be enforced by a penalty, both to induce states to enfranchise the freedmen and to help assure that male citizens would vote for presidential electors. States could withhold these rights if willing to suffer the penalty.[220] The Fifteenth Amendment closed that loophole for the freedmen; the proposed Sixteenth Amendment would have closed it with respect to all presidential elections.[221]

The Senate debated the proposed Sixteenth Amendment at considerable length and, on February 9, voted with over a 2/3 majority to combine this proposal with the Fifteenth Amendment.[222] Senator Morton had stressed the danger, earlier highlighted in the 1826 debates in Congress, that a state legislature might intervene at the last minute, change the result of an election, and trigger civil war.[223] Senator Buckalew stressed the threat of legislative corruption:

> [H]ere is an amendment proposing that the people shall have secured to themselves the right of choosing presidential electors; that it shall not be taken or snatched from them by intrigue and corruption of the Legislatures. . . that the corruption of a few votes in a few States shall not turn the scale and change elections. . .[224]

There were references to the prior year's controversies in Florida and Alabama, as well as to South Carolina's constitutional requirement that the people elect the electors.[225] Senator Buckalew, who generally adhered to states' rights and racist doctrines, dismissed the South Carolina constitutional provision as a mere nullity.[226] A subsequent committee report Buckalew

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was philosophically committed to human freedom. Chapter 9 of his 2017 biography is titled "A Radical Champion for African Americans." A. James Fuller, Oliver P. Morton and the Politics of the Civil War and Reconstruction (2017) 234-273.

[218] Globe 40:3, 668, 711.

[219] Globe 40:3, 711.

[220] *Supra*, notes 170-177 and accompanying text.

[221] *Cf.*, Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. (2001) 547-48, note 51 (discussing the relationship between Section 2 of the Fourteenth Amendment and the proposed Sixteenth Amendment).

[222] Globe 40:3, 1042, 1044.

[223] Globe 40:3, 711, 1042.

[224] Globe 40:3, 1289.

[225] Globe 40:3, 1288, 1290-91.

[226] Globe 40:3, 1288. Senator Buckalew, who had missed the crucial votes on Section 2 and the Fourteenth Amendment in June 1866 (Globe 39:1, 3039-3042), did not refer to Section 2, which the South Carolina Constitutional Convention had specifically considered. Buckalew voted against the Fifteenth Amendment on states' rights grounds, maintaining that the requisite number of the original states would not have ratified the Constitution had they believed that it would empower three-fourths of the states to force them to allow Blacks to vote in state elections. Globe 40:3, 1639. Similarly, Buckalew opposed the

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wrote, on the other hand, characterized this as an open question.[227] Some members of Buckalew's committee obviously did not agree that state constitutions could be considered a nullity.[228]

Although the "Sixteenth Amendment" was the first amendment dealing solely with the electoral college in over 50 years to pass the 2/3 threshold in either house of Congress—and though it provided substantial evidence of deep bipartisan support for popular election—*McPherson*'s historical sketch did not mention it.[229] Whatever Senator Buckalew's personal views might have been, his Senate committee report (similarly not mentioned in *McPherson*) offers further evidence that state legislative "plenary power" over presidential elections clearly had not been "conceded."

Senator Oliver P. Morton's 1874 Senate Report.

McPherson cited at length one specific item of Reconstruction history, to wit, the following passage from an 1874 Senate Report written by Indiana Senator Oliver P. Morton:

> The appointment of these electors is placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature. . .and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, or any agent of its will, to appoint these electors. This power is conferred on the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[230]

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requirement that the southern states could never withdraw the rights of universal suffrage that Congress had required in their new constitutions, arguing that the "republican form of government" referenced in the Constitution is limited to the concept of republican government as it was understood in 1787. Globe 40:2, 3028. Buckalew was absent for the vote on the Thirteenth Amendment but would have voted against it. Globe 38:1, 1490. He voted for an amendment that would have denied citizenship to African-Americans and barred them from assuming any federal office or position of trust or profit. Globe 38:1, 1424 ("No negro, or person whose mother or grandmother was a negro, shall be a citizen of the United States and be eligible to any civil or military office, or to any place of trust or profit under the United States.")

[227] S. Rep. 40-271. The Report is reprinted in Charles Buckalew, Proportional Representation (Philadelphia: J. Campbell and Son, 1872) 65-137. The passage mentioned in the text is at page 105.

[228] The Committee included two Senators who had voted on Section 2 of the Fourteenth amendment (Benjamin Wade (Ohio) and Henry Anthony (RI)) and Alabama Senator Willard Warner, who advocated for Alabama's 1868 bill and was intimately familiar with the debate.

[229] McPherson, 146 U.S. at 32-33.

[230] S. Rep. 43-395.

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The quoted passage epitomizes the rhetorical style for which Senator Morton was famous.[231] A great deal of evidence undermines Morton's claim , however.

Justice Joseph Story (whom the court quoted in the preceding paragraph), for instance, wrote that the constitutionality of legislative choice had often been "doubted" by able and ingenious minds.[232] Morton's assertion was further contradicted by Thomas Hart Benton's suggestion in 1824 that Congress might not count electoral votes from states that usurped the right of the people to vote; by S. Rep. 19-22, which characterized legislative election as mere usurpation without the consent of the people; and by numerous Representatives who spoke during the lengthy debate on the issue in 1826.[233] Further, numerous "practical constructions" during Reconstruction undermined Morton's claim and it even was contradicted by Senator Buckalew's March 1869 report for a select committee of which Morton was a member. [234]

Morton's attempted analogy to legislative selection of U.S. Senators does not help his claim. The original Constitution contained two, separate provisions concerning election of U.S. Senators. The first, Art. I, Sec. 3, cl. 1, stated that senators "shall be. . . chosen by the Legislature" of each state. This provision was a direct delegation of power to an existing legislative body to act, specifically to elect senators. As with other direct delegations to take specific actions, such as ratification of constitutional amendments, this obligation could not be overridden by a state law or even a state constitution.[235] A governor, for example, could not veto either a legislature's choice of a U.S. Senator or a state legislature's decision to ratify a constitutional amendment. Article II, however, has no analogous provision. Article II specifically requires each "state" to choose and appoint a U.S. Senator every four years, but not each legislature.[236]

The original Constitution's second provision concerning the selection of U.S. Senators is Art. I, Sec. 4, cl. 1, which states that each state legislature "shall . . prescribe[]" the "Manner of holding elections for Senators." This provision is analogous to Art. II, Sec. 1, cl. 2 ["may direct" the "Manner" of "appointment"].[237] The language in Article I Sec 4 requires a legislature to

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[231] Morton was known as a powerful orator who could seize on a telling argument and pound his adversaries with it relentlessly to advance his point. He also was a foremost practitioner—perhaps even the first practitioner—of "waving the bloody shirt." Fuller, Oliver P. Morton and the Politics of the Civil War and Reconstruction (2017), Ch. 8. Morton deployed the "absolute power of state legislatures" argument in a similar fashion to dramatize the need for constitutional reform.

[232] McPherson, 146 U.S. 33.

[233] *Supra* notes 102-138, and accompanying text; Bohnhorst, et al., "Presidential Election Reform," 460, n. 71.

[234] *Supra*, notes 155-210 and 227-30 and accompanying text.

[235] Constitution, Article V; Hawke v. Smith, 253 U.S. 221 (1920)(authority to ratify delegated to the legislature, referendum established in state constitution did not apply, ratification does not involve legislation.)

[236] Art II, Sec. 1, cl. 2: "Each State shall appoint. . ." Contrast Art. I, Sec. 3 cl. 1: "two Senators from each State [shall be] chosen by the Legislature thereof. . ."

[237] Some of the language from both provisions was drawn from Article V of the Articles of Confederation, which provided that each state's legislature "shall direct" the "manner" of "appointing" representatives to Congress. In at least half of the original states, however (including in the three states that adopted constitutions after the Articles were adopted), the manner of electing representatives to the Continental Congress was specified in the state's constitution. There is no indication that the Articles were intended or

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legislate, not to take action itself. But a state legislature can only legislate in the manner specified by the constitution of its state.[238] Moreover, this specific language does not necessarily refer to the existing legislature. Once a law "prescribes," unless specifically time-limited, it remains the law until it is repealed.

The U.S. Senate actually had directly addressed the different meanings of these Article I provisions in the February, 1866 controversy about seating John Stockton, a Democrat from New Jersey. Stockton had been elected by the New Jersey legislature in joint session by a plurality vote, but 38 New Jersey Legislators filed a protest.[239] The lengthy U.S. Senate proceedings that followed considered earlier law regarding how representative bodies elect, ranging from ancient Rome to the College of Cardinals to banking corporations. The Senate also discussed New Jersey's first Constitution of July 2, 1776 and statutes under that Constitution through contemporary New Jersey law.[240] The closely-divided Senate concluded that the legislature, meeting in joint session, was required by law to elect by majority vote and that the joint session could not ignore this, and Article I, Sec. 3, cl. 1 delegated only the power to elect, not the power to make or change the law.[241]

Michael Morley has suggested that the Stockton case lends support to the Independent State Legislature Doctrine (ISLD).[242] His argument focuses on the report of a divided committee that had recommended that Stockton retain his seat.[243] The committee rationale, explained by its chair, Illinois Senator Lyman Trumbull, was that there was no existing law that would restrict the power of a joint session of the legislature to do as it wished. But, significantly, the full Senate

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understood to displace state constitutions. Vikram David and Akhil Reed Amar, "Eradicating Bush-League Arguments Root and Branch: The Article II Independent State Legislature Notion and Related Rubbish," forthcoming in 2021 Supreme Court Review, available at SSRN, https://ssrn.com/abstract=3731755, 29-30.

[238] Ohio ex rel. Davis v. Hildebrandt, 241 U.S. 565 (1916)(a state's redistricting plan under Article I is subject to a state constitutional right of the people to petition and vote on legislation through referendum); Smiley v. Holm, 285 U.S. 335 (1932)(redistricting plan under Article I is subject to governor's constitutional power to veto legislation); Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015)(state constitutional power of the people to initiate legislation applies to redistricting under Article I).

[239] Globe 39:1, 1565.

[240] Globe 39:1, 1564-73; 1589-1602; 1635-48; 1666-67.

[241] Only Senator William Fessenden said the legislature, by concurrence of the separate bodies, might disregard existing law. *Id.*, 1567-68. Neither Stockton himself, nor Senator Trumbull who presented the case for seating Stockton on behalf of the relevant committee, agreed. *Id.*, 1591 (Stockton, legislature could not set aside an existing positive law); 1597-98 (Trumbull: "not prepared to concur in the [argument] that no provision of law of a previous legislature would in any manner bind the Legislature called on to perform the act [of electing a U.S. Senator];" sees case as one in which there was no pre-existing law). Due to the complexity of the issues and the nature of legislative proceedings, it is impossible to be certain on what basis the Senate acted, or even if there was a rationale that commanded a majority view. Clearly, however, the legislature did not have "plenary" power to do what it did.

[242] Morley, *supra* note 39, 62-65 (2021). Petitioners and their amici in Moore v. Harper do not mention the Stockton case, which further refutes their erroneous assertion that in elections governed by Art. I Sec. 3 and Art. I Sec. 4, a state legislature could disregard its constitution. *Cf. supra* note 77.

[243] *Ibid.*

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disagreed.[244] Several Senators expressly supported the argument within the election protest that was filed by the 38 New Jersey legislators. They claimed that terms of the existing law, first enacted in 1794, still governed; that law had to be interpreted in light of the New Jersey Constitution of July 2, 1776 , which required a joint session of the legislature to elect by majority vote.[245] In sum, the state constitution did matter; the legislature could not be "independent" enough to ignore existing law.

In *McPherson*, the Court did not mention the Stockton matter; and it introduced its discussion of the 1874 Report with anodyne language—"In this report it was said. . ."[246] Chief Justice Fuller cited the Report as part of the historical record, and the Court's own analysis contradicted the Report's more extreme assertions. For example, the Court said repeatedly that state legislatures are creatures of their state constitutions.[247] And the actual holding in *McPherson* was that the "State"—and not the legislature, only one arm of state government--has exclusive power over the manner of appointment of presidential electors.[248]

The Election of 1876: the Colorado Constitution and the Electoral Commission

Reconstruction was entirely finished after the contested and chaotic presidential election of 1876, which was resolved with the aid of an Electoral Commission on which both Oliver P. Morton and Justice Field served.[249] The McPherson Court, on which Justice Field also sat, said only the following about that election: "Even in the heated controversy of 1876-77 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged. . . "[250]

Colorado's legislature did choose the state's electors in 1876, but there would have been no opportunity and no basis to suggest that this constituted a usurpation of the rights of the people or that it was otherwise unconstitutional. Acting in what James Madison referred to as their highest sovereign capacity,[251] the people of Colorado ordained and established a Constitution in which they delegated to the legislature the power to elect their electors in 1876, the year that Colorado became a state, but they also preserved the authority of the people to

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[244] Globe 39:1, 1565, 1668.

[245] Globe 39:1, 1595 (Cragin, "[I]t is clear to my mind that the Legislature in 1794. . . had in view this constitutional provision which required a majority vote. . ."); 1591 (Howe, "it was the old and pre-existing law that applied.").

[246] Michael Morley has said the McPherson Court quoted the 1874 Report "approvingly in support of the independent state legislature doctrine," which the court "enthusiastically endorsed." *Supra* note 39, 65, 70. Others strongly disagree. Hayward Smith, "History of the Independent State Legislature Doctrine," 53 St. Mary's Law Review 445 (2022) 532, n. 401 ("not supported by any reasonable reading of the case"); Mark Bohnhorst, "The Constitutionality of Citizen Initiative for Reforming the Presidential Election System," Dec. 2020, Appendix. Making Every Vote Count, www.makingeveryvotecount.com/research-whitepapers-library (itemizing multiple instances in which the Bush v. Gore litigation team similarly mischaracterized or misrepresented the 1874 Report).

[247] McPherson 145 U.S. 25.

[248] McPherson, 146 U.S. 35. In other words, no state legislature is entitled to assert its own version of Louis XIV's famous declaration, "L'etat, c'est nous."

[249] See generally, Electoral Commission Proceedings, *supra* note 57.

[250] McPherson, 146 U.S. 33.

[251] *Supra* notes 89-91 and accompanying text; note 98.

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elect forever afterward.[252] Rather than providing evidence that legislatures possess "plenary" power, these Colorado Constitution provisions in fact underscore the belief that the people are sovereign. Because Article II of the U.S. Constitution is ambiguous, it did not foreclose the power of the people themselves to delegate their rights. Delegation by the people did not "deny or disparage" their rights and powers; rather, Article II actually affirmed those rights and powers and it was thus fully consistent with the Ninth and Tenth Amendments.[253] In 1876 Colorado had only the minimum of three electors, and Section 2 of the Fourteenth Amendment did not seem relevant.[254]

Senator Morton's claim that it was "undoubtedly" true that state laws, state constitutions, and other organs of state government could not interfere with a legislature's absolute power over presidential elections was, in fact, contradicted during the proceedings of the Electoral Commission of 1877. Several times, for example, Morton asked pointed questions, apparently seeking to enlist support for his contention that state legislatures can ignore state constitutions in setting the rules for either congressional or presidential elections.[255] The repeated reply was that provisions of state constitutions do apply, so long as they do not directly conflict with the federal constitution.[256]

Moreover, the claim that state constitutions do not apply to presidential elections was raised directly in the South Carolina case before the 1877 Commission.[257] The South Carolina constitution required the creation of a voter registry,[258] which was never done. The Hayes electors argued that the state constitution did not apply to federal elections.[259] In separate opinions several—but not all—of the pro-Hayes Commissioners did mention the absolute or plenary power doctrine.[260] This was not the basis of any decision, however. The pro-Hayes Commissioners ruled that "it may be the duty of the Legislature to enact such a [voter registry]

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[252] Colorado Constitution (1876), Schedule, Secs. 19, 20.
[253] *Cf., supra* notes 71, 78-79, 92, 96-98 and accompanying text.
[254] Bohnhorst, *et al.*, "Presidential Election Reform," 450 (each state entitled to at least three electors).
[255] Electoral Commission Proceedings, *supra* note 57, 337 (Morton: State cannot by its constitution add an additional condition for U.S. Senators; Senator Trumbull: But a state may provide in its constitution that certain persons—e.g., supervisors of elections—shall not be candidates for any offices); 486-87 (Morton: "Is it competent for a State, by its constitution, to regulate in any way the appointment of electors?" Rep. Jencks: "The constitution of each State and the United States Constitution are equally binding upon the legislature and governor"), *cf.* 396 (Campbell: If state legislatures "have supreme authority to direct on this subject," legislature can designate certain individuals and their associates "a body corporate" and confer on those individuals "the sole and exclusive power and privilege to nominate and appoint [presidential electors]." Note, in the John Stockton election contest of February 1866, Senator Trumbull had not concurred in an argument based on the Independent State Legislature Doctrine. *Supra* note 241.
[256] *Ibid.*
[257] Electoral Commission Proceedings, *supra* note 57, 659-703.
[258] Id., 671. Constitution of 1868, Art. VIII, Sec. 3: "It shall be the duty of the general assembly to provide from time to time for the registration of all electors."
[259] *Id.*, 682-83
[260] *Id.*, 832-33 (Oliver P. Morton, plenary power); 853 (Frelinghuysen, legislative power is "entirely untrammeled"); 968 (Garfield, exclusive authority).

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law."[261] They determined, however, that, "Failure to establish a system of registration does not render nugatory all elections."[262] Justice Bradley's separate opinion explained the basis for this facet of the ruling—the constitutional provision was directory only, which meant the elections were "voidable" but not "void."[263]

For their part, the Democrats clearly did not "concede" plenary power when it came to state constitutions. They claimed that state constitution did apply to presidential elections and they rejected the absolute legislative power argument in no uncertain terms.[264]

In the South Carolina case, the Hayes Commissioners declined to endorse an argument that Justice James Story had made during the 1820 Massachusetts Constitutional Convention. There, Story had cited "unlimited" discretion of state legislatures over federal elections as one reason not to include a requirement for election by districts in the state constitution. The Hayes electors quoted at length from Story's argument, but the Electoral Commission did not adopt any such reasoning.[265]

The Hayes electors did not assert that state legislatures could ignore constitutions; rather, they acknowledged that legislative power was subject to—

> "the obligations of the amendments of the [U.S.] Constitution in relation to suffrage and such regulations as Congress may be authorized to make."[266]

This clearly invoked both the Fifteenth Amendment and Section 2 of the Fourteenth Amendment. Indeed, the point was emphasized in January 1877, during the Congressional debate over creation of the Electoral Commission.[267] Mississippi Representative John Roy Lynch

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[261] *Id.,* 702.
[262] *Ibid.*
[263] *Id.*, 1039-40. Justice Bradley's explanation of the issues in this and other cases and of reasons for counting the Hayes electoral votes is comprehensive, clear and generally well-reasoned. *Id.*, 1019-1041.
[264] Electoral Commission Proceedings, *supra* note 23, 287 (Mr. Carpenter: "And the provisions of the Constitution that each State shall appoint electors must be construed to mean that such State, according to the provisions of its own constitution, shall appoint electors. . . . It is only the State—the constitutional republican State—a State of the Union under its written republican form of government, proceeding according to its constitution, which constitution is constantly subject to Federal supervision, that can appoint an elector"); 878 (Commissioner Bayard: legislature is one component of state government and is subject to the state's constitution, which is the expression of the people in their sovereign capacity).
[265] *Supra* notes 262-68 and accompanying text. Michael Morley attributed considerable significance to Story's 1820 statement, but he did not address its use before the Electoral Commission. Morley, s*upra*, note 39, 39-40. *See also*, Hayward Smith's critique of Morley's argument, *supra* note 246, 512-15 (only one of three delegates who spoke to the point in 1820 supported Story's argument; it is impossible to know the basis of the Massachusetts state constitutional convention's action).
[266] Id., 622.
[267] 5 Cong. Rec. 1025-26. (Rep. Lynch: Criticizing Rep. Garfield's assertion that there were only five grounds on which electoral votes could be challenged: Suppose a legislature declares only white citizens may vote for electors. "It may be said . . . that representation in Congress would be reduced. . .," but "this may be done at the next succeeding census, and not before." Congress must have power, despite this possible limitation, to enforce the Fourteenth and Fifteenth Amendments. "It is clear to my mind that, when a State shall have violated the fundamental principles and conditions of republican government in

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(who had been born into slavery) said that Congress must have power to consider wholesale violations of these amendments in connection with counting the electoral votes.[268]

Another important issue implicated in Senator Morton's 1874 Report, and addressed directly by the Electoral Commission, concerned the role of the state judiciary. If the state legislature had been delegated absolute power, to the exclusion of existing laws and the state constitution, what role would remain for the state's judiciary? The judiciary, after all, could not invalidate a legislature's election of a U.S. Senator or its vote to ratify a federal constitutional amendment.[269] An extreme implication of the 1874 Report, adopted by the concurring opinion in Bush v. Gore, is that state courts have limited authority to interpret a legislature's laws and to apply the state's constitution, and that, by contrast, federal courts do have jurisdiction to second guess state court decisions regarding state law.[270] This notion finds no support whatsoever in the Electoral Commission proceedings and directly cuts against the federalism concerns identified as central in recent U.S Supreme Court decisions that limit federal protection of voting rights.[271]

Justice Field, in particular, upheld the right and absolute power of state courts to interpret state statutes. He emphasized that when a state's highest court interprets a state statute, that court's interpretation is treated as part of the legislative text.[272] Others said essentially the same thing.[273] The issue, which was central to the dispute over the votes in Florida, was not about the role and power of the courts; rather it was about whether a decision rendered after electors already had been appointed and had cast their votes could be considered.[274] The Hayes Commissioners ruled it could not.[275] As Justice Bradley, who was also a

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choosing its electors, []the United States Government through its legislative department has ample power to inquire into the validity of such an election, and if necessary set it aside." Rep. Lynch's view was consistent with Sec. 23 of the Ku Klux Klan enforcement act of 1870. The law established a quo warranto action to challenge the right to office of anyone elected as a result of violations of the Fifteenth Amendment, but it withheld federal court jurisdiction for the office of presidential elector and for elections to Congress and the state legislatures. It was for each house of Congress to determine whether to seat members and for Congress alone to enforce the Reconstruction Act Amendments in presidential elections when it counted electoral votes. 41st Cong., 2nd Sess., Ch. 144, Sec. 23, 16 Stat. 146 (May 31, 1870.)

[268] *Ibid.*

[269] Cf., *supra* notes 238-41 and accompanying text.

[270] Amar and Amar, *supra* note 237, at 47-48 (citing October 26, 2020 footnote in opinion by Justice Kavanaugh re federal court jurisdiction to set aside state court ruling based on state law and the state constitution). The Supreme Court has recently accepted review of a case that raises the extreme version of ISLD in the context of Article I. Moore v. Harper, No. 21-1271 (cert. granted, June 30, 2022).

[271] *See, e.g.*, Brnovich v. Democratic National Committee, 141 S.Ct. 2321 (2021); Rucho v. Common Cause, 139 S.Ct. 2484 (2019); Shelby County v. Holder, 570 U.S. 529 (2013)

[272] Electoral Commission Proceedings, 976-77.

[273] *Id.*, 959 (Garfield: no question that construction of a statute given by the state's highest court is binding on others and is treated as part of the statute). In his book on the 1876 presidential election, Chief Justice William Rehnquist appears to have agreed: "Field's strongest point was probably the principle that a decision of a state's highest court was considered to be law just as surely as if enacted by the legislature." William Rehnquist, Centennial Crisis: The Disputed Election of 1876 (2004) 169.

[274] Electoral Commission Proceedings, 166 (Shellabarger, framing the issues).

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Commissioner, explained, prior to the appointment of electors, each state was free to provide whatever machinery it wished "for securing and preserving the true voice of the State in appointing electors. . . [the State may even require] attendance of the supreme court or any tribunal to supervise the action of the board, and to reverse it, if wrong."[276] Prior to appointment, power lay with the "state," not just with the legislature; after appointment and the casting of votes, state power, extending to state judicial power, ended and authority shifted to the national government.

The Electoral Commission Proceedings also help decipher *McPherson*'s "offhand" and "cryptic" reference to a "limitation upon the State in respect of any attempt to circumscribe the legislative power."[277] One clue to solving this puzzle is what the parties argued. The briefs seem to contain one, and only one, discussion of "circumscribing" legislative power:

> Any substantial departure from the manner prescribed must necessarily vitiate the whole proceeding. If, for example, the appointment of electors should be made by the Governor of a state, when the legislature had directed that they should be chosen by the qualified voters at a general election, the appointment would be clearly invalid and have to be rejected. So, too, if the legislature should prescribe that the appointment should be made by a majority of the votes cast at such election, and the canvassers or other officers of election should declare as elected those who had received only a plurality of the votes, or the votes of a portion only of the state, the declaration would be equally invalid as not conforming to the legislative direction; and the appointment of the parties thus declared elected could only be treated as a nullity.[278]

This passage is a quotation from Justice Field's separate opinion in the Florida case,[279] in which Justice Field and the Tilden Commissioners argued that the final decision of a state's highest court about the meaning of state law, even if made after the votes had been cast, should be treated as part of the statute itself and applied retroactively.[280] Specifically, Florida's State Canvassing Board had excluded some returns that it decided were "irregular, false or fraudulent." The effect was to change an approximately 80 vote lead for Tilden to a 45 vote win

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[275] *Id.*, 196 ("all proceedings of the courts [of the state]. . . subsequent to the casting of the votes of the electors on the prescribed day are inadmissible for any such purpose [i.e., to contest the appointment of the certified electors]").

[276] *Id.*, 1021, 1024 (Bradley). Rehnquist, Centennial Crisis, 170; Paul Leland Haworth, The Disputed Presidential Election of 1876 231 (1906) ("With admirable acumen and calculation, they [the Hayes Commissioners] placed themselves squarely upon the line of division between Federal and state powers"); 337-39 (this principle explains the Commission's various rulings). The Minnesota Constitution provides that the canvassing board itself includes two justices of the supreme court and two judges of the district court, along with the Secretary of State. Minnesota Constitution, Art. VII, Sec. 8. Surely the Minnesota legislature does not have "plenary" power to ignore the state constitution and to establish its own system for canvassing votes in presidential elections.

[277] McPherson, 146 U.S. 25; Amar and Amar, *supra* note 237, 20, 38.

[278] Making of Modern Law , U.S. Supreme Court Records and Briefs, 1832-1978, McPherson v. Blacker Transcript of Record with Supplemental Pleading, Brief of Attorney General Ellis, 20-21.

[279] Electoral Commission Proceedings, 975.

[280] *Supra* notes 276-280 and accompanying text.

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for Hayes.[281] To Justice Field, the state court ruling, which held that the Canvassing Board did not have the discretion to exclude the returns, was dispositive;[282] thus, the action of election officials was tantamount to conducting the election in only part of the state and to certifying as winners candidates who had lost the popular vote. To read McPherson's reference to "circumscribing legislative power" as a suggestion that state courts do not have complete authority to interpret state laws and constitutions is unsupportable. Justice Field's argument, from which the phrase appears to have been derived, was premised on exactly the opposite proposition.[283]

Justice Field voted against Senator Morton's position on almost every issue that came before the Electoral Commission.[284] In a long paragraph, *McPherson* incorporated a good deal of what Justice Field and others who sided with Tilden said about state constitutions, and the reference to "circumscribing" legislative power is part of that paragraph.[285] This portion of Chief Justice Fuller's unanimous opinion—which set out a core aspect of the Court's own legal reasoning—is in irreconcilable tension with Morton's 1874 Report, which the Court nonetheless cited as an illuminating historical document.

The relevant "practical constructions" of the 1877 Electoral Commission were (i) that state constitutional provisions might well be relevant, and (ii) that Article II, Sec. 1, cl. 2 confers exclusive power over appointment of electors on each "State," and (iii) that in that context state courts are the final expositors of the meaning of state statutes and constitutions. McPherson appeared to accept all these propositions.[286]

Reassessing McPherson

As noted, McPherson was an easy case. Whichever way the Court ruled, it would affirm some type of popular election.[287] It ruled that the district system was not unconstitutional. Legislative usurpation was not an issue to be decided.[288]

In many respects, McPherson endorsed fundamental principles that those who had objected to legislative elections had emphasized from the beginning. McPherson affirmed that the people are

[281] Rehnquist, Centennial Crisis, 104-05.
[282] Electoral Commission Proceedings, 976-77.
[283] Note also the court referred to "legislative power," and not to "the power of whatever legislature" happens to be sitting at the moment. "Legislative power" is the power to pass laws, which generally remain on the books and—as interpreted by the state's courts—continue to be binding whatever the predilections of a particular sitting legislature.
[284] The Electoral Commission decided the issues "in a series of straight (eight to seven) party line votes." Keyssar, Electoral College, 123.
[285] McPherson, 146 U.S. 25.
[286] Indeed, one part of the Court's decision considered and upheld a Michigan Supreme Court decision that effectively re-wrote the state's new law, agreeing that statutory language "may be rejected." McPherson, 146 U.S. 41. Petitioners and their amici in Moore v Harper do not mention the Electoral Commission, this despite the fact that the issues that are central to Moore v. Harper—the roles of state constitutions and power of state courts—were litigated before the commission.
[287] *Supra* notes 11-14 and accompanying text.
[288] *Ibid.*

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sovereign, noting that "representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity."[289] Chief Justice Fuller's opinion noted that the term "State" can have multiple meanings. He observed that the Constitution "frequently" refers to states as a political community, but "also in terms to the people of the several states and the citizens of each state."[290] The court cited Texas v. White,[291] which declared that the fundamental idea of republican government is that the people constitute the sovereign state.[292] Even when the government of Texas seceded from the Union, Chief Justice Samuel P. Chase's majority opinion had declared that the "state" of Texas continued to exist in the form of its people. The people of Texas continued to be entitled to a republican form of government as guaranteed by Article IV, Sec. 4 of the United States Constitution; in that constitutional clause, Chase insisted, "state" means the "people," and not the government.[293]

To repeat, in McPherson, legislative usurpation simply was not an issue. It was not necessary for the Court to confront the contradiction between the founding principles of American democracy that the Court embraced and a practice that had existed at the Founding but had been repudiated and abandoned.

McPherson did say this, however: "The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive."[294] Insofar as the "construction" and "meaning" to which the court referred is that a state may arrange for any method of popular election that it chooses, the statement is entirely uncontroversial. As Justice Story said, no one had questioned the power of a State to choose electors through any mode of popular election.[295]

Yet, if one were to read McPherson's "construction" and "meaning" to be that a state legislature has *carte blanche* to dispense with popular election,[296] the history of such an interpretation

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[289] McPherson, 146 U.S. 25, 26.
[290] McPherson, 146 U.S. 25.
[291] 74 U.S. 700 (1869).
[292] Texas v. White, 74 U.S. 720 ("The people. . . constitute the state. This is undoubtedly the fundamental idea upon which the republican institutions of our country are established. It was stated very early by an eminent judge, in one of the earliest cases adjudicated by this court, and we are not aware of anything in any subsequent decision of a different tenor." (citation omitted)).
[293] *Ibid.*
[294] McPherson, 146 U.S. 36.
[295] McPherson, 146 U.S. 33.
[296] The syllabus and headnotes for the opinion, written by different editors, contain conflicting interpretations mirroring those mentioned in the text. The syllabus in United State Reports, written by J.C. Bancroft Davis, the Court's Reporter of Decisions, suggests the Court held that state legislatures have exclusive power, that state legislatures may appoint, and that the historical narrative merely confirmed the Court's understanding of constitutional text. That synopsis also states that Article II "was not amended by the Fourteenth and Fifteenth Amendments," and that the Amendments do not secure a right to vote for presidential electors." McPherson v. Blacker, 146 U.S. 1 (1892).

Davis is notorious particularly for his knowingly false synopsis in another case under the Fourteenth Amendment, Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886). In that case Davis asserted that Chief Justice Waite had said at the beginning of oral argument that the Court unanimously agreed that corporations are "persons" protected by the Fourteenth Amendment. Justice Waite had said no such thing, and the Court had made no such determination. Adam Winkler, We the Corporations 149-153 (2018). Davis also was known to refuse to make corrections in opinions, even when they were requested by the Justices. Justice John Marshall Harlan once complained to the Chief Justice in another case: "I have read the head-notes. . . They are awful and are enough to make you. . . sick." Id. at 151.

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should not be ignored. This construction was repudiated again and again in the antebellum period, and it was ultimately abandoned in the face of those repudiations.[297] It was rejected even in the context of white terror after the Civil War.[298] Legislative election was implemented in the new state of Colorado in 1876, but even this temporary measure was adopted through a vote of the people and not through a power grab at their expense.[299] To read McPherson to allow a state legislature to supplant the popular vote is to misread even its dictum badly and to ignore entirely the actual history surrounding such a radical proposition.

From Historical Amnesia to the Pernicious Dogma of Today's Would-be Usurpers

For more than a century McPherson quietly lay on the shelf. The people voted in every presidential election in every state. One additional practical construction was added in 1932-33, when Congress proposed the Twentieth Amendment to the states, which unanimously ratified the new amendment. This amendment changed the start dates of congressional and presidential terms.[300] Therefore, if an election were ever to devolve to the House in the future, the president would be chosen by the freshly elected House, not its lame duck predecessor. According to Congress's explanation of the new amendment, the power of a legislature elected two years earlier to choose the president was "a power that should not exist;" indeed, preventing a lame duck legislature from electing the President was one of the three primary purposes of the Amendment.[301] The states evidently agreed.[302]

The McPherson headnotes in Supreme Court Reporter, written by editorial staff at West Publishing Company, made no mention of power of state legislatures to appoint electors directly. These headnotes said the holding regarding Article II was based on the Court's reading of history. In fact, the summary of the decision in these headnotes declared that the Fourteenth and Fifteenth Amendments do secure "additional rights and guarantees. . . to citizens in respect to voting at national elections." McPherson v. Blacker, 13 S.Ct. 3 (1892), at headnotes 2, 5.

Unfortunately, Reporter Davis' inaccurate description was consistent with the beliefs of many judges during the Gilded Age, including the Justices of the Supreme Court. One of the authors long ago offered extensive citations to judicial opinions and secondary sources that support Grant Gilmore's pithy claim that "[the] few people. . . who have ever spent much time studying the judicial product of the period have been appalled by what they have found." Quoted in Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921* [hereafter *Paradox of Paternalism*], 5 Law and Hist. Rev. 249-251 (]1987). Undoubtedly, the most notorious Supreme Court decision of the era was Plessy v. Ferguson, 163 U.S. 537 (1896), but there were many others that upheld even insurmountable barriers to the right to vote, for example, as guaranteed by the post-Civil War Amendments. See, e.g., Paradox of Paternalism at 256-263, 268-271; Avian Soifer, "*Righting the Wrong Wrongs: A Cautionary Tale of Congress, Labor, and European Immigrants in the Gilded Age*," 24 Emp. Rts. & Emp. Pol'y J. 49 (2020); Aviam Soifer, "Federal Protection, Paternalism, and the Virtually Forgotten Prohibition on Voluntary Peonage," 112 Colum. L. Rev. 1607 (2012).

[297] *Supra* notes 102-138 and accompanying text.

[298] *Supra* notes 180-213 and accompanying text.

[299] Colorado Constitution (1876), Schedule, Secs. 19, 20.

[300] Amendment XX, Sec. 1: "The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senator and Representatives at noon on the 3rd day of January. . ."

[301] S. Rep. No. 72-26. Edward J. Larson, "The Constitutionality of Lame Duck Lawmaking: The Text, History, Intent and Original Meaning of the Twentieth Amendment," Utah Law Review (2012), 707, 735, 744-46 ("'inconceivable that we should allow something as illogical as that [outgoing legislature electing the President] to adhere as a barnacle to our constitution'").

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In the course of the Court's rush to judgment in *Bush v. Gore*,[303] however, McPherson was dusted off, and the Court's historical amnesia over a century earlier begot alarming potential dogma, albeit within a *per curium* opinion that expressly disclaimed any precedential value.[304]

The briefs submitted by the Bush litigation team[305] repeatedly characterized the *McPherson* Court's reference to its own historical review as an interpretation of the constitutional language.[306] At most, however, it was a (mistaken) conclusion about the history concerning constitutional text that even the McPherson Court described as ambiguous.[307] Bush's lawyers repeatedly cited the 1874 Senate Report, but they mischaracterized it as a document that the *McPherson* had cited with "approval," as though the 1874 Report represented that Court's own analysis.[308]

The 5-4 *Bush* majority said the following about the right of the people to exercise their sovereign powers:

> The individual citizen has no constitutional right to vote for electors for President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, sec. 1. This is the source of the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. Id., at 28-33. . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35

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[302] Id., 732 (speed of ratification surprised even the chief proponent).

[303] 531 U.S. 98 (2000).

[304] In deciding *Bush v. Gore*—which the majority described as about "the minimum procedures necessary to protect the fundamental right of each voter"—the majority specifically noted that "[o]ur consideration is limited to the present circumstances." *Id.* at 109.

[305] "Litigation team" here includes both the lawyers for candidate Bush and the lawyers for the Florida legislature.

[306] Bush v. Palm Beach County Canvassing Board, no. 00-836, "Amicus curiae Brief of Florida Legislature on behalf of neither party," at 2-3; "Brief for Petitioners George Bush, et al.," at 43; Bush v. Gore, No. 00-949, "Amicus curiae Brief of Florida Legislature on behalf of neither party," at 3-4; "Brief for Petitioners George Bush, et al.,"

[307] McPherson v. Blacker, 146 U.S. 27.

[308] Bush v. Palm Beach County Canvassing Board, no. 00-836, "Amicus curiae Brief of Florida Legislature on behalf of neither party," at 3, 4-5; "Brief for Petitioners George Bush, et al.," at 43, 47; Bush v. Gore, No. 00-949, "Amicus curiae Brief of Florida Legislature on behalf of neither party," at 4; "Brief for Petitioners George Bush, et al.," at 20-21, 29. The mischaracterizations are itemized in Bohnhorst, Constitutionality of Citizen Initiative, *supra*, note 249. Most recently, the mischaracterizations were repeated in Moore v. Harper. Brief for Petitioners, Moore v. Harper, No. 21-1271 (August 29, 2022), at 40-42.

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> ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated"). . . [309]

This is pure dicta.[310] That said, however, the passage is deeply disturbing. When read against the full historical record as well as what the *McPherson* Court actually said about the Constitution, it is also deeply mistaken.

McPherson said neither that legislative power "is plenary"—in the sense of being independent of the state's constitution—nor that the reference to "plenary power" was based on the text of the Constitution.[311] McPherson in fact acknowledged that that text was ambiguous.[312] Even based entirely on selected snippets from the historical record, however, McPherson concluded only that "plenary power" had been "conceded" as a matter of "practical construction."[313] This was a substantial historical error regarding the context of legislatures usurping the rights of the people.

The passage quoted above from Bush v. Gore badly misreads McPherson in a second major way. The passage refers to "its power to appoint," and here "its" means the "legislature's."[314] The Constitution does not say the legislature has the "power to appoint," and neither did the Court in McPherson.[315] In both, the text clearly states that it is "the State" that is to appoint.[316]

The passage's major mistake is that it repeats and effectively endorses the extreme states' rights philosophy of John C. Calhoun of South Carolina: it assigns absolute power to state legislatures. It is abundantly clear that the nation never "conceded" to that philosophy. That is not what was intended, and it was opposed from the beginning.[317] It was overturned,[318] and it was fully and finally repudiated following the Civil War.[319] Congressmen repeatedly warned that this approach would seem to allow even "violent" efforts by legislatures to intervene in elections to change the result.[320] It also empowers state legislators elected up to four years previously to decide who will be elected President. When the per curiam opinion in *Bush v. Gore*

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[309] Bush v. Gore, 531 U.S. 98, 104 (2000)(internal citation to Oliver P. Morton's 1874 Report (S. Rep. No. 395, 43d Cong., 1st Sess.) omitted).

[310] Whatever the McPherson Court is thought to have said about a legislature's power to deprive the people of the right to vote would also be *dicta*.

[311] McPherson, 146 U.S. 25 ("the legislative power is the supreme authority, except as limited by the constitution of the state," "*if* the legislature possesses plenary authority" (emphasis supplied)).

[312] McPherson, 146 U.S. 27 ("where there is ambiguity or doubt. . . contemporaneous and subsequent practical construction is entitled to the greatest weight"),

[313] McPherson, 146 U.S. 35 (the practical construction was decisive: "from this review [of history] . . . from the formation of the government until now, the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors").

[314] Bush v. Gore, 531 U.S. 104.

[315] McPherson, 146 U.S. 35 ("In short, the appointment and the mode of appointment of electors belong exclusively to the states under the Constitution of the United States.")

[316] *Ibid*; U.S. Constitution, Art. II, Sec. 1, cl. 2.

[317] *Supra* notes 18-47, 63-77, and 83-93 and accompanying text.

[318] *Supra* notes 102-138 and accompanying text.

[319] *Supra* notes 162-215 and accompanying text.

[320] *Supra* notes 135-36; Bohnhorst, et al., "Presidential Election Reform," 462 n. 10.

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asserted that this "of course" was the law and that there was "no doubt" about it,[321] the justices not only misread McPherson and distorted the constitutional text. They also entirely ignored the most directly relevant constitutional text—specifically, Section 2 of the Fourteenth Amendment. It is logically as well as textually impossible that individuals could have "no constitutional right to vote for electors for President of the United States"[322] if the Constitution provides further that a state's denial or abridgement of "the right to vote in any election for the choice of electors for President of the United States. . ."[323] gives rise to a severe penalty for that state.

To no one's surprise, the Supreme Court brief submitted by Texas in December 2020 (and supported by seventeen states as amicus curiae), which sought to overturn the 2020 presidential election and send the election to the legislatures, invoked the 1874 Report, badly misconstrued *McPherson*, and anchored its argument on *Bush v. Gore*.[324] Fortunately, Texas and its amici did not prevail, but the January 6 assault on the Capitol followed, fueled in part by a vision of state legislatures intervening to overturn a presidential election. The misguided vision has not dissipated, and in *Moore v. Harper* petitioners again seriously mischaracterize *McPherson v. Blacker*.[325]

In the event the ISLD takes root, there is clear precedent for Congress to act.[326] Even in 1877, in the context of the most hotly contested election in the nation's history, it was nonetheless made clear that the Fourteenth and Fifteenth Amendments seriously constrain state legislative authority over presidential elections. Congress is not bound by misinformed and misguided judicial *dicta*—particularly when those *dicta*, and the violence they may provoke, may again threaten the Republic.

Summing up.

From 1787 onward, the Constitution assumed that the people would choose the electors, though of course the then-current definition of "we, the people" was narrow and the constitutional text concerning the Electoral College was not entirely clear. Many who feared for the rights of the people were persuaded to allow the Constitution to be ratified on the promise that it would be amended. The last two of the first ten amendments assured the people that rights that had not been specified still would be respected and that the people themselves would retain inherent powers.

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[321] Bush v. Gore, 531 U.S. 104.
[322] *Id.*
[323] Amendment XIV, Section 2.
[324] State of Texas, "Brief in Support of Motion for Leave to File," *Texas v. Pennsylvania*, No. 22O155, Dec. 7, 2020, 16, 21-22, 25. Pennsylvania responded that Texas' argument was "untethered from the actual state of the law" and that Texas was merely taking a quotation out of context. "Rather, in *McPherson*, the Court was simply quoting from a Senate Report." Commonwealth of Pennsylvania, "Opposition for Leave to File, etc.,," Dec. 10, 2020, 21-22.
[325] *Supra*, note 308.
[326] In 1821 and again in 1869 Congress declined to count electoral votes from states that had violated fundamental rights of the people—the right to settle, and the right of a citizen to hold office. In 1824 and 1869, Congressmen said that Congress may have the power not to count electoral votes from a state that has deprived the people of the right to vote in presidential elections in violation of law. In 1877 the Hayes electors agreed that state power to appoint electors is constrained by the Fourteenth and Fifteenth Amendments. *Supra*, notes 267-269 and accompanying text.

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From the Founding through the election of 1824, only three presidential elections were genuinely contested—1800, 1812 and 1824. Each time, state legislative election of electors was utilized to some extent, and each time it was also denounced. Between 1824 and 1826, in the aftermath of the most powerful of those denunciations, the number of states whose laws deprived the people of the right to vote in presidential elections dropped from 7 to 2. By 1832 there was only one such state—South Carolina, the leading proponent of nullification and, ultimately, of secession.

South Carolina repudiated its old practice after the Civil War. In 1866 Congress acted to remedy the original constitutional ambiguity by making it clear in Section 2 of the Fourteenth Amendment that any denial or abridgement of the right to vote in presidential elections by all male citizens of the state-except for "Indians not taxed" and "participants in rebellion or other crime"—would come at a steep cost. A state that abridged the right would have its representation and its electoral votes reduced. The states ratified this amendment.

Legislative usurpation was tried again, in a serious way, only in 1868 in Florida and Alabama. The more extensive debate in Alabama demonstrates that, in the wake of the Civil War, the nation was finally committed to basic principles articulated by the likes of James Wilson, Thomas Jefferson and John Adams at the Founding. The Civil War was fought in large measure to vindicate these ideals. The public repudiated the Alabama legislature's action in bipartisan fashion, emphasizing that, even during a vicious terrorist campaign, popular elections must be held.

This history was entirely forgotten or ignored by the United States Supreme Court in 1892 and again in 2000. Historical amnesia gave rise to the false premise of "plenary power" for state legislatures. The efforts of former President Donald Trump and his supporters to undermine the will of the people in the 2020 presidential election sought to turn that doctrine into dogma in ways that again threaten the Republic.

This article analyzes the historical use and abuse of the Independent State Legislature Doctrine in the context of presidential elections under Article II. By describing any concept they like as a doctrine, apparently many justices now believe they can maintain their claim to be textualists by dressing up even radical departures in doctrinal garb.[327]

The Independent State Legislature Doctrine is anchored in the belief that any word in the Constitution must always mean only one thing. Therefore, the doctrine would have it that because the word "Legislature" often refers to each state's institutional legislature, it always must mean an institutional legislature. The Petitioners in Moore v. Harper cite this notion.[328] As McPherson itself proves, however, the underlying assumption is false.[329] The term "State" does not mean the same thing throughout the Constitution; sometimes, but not always, the term embodies "the people" within a state. And, if at times "state" may mean "the people," it would seem logically that the term "Legislature" (referring to a part of the state) can also sometimes mean the people. More specifically, "legislature" refers to a body that is "of" the state ("legislature thereof"[330]) and clearly not independent from the state.

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[327] See also, e.g., West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587(2022) (innovative "major question doctrine" in administrative law).

[328] Petition for a *writ of certiorari*, Moore v. Harper, No. 21-1271 (March 17, 2022) at 28. *See also* Michael T. Morley, "The Intratextual Independent 'Legislature' and the Elections Clause," 109 Nw. U. Law Rev. 847 (2015).

[329] *Supra* notes 290-293 and accompanying text.

[330] The phrase "legislature thereof," added by the Committee of Style after September 10, 1787, *supra* note 57, was used only three times in the original Constitution. Each time it referred to federal elections.

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It may refer to the exercise of law-making power delegated to government by the people, for example, subject to limits imposed by the people through the people's constitution.[331]

This article shows that the Framers were deeply concerned about corruption and cabal in state legislatures in particular. The Constitution, ordained and established by "We the people" was a grand experiment that brought the creation of the national government close to the people. The Founders specifically rejected the idea that state legislatures would ratify the new governmental format they launched, fearing that demagogues could easily defeat ratification. The Framers clearly did not embrace the idea that the state legislatures would choose presidential electors. They sought: (i) to assure that the national government expressed the will of the people, as far as practicable at the time in their world view, and (ii) to ward off the corruption they associated with legislative bodies. Years later, the 39th Congress had compelling reasons to fear in particular that states, newly-readmitted to the Union after the Civil War, would find multiple ways to deny or abridge the popular vote: hence, Section 2 of the Fourteenth Amendment.[332]

Petitioners in Moore v. Harper complain that the North Carolina Supreme Court relied on state constitutional provisions requiring fair and free elections.[333] Yet the experience of South Carolina demonstrates that exactly those concepts embracing the popular vote had deep roots and concrete meaning. James Madison, for example, condemned South Carolina's "unjust" and "unequal[]" system of legislative appropriation, "particularly with respect to Charleston, which is represented by 30 members."[334] Although ameliorated to some extent by constitutional amendments adopted in the decades leading up to nullification,[335] South Carolina's legislature continued to be mal-apportioned until 1865. President Andrew Johnson commented that the majority of white voters had been politically enslaved, and the South Carolina Constitutional Convention of 1865 responded directly.[336]

The genius of the U.S. Constitution lies in its division of power. The very idea of an absolute or plenary power that can subjugate a majority to a permanently entrenched minority divorced from control by the sovereign people, flies in the face of what the Framers sought to accomplish. Such unchecked power does violence to the nation's core and ongoing commitment to representative democracy through majority rule. Indeed, one check proposed by Edmund Randolph during the Constitutional Convention was that federal courts have the power to void state laws that "violated principles of equity and

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Art. I, Sec. 3 (election of senators); Art, I, Sec. 4 (election of Congress); Art. II, Sec. 1, cl. 2 (election of presidential electors).

[331] *See generally* Charles S. Black, Structure and Relationship in Constitutional Law (1969). The U.S. Supreme Court repeatedly has interpreted Art. I, Sec. 4 in this way.

[332] Cf., supra notes 170-177 and accompanying text.

[333] Petition, *supra* note 328 at 36.

[334] John D. Kaminsky, et. al., The Documentary History of the Ratification of the Constitution Digital Editions (2009), Virginia, 1150. Petitioners in Moore v. Harper note that it was the South Carolina constitution of 1778 that created this injustice. Pet. Br. 30. . But the constitution had been drafted by the legislature, as if it were a piece of ordinary legislation. Don E. Fehrenbacher, Constitutions and Constitutionalism in the Slaveholding South (1969), 4. Madison was right to criticize the legislature for creating a system of notoriously unequal representation.

[335] Fehrenbacher, 7.

[336] *Supra,* notes 161-165 and accompanying text (discussing simultaneous correction of the "gross error" of "usurpation" of the right to vote in presidential elections . See generally, Sidney Andrews, The South Since the War (Boston, 1866), 47-83. The all-white constitutional convention did not address the injustice of disenfranchisement of Blacks.

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justice."[337] That is what the North Carolina Supreme Court did in Moore v. Harper. And nothing in the U.S. constitution bars the people of a state from empowering their state's courts to protect the right of the people to vote. Even in the context of the 1876 presidential election—the most intensely litigated election in U.S. history—the notion that state constitutions and state courts could be ignored was firmly rejected. It should be firmly rejected again.

[337] Farrand 3: 56. ("[T]hat any individual conceiving himself injured or oppressed by the partiality of injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice.")

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CONSTITUTIONAL TEXT, FOUNDING-ERA HISTORY, AND THE INDEPENDENT-STATE-LEGISLATURE THEORY

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Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory

by Dan T. Coenen*

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ABSTRACT

One question raised by proponents of the so-called independent-state-legislature theory concerns the extent to which state courts can apply state constitutional requirements to invalidate state laws that concern federal elections. According to one proposed application of the theory, state courts can never subject such laws to state-constitution-based judicial review. According to another application, federal courts can broadly, though not invariably, foreclose state courts from drawing on state constitutions to invalidate federal-election-related state legislation. This article evaluates whether either of these positions comports with the original meaning of the Constitution. Given the article's focus on the originalist methodology, it directs attention only to the text of the Constitution and the context in which that text was drafted and evaluated in 1787 and 1788. This study of the relevant text and framing-era history—particularly as that history is disclosed by the Federalist Papers—casts a long shadow over the independent-state-legislature theory. At the least, it indicates that, as an originalist matter, there is no sound basis for broadly empowering federal courts to constrict state-court judicial review of federal-election-related laws under state constitutions, far less for precluding such judicial review altogether.

INTRODUCTION

The Supreme Court will soon examine the doctrinal implications of the so-called independent-state-legislature theory.[1] In a spate of recent writings, legal scholars have grappled with this theory, with most of them casting it in a negative light.[2] This literature covers many points, but much of

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[1] *See* Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (U.S. June 30, 2022) (No. 21-1271).

[2] *See, e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1 (2021); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59 (2021); Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections,* 108 VA. L. REV. (forthcoming 2022); Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052 (2021); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, WIS. L. REV. (forthcoming 2022); James Marisam, *The Dangerous Independent State Legislature Theory*, MICH. ST. L. REV. (forthcoming 2022); Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57 (2021); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. __ (forthcoming 2023); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L. REV. 445 (2022) [hereinafter Smith, Revisiting the History]; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FL. ST. U. L. REV. 731 (2001) [hereinafter Smith, History];

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it concerns the implications of post-ratification legislative and judicial actions, including decisions of the Supreme Court issued during the past century-and-a-half.[3] This article takes a different tack. It focuses squarely on the constitutional text and ratification-era writings, particularly the Federalist Papers. In other words, it examines the independent-state-legislature theory from, and only from, an originalist perspective.[4] And the conclusion that emerges from this analysis is that this theory, at least in any highly federal-court-empowering form, does not comport with a proper reading of the Constitution.[5]

More specifically, the analysis offered here challenges a key argument made by the leading academic defender of the independent-state-legislature theory—namely, that it "is consistent . . . with . . . the structure and political theory underlying the Constitution."[6] Indeed, the ensuing discussion undertakes to show not only that this line of argument is in error, but that it has things exactly backwards. In sum, this article makes the case that both "the structure" of the Constitution and the "political theory" underlying it cut sharply against the idea that state legislatures are somehow exempt, when they enact laws regarding federal elections, from the generally applicable

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Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J. L. & PUB. POL'Y (forthcoming 2023); *see also* Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689 (2016); Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123 (2021). The principal academic defender of the theory is Professor Morley. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) [hereinafter Morley 1]; Michael T. Morley *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020) [hereinafter Morley 2]; Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847 (2015) [hereinafter Morley 3]. Focused defenses of constrained applications of the independent-state-legislature theory also surfaced in the wake of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). *See* Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v Gore Defended,* 68 U. CHI. L. REV. 613 (2001); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001). For other treatments of the intersection of the theory and that case, see RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 155–56 (2001); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001); and Robert A. Shapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661 (2001).

[3] *See, e.g.*, Amar & Amar, *supra* note 2, at 14-36 (discussing, among other things, the Supreme Court's ruling in *McPherson v. Blacker*, 146 U.S. 1 (1892)); C. Shapiro, *supra* note 2, at 11-38 & 55-58 (concluding that "the pre-2000 history demonstrates that from the Founding, drafters of state constitutions, state legislatures, state courts, and Congress have all repeatedly either rejected the [independent-state-legislature theory] outright or proceeded on the understanding that it did not exist," *id.* at 19); Weingartner, *supra* note 2, at 28-29, 35-64 (discussing the post-ratification history in detail).

[4] To say the least, the legal literature contains many jurisprudential treatments of how legal analysts should think about and apply the originalist methodology. This article leaves the exploration of such questions to others. Instead, it offers an analysis meant to map onto how the Supreme Court in practice makes use of the originalist methodology—in particular, by focusing carefully on the words of the constitutional text and their most sensible reading in light of informative founding-era historical materials.

[5] This review is informed in substantial part by my earlier study of The Federalist Papers—which is an "earlier study" in part in the significant (at least for me) sense that my examination of the key ideas informing the ratification process, as revealed in those founding-era essays, preceded my giving any serious thought to the independent-state-legislature theory. *See* DAN T. COENEN, THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA (2007).

[6] Morley 2, *supra* note 2, at 14. *See id.* at 35 (describing the theory, including insofar as it operates to bar in a sweeping, if not complete, way state judicial review of state laws under state constitutions as "most faithful to the Constitution's underlying logic and structure").

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and deep-rooted principle that those legislatures must comply with their own state's constitution as interpreted by their own state's courts.

I. UNDERSTANDING THE INDEPENDENT-STATE-LEGISLATURE THEORY

The independent-state-legislature theory has given rise to much confusion, in part because different analysts have invoked the theory in defending a variety of different doctrinal positions.[7] Particularly prominent accounts of the theory, however, focus on a core idea—namely, that ordinary governing principles, under which state courts can and do review the legality of state laws under state constitutions, do not apply to state legislation concerning federal elections. It is this aspect of the theory that is at issue in *Moore v. Harper*, which is now pending before the Supreme Court.[8] There, the North Carolina Supreme Court held that the North Carolina Constitution prohibited the state legislature from putting in place a congressional-voting-district map drawn to carry out a highly aggressive form of partisan gerrymandering.[9] Following the issuance of that decision, the U.S. Supreme Court declined to stay the state court's judgment pending full briefing and argument in case. Three Justices, however, voted to grant the requested stay because they thought it likely that this application of the North Carolina Constitution by the North Carolina Supreme Court ran afoul of the independent-state-legislature theory as enshrined in the U.S. Constitution.[10]

The *Moore* case raises two main questions. The first concerns whether state courts, when dealing with state laws insofar as they apply to federal elections, are wholly foreclosed from exercising their long-accepted power of judicial review—that is, their power to assess whether challenged state laws exceed the limits imposed by the state constitution.[11] The second question is closely

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[7] For example, according to one proposed doctrinal build-out of the theory, state legislatures must act "independently" in the sense that there are strong limits on their ability to delegate rulemaking authority to other decisionmakers with regard to the times, places, and manner of federal elections. *See* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 718 (2016). *But see, e.g.*, Krass, *supra* note 2, at 105 (concluding that "Elections Clause delegations are entirely permissible"); Douglas, *supra* note 2, at 84 (same). A particularly extreme view of the theory suggests that a state legislature is so "independent" that it may overturn even the otherwise-settled results of federal elections that already have occurred. *See* J. Michael Luttig, *The Republican Blueprint to Steal the 2024 Election*, CNN: OPINION (Apr. 27, 2022, 9:09 AM), https://www.cnn.com/2022/04/27/opinions/gop-blueprint-to-steal-the-2024-election-luttig/index.html (both identifying and vigorously challenging this theory). This view of the theory, however, raises such a serious set of constitutional problems that many observers view it as highly unlikely to gain the support of the federal judiciary. *See, e.g.*, Ned Foley, *One point about Judge Luttig's new CNN piece*, ELECTION LAW BLOG: ELECTION SUBVERSION RISK (Apr. 27, 2022, 11:19 AM), https://electionlawblog.org/?p=129026.

[8] *See supra* note 1.

[9] Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (U.S. June 30, 2022) (No. 21-1271).

[10] *See* Moore v. Harper, 142 S. Ct. 1089, 1089-91 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting from the denial of an application for a stay). In a separate opinion, Justice Kavanaugh, while concluding that a stay should not issue due to timing considerations, noted that in his view "both parties have advanced serious arguments on the merits." *Id.* at 1089 (Kavanaugh, J., concurring)

[11] One variant of this idea posits that state courts can overturn state legislative action concerning federal elections only to the extent that the legislation runs afoul of state constitutional laws that impose "procedural," rather than "substantive," constraints on the state legislatures. *See* Morley 2, *supra* note 2, at 24 (advancing an argument for

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related to the first. It concerns whether, even if some measure of state-court judicial-review authority as to such laws remains in place, federal courts nonetheless possess a broad power to overturn some, though not all, otherwise-authoritative state-court pronouncements as to the meaning of state constitutional law. The ensuing discussion makes the case that the answer to both of these questions should be "no." The first proposed build-out of the independent-state-legislature theory, which would strip state courts of any power of state-constitution-based judicial review in cases involving federal elections, is the focal point of Part II. The second proposed build-out, which would broadly empower federal courts to overturn otherwise-binding state-court interpretations of state law in many (though not all) federal-election-related cases, is the subject of Part III.

Another foundational point about the independent-state-legislature theory concerns the sorts of laws to which it applies. In particular, the theory has potential application to two different types of state laws concerning federal elections: (1) laws that deal with federal-legislator elections, a subject dealt with in the Elections Clause of Article I, section 4, and (2) laws that deal with presidential elections, a subject dealt with in the Electors Clause of Article II, section 1. Academic commentators tend to agree that the same federal constitutional rules regarding the operation, or non-operation, of the independent-state-legislature theory should apply to both types of state legislation.[12] In particular, critics of the theory have suggested that it is marked by flaws that apply in equal measure in both settings.[13] Even so, much of the existing commentary focuses on the Electors Clause, in part because three Justices relied on the independent-state-legislature theory in voting to overturn the state-law-based action of the Florida Supreme Court in the presidential-election case of *Bush v. Gore*.[14] Again, however, this essay moves in another direction. Here, the focus is on House and Senate elections and the treatment of those elections in Article I, section 4.

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eliminating all state-court constitutional review of federal-election-related laws but in the end opting for the more limited rule, distinguishing between substantive and procedural rules, in part based on earlier Supreme Court rulings that specifically authorized state-constitution-authorized review of restrictions potentially characterized as "procedural"); *see also* James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections,* 27 LAW & CONTEMP. PROBS. 495 (1962) (viewing governing judicial precedents as properly read to support the distinction between procedural and substantive limits on state legislative action). For a treatment of the independent-state-legislature theory that directly targets this proposed distinction, see Smith, Revisiting the History, *supra* note 2. Because the analysis offered in this article challenges the elimination of state-court review of state laws concerning federal elections under state constitutions as a general matter, it necessarily rejects any effort to distinguish in this regard between so-called "procedural" and "substantive" state constitutional constraints. Put another way, all the arguments offered here for rejecting a totally categorical ban on state-court judicial review of state-made federal-election laws support with no less vigor a rejection of an all-but-categorical ban on such state-court judicial review said to apply "only" to the invocation of substantive state constitutional restrictions.

[12] *See, e.g.,* Levitt, *supra* note 2, at 1062 ("What is true of the delegation to the 'Legislature' for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors."); Marisam, *supra* note 2, at 5 ("While their precise language differs, the [election-related] clauses are conceptually similar and are governed by the same precedent."); Weingartner, *supra* note 2, at 4 ("Both Clauses refer to state legislatures using identical language, suggesting each confers authority in the same manner and with the same effect—if any—on the power of state constitutions to constrain state legislatures.").

[13] *See, e.g.,* Amar & Amar, *supra* note 2, at 30.

[14] 531 U.S. 98 (2000). The point is illustrated by a recently published critique of the independent-state-legislature theory, the title of which specifically references "The *Article II* Independent-State-Legislature Notion." Amar & Amar, *supra* note 2, at 1 (emphasis added).

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II. STATE-COURT JUDICIAL REVIEW OF STATE LEGISLATION REGARDING FEDERAL ELECTIONS UNDER STATE CONSTITUTIONS

A. The Constitutional Text and Background Understandings

The text of the Constitution provides the proper place to begin in identifying the rules it establishes—a point that lies at the heart of the originalist interpretive methodology.[15] In pertinent part, Article I, section 4 states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The independent-state-legislature theory, insofar as it applies to the elections of federal legislators, is founded on the Framers' use of the term "the Legislature thereof"—that is, the legislature of "each State"—in this clause.[16]

Section 4's reference to "the Legislature," however, does not support the no-state-court-review aspect of the independent-state-legislature theory on a fair reading. After all, while the section by its terms authorizes the making of a state's rules regarding federal elections by "the Legislature thereof," nothing in the section indicates that "the Legislature," when it does make such rules, can wholly disregard the state constitution as interpreted by the state courts. In other words, the text of section 4 simply does not state, or otherwise signal, that "the Legislature" of a state, when it passes state laws regarding House and Senate elections, may do so in a way that is directly at odds with the way in which "the Legislature" normally acts, because it must so act, in doing its work.[17] To be sure, section 4 would bar (at least in the absence of legislative participation or approval) a state constitutional provision that strips the "the Legislature" of all power to enact legislation on this subject—for example, by granting the governor sole authority to establish federal-election rules.[18] But recognizing this textual point is entirely different from concluding that the state "Legislature," in the context of making laws concerning federal elections pursuant to ordinary state-lawmaking

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[15] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 56 (2012) (setting forth the "Supremacy-of-Text Principle").

[16] *See* Morley 1, *supra* note 2, at 503, 508 (highlighting that the "independent state legislature doctrine arises from the fact that the Constitution grants authority to regulate the 'Manner' of conducting congressional elections and appointing presidential electors specifically to the 'Legislature' of each state rather than to the state as a whole"). C. Shapiro, *supra* note 3, at 8 (noting that "[p]roponents of the [independent-state-legislature theory] point to the word 'legislature' in [Article I, section 4] to argue that when state legislatures exercise their authority over federal elections, nothing in their state constitutions can operate to limit their choice of actions"); Marisam, *supra* note 2, at 4 ("The independent state legislature theory starts with the text of the Elections and Electors Clauses and homes in on their references to state legislatures.").

[17] *See infra* notes 20-27 and accompanying text (detailing the operation and framing-era endorsement of judicial review, including within state systems). *See* Smith, Revisiting the History, *supra* note 2, at 453 (challenging the independent-state-legislature doctrine on the ground it produces the "extraordinary" result of rendering state legislatures "free from constitutional restraints . . . that would ordinarily apply").

[18] For more on what actors qualify as "the Legislature" for purposes of the Elections Clause, *see infra* note 35. With regard to the ability of "the Legislature" itself to involve others, such as administrative agencies in the formulation of election rules, see *supra* note 7.

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processes, can put in place whatever rules it wants, wholly irrespective of generally applicable state constitutional restrictions. The text of Section 4 simply does not dictate that result.[19]

Even more important, the most natural reading of section 4 is the one that points to a simple and unsurprising conclusion—namely, that, as usual, state legislatures, in their actions as state lawmakers, do have to comply with state constitutional rules as laid down by state courts. This reading of the Elections Clause makes sense because the Framers and the ratifiers well understood that this is how state legislatures had operated in the past, and would continue to operate in the future, as an accepted—and, indeed, foundational—feature of the American system of republicanism.[20] In the Federalist No. 78, for example, Alexander Hamilton famously explained why there exists a "natural presumption" that stands against the idea "that the legislative body are themselves the constitutional judges of their own powers . . . ."[21] This presumption arose because "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[22] Of particular importance with regard to the independent-state-legislature theory, Hamilton made it clear that this "natural presumption" extended no less to the work of state legislatures than to the work of the federal Congress. Indeed, he celebrated the fact that "the right of the courts to pronounce legislative acts void, because contrary to the constitution" has been "of great importance in *all the American constitutions*"—that is, in all the constitutions then in effect in the separate states.[23] Hamilton also made it clear that, for the Framers and the ratifiers, the power of judicial review was understood to apply not only in a sometimes-as-to-some-subjects fashion.

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[19] *Accord, e.g.*, Ariz. State Leg. v. Ariz. State Indep. Redistricting Comm'n, 576 U.S. 787, 817-18 (2015) ("Nothing in [the Elections Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place and manner of holding federal elections in defiance of the State's constitution."). For one illustrative scholarly assessment that reaches this same conclusion, see Weingartner, *supra* note 2, at 4.

[20] *See, e.g., id.* at 13 ("state legislatures … *are* constrained by state constitutions when they enact election laws and have been since the Founding") (emphasis in original).

[21] THE FEDERALIST NO. 78, at 524–25 (Alexander Hamilton) (Cooke ed., 1961).

[22] *Id.* at 525. *See id.* at 526–27 ("[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . . ."); *id.* at 528 (citing the role of judges as "faithful guardians of the Constitution"); *see also* THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Cooke ed., 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number."). Moreover, this understanding of the centrality of judicial review reflected very basic understandings of the nature of popular sovereignty, the core organizing principle upon which our nation's distinctive vision of constitutional republicanism was built. *See, e.g.*, Larry D. Kramer, *The Supreme Court in Politics*, in The Unfinished Election of 2000, at 105, 122 (Jack N. Rakove ed., 2001) (describing two ideas as "sacred to the Founders of our Republic": "first, that the people of a political society could speak for themselves and did so through their constitutions, and second that people's voice is always superior to that of their rulers"; adding that these ideas were so transcendently important that they "led … Americans to …declare independence" and that "the notion that the Framers would have violated this principle about the authority of a state constitution is," for this reason, "wildly implausible"); *id.* at 122-23 (adding that stripping state courts of the ability to enforce state constitutions, in keeping with the overarching principle of popular sovereignty, would "have violated the most basic principle of the American Revolution").

[23] THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Cooke ed., 1961). *See also, e.g.*, THE FEDERALIST NO. 44, at 305 (James Madison) (Cooke ed., 1961) (explaining that "the State Legislatures" are subject to being checked by the states' "judiciary departments" when those legislatures "violate their respective constitutional authorities"); THE FEDERALIST NO. 82, at 544 (Alexander Hamilton) (Cooke ed., 1961) ("applaud[ing] the wisdom of those states, who have committed the judicial power in the last resort, not to a part of legislature, but to distinct and disinterested bodies of men").

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Instead, it was to apply in such a comprehensive way that, "*whenever* a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former."[24] This was the basic and well-understood framework within which "the Legislature[s]" of the states operated at the time that the Elections Clause became law. The Framers' use of the term "the Legislature" thus suggested that the usual rules with respect to the exercise of state legislative power would apply pursuant to section 4, just as they applied with regard to *all* exercises of state legislative powers.[25] Put another way, there is no sound basis for concluding that the Framers' use of the term "the Legislature," without more, would have signaled to readers of the Constitution in 1787 and 1788 an unstated plan—incompatible with basic principles of popular sovereignty[26]—to provide state legislators with a newfangled immunity from the governing principle pursuant to which state courts assess the constitutionality of state legislation under state constitutions.[27]

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[24] THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Cooke ed., 1961 (emphasis added).

[25] *See, e.g.*, In re Opinion of the Justices, 107 A. 705, 706 (Me. 1919) (indicating that, in making laws as to the selection of presidential electors, the state "shall" act, "as it must of necessity, through its lawmaking body" and thus "in accordance with and in subjection to the Constitution of the state, [as it does in promulgating] all other acts and resolves having the force of law"); Douglas, *supra* note 2, at 83 (reasoning that the Framers' use of the term "legislature" indicated that the state legislature would be subject to "the normal limits on its lawmaking authority"); Pildes, *supra* note 2, at 727-28 (concluding, that "state legislatures were not understood at the time to be more 'independent' by way of Article II of the constraints and conditions on their power than they were when acting pursuant to any other source of authority"); *see also* C. Shapiro, *supra* note 3, at 40 ("That state constitutions apply to *all* state election law is, to put it mildly, a widespread baseline assumption.") (emphasis in original). *See generally* SCALIA & GARNER, *supra* note 15, at 318-19 (noting that ""[a] fair construction ordinarily disfavors implied change," so that, a "statute will not be interpreted as altering," background principles embodied "in the common law" unless the lawgiver signals its intent to effectuate such a change "with clarity").

[26] *See supra* note 22.

[27] *See, e.g.*, Weingartner, *supra* note 2, at 26 ("The Constitution was drafted and ratified against a backdrop of state constitutions that empowered and constrained state legislatures, and there is no indication the Framers sought to upset the balance of power within states."); *see also* R. Shapiro, *supra* note 2, at 665 (setting forth the proposition that the Electors Clause "indicates that the determination of the method of selecting presidential electors shall be governed by state law, as state law is commonly made in the state," thus supporting the conclusion that the clause "does not endow the state legislature with a special role"; concluding for this reason that "the state legislature would act in this area of lawmaking as it does in all others, subject to the constraints of the state constitution and to the interpretive authority of the state courts"). Another fact concerning the Framers' and ratifiers' background understandings supports this same conclusion: These lawgivers recognized that states would, as they had in the past, conduct state and federal elections at the same times and in the same places pursuant to the same manner-of-election procedural rules as a common, if not routine, matter. *See* THE FEDERALIST NO. 61, at 414 (Alexander Hamilton) (Cooke ed., 1961) (noting "the convenience" that came about due to state authorities' conducting together "elections for their own governments, and for the National Government"). Given this state of affairs, it would inevitably present significant administrative problems for state election officials to have to apply one set of rules as to the manner of elections—concerning, for example, voter identification laws or ballot-marking laws or drop-box-delivery laws—to state-officer elections, but not to federal-officer elections, in the context of a single and unitary election process. Yet that is precisely the result that would obtain if federal courts could overturn state election laws in their application to federal—but not state—elections pursuant to the independent-state-legislature theory. *See, e.g.*, Marisam, *supra* note 2, at 5 (noting the danger that state election officials will have to apply different rules to state and federal elections if state constitutional rules, as interpreted by state courts, apply to state elections but not to federal elections); *id.* at 39-40 (adding that such difficulties might well often arise because "federal and state elections are held on the same day and the candidates typically appear on the same ballot"; adding that "the election administration costs of maintaining two sets of ballots and two sets of rules for casting and counting those ballots (one for state races and the other for federal) would be

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Why, then, did the Framers reference "the Legislature" as the recipient of the granted power to prescribe "Regulations" as the time, place and manner of congressional elections as opposed, for example, to granting that power to "the State" as a whole? The answer is simple: The Framers referenced "the Legislature" of the state in section 4 for exactly the same reason it also referenced "the Congress" only a few words later—that is, because "the Legislature" is both the natural and the ordinary repository of the power to make laws, including election laws, as opposed to the powers to enforce or interpret the laws.[28] Put another way, the Framers' chosen phrasing served the straightforward purpose of clarifying that state legislators, rather than federal legislators, were vested with the power to promulgate legislation regarding the election of federal legislators "in the first instance."[29] But honoring that purpose in no way requires so dramatically energizing the state legislature's authority that it can ignore, contrary to the rules that apply to state legislation in every other context, the commands of its state constitution when it enacts laws governing the election of congresspersons and senators.

One argument offered in favor of the independent-state-legislature theory pivots on the point that the Framers assigned some powers to "the State" as whole, as opposed to only "the Legislature thereof."[30] The suggestion seems to be that the Framers would have referred to the "the State,"

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severe"); C. Shapiro, *supra* note 3, at 48-49 (likewise emphasizing the complexities that inevitably would arise from the application of different legal rules to state and federal elections that are conducted simultaneously); *id.* at 55 (adding that such a "a two-tier election system … could be confusing to voters and difficult or even impossible to implement"). To be sure, the Framers *expressly* dictated that Congress itself could provide for some such differential treatment (assuming that state lawmakers did not go along with congressionally stipulated federal-election rules for purposes of their own state-officer elections). But there is no indication that the Framers meant to go a very long step further in the direction of fostering administrative disharmony and potential voter confusion by also—and only *implicitly*—authorizing federal courts to disable state courts from applying the same rules applicable to elections for state officeholders to elections for federal officeholders as well.

[28] *See* THE FEDERALIST NO. 75, at 504 (Alexander Hamilton) (Cooke ed., 1961) ("The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society."); *see also* THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Cooke ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."); *see generally* Kramer, *supra* note 22, at 123 (reasoning that the Framers, in formulating the Electors Clause, "naturally assumed that election laws would normally be fashioned in the legislature").

[29] THE FEDERALIST NO. 59, at 399 (Alexander Hamilton) (Cooke ed., 1961). *See id.* (describing the division of legislative labor effectuated by section 4 as one under which the election-law legislative power was assigned "primarily" to the state legislatures, although "ultimately" to Congress—thus giving to state legislature the lion's share of legislative power in this field in relation to Congress because Congress could be expected to exert its own legislative power only in "extraordinary circumstances").

[30] *See* Morley 2, *supra* note 2, at 83; *see also supra* note 17 (referencing Professor Morley's reliance on this argument from textual contrast). In *Wise v. Circosta*, 978 F.3d 93, 112 (4th Cir. 2020), for example, the dissenting judges found support in this textual contrast for one iteration (albeit a narrow one) of the independent-state-legislature doctrine. As they wrote: "The Founders knew how to distinguish between state legislatures and the State governments as a whole. They did so repeatedly throughout the Constitution. *See, e.g.*, U.S. CONST. art. 1, § 2 (distinguishing between 'State' and 'State Legislature')." *Id.* at 112 (Wilkinson & Agee, JJ., dissenting); *see also Moore*, 142 S. Ct. at 1090 (Alito, J. dissenting from the denial of an application for a stay) (finding the challenger of the state-court constitutional ruling "likely [to] prevail on the merits" in part because: "[Section 4] could have said that these rules are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power, as States are generally free to allocate state power as they choose. But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously.").

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rather than to "the Legislature thereof," had they meant to leave in place a power in state courts to engage in judicial review under state constitutions. This argument misses the mark, however, because it misunderstands the balance that the Framers struck in the Elections Clause—a balance that did channel specialized federal-election-law authority to each state "Legislature," as opposed to each "State" as a whole, while nonetheless leaving undisturbed the accepted power of state courts to assess whether resulting election laws violate the state constitution. Put another way, this judicial-review-preserving, background-understanding-based interpretation of the term "the Legislature" does not render that term "meaningless," or even come near to doing so.[31] To the contrary, the Framers assignment of the section 4 lawmaking power to the state "Legislature" had, and continues to have, three highly consequential effects.

First, as noted earlier, the phrasing of the Elections Clause signals the Framers' plan that each state's legislature would be the initial actor in formulating federal-officer election laws.[32] In other words, absent congressional intervention, any law governing such elections enacted by the state legislature is the controlling law regarding federal elections unless and until a court (whether state or federal) engages in the exceptional act of invalidating that law pursuant to its power of judicial review.[33] Second, even if a state court were to invalidate a state statute concerning federal elections, the underlying lawmaking power of "the Legislature" remains unaltered. As a result, the state legislature is free to respond to any such judicial ruling (and otherwise to tinker with "Times, Places and Manner" rules) by reformulating state election law however it might like, so long as it does so, as it must in every other lawmaking context, in compliance with state constitutional (as well as federal-law) commands.[34] Third, the Framers' phrasing of the Elections Clause vested the "the Legislature" with one wholly irreducible role with regard to promulgating state laws

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[31] Wise v. Circosta, 978 F.3d 93, 112 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (raising concerns that a failure to incorporate some form of the independent-state-legislature doctrine into federal constitutional law would render "meaningless" the Framers' use of the term "the Legislature" in the Elections Clause); *see also Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting from the denial of an application for a stay) (reasoning that "if the language of the Elections Clause is taken seriously, there must be some limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections").

[32] *See supra* note 29 and accompanying text.

[33] It merits mention that the invalidation of state laws under state constitutions at the time of the founding was uncommon, thus removing any reason to believe that the Framers and the ratifiers somehow were of the view—and particularly of the wholly unstated view—that there was a special need, somehow reified in section 4, to squelch judicial activism with regard to state laws concerning federal elections. *See, e.g., infra* notes 99-101 and accompanying text (noting, among other things, Hamilton's reference in the Federalist Papers to the strong pressures on state courts to avoid the invalidation of state legislation).

[34] Put another way, the assignment of state lawmaking power by section 4 remains far-reaching for the same reason that the assignment of federal lawmaking powers to Congress is far-reaching notwithstanding the existence of the institution of judicial review. When, for example, the Supreme Court invalidates a federal law enacted under its naturalization power because that law violates equal-protection principles, no one would suggest that such a ruling renders the naturalization power an empty vessel. The reason why is that Congress remains entirely free to enact many other laws pursuant to its naturalization power and even to address the very same subject matter dealt with in the invalidated legislation so long as it conforms any new law to governing constitutional strictures. The key point is that this same allocation of governing authority—that is, an allocation under which state legislative authority to enact laws is general and broad, while judicial authority to review such laws is fact-bound and episodic—exists with regard to the making and operation of state laws concerning the times, places, and manner of federal elections. And this is the case without any need to distill by inference from section 4 a basic rearrangement of state-constitution-based allocations of governing state powers pursuant to the independent-state-legislature theory.

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concerning federal elections. Section 4 operates in this way by clarifying that no state constitution or other component of state law can assign the underlying power to promulgate federal election laws to anyone (for example, a specialized administrative body) other than the state "Legislature" itself, at least without the legislature's own agreement.[35] Nor is this limiting principle an insignificant matter—a point revealed in dramatic fashion by the Court's vigorous disagreement over the principle's proper application to initiative-based lawmaking in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[36]

These observations make it clear that the assignment of power to each state "Legislature" in the Elections Clause has important consequences, including within the long-taken-for-granted legal environment in which state courts engage in state-constitution-based judicial review. More specifically, this discussion reveals that the contrast between the term "the State" (as used in some constitutional provisions) and "the Legislature" (as used in section 4) does not signal a plan to wipe out such state-court judicial review in cases involving challenges to state-made federal-election-related laws. The difficulty with any such argument based on textual contrast is that these two different terms *do* have two different meanings—indeed, two very different meanings—even if the state courts can (as usual) invalidate state-legislature-made federal-election laws that abridge the state constitution. To repeat, it is only because the term "the Legislature" is used in section 4 that (1) that section establishes a governing "default provision" under which, absent the exceptional event of judicial or congressional intervention, all laws enacted by the state's *legislature* regarding federal elections are wholly controlling;[37] (2) even when a state court strikes down a state law as applied to federal elections, the state *legislature* retains its power to respond to that ruling by enacting a new (albeit constitutionally permissible) law;[38] and (3) while states can establish constitutional limits that put some limits on the state legislature's power to enact federal-election laws—for example, by blocking legislative enactments that violate either generalized or

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[35] *See, e.g.*, David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) (indicating that "a state constitution may not itself direct how electors are chosen, at least if the constitution is not the work of the legislature").

[36] 576 U.S. 787 (2015). There, the Court—in a five-to-four ruling—upheld the challenged law on the theory that the voting-eligible citizenry of the state can qualify as "the Legislature thereof" for Election Clause purposes when authorized to adopt laws by way of an initiative process—a result that was supported by two current members of the Court, but rejected by three now-sitting Justices. Notably, the matter at issue in the *Arizona State Legislature* case is entirely different from the issue presented in *Moore*. This is so because, in *Arizona State Legislature*, members of the Court vigorously disagreed about the meaning of the term "the Legislature"—and, in particular, whether that term was properly understood to refence only the state's then-sitting, representative legislative body. In *Moore*, however, the challenged redistricting law was, without question, enacted by that body, so that no interpretive dispute about the meaning of the term "the Legislature" is in the picture. Put differently, the issue in *Moore* does not have to do with the intrinsic meaning of the term "the Legislature" as established by dictionaries or other touchstones of determining textual meaning. Instead, the question has to do with whether federal courts should *extrapolate* from the assignment of a power to "the Legislature" of a state, in contrast to Congress, a founding-era design to extirpate in this context the generally recognized power of state-constitution-based state-court judicial review. As to this question, there is no dictionary-definition answer. Instead, the interpreter of the text must consider other signals of original meaning, including basic background understandings as to how legislatures and courts were understood to operate as an ordinary matter within the American republican system.

[37] Foster v. Love, 522 U.S. 67, 69 (1997).

[38] *See supra* note 34 and accompanying text.

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voting-related equal-protection-related rights—they cannot assign the underlying power to adopt federal-election "Regulations" to anybody or any body other than the state *legislature* itself.[39] These powers of the state legislature are significant, and not one of them would be enshrined in the U.S. Constitution had section 4 channeled the authority to craft time, place and manner rules to "the State" as a whole, thus authorizing state constitution-makers to assign that power to whatever arms or agencies of the state government it might like, regardless of the state legislature's wishes. Accordingly, there is no sound basis for the argument that federal courts must endorse the independent-state-legislature doctrine, especially in its most extreme forms, to render meaningful the Framers' choice to use the term "the Legislature," rather than the term "the State," in the Elections Clause.[40]

The foregoing discussion points to one conclusion: There is not a sound textual basis for concluding that section 4 was understood at the time of the founding to eliminate the standard

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[39] *See supra* notes 35-36 and accompanying text. In other words, these points show why the Framers *did* mean to assign the lawmaking power regarding the conduct of federal elections to the state legislature, and *not* to the state as a whole. But the Framers' making of that decision did not mean that they *also* meant to declare that this thus-assigned state legislative power could be wielded in a such a dramatically unchecked way that it would not be subject to the normal lawmaking constraints imposed by state law as set forth in the state constitution.

[40] Professor Morley also seems to argue that Article 4 somehow immunizes state legislatures from ordinarily applicable state constitutional rules on the theory that (1) the power to regulate federal elections is, conceptually, a federal power, (2) for this reason, state legislatures should be treated like Congress (rather than like state legislatures) when they wield that power; and (3) that, accordingly, state legislatures should not be subject to state constitutional rules to the extent they concern federal elections because Congress would not be subject to such state constitutional rules. *See* Morley 2, *supra* note 2, at 15-37. This effort to equate state legislatures and the federal Congress suffers from many flaws. First, it overlooks the fact that state legislatures, whatever the conceptual nature of their their powers, are themselves creatures of state constitutions and thus both logically and routinely viewed as subject to whatever limits those constitutions impose upon their lawmaking authority. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.P. 1795) (Patterson, J.) (observing that legislatures are "Creatures of the Constitution" and "owe their existence to" it, so that "all their acts must be conformable to it, or else they will be void"); Seifter, *supra* note 2, at 1797 (asserting that "there is no such thing as a free-floating state legislature, un-moored from its constitution"; rather, in their very nature "state constitutions create, limit, and define state legislatures"); Douglas, *supra* note 2, at 83 (because "state constitutions create state legislatures, … one would think that state legislatures cannot act outside of the state constitution's mandates"). Second, any underlying theory that the power to regulate federal elections is entirely national in character is itself controversial even as a conceptual matter—so much so that it was flatly rejected by four members of the Court (including one current member of the Court) in *U.S Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). *See id.* at 850-65 (Thomas, J., dissenting). Third, whatever one concludes about the conceptual nature of the power to regulate the times, places, and manner of federal elections, the founding generation proceeded from the real-world understanding that state legislatures would wield that power. *See infra* note 80. And because the Framers and ratifiers simply assumed that state legislators would have this power, there is every reason to believe that they also assumed that, as usual, resulting exercises of this state legislative power would be subject to state constitutional controls. Finally, the assertion that the state legislature's exercise of the times-places-and-manner power must parallel precisely congressional exertions of that same power is wrong as simple factual matter. For example, when Congress wields its Section 4 power, its actions are subject to presidential veto. But no one argues that, because state legislative action is rightly seen as paralleling the congressional power to regulate federal elections, such state action is likewise subject to a veto by the President of the United States. Viewed from a wide angle, Professor Morley's argument—which is based on a series of inferences that proceed from the premise that the Elections Clause power is conceptually national in nature—falters because it subordinates real-world understandings to an abstract line of theoretical argument (and a very disputable line of theoretical argument at that). *See also* The FEDERALIST NO. 12, at 74 (Alexander Hamilton) (Cooke ed., 1961) (expressing concern that arguments built on on "too great abstraction and refinement" can "lead men astray from the plainest paths of reason").

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practice under which state courts can and do evaluate the conformance of state laws with state constitutions. There is, however, a powerfully sound textual basis for reaching the opposite conclusion—namely, that we would not expect the Framers to "hide elephants in mouseholes" by casting aside, through use of nothing more than the term "the Legislature," the foundational principle of American republicanism that state legislation must comport with state constitutions as expounded by state courts.[41] In other words, if the Framers had wished to effectuate such a radical inversion of basic structural postulates, both common practice and common sense suggest that they would have done so in a more straightforward and transparent way than by burying the governing principle in the two spare words on which the whole case offered in support of that result depends.[42]

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[41] Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 468 (2001).

[42] *See* Smith, Revisiting the History, *supra* note 2, at 476 (noting that, against the backdrop of preexisting law, if the drafters "were proponents of legislative independence—it is hard to explain why they did not explicitly address the problem in their drafting"). This text-based line of analysis is bolstered by another aspect of the phrasing of Article I, section 4—that is, its assignment to the state legislatures of the power to "prescribe[] . . . Regulations." The relevant point is that this language made clear that, when state legislatures acted pursuant to section 4, they would be exercising an obvious *lawmaking* power (*see supra* note 28), which thus would naturally entail—absent any specification to the contrary—a susceptibility to the application of constitutional limits that routinely operate to limit lawmaking activity. *See id.* at 454 n.24 (2022) (highlighting how the terms "direct" as used in Article II and "prescribe" as used in Article I worked "in each instance, [as] a lawmaking verb" thus logically rendering resulting legislation subject to ordinary legal restraints applicable to legislation—in potential contrast, for example, to the non-lawmaking powers to "ratify" constitutional amendments and to "choose" the state's senators). This foundational point about the nature of the power grant made by section 4 reveals the error in one argument sometimes made in favor of the independent-state-legislature doctrine—namely, that state legislatures should enjoy the same measure of unchecked independence that they have been said to possess in ratifying constitutional amendments under Article IV or that they originally had to elect federal senators under Article I, section 3. *See, e.g.,* Weingartner, *supra* note 2, at 27 ("[T]he Constitution assigns state legislatures various functions in the federal system, including the selection of Senators and the ratification of constitutional amendments, most of which are not subject to state constitutional constraints. As the argument goes, the use of similar language in the Elections and Electors Clauses suggests that state legislatures' power to regulate federal elections is similarly unconstrained."). The error in this line of reasoning is that likening the Elections Clause to either the Ratification Clause or the Senate-Selection Clause mixes up apples and oranges. State legislatures, after all, do not *pass laws* when they ratify constitutional amendments or when they (as they once did) select senators. And because the power of judicial review naturally extends to legislative action in passing laws, but not to necessarily to "non-legislative" actions, the effort to equate the dictates of these different constitutional provisions fails. Indeed, the Supreme Court itself already has rejected, for this very reason, this attempt to read the Election Clause as identical in this way to these other more broadly state-legislature-empowering constitutional provisions. *See* Smiley v. Holm, 285 U.S. 355, 365 (1932) (defining the relevant question in the case as whether section 4 "invests the legislature with a particular authority …, the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws" under state constitutions; going on to answer this question in the negative, thus validating state laws requiring approval of acts of "the Legislature" by the state governor even though that body does not "include the state's chief executive officer as a part thereof"); *id.* at 365-66 (1932) (distinguishing the rules put in place by section 4, under which the state legislature acts as a "lawgiver" engaged in "lawmaking in its essential features," rather than as "an electoral body" or " ratifying body" under the constitutional provisions concerning the election of senators and ratification of constitutional amendments); Hawke v. Smith, 253 U.S. 221, 228-31 (1920) (describing the power assigned to state legislators to select federal senators under the original Constitution and to ratify amendments under Article V as "entirely different" from the ordinary lawmaking power assigned to state legislatures by Article I, section 4, so that otherwise-applicable rules regarding the gubernatorial veto do not apply in these specialized contexts). For other analyses reflecting this same conclusion, see, e.g., Kirby, *supra*

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The text of section 4 supports this conclusion for another reason, too: Its internal architecture provides telling evidence that state constitutional rules do bind state legislatures when they exercise their section 4 powers. This is the case because section 4 does not deal only with state legislatures. It also provides, without any further elaboration, that "*the Congress* may at any time by Law make or alter such Regulations" as to the times, places, and manner of federal-representative elections.[43] This text is significant because no one argues that section 4's unadorned grant of power to "the Congress" permits federal legislators to ignore the federal Constitution as interpreted by federal courts in promulgating federal-election-related laws. Rather, it is universally understood that "the Congress," in promulgating such laws, must comply—as it always must comply—with federal-court pronouncements regarding the federal Constitution. The principle of applying parallel texts in parallel fashion thus steps into clear view.[44] And it signals that, just as surely as no unorthodox displacement of then-accepted judicial-review powers was understood to have been effectuated by the Framers' unadorned reference to "the Congress" in section 4—thus creating some sort of "independent-federal-Congress" doctrine—no similarly unorthodox displacement of then-accepted judicial review powers was understood to have been effectuated by the similarly unadorned, and directly parallel, reference to the state "Legislature" in the very same sentence.[45] In sum, the no-state-constitutional-review version of the independent-state-legislature

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note 2, at 502 (asserting that "[n]o law in the usual sense of the word results from a single legislature's ratification of a proposed amendment" as confirmed by an "early ruling that action of Congress in proposing an amendment is non-legislative in character and need not be approved by the President"; citing *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)); *id.* at 502-03 (distinguishing a state legislature's power to elect senators and to ratify constitutional amendments from the promulgation of election rules because such rules "are legislative in nature" in that they impose "a mandate, the disobedience of which would result in … legal consequences"); and R. Shapiro, *supra* note 2, at 668 ("The ratification of constitutional amendments differs in many ways from designating the manner of selecting presidential electors. The latter involves the articulation of election procedures in a manner generally accomplished by legislative activity. Promulgating an election code, for whatever office, is a kind of function normally undertaken by the body wielding the lawmaking authority of the state.").

[43] U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

[44] See SCALIA & GARNER, *supra* note 15, at 195 (stating that, when words are "associated in a context suggesting that [they] have something in common, they should be assigned a permissible meaning that makes them similar").

[45] *Accord, e.g.*, Weingartner, *supra* note 2, at 27 (noting that "[t]he Elections and Electors Clauses grant authority to Congress as well as state legislatures, but Congress's power under the Clauses is clearly subject to the usual constitutional constraints"); Levitt, *supra* note 2, at 1064 n.39 (reasoning that the logical inference is that in both contexts the lawmaker is subject to "normal constraints," including "substantive constitutional requirements"); *see also* Rubin, *supra* note 2, at 66-67 (reasoning that the assumption that state courts act subject to the state court's judicial review power also finds support in the delegation of many powers to Congress, all of which are subject to the federal judicial review power even though no such textual grant of power expressly provides for that result). Indeed, in *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), the Court specifically focused on the argument that Article 4—by textually allocating to "the Congress" the power to make laws regarding federal elections—thereby removed the traditional power of judges to assess the constitutionality of such exercises of state lawmaking authority. The Court, however, firmly rejected this line of analysis in words that are illuminating here: "[N]othing in the language of [Article I, Section 4] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Id.* The same essential rationale applies to laws made by state legislatures and challenged under *state* constitutions. That is, there is simply "nothing" in the phrasing of Article 4 that negates "the power of courts"—whether state or federal—"to protect the constitutional rights"—whether state or federal—"of individuals from legislative destruction."

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theory not only clashes with the founding generation's basic understanding of how "the Legislature" routinely operates within republican systems;[46] it also assigns cognate textual passages oddly discordant meanings.[47] Accordingly, as a textual matter, that approach to the Election Clause should be rejected.[48]

B. Pre-Ratification History and Underlying Constitutional Theory

The foregoing discussion demonstrates why the controlling text of section 4, when read in light of widely shared assumptions about state-court judicial review of state laws under state constitutions, undermines the suggestion that the members of the founding generation would have understood that section to free state legislators from state constitutional restrictions when they enact federal-election laws. Might it nonetheless be that courts could find a way to interpret section 4 to prohibit state-court review of state legislative actions concerning federal elections? Perhaps some judges would endorse this interpretive position if they could point to historical materials indicating that the Framers and ratifiers intended to endorse this exception-to-the-ordinary-rule approach.[49] As it turns out, however, there is "no evidence" that the Framers and ratifiers made any such choice or meant to take any such action.[50] Indeed, even the leading academic proponent of the independent-

[46] See *supra* note 20-27 and accompanying text.

[47] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 836 (2015) (Roberts, J., dissenting) (emphasizing the need, in interpreting section 4, to take account—in keeping with the section's original phrasing—"of the parallel between 'the legislature of each state' and 'the legislature of the United States'"); Smiley v. Holm, 285 U.S. 355, 367 (1932) (reasoning that, because of the parallel vesting of state and congressional power under section 4, the clause is properly read as authorizing state gubernatorial vetoes of state laws enacted under the clause pursuant to state constitutions just as it allows presidential vetoes of federal laws enacted under that same provision). A separate argument from textual parallelism—and one that bears directly on the original meaning of section 4—focuses on comparing the text of Article I, section 4 with its predecessor text in the Articles of Confederation. In his earlier work, Professor Smith has set forth this argument in detail. *See* Smith, Revisiting the History, *supra* note 2, at 463-76. The argument stems from the fact that the Articles of Confederation—which included language that empowered state legislatures in a way that later was closely tracked by section 4—did not operate to free those state legislatures from state constitutional restraints when they established rules concerning the election of federal representatives. As Professor Smith goes on to explain: "Assume for a moment that by 1787, in a departure from the past, legislative independence had become a concept the Framers wanted to enshrine in the new Constitution. If that were the case, it is simply inconceivable that they would have attempted to incorporate the novel concept into the new Constitution by using language so closely resembling that of the Constitution under which—as they very well knew—legislatures had been decidedly non-independent." *Id.* at 483-84. Because Professor Smith has painstakingly laid out this argument in his earlier work, a fuller account of it is not offered here.

[48] *See* Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring in the denial of application to vacate stay) (highlighting and relying on "the authority of state courts to apply their own constitutions to election regulations" in declining agree to inject the Supreme Court into a state-law election dispute).

[49] Even in these circumstances, other judges might well find that the text itself was sufficiently clear that such evidence would not support displacing the original meaning of the Constitution—and this would be particularly true if only a small number of decision-makers expressed such a view and/or they recorded that position primarily in non-public settings. *See generally* SCALIA & GARNER, *supra* note 15, at 69–77 (discussing the primacy of the "ordinary-meaning canon" of interpretation).

[50] Smith, Revisiting the History, *supra* note 2, at 455; *see id.* at 456–57 (emphasizing, in particular, with regard to the availability of state-court judicial review, that "the Founding generation . . . did not perceive anything special or unique" about state legislative enactments regarding federal elections); *id.* at 459 (noting that "nothing" in the work

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state-legislature theory recognizes that "[t]he history of the Elections Clause . . . is *silent* on whether state constitutions may impose substantive limits on the authority of the state legislatures over federal elections."[51] This history, even standing alone, is of critical importance for a straightforward reason: It indicates that there is no reason to read the words of section 4 in anything other than their natural sense. And, as we have seen, their natural sense is that the ordinary practice of subjecting state laws to state-court judicial review to ensure their compliance with state constitutions would be left undisturbed.[52] To be sure, the Elections Clause did not specify in terms that state courts could continue to exercise this well-recognized power in dealing with state laws concerning federal elections. But especially given the dearth of historical evidence affirmatively indicating a plan to alter otherwise-operative rules in this context, that point is without consequence. The governing principle, as Alexander Hamilton explained in The Federalist No. 83, is that one cannot "surmise that a thing, which is only *not provided for,* is entirely *abolished.*"[53]

In sum, the text of section 4—especially given the lack of a historical record indicating that the founding generation had some other view of the matter—indicates that state courts remained able to exercise their ordinary state-law-based judicial review powers in assessing the constitutionality

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of the Framers and ratifiers suggested "an intent to create independent 'legislatures'" with regard to the enactment of election laws); *id.* at 464 ("[T]he historical record contradicts the notion that the Founding generation saw any reason to treat these 'legislatures' with unusual deference [when enacting federal-election-related laws]—that is, to allow these legislatures to operate 'independently'"); *see also* Kirby, *supra* note 2, at 501 (indicating, with regard to presidential selection, that "[t]he framers were never concerned with limitations which might be imposed by the states upon their legislatures' power"); Kramer, *supra* note 22, at 122 (noting the lack of historical evidence supporting the independent-state-legislature theory); Pildes, *supra* note 2, at 727-28 (asserting that there is "no evidence from the Constitutional Convention or the state ratifying conventions that any thought was given, one way or the other, as to whether the word 'legislature' in [the Electors Clause] was designed to impose distinct and special constraints on state court interpretation of presidential elector laws" and that "the absence in the Bush v. Gore concurrence or academic commentary" of any citations to framing-era materials at odds with Professor Smith's assessment of "original purposes" and "historical practices" should preclude stripping state courts of their "traditional powers to assess whether state laws concerning federal elections comport with state constitutions").

[51] Morley 2, *supra* note 2, at 27 (emphasis added). *Accord,* Morley 1, *supra* note 2, at 503 (acknowledging that the Framers never "expressly considered" the independent-state-legislature theory and in particular did not "address[] the potential significance of their use of the term 'legislature'" in Article I, section 4); *see* C. Shapiro, *supra* note 2, at 10 (noting that Professor Morley "admits . . . that there is no evidence that the Framers expressly considered the issue"); *see also* McConnell, *supra* note 2, at 661 (agreeing in the process of endorsing a narrow version of the independent-state-legislature doctrine that "[t]here is no relevant legislative history"); Weingartner, *supra* note 2, at 29 (noting that, at both the Philadelphia Convention and in the state ratifying conventions, "the Elections Clause proved controversial [because of its] allocation of authority between States and Congress" but that its supposed "allocation of power *within* a state, including the role of state constitutions, was not addressed") (emphasis in original).

[52] *See* Kramer, *supra* note 22, at 122-23 (observing with regard to the Electors Clause: "Certainly we would find lots of evidence on the subject [had the founders] purported to [negate state-constitution-based judicial review], for so controversial a step would have evoked intense discussion. Instead, there is nary a word, because in context everyone understood this clause as a simple delegation to states of power to choose electors pursuant to their ordinary legal process …."); *see also* Pildes, *supra* note 2, at 727-28 (adding that, "as a matter of historical practice, state legislatures were not understood at the time [of the founding] to be more 'independent' by virtue of [the Electors Clause] than they were when acting pursuant to any other source of authority").

[53] THE FEDERALIST NO. 83, at 558 (Alexander Hamilton) (Cooke ed., 1961); *see also id.* (going on to describe the argument to the contrary as "almost too contemptible for refutation" because "[e]very man of discernment must at once perceive the wide difference between *silence* and *abolition*"; emphasis in original).

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of state legislation as applied to federal elections. Let us assume for the sake of argument, however, that this conclusion is at least debatable. It is on this basis that Professor Morley appeals to the "political theory underlying the Constitution" in arguing that federal courts must endorse the independent-state-legislature theory—and, indeed do so in such an aggressive way as to foreclose state-constitution-based judicial review of state laws concerning federal elections, at least in nearly all cases.[54] In fact, however, the political theory that lay behind the United States Constitution supports exactly the opposite conclusion. And so, too, do the animating purposes that gave rise to section 4 itself.

1. Basic Constitutional Theory and the Independent-State-Legislature Doctrine.

What was the underlying theory that gave rise of the American Constitution? However one might answer that question in a lengthy tract, there are core features of the theory that were well understood at the time of the founding. Moreover, these features work in harmony in counseling rejection of the independent-state-legislature theory, at least in its strongest forms.

To begin with, the makers of the American Constitution did not—to say the least—believe that legislative bodies should be independent.[55] Instead, they believed that legislatures needed to be made subject to a multiplicity of checks and balances within a system of separated government powers.[56] Of overarching significance in this regard, the Framers and ratifiers viewed the legislature as the *most dangerous* branch within the specialized form of republican government that emerged in post-revolutionary America. Accordingly, in the view of leaders of the time—however much that view might differ from common opinions of today—it was the legislative branch that was most in need of being subjected to checks imposed by other governmental bodies and processes.[57] The authors of *The Federalist* made this point time and again, emphasizing that

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[54] *See supra* note 6 and accompanying text.

[55] *See, e.g.,* THE FEDERALIST NO. 73, at 495 (Alexander Hamilton) (Cooke ed., 1961) (noting, in discussing the proposed presidential veto power, that "[t]he oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest"); THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Cooke ed., 1961) (observing that the existence of a judicial check "not only serves to moderate the immediate mischiefs of those [laws] which may have been passed, but it operates as a check upon the legislative body in passing them" in the first place based on "motives of … injustice").

[56] *See, e.g.,* THE FEDERALIST NO. 51, at 347–48 (James Madison) (Cooke ed., 1961) ("To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that . . . the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."); *see also* Smith, Revisiting the History, *supra* note 2, at 457 (describing the independent-state-legislature theory as clashing with the view of "the founding generation" as to the "normal checks and balances of state government").

[57] Of significance in this regard was the radical reformulation of the meaning of republicanism worked by American constitution-makers at both the state and federal levels. The key move made by the architects of these new governments was to repudiate the British model of a *partial* republican system and to embrace instead the idea of implementing *wholly* republican governmental systems. More specifically, within the British model, the executive branch in the form of the monarch was especially to be feared because the monarch was not accountable to the people as a whole (for example, by way of electoral removal) or to the House of Commons (for example, by way of impeachment). Within the republican systems that emerged in the United States, however, all the branches of were republican in character, in the sense that each branch was accountable to the people either directly (by way of electoral

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"[i]n republican government the legislative authority, necessarily, predominates."[58] Thus, as they explained, "the tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments,"[59] so that it is "against the enterprising ambition of this department, that the people ought to . . . exhaust all their precautions."[60] In short, the Framers and ratifiers came at their work with a fundamental understanding that the gravest dangers within republican systems were posed by legislative bodies.[61] And, given this basic understanding, there

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control) or indirectly (because of important checking functions assigned to the people's elected representatives). *See* COENEN, *supra* note 4, at 96–98. And within this new system of republicanism, the federalist creators of the Constitution agreed, the legislative branch posed the greatest measure of danger both because of its unusually "extensive" powers, THE FEDERALIST NO. 48, at 333 (James Madison) (Cooke ed., 1961), and the because of the distinctly built-in danger it posed of becoming the vehicle of tyrannical majoritarian action. *See* COENEN, *supra* note 4, at 79–86, 88–89, 91. *See generally* THE FEDERALIST NO. 48, at 333 (James Madison) (Cooke ed., 1961) ("[The Framers of the State Constitutions] seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."); *id.* at 333–34 (observing that the heightened dangers posed by the legislature within a wholly "representative republic" arise because such a republic operates very differently from a government in which "numerous and extensive prerogatives are placed in the hands of a hereditary monarch," thus rendering the executive branch "the source of danger [to be] watched with all the jealousy which a zeal for liberty ought to inspire"; adding that, within American republics, the same "jealously" and resulting "precautions" need to be directed at "the legislative power" because it "is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions").

[58] THE FEDERALIST NO. 51, at 350 (Alexander Hamilton) (Cooke ed., 1961). *see also* THE FEDERALIST NO. 48, at 333 (James Madison) (Cooke ed., 1961) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.").

[59] THE FEDERALIST NO. 49, at 341 (James Madison) (Cooke ed., 1961); *see also* THE FEDERALIST NO. 73, at 494 (Alexander Hamilton) (Cooke ed., 1961) ("[There is a] propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments . . . .").

[60] THE FEDERALIST NO. 48, at 334 (James Madison) (Cooke ed., 1961). *See also* THE FEDERALIST NO. 71, at 483–84 (Alexander Hamilton) (Cooke ed., 1961) ("The tendency of the legislative authority [is] to absorb every other . . . . In governments purely republican, this tendency is almost irresistable. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves; and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity."); THE FEDERALIST NO. 49, at 341–42 (James Madison) (Cooke ed., 1961) ("The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influencial part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that [in a contest for power] the adverse party would have an equal chance for a favorable issue."); THE FEDERALIST NO. 66, at 448 (Alexander Hamilton) (Cooke ed., 1961) ("[T]he most *popular* branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member of the government.") (emphasis in original); THE FEDERALIST NO. 71, at 484 (Alexander Hamilton) (Cooke ed., 1961) ("[Legislators] often appear disposed to exert an imperious controul over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.").

[61] *See* THE FEDERALIST NO. 55, at 374 (James Madison) (Cooke ed., 1961) ("In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason."); THE FEDERALIST NO. 58, at 395–96 (James Madison) (Cooke ed., 1961) (noting the occurrence in large assemblies of the "the ascendancy of passion over reason"); *see generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 494 (2016).

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is no good reason to suppose that they would have viewed the text of the Constitution as removing, solely by way of section 4's passing reference to "the Legislature," a key (if not *the* key) separation-of-powers-based check on state legislative action.[62]

Of no less importance, the entire constitutional project was driven forward by the Framers' perception that *state* legislatures (in contrast to the federal Congress) were particularly dangerous agencies of government because of their built-in tendency to abuse their powers by mistreating "the minor party."[63] Indeed, a recognition that state legislatures were distinctly susceptible to engaging in oppressive actions—and thus as being most in need of oversight by other arms and processes of government—lay at the very root of the constitutional plan.[64] Nor did the Framers'

[62] The Framers' and ratifiers' focused concern about factional abuses within the legislative branch had its roots in their study of history, which the authors of The Federalist viewed as "that best oracle of wisdom." THE FEDERALIST NO. 15, at 96 (Alexander Hamilton) (Cooke ed., 1961); *accord, e.g.*, THE FEDERALIST NO. 20, at 128 (James Madison) (Cooke ed., 1961) ("Experience is the oracle of truth . . . ."); THE FEDERALIST NO. 72, at 489–90 (Alexander Hamilton) (Cooke ed., 1961) ("That experience is the parent of wisdom is an adage, the truth of which is recognized by the wisest as well as the simplest of mankind."). That history disclosed how popular legislatures, over and over again, had acted in accordance with the same qualities of self-interest, passion, and short-sightedness that are deep-seated features of human nature. *See, e.g.*, THE FEDERALIST NO. 42, at 283 (James Madison) (Cooke ed., 1961) ("[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies . . . by the clamours of an impatient avidity for immediate and immoderate gain."); THE FEDERALIST NO. 10, at 61 (James Madison) (Cooke ed., 1961) ("If the impulse and the opportunity [of a majority faction] be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control."); THE FEDERALIST NO. 6, at 32 (Alexander Hamilton) (Cooke ed., 1961) ("Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals, in whom they place confidence, and are of course liable to be tinctured by the passions and views of those individuals?"); THE FEDERALIST NO. 62, at 418–19 (James Madison) (Cooke ed., 1961) (highlighting "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions"; adding that that "[e]xamples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations . . . ."). These tendencies in turn dictated the wisdom of restricting legislative authority by constructing counterposed institutions prepared to vindicate enduring constitutional rights lest those rights end up serving as nothing more than "fine declarations." THE FEDERALIST NO. 84, at 580 (Alexander Hamilton) (Cooke ed., 1961); *see, e.g.*, THE FEDERALIST NO. 15, at 96 (Alexander Hamilton) (Cooke ed., 1961) (observing that "the passions of men will not conform to the dictates of reason and justice, without constraint"). And the most well-suited institution to guard against these abuses—rooted, as those abuses inevitably are, in a failure to take reasoned account of the society's longer-term interests—lay in empowering the judicial branch, schooled in the importance of ensuring the protection of enduring constitutional principles, to check legislative excesses.

[63] THE FEDERALIST NO. 10, at 57 (James Madison) (Cooke ed., 1961); *see* THE FEDERALIST NO. 60, at 407 (Alexander Hamilton) (Cooke ed., 1961) (citing the lesser likelihood "that any decided partiality should prevail in the councils of the union than in those of any of its members"). *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 438-53 (1969); Sweren-Becker & Waldman, *supra* note 2, at 1004 (observing that "distrust of state lawmakers . . . permeated the final Constitution").

[64] *See* THE FEDERALIST NO. 10, at 60, 62 (James Madison) (Cooke ed., 1961) (asserting that "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens" and that the risk that the citizenry's "chosen body" of legislative "Representatives" will act in this way particularly acute "within [the] particular States"); THE FEDERALIST NO. 27, at 172 (Alexander Hamilton) (Cooke ed., 1961) ("[O]ccasional ill humors or temporary prejudices and propensities… in smaller societies frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes, which though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction and disgust."). *See also* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 522 (1989) (Scalia, J., concurring in the judgment) (citing THE FEDERALIST NO. 10 in observing that "[a]n acute awareness of the heightened

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focused fears of state legislatures have their origins in only theoretical musings. Rather, those fears grew out of the Framers' and the ratifiers' own lived experience—a lived experience that revealed, in their eyes, an all-but-relentless stream of short-sighted abuses engaged in by state legislative assemblies in the post-Revolutionary period.[65] In sum, the federalists of 1787 and 1788, unlike their antifederalist adversaries who failed to thwart the Constitution's ratification, proceeded from the premise that the need for structural checks on "the legislative body" was distinctly strong in "the Small Republic"—that is, in "the States."[66] The Framers and ratifiers also recognized—and, again, not only in the abstract—that a critical safeguard against state legislative malfeasance came in the form of judicial review undertaken by state courts to test whether state laws conformed with state constitutional constraints. Indeed, as Hamilton pointedly explained in discussing the value of judicial review, "[t]he benefits of the integrity and moderation of the judiciary have already been felt in more *states* than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of the virtuous

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danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history," so that the emergence of modern-day evidence of heightened dangers of oppression "at the state and local" level, as opposed to" the federal level" should "come as no surprise").

[65] *See* THE FEDERALIST NO. 10, at 57 (James Madison) (Cooke ed., 1961) ("Complaints are every where heard from our most considerate and virtuous citizens . . . that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority."); THE FEDERALIST NO. 14, at 83 (James Madison) (Cooke ed., 1961) (pointing to "the diseases of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own"); THE FEDERALIST NO. 48, at 334-355 (James Madison) (Cooke ed., 1961) (finding that "proofs" of past state legislative wrongdoing "might be multiplied without end" and disclosed "in abundance from the records and archives of every State in Union"); *id.* at 336-37 (going on to discuss the findings of "the council of censors," which examined the Pennsylvania legislature in 1783-84, finding in the end that the state's "Constitution had been flagrantly violated by the Legislature in a variety of important instances"); THE FEDERALIST NO. 80, at 537 (Alexander Hamilton) (Cooke ed., 1961) ("[F]raudulent laws . . . have been passed in too many of the states."); THE FEDERALIST NO. 63, at 423 (James Madison) (Cooke ed., 1961) (decrying the "iniquitous measures" recently adopted by Rhode Island legislators notwithstanding their susceptibility to electoral removal from office every six months).

[66] THE FEDERALIST NO. 10, at 62, 64 (James Madison) (Cooke ed., 1961). Indeed, in justifying other features of the Constitution, the authors of the Federalist Papers identified additional reasons—that is, reasons that reached beyond the elevated danger of factional legislative abuse in a small republic—for concluding that the need for judicial review of legislative action was especially acute within the states. Madison, for example, emphasized the salutary role that would be played in the federal government by long-serving federal senators in checking short-sighted action by House members who would stand for election every other year. *See* THE FEDERALIST NO. 62, at 418–19 (James Madison) (Cooke ed., 1961) (discussing how giving senators "authority by a tenure of considerable duration" would protect the people from "impulse of sudden and violent passions"). At the time the Constitution was drafted and ratified, however, not a single state had in place a six-year term for senators; indeed, only one state, Maryland, even provided for a five-year senatorial term. *See* THE FEDERALIST NO.63, at 429-30 (James Madison) (Cooke ed., 1961) (discussing the Maryland Senate). In similar fashion, Madison highlighted the risk that within state systems, unlike under the proposed federal Constitution, the likelihood of unchecked legislative dominance was heightened because state judges might well lack protection against legislative retaliation by way of judicial salary reductions. *See* THE FEDERALIST NO. 48, at 334 (James Madison) (Cooke ed., 1961) ("As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former."); *id.* at 337 (noting that, "[t]he salaries of Judges, which the [Pennsylvania] Consitution expressly requires to be fixed, had been occasionally varied" by the state legislature). These points reinforce the conclusion that there is no reason to believe that the Framers and ratifiers would have meant, by way of section 4, to augment significantly the power of already-dominant and greatly feared state legislative bodies by freeing them from state-court constitutional review in dealing with an important category of state legislation.

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and disinterested."[67] Given this outlook, it would be misguided—and, indeed, anomalous—to conclude that, by referring without more to "the Legislature" in the Elections Clause, the Framers meant to put in place an independent-state-legislature doctrine that would nullify the check provided by "the firmness of the judicial magistracy" in "confining the operation of . . . laws" enacted by state legislatures.[68]

2. The Independent-State-Legislature Theory and the Purposes of Section 4

What all of this means is that the independent-state-legislature theory, insofar as it would block state courts from evaluating state legislative action under state constitutions, does not only stand in tension with the most natural reading of the constitutional text; it also clashes with core ideas about how American systems of checked-and-balanced government were understood to operate—core ideas that the Framers and ratifiers openly discussed, firmly held, and built upon in creating our nation's founding charter. Perhaps some proponents of the independent-state-legislature theory would respond that this background-thinking-based account of section 4 misses nuances in the Framers' understanding of how that particular constitutional provision would operate.[69] They might posit, for example, that there is something special about the making of state laws concerning federal elections that mitigated in this context the Framers' and ratifiers' general concern about the risk of tyrannical majoritarian action undertaken by state legislative bodies. But common sense suggests that just the opposite is true. Why? Because factional partisans are especially likely to oppress their political rivals in the context of framing laws that fundamentally shape who holds the levers of government power—that is, by enacting self-serving laws that determine access to, and the impact of, the vote.[70] Nor is this extrapolation supported only by common sense. Rather,

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[67] THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Cooke ed., 1961).

[68] *Id. See also* R. Shapiro, *supra* note 2, 672 (drawing on these considerations in concluding that the history of the founding does not support "the idea that [the Electors Clause] lifts the state legislature out of the usual state governmental framework" so as to render it exempt from ordinary principles of state-court oversight). In particular, these considerations render untenable Professor Morley's claim that the Framers somehow made "a fundamental structural decision" to repudiate state-court judicial review of federal election laws by placing the subject of such elections "under the *ultimate* control of the political—and politically accountable—entities" that are the "representative legislative assemblies." Morley 1, *supra* note 2, at 33. After all, as this discussion reveals, the federalist thinkers who won the battle for ratification were intensely skeptical of "representative legislative assemblies," especially within state systems, precisely because they ware "politically accountable" to factional majorities. *See supra* notes 56-66 and accompanying text. In addition, the underlying premise of Professor Morley's assertion is erroneous because "representative legislative assemblies" were not given "ultimate control" over decisions as to the times, places and manner of federal elections by the Constitution—at least in the relevant sense that the actions of those assemblies could never be overturned by anyone else. In particular, no one doubts that laws on this subject enacted by the "representative legislative assembl[y]" that is Congress were and are subject not only to presidential veto but also to judicial review at the hands of federal courts. The legislature-centric, ultimate-control-based rationale advanced by Professor Morley thus rests on an unsteady foundation.

[69] For one such attempted, but unavailing, conceptualization of section 4, based on the supposed distinction between "procedural" and "substantive" limits on state legislative action, see *supra* note 11.

[70] *See* THE FEDERALIST NO. 61, at 413 (Alexander Hamilton) (Cooke ed., 1961) (identifying specifically the danger that "a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors"). This real-world tendency of political decsionmakers is widely recognized by social scientists and constituional scholars; indeed, it has long influenced decisionmaking in the election-law context by the U.S. Supreme Court. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the*

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as we soon will see, this very concern weighed heavily on the minds of Framers and the ratifiers as they crafted and evaluated section 4 itself.[71]

Faced with this difficulty, adherents of the independent-state-legislature theory might offer in its support another line of defense. Their claim would not be that the Framers decided that state legislatures, for some reason, should be viewed as distinctly trustworthy when they enact federal-legislator-election laws. Instead, their argument would be that the Framers chose to establish a uniquely specialized system of federal-government-only checking of state legislatures when those legislatures wield their power to enact such laws. According to this reasoning, the Framers and ratifiers meant to say that, when state legislatures pass laws on the subject of federal elections, the *only* check on their authority could come by way of the Congress's invocation of its power to "by Law make or alter such Regulations."[72]

The first problem with this argument is that the text does not support it. This is so because it does not follow from the proposition that Congress may displace state laws addressing the election of federal representatives as a matter of legislative policymaking that state courts cannot discharge their entirely separate function of assessing whether those laws abridge the foundational and enduring principles established by the state's charter of government.[73] Indeed, long-accepted features of federal preemption law undermine any such state-court-disempowering view of congressional exclusivity in the checking of state legislative action.[74]

Democratic Process, 50 STAN. L. REV. 643, 648, 650 (1998) (discussing how "partisan forces have manipulated" election rules because "existing holders of political power" often seek "to perpetuate their political control").

[71] *See infra* notes 79-80 and accompanying text.

[72] U.S. CONST. art. 4, § 4, cl. 1. *Cf.* Wise v. Circosta, 978 F.3d 93, 112 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (reasoning, albeit in endorsing only a limited form of the independent-legislature-theory, that section 4 "establish[es] a check on the power of the state legislature" by establishing a "power … given to one institution: the United States Congress"; whereas no such power is expressly "given to the state courts").

[73] *Accord, e.g.*, Weingartner, *supra* note 2, at 32 (concluding that the Framers, by granting the section 4 federal legislative power to Congress, meant "to impose additional checks on state legislatures, not to remove existing ones" in the form of state-court judicial review).

[74] This is the case because the federal Constitution as a general matter vests Congress with the power to preempt many forms of state legislative action without, in so doing, negating the state courts' traditional and freestanding authority to adjudge whether state laws run afoul of state constitutions. In other words, the no-state-court-judicial-review iteration of the independent-state-legislature theory both oddly and dramatically departs from ordinary principles of constitutional preemption law by declaring that Congress has an *exclusive* power to overturn state legislative actions concerning, but only concerning, state-made federal-election-related laws. Nothing in the text or history of the Constitution, however, suggests a design to provide for this one-context-only, state-court-disempowering result. In addition, the Framers could have easily specified in section 4 that congressional intervention would henceforth constitute the only check on the power of state legislatures to enact federal-election laws if they had meant to provide for that result. That the drafters of the Constitution declined to do so (and, from all appearances, even to consider the possibility that such a drafting tweak might serve some useful purpose) signals an underlying design to leave undisturbed the ordinary principle under which laws enacted by state legislatures are subject to state-constitution-based judicial review by state courts. Indeed, this is especially true because, in other constitutional provisions, the Framers made it textually clear that granted powers are "sole" or "exclusive" in the sense that they foreclose action by other arms of government. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 6 (providing that the Senate has the "sole power to try all Impeachments"); U.S. CONST. art. I, § 8, cl. 17 (granting to Congress the power "[t]o exercise exclusive Legislation" with regard to the District of Columbia). The Framers did not indicate in the text of the Elections Clause, however, that the state legislature's lawmaking power as to federal elections was "sole" or "exclusive," particularly

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A second difficulty with this exclusive-congressional-check reading of section 4 is that, as explained earlier, nothing in the historical record indicates that the section was meant to exempt state legislatures from the usual requirement of having to act in accordance with state constitutional limits.[75] This lack of evidence is important because it confirms that section 4 should be read as carrying forward traditional and accepted practice—that is, the practice under which state courts can and do assess whether state laws enacted by state legislatures comport with state constitutions.[76] As it turns out, however, the historical record is telling in another way, too: It discloses the purposes that *did* drive the decision to grant to Congress its section 4 revisionary power. Moreover, a proper understanding of those purposes directly undermines the independent-state-legislature theory.

The decision of the Framers to give to Congress its section 4 power sprang from two concerns. First, they perceived a need to install a curative mechanism for dealing with the possibility that self-interested, even "sinister," state legislators might disrupt the very ability of federal government to function—most notably, by refusing to provide for any election of federal legislators at all.[77] Advancing that purpose, however, in no way supports the extrapolation of a federal constitutional rule that exempts state legislators from complying with state constitutional law when they *do* pass laws providing for federal elections. To the contrary, the underlying thinking that gave rise to this concern—namely, that state legislators tend too often to act in wrongful ways—aligns with the sensibility of leaving in place the ability of state courts to check the misdeeds of state legislatures by continuing to wield the already-recognized power of judicial review.[78]

No less important, the historical record shows that the founders' goals in fashioning the Elections Clause reached beyond simply ensuring that the federal government could operate in the face of state legislative obstructionism. In particular, the Framers and ratifiers feared that state legislatures would engage in self-interested malfeasance in any number of ways as they exercised their section 4 power—including, for example, by configuring electoral districts to discriminate against political

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in such a far-reaching sense that it excluded state courts from wielding their non-legislative and well-settled judicial power to assess whether such laws run afoul of the state constitution.

[75] *See supra* notes 50-51 and accompanying text.

[76] *See supra* note 52 and accompanying text.

[77] *See Ariz. State Legis.*, 576 U.S. at 836 (Roberts, C.J., dissenting) (noting that "Alexander Hamilton and others" justified the empowerment of Congress in section 4 on the ground that it provided a mechanism for addressing "the specter of state legislatures . . . deciding to 'annihilate' the Federal Government by 'neglecting to provide for the choice of persons to administer its affairs'") (quoting THE FEDERALIST NO. 59). *Accord, e.g.*, THE FEDERALIST NO. 59, at 402 (Alexander Hamilton) (Cooke ed., 1961) (expressing concern that states might engage in a "conspiracy" to "prevent an election" of federal officials and noting that this danger needed to be dealt with in part because it would arise every two years); *id.* (adding that state leaders might accede to "the temptation" to "seiz[e] the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited) to discontinue the choice of members for the Federal House of Representatives"); *see also* Sweren-Becker & Waldman, *supra* note 2, at 1006 (noting that this "fear was not far-fetched," thus creating "a risk the whole experiment could collapse," because key antifederalists, such as Patrick Henry in Virginia and George Clinton in New York, were deeply opposed to the Constitution's empowerment of the federal government and "held sway" to a far-reaching degree within their own state legislatures).

[78] *See* THE FEDERALIST NO. 59, at 402 (Alexander Hamilton) (Cooke ed., 1961) (pointing to section 4's underlying focus on addressing the threat posed by the emergence of a "strong faction" in a state bent on undermining federal authority and the resulting "abuse of a power over . . . elections in the hands of the State Legislatures").

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outsiders or to erect other obstacles to voting by disfavored groups.[79] In short, the Framers and ratifiers granted to Congress its section 4 revisionary power to provide a counterweight against state legislative wrongdoing; and this goal of checking state *legislatures* in no way aligned with installing a wholly separate check on state *courts*. Rather, just the opposite is true. Because the federalist leaders who forged and endorsed section 4 meant in doing so to stymy self-interested state legislative abuse, there is no reason to believe that they meant to abrogate the ability of state courts to guard against exactly this same danger by subjecting state-made federal election laws to state-constitution-based judicial review.[80]

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[79] *See Ariz. State Legis.*, 576 U.S. at 815 ("The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."). James Madison made the key points at the Constitutional Convention itself. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240-41 (Max Farrand ed., 1911) (quoting James Madison) (defending the Elections Clause against efforts to further empower state legislatures, at the expense of Congress, because "the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices"; "[i]t was impossible to foresee all the abuses that might be made of the [state legislatures'] discretionary power"; and "the State Legislatures . . . would take care so to mould their regulations as to favor the candidates they wished to succeed"); s*ee also* Sweren-Becker & Waldman, *supra* note 2, at 1002 (noting that the Framers motives in structuring of the Elections Clause included "a distrust of state lawmakers" in light of the "tactics that could be used by incumbent factions and parties to blunt representation and exclude voters"); *id.* at 1007 (explaining that this decision was rooted in concerns, articulated in particular by James Madison, that "state lawmakers would abuse their power in ways that were impossible to predict at the time" so that the need existed to "prevent self-interested partisans from twisting election rules to benefit their faction"); *see also id.* at 999 (noting that the Elections Clause reflected the Framers' "clear-eyed sense of the risk of political abuse by state lawmakers" and that "suspicion of those very legislators suffuses the purpose and history of the Clause"). Nor did the expression of these concerns escape attention as debates over the Constitution, and section 4 in particular, unfolded. *See id.* at 1008–12 (recounting the recurring expressions of concern about the dangers of state legislative abuses in discussions of section 4 in the course of the ratification process; focusing on "denunciation of the likely machinations of self-interested state politicians," the "unvarnished distrust of state legislatures," and fears of "voter suppression tactics by state lawmakers"); *see also id.* at 1009 (noting, in particular, that such concerns were voiced in the state ratification conventions, particularly the critical conventions in Massachusetts, Virginia, and New York, and referencing in particular the argument made by a delegate at the Maryland Convention that "we may easily suppose improper regulations [of federal elections] to take place in a state assembly, from the prevalence and sinister views of a party…."); Weingartner, *supra* note 2, at 31 (noting with regard to debates over ultimate federal or state control under the Elections Clause, that the "Federalists . . . saw state legislatures as the greater threat" with regard to the danger of promoting unfair elections).

[80] *See* Weingartner, *supra* note 2, at 32–33 (explaining why the recognized "purposes" of the Election Clause pointed to in the ratification debates "reveal an overriding concern with unchecked authority over elections and a distrust of state legislatures in particular," so that "it is hard to imagine that the Framers intended the Elections Clause to eliminate" judicial review of state election laws under state constitutions). A related point concerns the ratification-period debate between federalists and antifederalists about the proper scope of Congress's section 4 revisionary power. This story begins with fact that, as the ratification process got underway, there was a starting-point agreement between the federalist and antifederalist camps that state legislatures should be and would be empowered to regulate the times, places and manner of holding federal elections. A question thus arises: What if that approach had been both the beginning and end of the matter, so that *no* power had been vested in Congress to alter state laws regulating the "Times, Places and Manner" of such elections? If this had been the outcome of the contest over ratification, there would be no basis for foreclosing state-court review of state-made federal-election laws, based on the theory of an impliedly exclusive congressional review power, because no congressional review of any kind would have even existed. Moreover, as it turns out, just such an outcome almost occurred. The reason why is that antifederalists viewed with grave skepticism the power granted to Congress by section 4 to displace any state laws concerning federal elections, and they sought to hoist their federalist opponents on their own petard as they challenged this across-the board grant

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An example might help to illustrate this key point. Assume that in, say, 1820 most Catholic voters in New Jersey lived in a small area in the southern part of the state. Assume also that the Protestant-dominated legislature had made it extremely difficult for those Catholics to vote by passing a law that located their polling place for federal elections far away from the area in which they resided. If the New Jersey Constitution at the time prohibited abridgment of the right to participate freely in elections, could it really be the case that the state courts would be barred from applying this provision to protect those voters by invalidating the state legislature's poll-location law? Could it really be, in other words, that the Framers and ratifiers of the U.S. Constitution meant to remove the pre-constitutional power of state courts to invalidate such short-sighted, faction-based, oppressive, and discriminatory measures? To be sure, the federal Congress could, in theory, step in to alter the location of the problematic polling place. But could the federal Congress really be counted on to direct its attention to such a highly specialized and localized law and—in a world in which Catholics might well be an even smaller minority nationwide than in New Jersey—what reason is there to believe that Congress would remedy the injustice even if the matter came to its attention? Again, perhaps the federal courts could rightly read section 4 to foreclose remedial intervention by the state courts in these sorts of circumstances if the historical evidence revealed that the Framers and ratifiers meant to endorse that surprising result. But, as we have seen, there is "no evidence" in the historical record that any such plan was on their minds.[81]

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of congressional authority. More specifically, the antifederalists pointed out that (as noted earlier) the federalists had justified the inclusion of the grant of this congressional power in the Constitution in large part because it was needed to deal with the danger that state legislatures in the future would fail to provide for any federal elections, thus threatening the ability of the federal government to operate at all. *See supra* note 77 and accompanying text. But—so the antifederalists argued—if this were the purpose of the congressional power grant, it did not make sense to give Congress a full-bore authority to regulate federal elections in any way whatsoever. Rather, a proper drafting of section 4 would have authorized Congress to address only wholesale state failures to conduct federal elections. Indeed, the antifederalists were sufficiently successful in pushing forward this argument that some state ratifying conventions specifically proposed that, following ratification, Congress should include in its proposal of follow-up amendments to be sent to the states (that is, in what later became the Bill of Rights), a provision that limited Congress's section 4 power in exactly this way. *See, e.g.*, Sweren-Becker & Waldman, *supra* note 2, at 1014–15 (noting that "many [state-convention delegates] proposed that Congress's power to regulate should only be triggered by a state's complete failure to enact federal election regulations" and that several states ultimately proposed amendments that would have "limit[ed] Congress's power to occasions of state default"). To be sure, such an amendment was never adopted. But the critical point is that no one even hinted at the idea that the presence or absence of the state judiciary's power to review state legislative enactments for compliance with state constitutions hinged on whether the antifederalists' proposed amendment of the Elections Clause was or was not ultimately put in place. And this was the case for a simple reason: At bottom, the scope of Congress's policymaking decisional power under section 4 concerns a subject entirely different from the scope of state court's power to assess the legality of state laws under state constitutions pursuant to the doctrine of judicial review. Thus, as the history of section 4 indicates, the state courts' judicial-review authority was meant to be equally available whether Congress, in the end, had the power to displace no state laws, some state laws, or all state laws concerning the times, places, and manner of federal elections.

[81] *See supra* note 50 and accompanying text. One might respond to this posited case by observing that, had the Framers been concerned about these sorts of legislative misdeeds, they would have included in the Constitution (or at least the Bill of Rights) federal-law protections against them. This line of reasoning, however, fails to take account of the basic architecture of the Constitution, which focused on defining the relations between citizens and the government of the United States, and not between citizens and governments of their own states. *See infra* note 83 (noting the *Barron* case). It also neglects the point that one reason the Framers would not have included extensive protections of citizens against misconduct by their own state legislatures in the United States Constitution is that states could—as many of them did—incorporate such protections into their own constitutions. *See, e.g.*, THE FEDERALIST NO. 84, at 579

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There may be a temptation to dismiss concerns raised by cases of this kind based on the idea that the federal Constitution often provides correctives for state legislative wrongdoing in fashioning federal-representative-election laws, irrespective of state constitutional constraints.[82] Any reliance on this line of thinking, however, is incompatible with the quest to identify the *original* understanding of section 4's operation. The reason why is that imposition of meaningful federal constitutional restrictions on state action—including restrictions that protect discriminated-against voters (and religious or other minorities more generally)—did not take hold until the Fourteenth Amendment was ratified in 1868. Put another way, the original meaning of section 4, which came into being in 1788, must be determined in light of background legal structures, and resulting presuppositions, that existed in the world of that time. And that world was one in which state infringements of individual constitutional rights were to be guarded against, if at all, by state courts applying state constitutions; indeed, there existed no other way for courts to protect individual rights against the actions of state legislators because the federal Constitution, except in rare cases, simply did not speak to that matter.[83] In sum, any argument that the existence of judicially enforceable federal constitutional restraints on the actions of state legislatures might lend support to the independent-state-legislature doctrine by reducing the need for judicially enforceable state constitutional restraints is, from an originalist perspective, wholly without force.[84]

(Alexander Hamilton) (Cooke ed., 1961) (arguing that there existed a lessened justification for establishing individual rights in the federal constitution, which assigns to federal authorities only limited powers, than in the constitutions of the states, which deal with "the regulation of every species of personal and private concerns"). One might also build out this hypothetical case in other ways. Perhaps, for example, the New Jersey constitution that was in place in 1820 also included a protection of the free exercise of religion, which had been interpreted to protect members of particular religious communities from intentional legislative discrimination. Could the state courts have invoked the state constitution's Free Exercise Clause to protect the disadvantaged Catholic voters? Not according to the iteration of the independent-state-legislature theory that would prohibit all state-constitution-based state court judicial review of federal-election-regulating measures.

[82] *Cf.* Morley 2, *supra* note 2, at 16 (responding to critiques of the independent-state-legislature doctrine in part by observing that "[e]ven under [it], legislatures' authority to regulate federal elections would remain subject to numerous important constraints"); *see id.* at 20–21 (asserting, in particular, that "[w]hile the Elections Clause and Presidential Elections Clause permit state legislatures to regulate federal elections without state constitutional constraints, state legislatures remain bound by a wide range of explicit and implicit limitations stemming from both the U.S. Constitution and Congress").

[83] *See* Barron v. Baltimore, 32 U.S. 243, 250-51 (1833) (holding that even the protections afforded by the later-adopted Bill of Rights applied only the actions of the federal government, and not the actions of the states).

[84] There is another point, too. On the better view, taking account of the rights-related limits imposed by the Fourteenth Amendment might be seen as helping to clarify why federal courts should reject any rule that would foreclose state courts from applying state constitutional limits to state laws regarding voting rights in federal elections. The reason why is that, because of the operation of the Fourteenth Amendment, claimants of rights—such as the right to free speech (including speech that criticizes the federal government)—can routinely appeal to two separate sources of law in challenging state legislative action. They can invoke the federal Constitution, and they can also invoke their own state constitution even if they cannot succeed on their federal-law constitutional claim. If state courts cannot invoke state constitutions in the context of assessing state laws that concern federal elections, however, then the right to vote will have its source of judicial protection in such cases *only* in federal constitutional law, thus rendering it a distinctly enfeebled, de facto second-class right. In addition, singling out the right to vote for such junior-varsity treatment is odd, if not anomalous, because the Court often has described voting rights as especially fundamental on the ground that they tend to be "preservative of all rights." Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966). To be sure, some observers have challenged the idea that certain constitutional rights should be viewed as more

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3. State Courts, State Legislatures, and the Independent-State-Legislature Theory

What, then, is left to be said for the independent-state-legislature doctrine? Some analysts might reason that, had the Framers focused on the matter, they would have concluded that allowing state courts to review the constitutionality of state laws regarding federal elections was a bad idea. Perhaps, so the argument would go, the Framers would have found that state court judges might too often overreach in wielding this authority, including by issuing rulings close in time to election-day voting, thus trenching in disruptive ways on choices made by the people's elected representatives. Any such argument, however, is marked by a plethora of weaknesses.

First, this argument rests on wholly speculative assertions about what the Framers and the ratifiers would have decided had they thought about this issue. What is more, according to the most prominent forms of originalism-based interpretation, even the *actual* intentions of the Framers, if internally held and not shared with others, should not count in the process of deciphering the Constitution's meaning.[85] Accordingly, it should follow *a fortiori* that claims about what the Framers and ratifiers *would have decided* had they thought about a matter should not count either—at least when the decision they supposedly would have made is one that conflicts with what the constitutional text dictates in light of widely shared background assumptions about how American republican governments function.[86]

Another problem is that any argument for the independent-state-legislature doctrine rooted in fears of judicial abuse in applying state constitutions in this context proves too much because the risk of such abuse applies to all state laws—not just laws concerning the times, places, and manner of federal elections. No one would argue, however, that this risk justifies the abandonment of state-constitution-based judicial review as a general matter. Moreover, it is well-understood that the state courts' power to invalidate state laws because they violate state constitutions extends to many such laws that concern important federal interests (laws concerning, for example, whether persons convicted of a crime can vote for federal legislative officers at all) and any number of highly time-sensitive matters (such as in cases involving the so-called right to die).[87] The fear-of-judicial-abuse-based argument also runs up against the terms and structure of section 4 itself. After all, that

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fundamental than others. But even if one fully embraces this position, there is no good reason to afford voting rights *less* protection against state infringement than is afforded to all other rights, which is precisely what the independent-state-legislature theory, if given doctrinal effect, would do. *Accord,* Marisam, *supra* note 2, at 2 (reasoning that removing state-court power to strike down state election laws as violative of state constitutional law would improperly "make voting rights the least protected civil right"); *id.* at 38–39 (reasoning that judicial endorsement of "[t]he independent-state-legislature theory would create a system where voting rights are the only civil rights that do not have the double protections of federal and state constitutional law" and that "[t]he fundamental right to vote would, in this way, be the least protected civil right").

[85] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) (stating that the "original meaning of the text" controls, not "what the original draftsmen intended"); *accord, e.g.*, Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (explaining that, "when interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people").

[86] *See supra* notes 20-27 and accompanying text.

[87] *See generally* Marisam, *supra* note 2, at 21–22 (asserting that arguments for the independent-state-legislature doctrine based on the risk of state-court overreaching cannot be squared with the acceptance of state court judicial review in every other context).

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section empowers Congress to check, and prophylactically to guard against, not only perceived state legislative abuses in the enactment of statutes but also perceived state judicial abuses in interpreting state laws, including state constitutions.[88] Especially given the Framers' installation of this textually express congressional check on state judicial excesses, it is hard to justify the extrapolation of a further—and textually non-express—federal judicial check on the state courts' power of judicial review when, as here, such an extrapolation runs against the grain of the most natural reading of the operative constitutional text.

Finally, allowing state legislatures to escape state-court review of federal-election-related laws would contravene the founding generation's *actual* thinking about the *comparative* dangers posed within republican systems by judicial and legislative bodies. The writings of the period are particularly clear on this score—so much so that Hamilton observed, in response to antifederalist handwringing about judicial review, that "the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom."[89] This understanding stemmed in part from the Framers' and ratifiers' perception that (as already noted) the legislative branch was the arm of government "most to be feared," especially because of its built-in susceptibility to factional majority capture.[90] In addition (and also as already noted), this focused worry about legislatures was at its highest ebb when it came to *state* legislatures,[91] and it included in particular openly expressed fears among leading federalists that state legislatures would misuse their powers in establishing governing rules for federal elections.[92] At the same time, the framing generation unmistakably saw the judiciary as the "least dangerous" branch[93]—indeed, "beyond comparison the weakest of the three departments of powers."[94] Nor was this outlook in any way controversial, at least among the federalists whose views won out when the Constitution became law. Rather, it directly tracked the thinking of Montesquieu, the great theoretician of separated powers, whose work was well known to informed observers of the time.[95]

The judiciary's perceived weakness sprang from both the "nature of its functions"[96] and its exposure to checks on its authority that did not apply to state legislatures.[97] Among other things, the power of the judiciary was seen as intrinsically limited because it focused on resolving discrete issues in litigated cases by applying preexisting texts in reasoned fashion in response to

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[88] This is so because Congress has the authority in all cases to "make . . . such Regulations" regarding "the Times, Places and Manner" of federal-legislator elections as it wishes, regardless of whether it does so in response to state legislative or judicial action.

[89] THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Cooke ed., 1961).

[90] *See supra* notes 55-61 and accompanying text.

[91] *See supra* notes 63-66 and accompanying text.

[92] *See supra* notes 77-80 and accompanying text.

[93] THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Cooke ed., 1961).

[94] *See id.* at 523.

[95] *See id.* (quoting Montesquieu for the proposition that "of the three powers above mentioned, the judiciary is next to nothing").

[96] *Id.*

[97] *See id.* at 522–23 (citing "the natural feebleness" of the judiciary and asserting that "the judiciary … will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them" and that, as a result, the real danger in republican systems is that the judiciary will be "overpowered, awed, or influenced by its coordinate branches," especially "the representative body").

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counterpoised arguments made by legal specialists.[98] In addition, at the time of the framing, state judges faced risks of far-reaching legislative reprisals, including by way of state budgetary decision-making.[99] What all of this meant, at the time the Constitution came into being, was that it would "require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution," whatever might be the subject that a challenged statute concerned.[100] In sum, just as surely as the Framers saw heightened reasons to fear the abuse of power by state legislatures, they could and did identify special reasons to worry that state-court judges would wield their own rightful authority with undue timidity.[101] Against this backdrop, to disable state courts from policing state legislatures under state constitutions, based on concerns about state judicial misbehavior in reviewing state legislation concerning federal elections is to stand on its head the Framers' and ratifiers' actual view of the dominant conditions of their time—a view that saw legislatures (especially state legislatures) as worrisomely strong and judges (especially state courts) as worrisomely weak.

Nothing in this assessment of the comparative dangers posed by state courts and state legislatures is meant to suggest that state judges always act in simon-pure ways, wholly free of error or unworthy motivations. Indeed, even while extolling the institution of judicial review, Hamilton acknowledged that "individual oppression may now and then proceed from the courts of justice."[102] That, however, is precisely the point. Having recognized that some judges will sometimes act improperly in wielding the power of judicial review, the Framers and the ratifiers saw that risk as one well worth taking because of the far greater danger posed by legislative bodies that by nature are both uniquely powerful and distinctly inclined to engage in faction-based "encroachments and oppressions."[103]

It was against the backdrop of these considerations that the founding generation forged, evaluated, and ultimately ratified the Constitution, including Article I, section 4. And in light of this historical record, that clause cannot fairly be understood to have stripped state courts of their traditional—

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[98] *See, e.g.*, THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Cooke ed., 1961) (emphasizing that discharging the judicial function will require extensive learning of judicial precedents, which "must demand long and laborious study to acquire a competent knowledge of them"); *see also* THE FEDERALIST NO. 81, at 544 (Alexander Hamilton) (Cooke ed., 1961) (noting that "[t]he members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges").

[99] *See supra* note 66; *cf.* Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?*, *in* ASSAULTS ON THE JUDICIARY: ATTACKING 'THE GREAT BULWARK OF PUBLIC LIBERTY,' Report of the 1998 Forum for State Court Judges 49, 51 (Roscoe Pound Found. ed., 1999) (explaining that "legislative reprisals . . . may threaten both decision and institutional independence").

[100] THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Cooke ed., 1961); *see id.* at 523 (asserting that "the general liberty of the people can never be endangered [by the courts] so long as the judiciary remains truly distinct from both the legislative and executive" and that "liberty can have nothing to fear from the judiciary alone" as long as it is constructed so as not to be placed in "union with either of the other departments").

[101] *See supra* notes 66, 99 and accompanying text.

[102] THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Cooke ed., 1961). *See also* THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Cooke ed., 1961) (noting that "[p]articular misconstructions and contraventions of the will of the legislature may now and then happen . . . .").

[103] THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Cooke ed., 1961); *see generally* THE FEDERALIST NO. 80, at 541 (Alexander Hamilton) (Cooke ed., 1961) ("The possibility of particular mischiefs can never be viewed by a well-informed mind as a solid objection to a general principle, which is calculated to avoid general mischiefs, and to obtain general advantages.").

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and, indeed, celebrated—authority to overturn state laws that violate state constitutional requirements.[104]

III. FEDERAL JUDICIAL AUTHORITY TO SECOND-GUESS STATE COURT INTERPRETATIONS OF STATE CONSTITUTIONS

A critic might respond to the analysis set forth in Part II by saying that it attacks a straw man. "I fully recognize," such a critic would declare, "that the independent-state-legislature theory does not *always* require federal courts to cast aside state-court applications of state constitutional limits to federal-election-related laws." Rather, so the critic would continue, "the independent-state-legislature doctrine only *sometimes* requires federal courts to step in in this way." In other words, federal courts are required to intervene in this set of cases only when the state courts intrude *too much* on the state legislature's Elections Clause power.

At least some judges will worry about the methodological problems posed by this sort of intrude-too-much approach.[105] Whatever one concludes about this concern, however, there are deeper difficulties with the you're-attacking-a-straw-man critique. One problem arises because federal courts should not be able to achieve, by way of a quiet entry through the backdoor, what they cannot accomplish by issuing a loud-and-clear right-through-the-front-door pronouncement. "The Constitution," after all, "is concerned, not with form, but with substance."[106]

There is another problem, too. The difficulty is that the same underlying concerns set out in Part II, all of which counsel against *prohibiting* state-court review of state legislation concerning federal elections, likewise cut sharply against *limiting or diluting* state-court review of state legislation in this context. Part II highlights, for example, (1) the unremarkable character of the use of the term "the Legislature" in Article I, section 4 to signal (and only to signal) the assignment to state lawmakers of a particular lawmaking power that otherwise might have been given solely to Congress; (2) the background understanding that any exercise of lawmaking powers by state legislatures naturally carries with it a susceptibility to judicial review by state courts to ensure compliance with state constitutions; (3) the absence of any indication in section 4's drafting history that state-court judicial review was meant to be made subject to some specialized limitation with regard to federal-election laws passed by state legislatures; (4) the recognition among informed observers of the time that state and federal elections would routinely take place together, thus creating the risk of serious practical problems if different legal rules had to be applied to federal and state elections; (5) the existence of a deep belief among those same observers that the establishment of strong institutional checks on legislative action was of key importance within American republican systems to counter the dangers of majoritarian factional abuse; (6) the reality that the Framers and ratifiers also perceived, based largely on their own recent lived experience,

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[104] *Accord, e.g.*, R. Shapiro, *supra* note 2, at 672 (concluding that the independent-state-legislature theory "does not rest on firm foundations of text, precedent, or history")

[105] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting) (criticizing use of a constitutional test requiring courts to decide whether legislative action impairs presidential authority "too much" because of its "ad hoc, standardless nature"); Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch J. concurring) (suggesting the inappropriateness of a constitutional rule that requires courts to ask whether a state "hasn't done *enough*" to protect voting rights in part because of the difficulty of gauging "how much is enough").

[106] Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

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that this danger was especially acute within state governments, thus creating the highest level of need to counter the risk of such abuses by state legislatures, including through the exercise of the state courts' power of judicial review; (7) historical evidence indicating that, even as they drafted and approved section 4 itself, the Framers and ratifiers focused on the perceived risk that state legislatures might well abuse their authority in promulgating federal-election laws in many different ways; (8) the widely shared belief that the comparative threat of wrongful government intervention by judges, and especially state-court judges, was dramatically less acute than was the threat of wrongful action by state legislatures, thus reinforcing the case for leaving undisturbed the judicial-review power at the state level; and (9) the fact that the Framers and ratifiers relied on this balancing of judicial and legislative dangers in endorsing judicial review as a general matter, with no indication that that balance somehow should or would operate in a different way with regard to the enactment of state legislation concerning federal elections.

The key point here is both apparent and important: Every one of these considerations serves not only to undercut the argument that state courts should never be able to review the legality under state constitutions of state legislation concerning the times, places, and manner of federal elections; in addition, each of these considerations signals that that power should not be significantly watered down or compromised by establishing specialized limits on the accepted state-constitution-based judicial-review power of state courts because of some supposed need, unsupported in the history of the founding, for federal judges to safeguard the "independence" of state legislatures.

The question thus arises whether section 4 imposes any limit at all on the power of state courts to invalidate state laws regarding federal elections on state constitutional grounds pursuant to the so-called independent-state-legislature theory. In part for the reasons just given (and, as we soon shall see, for additional reasons, too), one entirely plausible answer to this question is "no"—as long as the legislature is free to respond to such an invalidation by adopting a new law on the same subject, thus ensuring that it retains the final power, freely exercisable in the long run, to make law in this field, albeit within constitutional boundaries.[107]

On another view, the answer should be "yes." This is the case, so the argument goes, because otherwise the state judiciary might effectively wield legislative, rather than judicial, power, thus usurping the state legislature's constitutionally assigned role. The worry, in other words, is that state judges will make up whatever rules they want to put in place in handling federal-election cases and then pretend that those rules are constitutionally mandated.[108] Perhaps the federal courts

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[107] *See Ariz. State Legis.*, 576 U.S. at 840-41 (Roberts, C.J., dissenting) (explaining, for example, that the result in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)—upholding a state veto-by-public initiative process as applied to a state legislature's federal districting law—was permissible under section 4 because its effect was "to send *the Ohio Legislature* back to the drawing board"; adding that "the legislature was not displaced; … it just had to start on a new redistricting plan"; that "[t]here is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether"; and that the case involved only "imposing some constraints" on the state legislature, as opposed to "deposing it altogether") (emphasis in original).

[108] *See, e.g.*, Republican Party of Pa. v. Boockvar, 141 S. Ct 1, 2 (2020) (statement of Justice Alito regarding denial of motion for expedited review) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority

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will in due course embrace some version of this approach. Even if they do, however, there are at least three reasons—on top of the nine reasons already noted at the outset of this discussion—why, pursuant to the originalist interpretive methodology, any such federal-court power to reevaluate state-court interpretations of state constitutional law should be wielded with the greatest measure of caution and restraint.[109]

First, as noted earlier, the federalist thinkers who won the battle for ratification praised the work of state court jurists who had the "fortitude" to vindicate enduring constitutional values by invalidating state legislation pursuant to the doctrine of judicial review.[110] The interfere-too-much conception of the independent-state-legislature doctrine, however, sends exactly the opposite message. Indeed, it is hard to imagine any decision of a federal court more disrespectful of state-court judges than one that depicts them as taking over the role of the state "Legislature" by only purporting, and not fairly so, to discharge the judicial function in applying the state constitution.[111] Revisiting our southern New Jersey polling-place law, in light of *Moore v. Harper*, helps to illuminate this problem. To begin with, if our hypothetical New Jersey Supreme Court of 1820 were to invalidate the challenged polling-place-location law on state-constitutional grounds, in a reasoned opinion in the wake of extensive adversarial argument, it seems clear that its ruling would constitute a proper exercise of the state court's judicial-review power. But now consider the modern-day *Moore* case. In it, three Justices, by way of an opinion written by Justice Alito, concluded that the Court should have stayed the North Carolina Supreme Court's ruling—that is, that state court's ruling that the state legislature violated the state constitution when it put in place an "intentionally and carefully designed" partisan gerrymandering scheme[112] so "extreme"[113] and

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to make whatever rules it thought appropriate for the conduct of a fair election."); *see also* Epstein, *supra* note 2, at 635 (noting that "we must recognize that it is always possible for any court, at any level, to [interpret state law in such an unjustifiable way] that its decrees can be regarded as judicial legislation").

[109] Notably, a variety of commentators have reflected on what such a restrained version of the doctrine might look like. *See, e.g.*, Litman & Shaw, *supra* note 2, at 32 (suggesting that a proper approach might be to overturn state-court rulings only in cases where the interpretation of state law is so "unforeseeable" and lacking in "any fair or substantial support" that it collides with due-process principles or that federal courts transplant into this context "the extremely rare, extremely limited, and extremely deferential review of state law that is reflected in the adequate and independent state ground doctrine"); Epstein, *supra* note 2, at 619 (endorsing an independent-state-legislature doctrine pursuant to which "[i]t must …be shown [that] the state court's interpretation does not fall within the boundaries of acceptable interpretation, but rather represents what must be termed, for want of a better term, a gross deviation"); Pildes, *supra* note 2, at 708, 710 (supporting federal-court intervention to guard against case-specific state-court implementation of an "abominable or comparable change in law" in a way that could potentially alter election results and thus defeat reliance on preexisting law; but insisting that such intervention can occur only in cases of "patent and fundamental unfairness"; internal quotation marks omitted); *see also* McConnell, *supra* note 2, at 663 (reasoning that, in the "unique context" of *Bush v. Gore*, there was "a constitutionally-based federal interest in ensuring that state executive and judicial branches … not use their interpretive and enforcement powers to change the rules after the fact").

[110] *See supra* text accompanying note 100 (quoting Alexander Hamilton in THE FEDERALIST NO. 78).

[111] *See* C. Shapiro, *supra* note 2, at 55 (making the case that "the [independent-state-legislature theory] is insulting to state courts and can undermine public confidence in the state judiciary").

[112] Harper v Hall, 868 S.E.2d 499, 520 (N.C. 2022).

[113] *Id.* at 509

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"stark"[114] as to qualify as "egregious."[115] In claiming that this state-court ruling would probably run afoul of the independent-state-legislature theory, Justice Alito drew attention to two features of the lower court's analysis: (1) that the Court relied on constitutional rights-creating provisions that did not "say[] anything about partisan gerrymandering";[116] and (2) that, in issuing its decision, the state court chose to "change course" from an earlier ruling in which the court had deemed a partisan-gerrymandering claim to present a nonjusticiable political question.[117] These circumstances, Justice Alito reasoned, indicated that the North Carolina Supreme Court's ruling bore the "hallmarks of legislation," thus rendering it likely to be subject to reversal in light of section 4's grant of the power to make federal election laws to the state's "Legislature."[118]

Now consider how this reasoning would bear upon the anti-Catholic poll-location case discussed in Part II. According to Justice Alito's reasoning, the New Jersey Supreme Court apparently would be barred from invalidating that law if (1) the relevant state constitutional clause did not "say anything" about polling-place locations and (2) a prior set of New Jersey Supreme Court Justices had deemed a related, though different, constitutional challenge to be nonjusticiable.[119] As to the first of these two points, however, a state court's application of a broadly phrased rights-protective constitutional rule to invalidate a state law can hardly be seen as evidencing that court's engagement in legislative, as opposed to judicial, action. After all, the United States Supreme Court itself has issued hundreds of decisions invalidating federal and state laws under the Equal Protection Clause, the Due Process Clauses, and other rights-protective provisions that are set forth in the federal Constitution in extremely generalized language.[120] Yet no one—and especially members of the Court itself—would suggest that all of those decisions, for that reason, bore the "hallmarks of legislation."[121]

As to the second point, it in no way signals that judges are taking on a legislative-type role simply because they are said to move away, to some degree, from past judicial rulings.[122] In fact, different

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[114] *Id.* at 547.
[115] *Id.* at 510
[116] Moore v. Harper, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of an application for a stay).
[117] *Id.* at 1091.
[118] *Id.*
[119] *See supra* notes 117-118 and accompanying text.
[120] For one example, consider *Bush v. Gore*, 531 U.S. 98 (2000), in which the Court applied the guarantee of "the equal protection of the laws" set forth in the Fourteenth Amendment to find a constitutional violation in a state's manner of conducting an election recount, thus effectively determining the result of a presidential election.
[121] *See also* Litman & Shaw, *supra* note 2, at 27 (observing that "federal courts could create some sort of federal constitutional line distinguishing narrow and specific state constitutional provisions from more open-ended ones" but adding that "[t]he constitution makes no such distinction, and federal courts should not invent one").
[122] Notably, in *Moore* itself, Justice Alito did not claim that the North Carolina Supreme Court had overruled the relevant precedent. And rightly so because the earlier case had—as the North Carolina Supreme Court pointed out—involved a challenge under a state constitutional provision that was not relied on in the *Moore* litigation. *See Harper v. Hall*, 868 S.E.2d at 539. Especially in these circumstances—which involved in essence the not uncommon judicial action of distinguishing an earlier case—the court's treatment of that earlier case cannot be fairly viewed as giving its ruling a "legislative" cast. *See, e.g.*, Baker v. Carr, 369 U.S. 185 (1962) (deeming an Equal Protection Clause challenge to state legislative-apportionment rules to be justiciable even though the Court had previously found a Guaranty Clause challenge to exactly the same practice to be nonjusticiable). Justice Alito also pointed to the fact that the relevant provisions of the North Carolina Constitution had not previously been read to establish a limit on partisan

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judges routinely interpret constitutional texts (as well as non-textual rules, such as the political-question doctrine) in different ways—as illustrated by countless decisions of the United States Supreme Court in which different groups of Justices take pointedly different views of the proper resolution of particular constitutional issues, as well as by cases in which one set of Justices chooses to overrule even a longstanding constitutional precedent put in place by a predecessor Court.[123] The existence of such disagreements does not (to say the least) mean that one set of judges is or was engaging in action that bears "the hallmarks of legislation." To repeat: In all but the rarest cases, it is both unfair to and disrespectful of state-court judges to cast them as acting in a nonjudicial manner when they interpret their own state's constitution to strike down a state law—and this is all the more the case when their rulings are based on methods of decision-making that directly parallel how the United States Supreme Court itself routinely acts when it makes decisions interpreting the United States Constitution.[124]

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gerrymandering "for 246 years." Moore v. Harper, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from the denial of an application for a stay). Again, however, this fact does not suggest that the court's ruling was "legislative" in character—as evidenced by innumerable decisions of the U.S. Supreme Court that recognized constitutional principles of the highest importance for the first time only after long spans of time had passed following adoption of the relevant federal constitutional provision. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (rejecting racial segregation of public schools); Reynolds v. Sims, 377 U.S. 538 (1964) (establishing the one-person-one-vote rule of state legislative apportionment); District of Columba v. Heller, 554 U.S. 570 (2008) (determining that the Second Amendment protects the right to possess arms for purposes unrelated to militia service); Nat'l Feder. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (concluding that the Commerce Clause does not support the congressional establishment of "individual mandates").

[123] Nor is this some new phenomenon that would have surprised members of the founding generation. *See* THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Cooke ed., 1961) ("There are endless diversities in the opinions of men. We often see not only different courts, but the Judges of the same court differing from each other.").

[124] Notably, Justice Alito's analysis in the *Moore* case is not subject to challenge on only these grounds. His "hallmarks of legislation" reasoning is also subject to question because it marks a far-reaching expansion of the independent state-legislature-theory to the extent that that theory has been drawn upon in earlier cases, including by the concurring three-Justice plurality in *Bush v. Gore,* 531 U.S. 98 (2000). There, after all, the plurality determined that it had cause to intervene, based on the independent-state-legislature theory, only because the Florida Supreme Court's ruling operated, in their view, to "wholly change" what was set forth in the text of governing law. *Id.* at 114. Nothing in Justice Alito's "hallmarks of legislation" analysis in *Moore*, however, rests on a finding that the North Carolina Supreme Court's reading of its state constitution was one with which "[n]o reasonable person" could agree, *id.* at 114, far less that it was "absurd," *id.* at 119. S*ee also id.* at 114 (acknowledging that federal courts must be "deferential" in assessing whether the state court has reasonably applied the operative legal text); *id.* at 115 (indicating that a "fair reading" of the governing text would be permissible, whereas an "impermissible distortion" of the governing text would not be); *see also* Democratic Nat'l Comm. v. Wis. Leg., 141 S. Ct. 28, 34 n.1, 35 (2020) (Kavanaugh, J., concurring) (concluding that, because the "the clearly expressed intent" of the lawgivers must control under the Elections Clause, state courts may not "rewrite state election laws"); Republican Party of Penn. v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting) (finding cause to intervene because the Pennsylvania court "violated the Constitution by overriding 'the clearly expressed intent of the legislature'" in interpreting the relevant text); Carson v. Simon, 978 F.3d 1051, 1062 (8th Cir. 2020) (concluding that a state administrative official could not settle a pending lawsuit, consistent with the Electors Clause, by establishing a rule in "direct contradiction to Minnesota election law" as set forth in the governing text); Wise v. Circosta, 978 F.3d 93, 104-05 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (declaring that non-legislative state officials cannot cause the "the work of the elected state legislatures" to be "undone" by rendering the "plain wording of [its] enactments … transgressed"); *id.* at 115 (indicating that federal courts can intervene to protect state-legislature prerogatives only if the state court has endorsed an interpretation of state law that departs from its "clear" commands); *id.* at 155 (precluding departures from a "clear mandate" reflected

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A second reason exists for giving only the narrowest application to any independent-state-legislature doctrine if such a doctrine is to be recognized at all: Permitting federal courts to second-guess the interpretation of state laws by state courts raises a direct threat to core principles of constitutional federalism. There is much to be said about this topic, but the main point is that all of our constitutional traditions, which in turn are founded on the Framers' and the ratifiers' establishment of a vibrant federal system, support this conclusion. More specifically, both bedrock theory and longstanding practice dictate that (1) the citizens of each state are entitled to establish their own state's constitution and (2) it is the task of state courts, which operate on behalf of the state's citizens, to interpret state law, including state constitutional law.[125] Nor can the tension between principles of constitutional federalism and the independent-state-legislature theory be brushed aside by claiming that federal courts do not interfere with federalism values when they simply "referee" whether state judges or state legislatures should have the final word on whether particular state laws will operate within the state.[126] This is the case because few doctrines pose a greater affront to principles of constitutional federalism than ones, like the would-be independent-state-legislature doctrine, that contravene fundamental choices made by a state's own citizens concerning *which government decision-makers* should hold the power to address key questions that affect those state citizens' lives.[127] To be sure, a state's citizenry could choose to fashion a state constitutional rule that blocks their state courts from applying state constitutional restraints to state legislative pronouncements about how to conduct federal elections. But it should matter greatly, with regard to constitutional federalism, that the citizens of a state have made precisely the opposite choice. Put simply, it is matter of high importance whether a state's citizens can protect themselves from short-sighted and oppressive decision-making by their own legislature in establishing how their own elections for their own federal representatives are conducted by subjecting that decision-making to judicial review by their own courts. And because the independent-state-legislature theory, to the extent it is reified in federal law, strips away from the

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in the governing legal text); Tex. League of United Latin Am. Citizens v. Hughes, 978 F.3d 136, 150 (5th Cir. 2020) (Ho, J., concurring) ("It is … offensive to the Constitution to rewrite Texas election law by executive fiat [or] judicial fiat").

[125] *See, e.g.*, Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291, 297 (1832) ("The Constitution assigns the final determination of state law to state courts"); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1875) ("[t]he State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise"); Kansas v. Marsh, 548 U.S. 163, 184 (2006) (Scalia, J., concurring) ("When state courts erroneously invalidate actions taken by the people of a State (through initiative or through normal operation of the political branches of their state government) on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy.") (emphasis in original). *See generally* Amar & Amar, *supra* note 2, at 25 (detailing why "state courts" are viewed as providing "the last word on the meaning of state law," including state constitutions).

[126] *Cf.* Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (suggesting, at least implicitly, that federal-court decisions overturning state court rulings regarding state federal-election-related laws raise at most a limited threat to constitutional federalism because such rulings do not "imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislature*") (emphasis in original).

[127] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (recognizing that a citizenry's decisions regarding "the character of those who exercise government authority" are central to how "a State defines itself as a sovereign"); Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

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state's citizenry this basic self-governing power, it clashes directly with core norms of constitutional federalism.

The underlying point is that a state is not an aggregation of government institutions, government offices, and government officials; rather, "[a] state ... is a political community of free citizens" [128] who are empowered to structure their governing institutions as they see fit, so long as they operate within a "Republican Form of Government."[129] Thus, for federal courts to overturn the choice of a state's own citizens that their state courts should be able to invalidate state legislation, including state legislation concerning that state's election of that state's federal representatives, is to infringe on the autonomy of that state's self-governing people in a distinctly serious way.[130]

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[128] Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1869).

[129] U.S. CONST. art. IV, § 4.

[130] *Accord, e.g.*, Litman & Shaw, *supra* note 2, at 27 (questioning the independent-state-legislature theory because it effectively calls for federal judicial "tinkering with the state's governance structures, including how ... the state chooses to allocate governing authority within state government"; citing in support of this analysis the work of Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988), which advocates—including on the basis of the Guarantee Clause—the imposition of significant limits on the federal government's power to interfere with state-based choices concerning how to allocate state decision-making power); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1170-71 (2007) (asserting that, "when federal courts defer to a particular branch of state government at the expense of another branch, they infringe on State sovereignty" because they "essentially dictate what state constitutional law should be," thus "nullify[ing] the power of the people within the States to define their government"). Nor do the federalism-related problems presented by the independent-state-legislature theory stop here. One additional problem raised by the "hallmarks of legislation" approach, and comparably interventionist rules, arises because the Supreme Court repeatedly has emphasized the importance of structuring federal constitutional doctrine so as to avoid the creation of confusion among citizens about rightful accountability, between state and federal officeholders, for the making of important government decisions. *See, e.g.*, New York v. United States, 505 U.S. 144, 168-69 (1992); Printz v. United States, 521 U.S. 898, 929-30 (1997); United States v. Lopez, 515 U.S. 549, 576-577 (1995) (Kennedy, J., concurring) (emphasizing the need for federal courts to maintain "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States"; reasoning that: "If, as Madison expected, the Federal and State Governments are to control each other, see THE FEDERALIST NO. 51, and hold each other in check by competing for the affections of the people, see THE FEDERALIST NO. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function."). The risk of blurred accountability is limited when state courts apply federal law as interpreted by the U.S. Supreme Court in deciding state-court cases because citizens broadly understand that state courts must honor the high Court's pronouncements on the meaning of federal law. Were the federal courts to endorse a strong version of the independent-state-legislature theory, however, a far more serious danger of accountability confusion would arise. Consider the unenviable position of the state supreme court justice who honestly and honorably believes that the state constitution requires Result A, but also anticipates that the U.S. Supreme Court, in applying the independent-state-legislature doctrine, is likely to find that Result A bears "the hallmarks of legislation." Such a state-court justice has two alternatives. First, the justice can embrace Result A, with the likely consequence of being reversed by the U.S. Supreme Court and depicted in the process as engaging in legislative, and thus lawless, behavior. Second, the justice can reject Result A, thus rendering a ruling on state law—and becoming exposed to "public disapproval" for rendering that ruling (*New York*, 505 U.S. at 168-69)—even though the justice chooses to make that state-law ruling only because of pressures exerted by the federal Supreme Court's endorsement of the independent-state-legislature doctrine. Either way, the state-court justice becomes open to rebuke among the electorate not because of that justice's own exercise of independent judgment but because of under-the-radar pressures exerted by the federally promulgated independent-state-legislature doctrine. *See*

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Any rule under which federal courts could set aside state-court rulings because they supposedly bear "the hallmarks of legislation" also would raise a separate, and particularly severe, federalism-related problem. The problem is that any such rule would inexorably push federal courts to deploy a *federal*-law methodology to assess whether state courts have overstepped *state*-law constitutional limits.[131] Perhaps, for example, federal judges would gravitate toward detecting the "the hallmarks of legislation" in the work of any state court whose reading of state constitutional law strikes those federal judges as too loosely tethered to a specifically-phrased legal text.[132] But it may well be, as a matter of a particular state's governing law, that the absence of such a tight textual fit is not a matter of determinative importance—perhaps, for example, because that state's longstanding jurisprudence favors a more purpose-sensitive style of reading legal texts.[133] Other states, too, may favor their own interpretive approaches, such as by endorsing a representation-reinforcing style of judicial review founded on a specialized vision of the proper, and oftentimes very limited, role of

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id. (justifying endorsement of the anticommandeering doctrine based in part on the risk of unjustifiable "electoral ramifications" for "state officials" if they act as they do because of "federal coercion" and not the basis of their own free choice). This set of facts also shines a light on a separate, but related, problem raised by the independent-state-legislature doctrine to the extent it permits federal judges to undo state-court interpretations of state constitutional law. The difficulty is that when (as is likely) state judges take the second of the two decisional pathways available to them in resolving the sort of issues presented by our hypothesized "Result A" case—that is, by under-reading state constitutional limits to avoid reversal by the U.S. Supreme Court—the intrusion on principles of constitutional federalism becomes particularly acute. Why? Because when state judges interpret their own state constitutions' provisions that bear upon state residents' voting rights, they are interpreting constitutional provisions that define voting rights not only for purposes of *federal* elections but for purposes of *state* elections as well. The consequence is that efforts to avert reversal by the Supreme Court inevitably will have significant *spillover* effects. *See* Marisam, *supra* note 2, at 39 (observing that "State laws setting the rules for elections apply generally to both state and federal races"). Moreover, these spillover effects will distort state law with regard to state elections not only by diminishing the individual *voting rights* of state citizens in those state elections; they also will impair *basic state choices about the structure of self-governance* by effectively altering the rules that determine how states conduct elections for their own officeholders—including their most important officeholders—in a way that departs, perhaps significantly, from how those elections otherwise would take place. Yet any such rearrangement of basic decisions about state self-governance raises the most serious tension with principles of constitutional federalism. *See also* THE FEDERALIST NO. 59, at 399-400 (Alexander Hamilton) (Cooke ed.) (noting that "no man would have hesitated to condemn" the inclusion in the Constitution of a provision "empowering the United States to regulate the elections" of state officers).

[131] *See* C. Shapiro, *supra* note 3, at 5 (noting the likelihood that recognition of an independent-state-legislature doctrine would require that "the Supreme Court … undertake its own textualist interpretation of state election law, de novo, without deference to state courts'… interpretive methodology").

[132] The point is not merely hypothetical. After all, as noted earlier, the three Justices who voted to issue a stay in *Moore v. Harper* relied in part on the state supreme court's inability to point to a state constitutional text that specifically refenced the problem of political gerrymandering. *See supra* note 117 and accompanying text.

[133] *See* Pildes, *supra* note 2, at 721 (distinguishing "purposive interpretation" from "textual interpretation," which tends to disallow analysis of the lawgivers' "underlying objectives"; adding that the application of these contrasting methodologies "has varied both over time and between different courts within our radically decentralized system of legal authority" and that "this is not the kind of question on which the Supreme Court can impose a uniform approach on all courts").

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the judicial branch.[134] For state courts to apply such theories of interpretation in giving meaning to state law is not wrong. Indeed, theories of this sort have guided decision-making by the U.S. Supreme Court itself in interpreting the U.S. Constitution over many years.[135] Against this backdrop, any decision by a federal court to supplant the underlying interpretive method used by a state court to interpret its own state constitution—as the independent-state-legislature theory, at least in its strong forms, effectively requires federal courts to do—raises a profound federalism-related problem. It does so because the embrace of a federal-law-based interpretive uniformity in adjudging whether state-court rulings bear "the hallmarks of legislation" clashes with the appropriate emergence, within our federal system, of different approaches to the judicial interpretation of local law within each of the nation's diverse, quasi-sovereign, and self-governing states.[136]

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[134] *See, e.g.,* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (detailing and expanding on that the process-centered representation-reinforcement theory set forth in 1938 in footnote 4 of *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), which guided Supreme Court decision-making in later decades).

[135] *See, e.g.,* Pildes, *supra* note 2, at 712 (noting, in keeping with Professor Ely's account (*see supra* note 134), that "post-1938 Supreme Court jurisprudence has found constitutional intervention most readily justified when democratic institutions are potentially compromised and hence to be distrusted with respect to particular issues" and that "much of modern constitutional law treats this distrust as present when democratic institutions are potentially self-interested players in the issue at hand"). Nor is this surprising, because there exists founding-era rhetoric that be seen as supporting the use of such methodologies by the federal courts. *See, e.g.*, THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Cooke ed., 1961) (suggesting the propriety of invalidating legislative enactments because they are contrary to the "manifest tenor" of the Constitution and commending state courts for drawing on state constitutions in issuing rulings that "mitigate[ed] the severity and confin[ed] the operation" of "unjust and partial laws"); THE FEDERALIST NO. 81, at 542 (Alexander Hamilton) (Cooke ed., 1961) (responding to arguments that federal judges will be "superior to the legislature" because they will be able to engage in interpretation according to the "*spirit* of the constitution" not by asserting that courts have no such power but instead by observing that according such a power to federal judges would not "give[] them any greater latitude in this respect, than may be claimed by the courts of every state"); *id.* at 545 (discussing the potential permissibility of judicial decision-making pursuant to "the general principles of law and reason"—in particular, in support the invalidating of legislative acts overturning judicial judgments); *see also* COENEN, *supra* note 4, at 180-81 (suggesting that, notwithstanding the availability of counterarguments, Hamilton's FEDERALIST NO. 81 can be viewed as effectively rebuffing antifederalist critiques of judicial review to the extent it is based on "the reason and spirit," as opposed to "the letter," of the Constitution). To be sure, there is much debate about what interpretive methodologies federal courts may properly deploy as they work to determine the meaning of the U.S. Constitution—including, in particular, whether they should be guided either wholly or primarily by the originalism-based style of interpretation that is the focus of this article. The important point to be made here, however, is that such debates properly concern how *federal* courts should go about interpreting *federal* constitutional law. It is an entirely different matter for *federal* courts to dictate to *state* courts how they should go about interpreting *state* constitutional law. Put simply, it comports with our system of federalism, at a fundamental level, for states to be able formulate their own legal systems, including their own legal systems of state constitutional interpretation, free of interference by federal courts, whose mission is not to formulate state law.

[136] *Accord, e.g.,* Kramer, *supra* note 23, at 123-24 (reasoning that overlaying a federal-law-based "plain meaning" approach on state-court interpretation of state law would "permanently alter the internal structure of state government"); Litman & Shaw, *supra* note 2, at 3 (rejecting any "narrow mode" of interpretation of state law by the federal Supreme Court because it would create "an exceedingly poor fit with the myriad and varied institutional arrangements in the states"); C. Shapiro, *supra* note 2, at 41-47, 52-55 (expressing concern that, among other things, "a maximalist [independent-state-legislature doctrine] essentially federalizes the interpretation and application of state election law as it applies to federal elections" in a manner that disrespects "State courts' understanding of and

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CONCLUSION

There is more to be said about the independent-state-legislature theory. Among other things, there exist both judicial and legislative precedents concerning the theory that have generated extensive commentary by constitutional scholars.[137] Here, however, the focus is not on the post-ratification actions of Congress, the state legislatures, or the state and federal courts. Instead, it is on the constitutional text and its original meaning, including as illuminated by ratification-era writings, such as the Federalist Papers.[138]

The analysis offered here focuses attention on the precise wording of section 4, the judicial-review-supportive legal backdrop against which that text was adopted, the framing-era purposes of the Elections Clause itself, and the deep theoretical commitments—centered largely on fears of state legislative abuse—that drove at a basic level the entire constitutional project. All of these considerations join together in supporting three main conclusions about the original meaning of the Elections Clause. First, section 4 does not foreclose state courts, in any across-the-board way, from evaluating whether state legislation regarding federal elections violates state constitutions. Second, the same reasons that dictate this conclusion—and other reasons as well—cut sharply against recognizing any principle that would expose state court rulings on the constitutionality of state-made federal-election-laws to second-guessing by federal courts on the ground that such rulings bear the "hallmarks of legislation" as that term is used by Justice Alito in his provisional treatment of the issue presented in *Moore v. Harper*. Finally, even if there does exist some

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immersion in their states' legal culture, precedent, and constitutions," *id.* at 54); R. Shapiro, *supra* note 2, at 685 (suggesting that any fair inquiry into whether state courts have invaded a state legislature's rightful sphere of action would require a "comprehensive assessment of a particular state's constitutional system" with a state-specific sensitivity to "the relationship among the constitution, the legislature, and the courts"); *id.* at 688 (adding that "constitutional structure, constitutional history, and constitutional culture" vary from state to state and that "a recognition of this variety and contingency casts doubt on the wisdom of assigning the interpretive task [with regard to declaring the meaning of state law] to the United States Supreme Court").

[137] Of particular importance with regard to the question of original meaning is the work of Professor Smith, who reports that "the 'legislatures' which engaged in the first exercises of the power pursuant to the Elector Appointment and Elections Clauses clearly believed that they were bound by their state constitutions." Smith, Revisiting the History, *supra* note 2, at 460. In addition, much ink has been spilled on the lessons to be gleaned, and not gleaned, from early Supreme Court rulings, particularly *McPherson v. Blacker*, 146 U.S. 1 (1892). *Compare, e.g.*, Morley 2, *supra* note 2, at 15 (arguing that *Blacker* lends support to the independent-state-legislature theory), *with* Amar & Amar, *supra* note 2, at 30-33 (arguing that advocates of the theory have greatly overread *Blacker*). Professors Amar and Amar have also directed attention to more recent decisions of the Court, including by arguing that the Court's ruling in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), undermines arguments for stripping state courts of their traditional judicial-review power pursuant to the independent-state-legislature theory. *Id.* at 35-36. Perhaps the most extensive historical account has been offered by Michael Weingartner. *See* Weingartner, *supra* note 2. Based on that account, he concludes that, "[s]ince the Founding, there has been a consistent, deliberate practice of state constitutions regulating federal elections and constraining state legislatures, one which enjoys the acceptance of courts, Congress, the public, and even state legislatures themselves." *Id.* at 4. Thus, he concludes that "longstanding practice, spanning all fifty states and with only scattered exceptions throughout history, has settled the meaning of the Elections and Electors Clauses and foreclosed the [independent-state-legislature] theory." *Id.* at 3.

[138] This is not to say that judicial and legislative precedents cast no light on the original meaning of section 4. Indeed, those precedents may shed much light, especially insofar as they reflect actions taken near in time to the Constitution's promulgation and ratification.

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specialized limiting principle that empowers federal judges to overturn state-court invalidations of federal-election-related laws in some circumstances, the federal judiciary should apply that principle in only the most circumspect and restrained way.

Some analysts have advanced policy arguments for embedding in American law doctrines based on the independent-state-legislature theory.[139] The most prominent of these arguments focuses on the claimed value of channeling authority regarding the governance of federal elections to democratically accountable state legislative officials.[140] This argument is subject to criticism on

[139] McConnell, *supra* note 2, at 661-62 (invoking "functional justifications," not rooted in the "legislative history," in support a limited form of federal-court review under the independent-state-legislature theory); Pildes, *supra* note 2, at 720 n.92 (noting, for example, that "Judge Posner has defended the [approach of the concurring Justices] in *Bush v. Gore* on pragmatic … grounds").

[140] *See* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch J., concurring) (arguing for restrictions on judicial interference with election laws because "[l]egislators can be held accountable by the people for the rules they write or fail to write," while "typically, judges cannot"; adding that "[l]egislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful" and that legislatures "enjoy far greater resources for research and factfinding on questions of science and safety"); Tex. League of United Latin Am. Citizens v. Hughes, 978 F.3d 136, 154 (5th Cir. 2020) (Ho, J., concurring) ("The Constitution vests control over federal election laws in state legislatures, and for good reason—that's where we expect the voice of the people to ring most loudly and effectively."); Marisan, *supra* note 2, at 19 ("Political accountability is, perhaps, the main justification given for the independent state legislature theory."). Another policy argument points to the danger that judges will unwisely and disruptively interfere with elections at the eleventh hour. *See, e.g., Democratic Nat'l Comm.*, 141 S. Ct. at 30 (Gorsuch J., concurring) (expressing concern about "[l]ast-minute changes to longstanding election rules"); *id.* at 31 (Kavanaugh, J.) (expressing similar concerns); Wise v. Circosta, 978 F.3d 93, 117 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (assailing state judicial actions "changing the rules of the upcoming elections at the last minute" because doing so "is making the courts appear partisan, destabilizing federal elections, and undermining the power of the people to choose representatives to set election rules"); Epstein, *supra* note 2, at 619 (noting, in the process of endorsing a narrow independent-state-legislature doctrine, that any claimed ability of the legislature to change applicable law "after a popular election" is "very disconcerting"); Marisam, *supra* note 2, at 26-27 (noting the existence of arguments along these lines). Worries about rule changes made by way of late-in-the-game state-court interference with federal elections, however, would seem to be best dealt with by developing doctrines that specifically target such interference. *See, e.g.*, Pildes, *supra* note 2, at 702-07 (detailing why state-court implementation of "new law" in the midst of an election dispute can raise serious problems when put in place after an election occurs, thus denying "fundamental fairness" through the creation of "vote dilution" and/or the compromising of legitimate "reliance" interests but endorsing adoption of limits on wholly "new rules" imposed by courts near in time to, of after, the submission of votes to deal with these problems); McConnell, *supra* note 2, at 663 (characterizing *Bush v. Gore* as a "unique context" case warranting federal intervention to address "after the fact" election-rule changes). In other words, concerns along these lines do not warrant "throwing out the baby with the bathwater" by entirely foreclosing (or broadly limiting) *all* state-court application of state constitutions to problematic state election laws under any circumstances. It is noteworthy, in this regard, that the North Carolina Supreme Court's ruling in *Moore* did not involve anything remotely like a late-in-the-game rejiggering of previously governing election-law rules in the context of a concrete election dispute. Instead, that case involved a challenge brought close on the heels of the state legislature's issuance of a congressional district map presumably designed to last for ten years. It is noteworthy in this regard that Professor McConnell, among others, has argued that there is value in promulgating election rules in an "ex ante" fashion—that is, "behind a veil of ignorance" because such action is taken "in advance of any particular controversy." McConnell, *supra* note 2, at 661-62. This rationale would, for example, provide a basis for federal-court intervention in the sort of post-election-day dispute about voting-making and vote-counting procedures presented by *Bush v. Gore* if a state court's action in fact involved (as Chief Justice Rehnquist concluded it did in that case) implementation of a new rule that dramatically departed from preexisting law governing the administration of elections. This concern, however, is entirely absent in a case like *Moore*. That case, after all, involves neither a post-voting controversy nor a dispute regarding generally applicable election-administration rules nor the legislature's acting "behind the veil of ignorance." Indeed, as to the last point, it

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its own terms.[141] But the deeper difficulty with the argument lies in its lack of an anchorage in the thinking of the Framers and ratifiers themselves and, indeed, in the direct tension that it raises with the focused fears of factional state legislative abuse that pervaded the constitution-making process.[142] Along the same lines, proponents of the independent-state-legislature theory have voiced concern that "[o]ur country is now plagued by a proliferation of pre-election litigation that creates confusion and turmoil."[143] Again, however, worries about perceived problems that "now" exist do not illuminate the Constitution's *original* meaning. What matters in discerning that meaning are the words of the Constitution itself and the conditions that surrounded their use as our founding charter made its way to becoming law. And what we know about those words and those conditions points with clarity to one conclusion: Federal courts lack the authority to formulate federal constitutional doctrine, at least in any highly interventionist form, founded on the so-called "independent state legislature" theory.

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is hard to imagine any action that involves less of a neutral, detached and mechanics-only-type legislative decision than one that purposefully seeks to structure electoral voting districts so as to favor members of the "in" political party over their "out" political opponents. *See id.* (emphasizing that, when a legislative election code is enacted, "no one knows (for sure) which rules will benefit which candidates"—as illustrated by the facts of *Bush v. Gore* in which "no one could have guessed in advance which candidate would favor strict enforcement of vote counting deadlines, no one could have guessed which candidate would benefit from counting ambiguous chads and dimples as votes, and no one could have guessed how the choice between optical scanning and punchcard voting systems would affect the relative positions of the candidates." *Id.*

[141] For example, the argument's focus on channeling decision-making to electorally accountable government officials is not free of complexity because most state judges—like state legislators—have to stand for election. In addition, this argument oddly preferences legislative authority regarding federal elections over legislative authority in every other area of law—and it does so despite common-sense concerns about the heightened dangers of partisan nest-feathering in the election-law context. *See, e.g.*, Tex. League of United Latin Am. Citizens v. Hughes, 978 F.3d 136, 154 (5th Cir. 2020) (Ho, J., concurring) (noting that skepticism about politicians regulating politics is "deeply engrained in our nation's DNA" and that "[a]s Americans, we have never trusted the fox to guard the henhouse"; internal quotation and citation omitted). The broader point is that fears of judicial abuse as state courts review federal-election-related laws, *see, e.g.*, R. Shapiro, *supra* note 2, at 662-63 (viewing the plurality opinion in *Bush v. Gore* as based on the perceived "need to protect the state legislature from the state courts" in light of concerns about "unprincipled judicial activism"), must be weighed against fears of legislative abuse in the making of those same laws in the first place—with there being much reason to conclude that the latter set of fears is rooted in a far more worrisome set of potential dangers. *See generally supra* notes 70-71, 79-80 and accompanying text. To say the least, this footnote is not meant to supply a comprehensive response to the *policy* arguments offered in support of the independent-state-legislature theory, far less to identify all the countervailing considerations of policy that might cut in the other direction. *See, e.g.*, Persily et al., *supra* note 2, at 739 (detailing why, courts "at a minimum" should exercise "caution" in applying any independent-state-legislature doctrine because any "aggressive judicial intervention" pursuant to such a doctrine would inevitably spawn a wide range of "knotty questions"); Pildes, *supra* note 2, at 713 (reasoning that federal courts might have structural advantages over state courts in policing *state* elections of state officials—for example, state governors—because state judges often interact with such officials, but that "federal courts have no unique structural advantage that would incline them toward greater impartiality in federal elections" because, for example, members of the federal judiciary are appointed by federal Presidents and confirmed by federal senators). All of these matters range beyond the subject of this article because they do not focus on the Constitution's original meaning.

[142] *See, e.g., supra* notes 20-27, 57-68 and accompanying text (highlighting the Federalist Papers' unstinting endorsement of state-court judicial review and recurring expression of intense mistrust of state legislatures, including in the election- law context).

[143] Wise v. Circosta, 978 F.3d 93, 117 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting).

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DEBUNKING THE NONDELEGATION DOCTRINE FOR STATE REGULATION OF FEDERAL ELECTIONS

One objection to the conduct of the 2020 election concerned the key role played by state executives in setting election rules. Governors and elections officials intervened to change a host of regulations, from ballot deadlines to polling times, often acting pursuant to legislation granting them emergency powers. Some advocates, politicians, and judges cried foul. They argued that state legislatures may not devolve the power to set the "Times, Places, and Manner" of federal elections under Article I, Section 4 of the Constitution.

This Article contests that view. Drawing on a survey of elections statutes in the thirteen original colonies, I argue that local officials frequently made critical decisions about the time, place, and manner of early American elections. Executive officers like sheriffs and local officials like selectmen had enormous discretion to determine the time and place of elections, and sometimes also their manner. That discretion was repeatedly affirmed by Congress. Advocates of the Independent State Legislature ("ISL") theory must interpret these ***1092** *exercises of local power as evidence that Founding-era legislatures delegated their power under the Elections Clause. As a doctrinal matter, this history suggests that courts embracing the ISL theory ought to accord a broad permission for legislatures to delegate their Elections Clause powers today. For opponents of the ISL theory, the history of local power over federal elections may provide further reasons to question the literal meaning of the term "legislature" in Article I, Section 4.*

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INTRODUCTION

Imagine that a state legislature amends its election laws by passing the following statute: "The Secretary of State is authorized to amend existing election law if, in her judgement, such amendments would promote the fairness of an upcoming election." Call this the "Delegation Act"; assume it is legal under the state constitution. Would a regulation promulgated under this Act violate Article I, Section 4 of the U.S. Constitution?

***1093** This hypothetical question was exactly the one faced by tens of federal courts during the 2020 election, when state executives across the country began modifying election rules to ensure COVID-safe elections. The result was a serious divide between Supreme Court precedent and a literalist reading of the Elections Clause pressed by textualists.

Article I, Section 4's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." [1] Precedent going back over a century reads this clause broadly, such that that "Legislature" means "whoever is allowed to legislate." [2] Under this rule, the Delegation Act is legal: the Secretary of State is authorized to promulgate regulations and is thus "allowed to legislate" [3] This interpretation was most recently affirmed by the U.S. Supreme Court in 2015. [4]

But several Justices have advocated discarding this precedent in favor of an alternative theory of the Elections Clause that features a so-called "Independent State Legislature" ("ISL"). [5] When the Elections Clause speaks of the "Legislature," they say, it means that exactly one entity may regulate the time, place, and manner of federal elections: "the representative body which ma[kes] the laws of the people." [6] Legislatures are thus "independent" when regulating federal elections in the sense that they are unbound by state constitutions (and, by implication, are free of ***1094** the institutions that enforce state constitutions, namely state courts). [7] As this Article was going to press, the Court granted certiorari to reconsider the ISL theory. [8]

The Delegation Act raises a different question arising from the literalist reading of the Elections Clause: May the legislature itself convey its power? This Article argues that the right answer is yes. The Federal Constitution allows expansive legislative delegations under the Elections Clause.

That claim is contested among proponents of the Independent State Legislature theory. Some approve of delegations. Chief Justice Rehnquist's concurrence in *Bush v. Gore* [9] endorses the Florida Legislature's decision to "delegate[] the authority to run the elections and to oversee election disputes to the Secretary of State ... and to state circuit courts." [10] The Arizona Legislature made similar arguments when it challenged a referendum establishing an independent redistricting commission in 2015: the legislature, it claimed, has total freedom to assign its regulatory duties to whomever it pleases. [11]

But more recent treatments of the ISL theory have begun to view delegations with greater skepticism. Several articles have expressed doubt about the propriety of delegations under the Elections Clause, arguing that the legislature cannot empower others to make rules for federal elections. [12] And even more modest proposals, like the proposal to use the ***1095** general federal nondelegation doctrine in federal elections, open the door to a future in which legislative delegations under the Elections Clause are highly contested. [13]

Some members of the judiciary appear even more hostile to Elections Clause delegations. During the 2020 election, a number of plaintiffs who brought Elections Clause challenges against executive actions found a sympathetic audience among federal judges. Citing the Elections Clause, for instance, the U.S. Court of Appeals for the Eighth Circuit overturned a Minnesota order extending the deadline for receiving mail-in ballots, even though the Minnesota Secretary of State claimed to possess delegated statutory authority to issue it. [14] Other judges either followed suit or issued dissenting opinions indicating they would have liked to. [15]

In short, an emerging movement that spans academia and the judiciary would severely curtail the power of state legislatures to delegate power over elections.

This Article's primary purpose is to show that, as a doctrinal matter, Elections Clause delegations are entirely permissible. The Federal Constitution recognizes the power of state legislatures to delegate their authority over elections to state executives and state courts. Federal courts reviewing such delegations should give full effect to Elections Clause delegations, regardless of their view on whether state legislatures are bound by state constitutions in making federal elections law, and regardless of the delegation rules they might apply to Congress under Article I, Section 8.

I argue that a delegation-friendly reading of the Elections Clause is the only interpretation that accounts for the clear course of practice in the ***1096** Founding era. Specifically, I undertake an original, comprehensive survey of election laws in the original thirteen states during the four decades following the ratification of the Constitution in 1788. While many scholars have used historical evidence to construe the meaning of the Elections Clause, all previous studies focus on evidence from the Civil War and the decades that followed it. [16] This is the first study to draw on the early American practice most relevant to an originalist interpretation of the Constitution. [17]

The historical evidence shows that local power over elections was widespread in the decades following the Founding. In nine of thirteen states, profoundly consequential control over the "Times" and "Places" of elections was exercised by local officials like sheriffs or justices of the ***1097** peace. To name just one example, Virginia sheriffs had the authority to adjourn elections up to four days, and they could relocate polling from the county courthouse if the county was "infected with any contagious disease, or ... in danger of an attack from a public enemy." [18] Or take New York, where elections inspectors had total power to determine polling places and polling times. [19] Advocates of the Independent State Legislature theory must interpret these examples as delegations, and thus ought to embrace the legality of legislative delegations today.

In modern elections, of course, state executives have joined local officials in exercising power over federal elections. One might well wonder whether there is a constitutional difference between local power at the Founding and state executive power today.

Proponents of the ISL theory cannot sustain that view. First, as a factual matter, both "local" and "executive" officers received delegated power in the Founding era. Second, what makes Founding-era local governments arguably distinguishable from modern-day state executives is their claim to quasi-sovereignty in regulating their own affairs. [20] It might thus be plausible to see local control over federal elections as an exercise of inherent, rather than delegated, power, a very different matter than horizontal delegations to state executives. But that interpretation would be utterly incompatible with the Independent State Legislature theory, which requires that state legislatures be the *sole* sources of legitimate rulemaking authority for federal elections; an exercise of inherent local power would scramble that narrative. Thus, advocates of the ISL theory ought to embrace delegation as the explanation for the historical evidence presented below.

Getting the delegation question right matters a great deal. COVID-19 is a powerful illustration of the need for occasional flexibility in election regulation, with dozens of states shifting their rules via executive action. [21] It is an open question whether safe and fair elections could have been held absent such delegations. But the implications of a nondelegation doctrine for the Elections Clause go far beyond COVID. State and local elections ***1098** officials depend heavily on delegation to keep their agencies moving. [22] Adopting a nondelegation rule would wreak havoc on those systems.

With that said, the primary purpose of this Article is to intervene in the doctrinal debate over Elections Clause delegation; its aim is not to defend the practice of delegation as a matter of policy. It may be true, as some political science research suggests, that delegation is a necessary (though insufficient) ingredient in creating independent and expert agencies, in which case we might see delegation as a good. [23] Some of the examples cited below demonstrate a darker side of delegation, which is the risk that delegees use their positions to further the political ambitions of their allies. For present purposes, I bracket the normative question of whether we ought to celebrate delegation or deplore it. The goal here is to show that local power was a fact that was widely viewed as legal and to draw out the doctrinal implications of that historical evidence.

This Article also does not resolve two broader issues raised by the Independent State Legislature theory, namely (1) whether state legislatures are bound by state constitutions and (2) whether state courts can review state election laws governing federal elections. To be sure, my argument matters most in a world where the ISL theory is adopted, since current doctrine would defer entirely to state constitutions to determine the legality of delegations. [24] And the evidence here may be relevant to debates over the ISL theory. As I note above, what I call "silent delegations" to local governments might instead be interpreted as evidence of inherent local power over federal elections, which would undercut the ISL theory's literalist reading of "legislature." [25] Also,

as ***1099** Hayward H. Smith has noted, the aggressive delegations I document below may undercut the view that legislative power over federal elections was sacrosanct.[26] But this Article is not primarily about whether the ISL theory is correct.

As I argue in Part I, that is partially in recognition of the fact that the ISL theory appears very likely to be adopted. The Supreme Court has not taken a case addressing the proper interpretation of the Elections Clause since the Arizona redistricting litigation in 2015. In that case, Chief Justice Roberts authored a ringing dissent, joined by Justices Thomas and Alito, effectively endorsing the ISL theory.[27] Today, the Chief Justice would almost certainly be in the majority. Justices Kavanaugh and Gorsuch trumpeted their adherence to the ISL theory during the 2020 election cycle, making five sitting Justices who have recently endorsed the ISL theory in their opinions.[28] In recent redistricting litigation, several Justices have restated their commitment to this view.[29] Even if it has not yet powered a majority opinion, the ISL theory already represents the views of the majority on the Supreme Court.

Finally, while this Article's primary purpose is to contribute to a revived debate on the meaning of the Elections Clause, the pervasiveness of local delegations I document here adds to a growing literature on delegations in the early republic more generally. Most notably, Nicholas Parrillo has recently uncovered the history of federal boards of tax assessors empowered in 1798 to review property assessments under an ambiguous congressional statute.[30] As Parrillo notes, originalist advocates of a more stringent nondelegation doctrine have traditionally argued that all Founding-era legislative delegations fall into the categories of (1) delegations concerning foreign affairs or (2) voluntary transactions and government benefits, such as those pertaining to veterans' benefits.[31] ***1100** If, as advocates of the ISL theory believe, state legislatures make federal law when they regulate federal elections and are subject to the same nondelegation rules as Congress,[32] then the proliferation of delegation in the Elections Clause context would seem to provide another example of delegation under the Federal Constitution that affected the exercise of core political rights.[33]

This Article proceeds as follows. Part I places this intervention in context by reviewing the scholarly and judicial discussion of the Independent State Legislature theory. It argues that the issue of permissible delegations has yet to be answered by extant scholarship and demonstrates that delegations were a major issue during 2020 election litigation. Part II presents the historical evidence suggesting that expansive and politically significant delegations to local officials were a pervasive feature of early American elections. Part III links that historical record back to modern controversies, arguing that state executives are no different from local officials. I conclude with some reflections on how federal courts should analyze delegations in future litigation.

I. THE INCREASINGLY IMPORTANT--AND UNRESOLVED--DELEGATION QUESTION

The Supreme Court's current doctrine holds that the Elections Clause's reference to the "Legislature" of each state means any process "performed in accordance with the State's prescriptions for lawmaking."[34] But a specter is haunting election law: the Independent State Legislature theory, endorsed explicitly or implicitly by a majority of the Court, and the central question in a case to be heard by the Court in October Term 2022.[35] The ISL theory would change current precedent such that the only body with the power to regulate elections would be the legislature, i.e., "the representative body which ma[kes] the laws of the people."[36] One result ***1101** of the ISL theory would be stripping state courts of the power to review federal elections law on state law grounds. A less-discussed implication of the ISL theory is that it would raise federal constitutional questions about state laws delegating Elections Clause powers to executive agencies.

In this Part, I review the scholarship and jurisprudence concerning the ISL theory. I argue that scholars have focused largely on the court-curbing dimension of the theory and have mostly ignored its implications for legislative delegations. I then turn to the case law to show just how important this gap is. Litigation related to the 2020 election cycle repeatedly raised delegation questions. Such questions are likely to intensify given the likely adoption of the ISL theory by the Supreme Court. In Part II, I begin answering some of the questions that courts continue to grapple with.

A. Scholarly Treatments of the ISL Theory

Legal scholarship paid little attention to the Elections Clause before the 2000 election.[37] In the ensuing two decades, most scholarly writing has primarily focused on the following question: When state legislatures make federal elections law, are they bound by their state constitutions?

The case against holding state legislatures to state constitutions hinges on the Federal Constitution's text. The Elections Clause says that the time, place, and manner of federal elections shall be determined "by the Legislature" of each state. For textualists, that's the ballgame: the Constitution's decision to grant power specifically to *the legislature* has a plain meaning, which is that the sole body permitted to regulate federal elections and choose presidential electors is "the entity within each state comprised of elected representatives that enacts statutes."[38] That meaning forecloses the use of any other mechanism--state constitution, referendum, whatever--to regulate the same subject matter.

***1102** Any argument to the contrary, they claim, is foreclosed by examining the other references to state legislatures in the Constitution.[39] For example, Article V requires state legislatures to ratify amendments to the Constitution, and that provision has been interpreted as delegating power exclusively to the "entity that enacts statutes"--not to the state's general lawmaking authority. Likewise, until the Seventeenth Amendment was passed in 1913, the provision in Article I requiring the "Legislature" of each state to choose its senators was interpreted as a non-delegable grant to the "entity that enacts statutes"--prohibiting, for instance, the use of popular referenda to choose senators instead.[40] Further, at least one scholar claims that delegates at the Constitutional Convention assumed state legislatures would be the exclusive holders of power under the Elections Clause.[41]

ISL theory proponents also argue that their rule makes sense. Richard Posner has argued that delegating power *solely* to legislatures minimizes the risks of interbranch disputes over election rules within state governments.[42] Michael McConnell argues that state legislatures are both the most democratic branches of state government and that they are unique in having to create rules ex ante, reducing their ability to play favorites.[43]

By contrast, critics of the Independent State Legislature theory argue that "legislature" means different things in different contexts. As the Supreme Court reaffirmed in *Arizona State Legislature v. Arizona Independent Redistricting Committee* ("*AIRC*"), "the meaning of the word 'legislature' ... differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise."[44] Sometimes state legislatures are called upon as mere ratifying bodies, not lawmaking bodies, as in ***1103** Article V or in Article I's Senatorial Selection Clauses. But the Elections and Electors Clauses call upon the legislature to exercise its lawmaking power and thus are properly read as invoking the lawmaking authority of the state generally.[45] In short, the apparently specific reference to the "legislature" of each state is ambiguous and might plausibly refer to the state's general lawmaking power.

The contention that the text is ambiguous is bolstered by historical accounts, which reveal little evidence that the use of the word "legislature" was understood literally. Hayward H. Smith's study of the original history of the Elections Clause argues that the reference to the state "legislature" was basically unremarked upon at the Constitutional Convention.[46] Further, the Elections Clause closely mirrors Article V of the Articles of Confederation, under which state legislatures had been bound by their state constitutions.[47] Smith goes on to document how state legislatures interpreted their own authority in the first several federal elections, showing that virtually all viewed themselves as bound by the procedural definition of "legislature" in their state constitutions, such as the availability of a gubernatorial veto.[48] Further, Smith has argued in more recent work that these structural provisions were every bit as binding as the kinds of substantive restrictions on legislation (for example, substantive guarantees of free and equal access to the ballot) that are often litigated today.[49] Not until the Civil War did courts suggest that state legislatures might have the authority to make federal elections rules unfettered by state constitutions.[50]

Opponents of the ISL theory have also proposed a number of policy-related reasons to prefer state constitutional supremacy. One is that states have developed significant reliance interests on current doctrine. Nathaniel Persily and co-authors argue that adopting a literalist reading of the Elections Clause would invalidate seven independent redistricting commissions, at least six voter-passed elections statutes modifying the ***1104** rules of federal elections, and tens of state constitutional provisions.[51] Likewise, in other work, Persily has pointed out the enormous and discretion-laden role that election officials play in American elections--a role that might likewise be called into question were the Independent State Legislature theory adopted.[52]

A related set of arguments proposes structural reasons to respect the supremacy of state constitutional law. Joshua Douglas points to the legacy of state constitutionalism as a fount of substantive rights. [53] In a similar spirit, Richard Pildes has argued that the usual channel-clearing logic justifying federal courts' supervision of state election procedures is attenuated where popular referenda have made changes to state elections law. [54]

This voluminous literature largely sidesteps the issue of whether and to what degree state legislatures may convey their *own* power to other entities. The literature assumes the only meaningful constraints on state legislative power are those imposed from above, in the form of state constitutional constraints. But legislatures make meaningful grants of power via statute all the time, grants that can result in genuinely independent agencies. [55] Just ask the Federal Reserve. Thus, the largely overlooked issue of legislative delegations is worth paying close attention to.

***1105** The one article to address the statutory delegation issue is Derek T. Muller's 2016 treatment. [56] That article presents a wealth of historical examples interpreting the Elections Clause in a way that suggests delegations are improper, most of which occur between the middle of the nineteenth century and the early twentieth century. [57] For instance, Muller discusses an 1880 controversy over whether Missouri could give St. Louis the right to set voter registrations and on the question of whether legislatures could divest themselves of power to appoint U.S. Senators before the passage of the Seventeenth Amendment. [58] But it is unclear how these examples connect to the way the ratifying generation of Americans would have understood the Elections Clause, which is, after all, the operative question for the originalist majority on the Supreme Court. [59]

The permissibility of delegations under the Elections Clause is thus unresolved by a literature focused mostly on the ISL theory. The sole scholarly treatment of delegation leaves much to be desired in helping us understand what the Elections Clause would have meant for delegation to the Americans who ratified it. As recent litigation has shown, this is a gap in need of filling.

B. The Emerging Judicial Focus on Delegation

The Supreme Court precedent on the books rejects the Independent State Legislature theory. Beginning with *Ohio ex rel. Davis v. Hildebrandt* in 1916, [60] the Supreme Court has repeatedly held that the State can define "Legislature" however it pleases. In *Hildebrandt*, Ohio said that its "Legislature" included a referendum process that could override enactments by the General Assembly; in *Smiley v. Holm*, the "Legislature" included a gubernatorial veto. [61] The Supreme Court approved both. Most recently, in *AIRC*, the Court upheld an Arizona constitutional amendment that transferred the power to draw congressional districts from the state legislature to a nonpartisan body. ***1106** Once again, the majority found no Elections Clause violation, reasoning that the Commission was validly drawing on the state's lawmaking power.

Under the current rule, legislative delegations are minimally suspect. A legislature's power to issue them is beyond question--the Federal Constitution simply has nothing to say about how the State's lawmaking power is divvied up. [62] For the same reason, there is no special role for federal courts to play in monitoring delegations. Just the opposite. Given that *Hildebrandt* and *Smiley* focus on the *state* constitution's definition of legislative power, *state* courts are the logical forum for policing delegations.

It is thus unsurprising that, before 2020, only a handful of federal courts had ever even *considered* whether the Elections Clause would pose problems for legislative delegations. [63] And in the few cases where plaintiffs did bring Elections Clause challenges, they did not get far. Take *Baldwin v. Cortes*, which stemmed from a consent decree signed by the Pennsylvania Secretary of the Commonwealth changing the deadline for candidate registration. [64] The Third Circuit brushed away a minor party's challenge to the consent decree, summarily citing "the Pennsylvania legislature's explicit delegation of authority to the Secretary ... to administer the state election scheme." [65] The court made no attempt to carefully parse the terms of the delegation and applied no constitutional scrutiny to the delegation itself. A facially valid delegation was enough.

Indeed, the only pre-2020 case invalidating an executive election regulation on the basis of the Elections Clause shows how low the bar has been. In *Libertarian Party of Ohio v. Brunner*, Ohio's Secretary of State rewrote the state's entire ballot access regime from scratch after the whole ***1107** statutory scheme was deemed unconstitutional by the Sixth Circuit. [66] After the new rules were challenged, the court granted relief on the ground that there was "*no* evidence" that the state legislature had

delegated the authority to craft the basic ballot access rules to the Secretary. [67] Rewriting an entire chapter of statutory law from scratch is not "delegation"; even the most deferential review would have reached the same result.

Times have changed. Though *Smiley* and *Hildebrandt* remain on the books, the Supreme Court recently granted certiorari in a case that squarely implicates the Independent State Legislature theory, adding to strong signals the Court sent during the 2020 election cycle. [68] As a matter of head-counting, litigants and lower courts might reasonably believe that the ISL theory is on the verge of formal adoption. Start with Chief Justice Roberts' dissent in *AIRC*, which endorses the ISL theory's key tenets and denounces the idea that elections regulations may be enacted by any entity other than the legislature itself. [69] That dissent was joined by Justices Alito, Thomas, and Scalia.

Next add Justices Gorsuch and Kavanaugh, who endorsed the ISL theory in the midst of the 2020 litigation cycle in *Democratic National Committee v. Wisconsin State Legislature*. Justice Gorsuch, joined by Justice Kavanaugh, wrote in a concurrence that "state legislatures--not federal judges, not state judges, not state governors, not other state officials--bear primary responsibility for setting election rules," with no reference at all to *Smiley* or *Hildebrandt*. [70] Justice Kavanaugh, concurring alone, went even further, explicitly endorsing Chief Justice Rehnquist's *Bush v. Gore* opinion. [71] Both comments were all the more striking since they were utterly unnecessary to the resolution of the case. [72] Combining ***1108** Justices Gorsuch and Kavanaugh with the three *AIRC* dissenters still on the Court makes a majority that has endorsed the ISL theory in writing; three of the five have reiterated their commitment to the ISL theory as recently as this March. [73]

Litigants got the message. During the 2020 election cycle, at least *thirteen* federal courts heard Elections Clause challenges to state executive action. The factual catalyst for the uptick was COVID-19, which resulted in a wave of executive orders designed to make voting pandemic-safe. Thirty-nine of the fifty states changed their election procedures in some fashion to respond to the pandemic, [74] and while some of these changes were accomplished by statute, most involved at least some executive action. [75]

A comprehensive survey of Elections Clause challenges to exercises of delegated power suggested that there were roughly four categories of Elections Clause challenges.

> (1) Some litigants challenged regulations and guidance documents issued prospectively to guide policy implementation. Guidance was often issued by secretaries of state or by state elections boards, [76] but in some states, governors issued executive proclamations with ***1109** implications for elections procedures. [77] Litigants claimed that these documents were invalid under the Elections Clause.
>
> (2) Other challenges resulted indirectly from prior litigation when state executives entered into settlements or consent decrees with adverse parties. Litigants then brought Elections Clause challenges to the validity of those agreements or decrees. [78]
>
> (3) Some post-election litigation alleged Elections Clause problems from executive noncompliance with statutes. [79]
>
> (4) Finally, some claims challenged *county* decisions to accept private donations to help finance the election, on the grounds that private funding disrupted state control over county elections processes. [80]

In the majority of cases, Elections Clause challenges ended without fanfare. Many courts did not reach the merits, since private citizens [81] and ***1110** legislators [82] generally lack standing to bring Elections Clause challenges to state action. [83]

But in cases that did reach the merits, a surprising number of judges departed from the decades-long consensus and embraced a highly hostile view of delegations--implicitly setting aside *Smiley* and *Hildebrandt*.

Some just ignored precedent. In *Texas League of United Latin American Citizens v. Hughs*, the Fifth Circuit considered a challenge to a proclamation by Texas Governor Greg Abbott that limited the number of sites where voters could drop off absentee ballots.[84] The proclamation was issued pursuant to the Texas Disaster Act, which gives governors the power to suspend regulatory laws, and the validity of which under the state constitution has never been questioned since its passage in 1975.[85] Nonetheless, Judge Ho issued a concurrence in which he argued that the proclamation "conflicts with Articles I and II of the U.S. Constitution" by usurping the legislature's power to regulate federal elections.[86] That claim directly contradicts *AIRC* and was made without a single citation to Supreme Court precedent.

The more common approach for courts skeptical of executive action was to construe the underlying delegating statute narrowly, often by applying something like a clear-statement rule to delegating statutes.

That was the path taken in *Carson v. Simon*, where the Eighth Circuit considered a consent decree entered into by the Minnesota Secretary of State extending the deadline for the receipt of mail-in ballots.[87] The Secretary claimed that the consent decree was permitted by Minnesota law allowing the Secretary to "adopt alternative election procedures" if "a provision of the Minnesota Election Law cannot be implemented as a ***1111** result of an order of a state or federal court."[88] The *Carson* court disagreed, using the Independent State Legislature theory as a substantive canon of statutory interpretation requiring the narrowest possible interpretation of delegating statutes. Thus, even though the consent decree was a judicial order[89] requiring the deadline extension, it was not covered by the statutory delegation because it was not imposed *adversely* and "[did] not declare the statute invalid."[90] Never mind that neither requirement is mentioned in the statute.[91]

A dissent issued by Judges Wilkinson and Agee in the Fourth Circuit case of *Wise v. Circosta* takes the same approach.[92] Just like in *Carson*, the North Carolina State Board of Elections entered into a consent decree after being sued.[93] Part of the consent decree extended the deadline for receiving ballots; the plaintiffs in *Wise* then sued the Board of Elections to enjoin it from implementing that portion of the consent decree. As in *Carson*, the Board argued that it could enter into the consent decree pursuant to its emergency powers, which come into force whenever "the normal schedule for the election is disrupted by ... [a] natural disaster."[94] And just as in *Carson*, the dissenters read this provision narrowly to exclude the COVID-19 pandemic, reasoning that the "natural disaster" excludes a pandemic that unfolded over several months.[95] While plausible, this reading is not required by the text. Black's Law Dictionary, for example, defines "disaster" as a "calamity" or "catastrophic emergency," and COVID-19 would seem to fit the bill, as many other ***1112** courts found during the 2020 litigation cycle.[96] But Judges Agee and Wilkinson invoked a kind of constitutional avoidance canon, among other factors, to justify their narrower reading: "If we refuse to defend the prerogative of the General Assembly to create election rules in a case as clear as this one, the power of the state legislatures under the Elections Clause and the Electors Clause will be at the mercy of other state-government actors."[97]

It is worth emphasizing that using constitutional avoidance to narrow legislative delegations cannot be justified under current Supreme Court doctrine, which expresses no preference for any particular distribution of legislative authority.[98] There is no Elections Clause problem if a delegation is consistent with the state constitution.

One way to read these cases, then, is that at least some lower court judges have concluded (as this Article does above) that *Hildebrandt*, *Smiley*, and *AIRC* no longer represent the doctrinal views of the majority of the Supreme Court.[99] The more aggressive approach to delegation cases may, that is, be a form of anticipatory overruling.[100]

II. THE EARLY PRACTICE OF DELEGATIONS TO LOCAL ELECTION OFFICIALS

Courts and scholars are increasingly concerned with the question of whether delegations to state executives are permitted by the Elections Clause. This Part draws on a comprehensive study of American election laws between 1788 and 1839 to show that delegations were a pervasive component of early American elections. During the first five decades after the ratification

of the Constitution, state legislatures aggressively ***1113** delegated authority to determine the times, places, and manner of federal elections to local government officials.

Table 1 summarizes my findings. Nine of thirteen states engaged in some significant form of delegation. States allowed local election officials to pick where the polls would be located, open and close them at will, and make critical decisions about how voting would unfold. Even from today's vantage point, some of these delegations are surprising. Virginia's early practice of allowing sheriffs to adjourn elections up to *eleven days* past Election Day makes today's extension of ballot deadlines seem quaint. [101] Or take Massachusetts, where town selectmen had the authority to decide whether voters had to stay at the polling place for the entire duration of an election for their votes to count. [102] While plenty of early Americans decried these practices on political grounds, nobody thought they violated the Elections Clause. As I argue in the next Part, the apparent consensus around the permissibility of local delegations ought to inform our understanding of the Elections Clause today.

Table 1: State Delegations, 1788-1839, by Type and Duration

	SIGNIFICANT DELEGATION THROUGHOUT	SIGNIFICANT DELEGATION FOR PART OF PERIOD	NO OR UNKNOWN DEGREE OF DELEGATION
Time	Massachusetts, New Hampshire, New York, Rhode Island, Virginia	Connecticut, New Jersey, Maryland	Delaware, Georgia, North Carolina, Pennsylvania, South Carolina
Place	Connecticut, Massachusetts, New Hampshire, New York, Rhode Island	Delaware, Maryland, New Jersey	Georgia, North Carolina, Pennsylvania, South Carolina, Virginia
Manner	Massachusetts, Rhode Island, Virginia	Maryland, New Hampshire	Connecticut, Delaware, Georgia, New Jersey, New York, North Carolina, Pennsylvania, South Carolina

I begin by describing the methods used to generate the historical claims in this Part; a comprehensive description is also provided in the Appendix. ***1114** I then address each of the three forms of state legislative power over federal elections--Time, Place, and Manner--and synthesize the evidence on the degree to which states delegated control to local officials in the early republic. In the next Part, I connect this historical evidence to modern debates over delegations to state executive officials.

A. Background

The claims in this Part are based on a survey of election laws in force between 1788 and 1839 in the thirteen original states. I first summarize the relevant historical context and then describe the methods used to complete the survey.

Early American elections took place against the backdrop of electoral practices developed during the colonial period, along with the attendant assumptions about the distribution of power. As a matter of black letter law, elections in colonial America were initiated by a writ issued by the governor and delivered to each town's sheriff, chief magistrate, or selectman. [103] While elections had to be completed within forty days of the issuance of the writ, the timing was otherwise entirely up to the local magistrate to determine. [104] By the time of the Revolution, all of the colonies had converged on either paper balloting or *viva voce* voting, in which a voter publicly announced his vote before a crowd. [105]

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These rules reflected a world where local communities had much thicker claims to control over their own affairs, including elections. [106] Thus, the fact that matters such as the sites and mode of election in each community were developed by custom and formally entrusted to the sheriff might best be seen as instances of a general theme of inherent local rights to self-government. [107] In some sense, this Article tells the story of ***1115** how the eighteenth century's localist worldview not only survived the disjuncture of the constitutional ratification but was in fact grafted onto the new elections organized for the Federal Congress despite that document's apparent commitment to the unitary domination of the state legislatures over federal elections. [108]

Another legacy of the colonial period was that access to suffrage was relatively limited and turnout anemic, which made small differences in electoral procedures enormously important to outcomes. [109] Turnout in elections was low both before and after independence: Figure 1 shows the number of votes cast (dashed line) and the share of the population voting (solid line) for every congressional election before 1825, as reported by Phillip Lampi. [110] Scholars have speculated on the reasons for low turnout; the best evidence suggests that some combination of restrictive voting qualifications, and the relative quiescence of federal politics in the first decade following the ratification of the Constitution, accounts for this striking trend. [111]

***1116 Fig. 1: Turnout and Votes Cast in Elections to the House of Representatives, 1789-1825** [112]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

In a low-turnout world, disenfranchising a few dozen voters by moving the polling place a few miles down the road might well change the winner of an election. Thus, we know that local election officials "continued to exert enormous influence upon the outcome of a contest," [113] and we know that minor manipulations of the electoral rules had outsized influence on electoral outcomes.

The question is whether local officials' power over elections was a form of theft, or whether they were exploiting what was legitimately theirs-- legislative power delegated by the state legislature.

I turn to the statutes governing elections to find out. The statutes governing the first federal elections are compiled in *The Documentary History of the First Federal Elections*. I added to this collection in two ways. First, I downloaded every single compilation of state statutes covering the study period available in HeinOnline's historical archive of state statutes. I used both optical character recognition-based searches and available indices to find all statutes mentioning the word "election" or "elections" Next, I searched for the word "election" in HeinOnline's state ***1117** session law library and downloaded any relevant statute passed within the study period. The average number of statutes yielded by this process was twelve per state, or around one every four years.

A number of the cases of local power I document below revolve around statutory silence. It is, of course, problematic to interpret every statutory silence as empowering local officials. To allay this concern, I undertook a parallel survey of the secondary historical literature on elections in each state. When a statute was silent on a particular kind of election power, I did not identify that as a delegation unless the secondary literature clearly demonstrated that the power was recognized as belonging to the local official. Relatedly, as I note in detail in Part III below, one might be skeptical that statutory silence is truly "delegation" at all rather than legislative deference to the colonial-era tradition of community self-governance over elections issues. [114] This Part simply assumes, however, that the right interpretation of these situations is that they are truly "delegations," since that is the interpretation most favorable to the ISL theory.

I offer one final methodological caveat concerning this Article's reliance on contested elections. Contested elections are a poor guide to the behavior of the average official, since the vast majority of elections are not contested. [115] If this Article were focused on defending the overall *virtues* of Elections Clause delegation, that would be a major problem. But it is not. My goal here is to map the outer limits of delegees' legitimate power to show just how expansive delegations were in the Founding era, and for this task, the exceptional circumstances of contested elections are ideal. I encourage readers to avoid drawing conclusions about whether Elections Clause delegations were typically abusive on the basis of the evidence below.

A complete description of the findings of my survey is contained in the Appendix. In the remainder of this discussion, I focus on synthesizing the key takeaways of my research for the Elections Clause by describing the delegations I identified pertaining to the time, place, and manner of conducting elections, respectively.

1118** ***B. Time

In the early republic, every state's statutes defined some date as "election day" But the timing of elections remained, in important ways, a matter of local discretion. In eight of the thirteen states, the actual opening and closing times of the polls were left entirely to the discretion of local officials during at least part of the study period. And in four of the thirteen states, the presiding officers at elections had the power to adjourn elections, meaning that "election day" was only the beginning of a period whose length was committed at least partially to the discretion of local officials. While outer limits on the adjournment power emerged by the 1830s, in the first decades of American independence some local officials had virtually no legal check on their power to adjourn.

1. Polling Times

States generally fell into three categories when it came to the opening and closing times of polls.

1. In New England, votes were cast in town meetings. [116] While the opening time of each meeting was set by statute, exactly when votes would be taken--and when the polls would be closed--was a matter left in the hands of presiding officers. In Massachusetts, New Hampshire, and Rhode Island, this power came from statutory silence, [117] but it was well-understood: "[t]he polls stayed open as long as the town wished," and the ***1119** selectmen could bring a motion to the meeting at any time to close them. [118] By the end of the study period, mild restrictions had appeared: an 1839 Massachusetts law required elections to stay open for at least two hours. [119] Not until 1841 did a Massachusetts statute specify that polling for federal elections had to begin by 2:00 p.m. (but "may be opened as early as nine o'clock"). [120]

The importance of this power was repeatedly brought to the attention of the legislature in the form of disputes over state elections. In 1810, a group of citizens from Standish, Massachusetts, complained to the General Court that, among other violations, the town selectmen had promised to open voting for state representatives at 1:00 p.m. but ultimately waited until past 3:00 p.m. to do so, allegedly to advantage their partisan allies. [121] But the General Court's Committee on Elections simply noted that "these facts, if proved, would not affect the right of the member to his seat," because town control over the time of elections was such a well-recognized principle. [122]

In Connecticut, the mostly Federalist selectmen enjoyed a narrower power to set the time of elections by controlling the order and form of the town meeting in which the elections took place. [123] Thus, the authors of a Connecticut Republican circular in 1803 pleaded with party leaders:

> [T]o make every effort to get voters from distant areas to the freemen's meeting on time, because "every one should remember that the presiding officers are federal, and will open meetings, when they judge safest--that 9 o'clock will not tarry a moment ... that the whole business can be done in two hours." [124]

***1120** 2. Elections in New York and New Jersey took place under procedures more similar to modern elections, that is, by means of the relatively fast submission of a ballot. But election inspectors, as the presiding officers were called, had well-established power to determine the opening and closing times of the polls. [125]

In New Jersey, for example, the 1779 state elections law (which came to govern federal elections in 1788 [126]) provided that elections judges "shall have full Power ... to close the [Election]" when all the voters present had voted or "a reasonable time for that Purpose shall have been allowed." [127] The import of this power was obvious. "[A] sheriff closed the polls in Trenton although he knew that forty voters were on their way to cast their ballots." [128] Elsewhere, "polling places remained open indefinitely in order to insure that all possible votes for a given faction were cast." [129] I could identify no challenge to these practices as illegitimate.

And while New Jersey adopted fixed polling times beginning in 1807, New York mostly did not. A single 1807 statute limited election inspectors' power by requiring that they open the polls by 10:00 a.m.--but only in New York City. [130] The decision to withdraw the power to set polling times from only one part of the state emphasizes that other election inspectors' power remained unfettered.

***1121** 3. In Virginia (and initially in Maryland), the starting and ending time of *viva voce* elections was similarly subject to the sheriff's discretion. [131] This power was affirmed in the disputed Virginia congressional election between Abram Trigg and Francis Preston, ultimately challenged in Congress. [132] The dispute is better known because of one candidate's use of the state militia to intimidate voters. [133] But another part of the complaint concerned the sheriffs discretion to open and close polls. [134] In Lee County, the complaint alleged, the sheriff closed polls at 300 p.m. on election day and refused to reopen them even when a group of eligible voters arrived. [135] The report of the Committee on Elections responded as follows: "On recurring to the election law of Virginia, the sheriff appears to be vested with discretionary power to close the poll at any time of the day after three proclamations made, and no voters appearing." [136] That discretion was deemed unreviewable.

2. Adjournment Power

A related power enjoyed by election officials in Massachusetts, New Jersey, New York, Virginia, and likely in Maryland was the power to adjourn elections, which meant that polling would continue on a subsequent day.

In New York, New Jersey, and Virginia, the power to adjourn was a matter of complete discretion and was written into statutes. New Jersey's 1779 election law granted election judges "full Power to adjourn the Election, from Time to Time, as Occasion may require"; [137] New York's 1797 election law recognized judges' power to "continue[] [elections] by adjournment, if necessary, from day to day, not exceeding five days." [138] ***1122** Both states gradually limited the adjournment power over the course of the study period, such that by 1830 election judges had virtually lost their adjournment power.

Virginia sheriffs also enjoyed the power to adjourn. As in New York and New Jersey, that power was somewhat circumscribed, as a 1785 statute allowed a maximum of four days of adjournment and only in cases of bad weather or crowded polls. [139] But sheriffs enjoyed broad deference on when to use their power--and indeed the secondary literature suggests that the legislature's four-day limit was not religiously observed. "In some cases, as in Harrison County in 1790, the sheriff could keep the polls open for as many as eleven days." [140] The same statutory scheme remained in place until 1841. [141] Sheriffs' broad discretion over the adjournment power was underscored in the disputed congressional election between Abram Trigg and Francis Preston mentioned above. The complaint alleged that Washington County's sheriff adjourned the election due to rain, when in fact there was none. In response, the Committee on Elections blithely noted that "from the latitude of discretion vested in him by law, he was fully authorized to do so." [142] Similarly, Maryland election commissioners appear to have enjoyed the adjournment power at least in the 1788 elections to the state ratifying convention. [143] Given the similarity of Maryland's early electoral politics to those of Virginia, it is plausible to infer that commissioners enjoyed similar power in the first federal elections in the following year. The advent of ballot voting with fixed poll times in 1802 would likely have removed any such discretion, however. [144]

***1123** In Massachusetts, [145] adjournment was (and is [146]) considered an implicit incident of towns' ability to organize their own meetings and was thus unmentioned in statutory law.

Records of disputed elections in Massachusetts provide one indication that the power was understood and remained unregulated for the study period. For example, an 1800 dispute over a state election from the town of Harwich, treated in more detail below, centered on the power of the town selectmen to adjourn the election; the General Court's Committee on Elections affirmed the selectmen's adjournment power with nary a word. [147] A similar conclusion can be drawn from histories of individual towns. For example, one history of Springfield reports that in an 1849 town election, "sharp at 12" a Loco Foco Democrat "moved an adjournment without day before the whigs had assembled," preventing the Whigs from electing their preferred candidate. [148] All recognized that nothing could be done without special legislative intervention. [149] The persistence of the adjournment power even in 1849 suggests that it remained strong throughout the study period.

In short, local officials in seven states enjoyed some combination of (a) the power to determine the opening and closing times of polls and (b) the power to extend elections for days, at their sole discretion, and in several states, that power remained unabated for decades after the Constitution was ratified.

C. Place

Because of the difficulty of travel, location was of critical importance to the ability to vote--all the more so when elections took place in winter or spring, when mud or snow might make roads impassable. [150] Indeed, as late as 1870, Congress was still receiving complaints that the locations of ***1124** polls had made it impossible for a losing candidate's supporters to vote. [151] One can only imagine how much more important the power to choose polling places was in the first years of the republic.

Every state's election law said something about the geographic lines on which voting would be organized. But while some states also took the step of specifying where within those boundaries the polls would be held, others did not.

States south of Maryland delegated little discretion in the location of polls. Elections were at the county courthouse, and if an alternate location was required, it was typically provided for in a statute. [152] However, even these states occasionally provided sheriffs with discretion to change polling locations in situations where meeting at the courthouse was impracticable. In 1785--presaging today's election disputes--Virginia delegated to sheriffs the power to alter the polling location from the courthouse if the town was "infected with any contagious disease, or ... in danger of an attack from a public enemy," a power that remained in force until at least 1818. [153] And while Georgia generally specified the location of elections in exacting detail, it occasionally permitted presiding justices to choose polling locations if thinly populated counties lacked a suitable courthouse by which to meet. [154]

By contrast, all of the states north of Maryland, except Pennsylvania and Rhode Island, conferred the choice of polling locations on local officials. Maryland, New York, and Delaware did so explicitly. New York election inspectors had discretion over polling places from the beginning; the state's 1787 election law instructed them to choose "the place (which shall be the most public and convenient for that purpose) ... where such ***1125** election ... next shall be held" and notify voters accordingly. [155] The power was repeatedly affirmed over the course of the next four decades. [156]

In Delaware and Maryland, delegation of place-related regulations emerged in the middle of the study period, as both states adopted voting at the local (i.e., subcounty) level. [157] In Delaware, the statute announcing voting by hundreds [158] provided default polling places but conferred discretion on election judges to "appoint some other place" for the polls if the default proved "impracticable." [159] In Maryland, the legislature named a number of specialized commissioners to divide each county except Baltimore into a "number of districts," and instructed the commissioners "make choice of a place in each district, at which the elections shall be held, as nearly central as shall be practicable, having regard to ... the accommodation of persons attendant upon such elections ...." [160]

In New England and New Jersey, election laws either explicitly or implicitly permitted town meetings held before election day to set the polling place. New Jersey, like Delaware and Maryland, delegated that power only starting in 1790 as the state began switching from courthouse elections to town-based elections. [161] By 1797, when the elections were first held locally throughout the state, New Jersey election law instructed towns to "appoint the place or places, not exceeding two, for holding elections within their respective townships or precincts" at their annual town meetings. [162] But secondary sources document a muscular use of this power for political gain. [163]

In New England, the power to choose the location of the poll was an incident of the town's broader power to decide on its meeting place. For instance, Massachusetts election laws simply commanded voters to ***1126** "assemble" in their towns with no instruction about where. [164] At least one contested election shows the import of this statutory silence. In the town of Harwich in the 1800 state elections to the General Court, [165] the town selectmen adjourned a town meeting set for electing state representatives on March 19 until March 28--and decided just days before the meeting was to resume that it would be held at a meeting house on the other side of the town. [166] A disgruntled group of citizens, complaining that the selectmen

could not unilaterally change the location of the meeting, gathered at the original polling location, elected an alternative slate of representatives, and petitioned the General Court to recognize their election. But the dissenters lost; nobody doubted that the selectmen could move the town meeting without warning. [167] While this precedent concerned a state election, the town's power to organize its meetings was no different when the meetings concerned federal elections.

The rest of New England was much the same. Connecticut delegated the power to choose meeting places beginning in 1784 and in every election law through 1839. [168] New Hampshire election statutes were similar to those of Massachusetts, with no detail provided on location. [169] But given the similarity of town meeting traditions one might infer that New Hampshire towns could similarly change their meeting places at will.

Thus, slightly more than half of the thirteen states delegated significant discretion to determine the location of elections to local officials. In most cases, the delegees were the presiding officers of elections. In some cases, as in Maryland, specialized officers were commissioned expressly for the purpose of picking polling places.

One way to see why delegation would have been attractive is to consider how much legislative effort went into *avoiding* delegation in states where the legislature set polling places by statute. A single digest of Georgia election laws passed between 1821 and 1829 contains no fewer than *seventy-nine* statutes dedicated solely to specifying polling locations ***1127** and election districts. [170] No wonder most state legislatures delegated their authority instead.

D. Manner

Compared with the extensive delegations of control over the time and place of voting, delegations respecting the manner of balloting are harder to document. For instance, New York and New Jersey--both of which empowered local officials to make critical time and place decisions--specified the procedures to be used at the polls in excruciating detail. [171] But some did delegate, and once again there was never a scintilla of opposition on Election Clause grounds.

1. *New England.* Massachusetts is where local officials' discretion over the manner of elections appeared most clearly. The early election laws of Massachusetts provided virtually no guidance on how elections were to be conducted beyond requiring that they be by ballot. [172] Thus, the fact that selectmen were "in a position to determine the manner in which elections were conducted" was widely understood. [173]

For instance, during the Boston elections for state representatives in 1785-86, "the selectmen ordered 'that no Votes would be received but such as are unfolded"' and required that "Persons who Vote for Representatives shall ... enter into the Hall and there remaine, until the Poll is closed."' [174] Needless to say, these requirements were nowhere contemplated in state law. There is every reason to think that selectmen enjoyed just as much control over town meetings where federal elections took place.

Things appear to have been similar in New Hampshire, where election statutes facially conferred vast discretion on selectmen. In the first federal elections law, the only instruction provided on how voting should proceed is as follows: "[T]he Selectmen of the several towns ... shall give fifteen days notice of the design of sd. meeting & shall during the Choice of Representatives preside ... impartially and shall receive the votes of all ***1128** the Inhabitants ...." [175] The explicit statutory reference to the meeting's "design" is difficult to parse, as it could conceivably mean both the *order* of the meeting, which would imply extensive discretion, and the *purpose* of the meeting, which would mean little. But given that the rest of the statute is silent on the procedures to be followed, the inference that it conferred significant discretion seems at least plausible.

Finally, the statutes of Rhode Island give little explicit indication of voting methods. One secondary source argues that *viva voce* voting was the norm until 1851, [176] but a 1762 law appears to require the use of paper ballots. [177] A more plausible form of discretion concerned the secrecy of those ballots. One secondary observer claims that state law "requir[ed] a secret vote upon the request of a single freeman and a second to his motion," [178] and another suggests that, as late as the 1850s, the secrecy of ballots was "optional." [179] While I could not locate a statute explicitly conferring upon towns the power to determine ballot secrecy, such a rule would represent a significant delegation over election procedures.

2. *The South.* Where *viva voce* voting was practiced, statutes hardly if ever provided any regulations governing the procedures to be employed, save that poll books had to be available on request. [180] Many secondary commentators have therefore inferred that sheriffs had immense discretion over the exact procedures used. For instance, the historian JR. Pole wrote of Virginia that "the election laws provide the basic guide" but that "the intentions of the legislature were interpreted in a startling variety of practices" in towns across the state. [181] Kentucky, once part of Virginia, mimicked Virginia's minimalist statutory scheme for governing *viva voce* elections; one historian reported that "[i]n a formal sense the sheriff was in a potentially powerful position since he was chief election officer of ***1129** the county," and thus "[n]ot infrequently sheriffs became embroiled in local election disputes" owing to their discretionary choices. [182] The evidence of local control over election procedures in Kentucky supports Pole's description of Virginia's elections.

Unfortunately, the secondary evidence provides limited detail on just *how viva voce* voting was subject to manipulation, leaving us to speculate on the ways sheriffs might have deployed their power. An example of a procedural decision that *might* have been subject to sheriffs' discretion was the use of voter lists, which were printed tickets available "if a voter could not recall the list of candidates for whom he wished to vote." [183] The degree to which tickets were used, made available, or incorporated into elections procedures is never specified in the election laws of the states studied here. We might conjecture that sheriffs used their power to shape these kinds of procedural decisions--but that would be just a guess.

III. WHY THE HISTORY OF LOCAL DELEGATION ANSWERS MODERN ELECTION CLAUSE DELEGATION QUESTIONS

In the last Part, I showed that many particulars respecting the "Time, Place and Manner" of federal elections in the Founding era were determined not by state legislatures but by local officials and that the exercise of local power over federal elections was widely viewed as legitimate. In this Part, I canvass three objections to applying the history of local delegation to modern delegation disputes, which typically involve horizontal delegations to state executives. I argue that advocates of the ISL theory cannot press any of these objections without threatening the core assumptions of the ISL theory itself. Indeed, as I point out below, some of the delegations I document--especially the phenomenon of silent delegations in New England--suggest chinks in the ISL theory's story of state legislatures as the sole legitimate sources of federal elections law.

Before diving into these objections, it is important to highlight a factual point about the evidence presented in Part II. Although all of the examples highlighted involve "local" officials, these officials in fact include members of both local governments *and* state executive branches. For example, although Virginia sheriffs were local in jurisdiction, they were ***1130** state officials--"the kings deputyes within theire Countyes" [184] in the colonial era, and members of the state executive or judicial branches after the Revolution [185] --much the way that U.S. Attorneys are members of the federal executive despite serving defined local areas. By contrast, Elections Clause delegees in other states were members of local government bodies. [186] In other words, if we were to apply modern constitutional categories to Founding-era delegees, we would find little basis for distinguishing "local" from "executive" delegations; both are represented in the set of earlier examples.

The starting point for any of the objections raised below is therefore that the contrast between "local" and "executive" power goes beyond the formal nature of institutional affiliation and has to do with the legitimacy of local claims to power over elections rules. I now turn to explaining why that might be so.

***1131** *A. The Structural Objection*

One objection to deploying the history of local delegations to justify modern executive power is that local governments were *different* than state executives in the Founding era. Perhaps the statutory authorization for local officials to fill in the details of electoral laws was less a form of delegation and more a kind of deferral to the unique quasi-sovereignty of local governments still recognized in many communities until the mid-nineteenth century. In short, maybe we are talking about forbearance, not delegation.

It might be hard for modern readers to see the force of this objection, since it is hard for us to imagine local power as anything *but* a delegation. Contemporary American law holds that local officials are "in every essential sense, only auxiliaries of the State for the purposes of local government," [187] and the power to regulate federal elections is viewed by modern courts as a

grant emanating from the Federal Constitution. If local officials are mere "auxiliaries" to the state legislatures, which hold all power over federal elections by default, then they stand in the same position as statewide executive officers. Both are simply instruments for the execution of the legislature's will.

But this conception of local power is anachronistic as applied to the Founding era. [188] During the colonial period, local governments routinely invoked a kind of natural law right, supported by customary practice, to govern their own communities. Thus, "the concept of the community was the font of moral and political authority, invoked to justify both criminal and civil regulation," and institutions as varied as "juries, municipal corporations, militias, churches, and even mobs," argued that they had legitimate claims to exercising power on behalf of their constituents--a sort of competing form of quasi-sovereignty that was a competitor to the supremacy of state governments. [189] While the subsequent decades ***1132** eliminated the viability of local quasi-sovereignty, that notion remained current until well into the nineteenth century. [190]

The idea of local quasi-sovereignty suggests a new way of seeing the grants of Elections Clause power. On this view, local officials were not agents of the state but rather alternative sources of law. [191] That is, Founding-era Americans might have seen the empowerment of local officials not as a form of *delegation* but as a recognition of "preexisting claim[s]" to govern elections grounded in custom. This would have been consistent with the many other cases in which community and custom were seen as the source of local power, rather than the grace of the state. [192]

This objection might have special force in situations where the state legislature permitted local authorities to govern federal elections by legislative silence. For example, most of the powers exercised by New England towns--the power to adjourn and the power to choose polling locations being two notable examples--were granted by legislative silence, implicitly drawing on the towns' inherent powers to govern their meetings. [193] In such cases, it may seem especially implausible that the state legislature would have been understood as conveying *its own power* to the towns, rather than allowing them to exercise power they already had. If this claim were true, then it would complicate the analogy between Founding-era local power and modern delegations to state executives.

While this objection may be powerful, it is one that advocates of the ISL theory simply cannot make. Conceding that local officials exercised *inherent* power to determine the times or places of federal elections would be incompatible with defining the word "legislature" in Article I, Section 4 as a literal reference to the state legislature. After all, unlike other functions of local government, local power over federal elections cannot be explained as a continuing exercise of pre-existing power from the ***1133** colonial period. The right to regulate federal elections was only created, by operation of the Federal Constitution, in 1789. [194] In other words, one cannot see local governments regulating federal elections as exercising authority duly acquired during the colonial period and undisturbed by the revolution. [195]

Rather, if Founding-era local officials legitimately exercised power over the first federal elections *without delegation* by the state legislature, then they must have relied on the kind of inherent power that they claimed in other spheres. But that would require "legislature" to have a broader meaning-- perhaps the meaning ascribed to it by the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* ("*AIRC*"), namely, any legitimate source of ex-ante legal rules. [196] Advocates of the ISL theory have no choice but to view the historical evidence here using the framework of delegation, and to assume away any historical distinction between local and executive power.

B. The Textual Objection

A perhaps more plausible version of the structural objection might instead focus on the precise wording of the Elections Clause, which requires that the rules for federal elections "shall be prescribed *in each State*" by the legislature. [197]

Given the background understanding that local governments could make rules even without explicit state authorization, perhaps Founding-era Americans would have understood the Elections Clause to refer only to election regulations that bound "each State"--that is, the whole thing. On this reading, the state legislature was the only entity entitled to make uniform, statewide federal elections law. So long as local sources of authority were limited in their exercise of power to sub-state geographic units, and so long as the state legislature retained exclusive authority to set statewide rules, statutes empowering local officials might comply with ***1134** the literal meaning of the Elections Clause without any need for delegation.

Like the structural objection, this objection would provide a basis for distinguishing contemporary delegations to state executives from the local delegations described in Part II, since it would imply *statewide* rulemaking authority is uniquely immune from transfer.

Even assuming the plausibility of this strained reading of the text, it, too, seems to prove too much for proponents of the Independent State Legislature theory. Limiting the effect of the Elections Clause to statewide rules would create an untenable loophole in the ISL theory's preferred reading of the text and would turn the ISL theory into a very limited theory of elections regulation.

Consider, for example, the ISL theory's putative ban on state court injunctions modifying state laws governing federal elections. If it were true that the Elections Clause protects the legislature's prerogative to set only statewide rules, then the ISL theory would become a restriction only on facial challenges to state law. As-applied challenges disputing the operation of an electoral regulation only *within a particular county* would be perfectly permissible, and judges deciding such challenges would be authorized to draw on any source of law, presumably including local custom, to resolve them. While critics of the ISL theory might welcome such a narrow reading, one imagines that its proponents would be dissatisfied with that result.

C. The Normative Objection

A final objection rests on the unique normative significance of local delegations, apart from any appeal to historical or textual distinctions. One might think that local power is more defensible than state executive power for any number of reasons. American elections scholars have long argued that local officials are better able to match election rules to community needs. [198] Further, local power might not evoke the traditional fear of executive overreach that animates opposition to executive power at all levels of government. [199]

***1135** But whatever one thinks of the merits of local power, advocates of the ISL theory must reject this line of reasoning out of hand. To permit local delegations because of their greater compatibility with favored constitutional values would open the door to a variety of uncomfortable objections to the ISL theory itself. To name just one example, the constitutional preference for democratic accountability may be poorly served by giving total control over election rules to legislatures gerrymandered to disenfranchise members of the opposite party. [200] Indeed, this kind of values-oriented analysis is precisely the kind undertaken by the Court in *AIRC* and decried by the ISL theory's defenders.

In short, the ISL theory is and must remain a highly formalist approach to the electoral power. An objection invoking functional values threatens the integrity of that approach and is basically incompatible with it.

* * *

CONCLUSION

The evidence presented here establishes that local power was a common feature of elections administration in the early years of the republic. In most states, the exact times and places of elections were left to local officials, and at least some also conferred power over the procedures of elections themselves. Advocates of the ISL theory must embrace this historical evidence as proof of the history of legislative delegation.

Plenty of Americans grumbled bitterly about the power local officials had over elections. "[L]oud were the complaints against sheriffs in Virginia, church wardens in South Carolina, town moderators in New England," and many other local officials besides. [201] In that sense, today's endless complaints about elections officials are part of a longstanding American tradition. But passionate though their complaints might have been, early Americans never suggested that the local officials' authority ***1136** to regulate elections ran afoul of the Elections Clause. Delegation was constitutionally unremarkable.

The ubiquity of delegation in the first decades of the republic has lessons for our understanding of the Constitution. The only reading of the Elections Clause that can comport with the settled expectations of Founding-era Americans is that the Constitution permits even extensive legislative delegations of discretion to determine the time, place, and manner of elections. An alternative

reading, in which delegation is prohibited or strongly disfavored, would lead to the absurd conclusion that the first several elections to Congress were basically illegal in most states. Courts should avoid reasoning that implies any disfavor towards delegations.

The conclusion that most delegations are compatible with the Elections Clause does not, however, end matters. Two legal questions remain for courts to resolve. One is how to identify delegations so extensive as to be impermissible, for surely even the most permissive delegation regime has limits. [202] The other is the how to reflect the historical evidence documented in this Article in interpreting delegating statutes.

Answering those questions completely is beyond the scope of this Article. But this Article suggests that two answers would be incompatible with the original meaning of the Constitution.

One wrong answer is to assert, as Judge Ho did in *Texas League of United Latin American Citizens v. Hughs*, [203] that extensive delegations to state executive officials are facially unconstitutional merely because they permit entities other than the legislature to make important decisions about the conduct of elections. That happened all the time in the early days of the republic. To take just one example, Judge Ho's rule would have invalidated Virginia's 1785 law permitting sheriffs to unilaterally choose alternative polling places in the event of a pandemic or public safety emergency, which remained in place for decades after the Constitution was ratified. [204] That is to say nothing of the scores of statutes conferring far greater discretion when public safety was *not* implicated. It ***1137** is difficult to believe that the original meaning of the Constitution could be so dissonant from everyday American practice. Indeed, this Article argues that it is not. So long as there is a valid statutory authorization, there is no constitutional problem with a legislative delegation under the Elections Clause.

Nor is it consistent with the evidence presented here to impose a special clear-statement rule on Elections Clause delegations, which would imply that delegations "press[] against a favored constitutional value." [205] That was the approach adopted by the Eighth Circuit in *Carson v. Simon* when it declined to view a consent decree as an "order of a court" requiring compliance. [206] It is also the approach that Judges Agee and Wilkinson would have adopted in *Wise v. Circosta* by declining to treat the ongoing global pandemic as a "natural disaster" for elections law purposes. [207] Both opinions claim that a clear-statement rule is required to preserve the legislative supremacy encoded in the Elections Clause.

But this Article shows that delegations enhance legislative supremacy rather than curtailing it. The most faithful reading of the Elections Clause, and the only one capable of explaining the first forty years of American practice, would view delegations as fully consistent with the text of the Constitution. Indeed, the historical evidence presented above teaches us that permitting delegations *enhances* the power of state legislatures to govern elections. Some policy options would have been practically off the table in the Founding era if delegation had been illegal.

Take the expansion of township voting in New Jersey and Delaware, which increased the number of polling places by an order of magnitude. Without delegation, the cost of such a change would have would have been immense. For proof of that, look no further than Georgia, where the legislature had to pass eight laws a year just to keep polling places up to date. [208] Such an immense legislative burden might have been enough to dissuade Delaware and New Jersey from reform. Instead, township voting was easily accomplished by simply delegating the power to choose polling places to local officials. The result was a change "that greatly ***1138** increased the accessibility of the polls." [209] Delegation made this sensible policy option--and many others-- practicable, enhancing the options available to legislators.

Courts would stray from the meaning of the Constitution by adopting a clear-statement rule that applies only in the context of federal elections and whose logic depends on the idea that delegations are constitutionally disfavored.

The evidence presented in this Article blocks off certain doctrinal paths, like a ban on delegations or a special Elections Clause clear-statement rule. But many remain. In particular, the question of how courts *should* interpret state statutes delegating power to executive or local officials merits much more discussion, especially if the Supreme Court chooses to adopt the ISL theory.

One alternative is to apply the state law of statutory interpretation to delegations. This approach has the virtue of staking the most plausible claim to capturing legislative intent, especially when Elections Clause delegations appear in trans-substantive statutes that apply beyond the context of elections; this is a point analogous to Carolyn Shapiro's broader argument against the

ISL theory.[210] For example, the Texas Disaster Act that was at issue in the *Texas League of United Latin American Citizens* litigation was passed in 1975 and allows the Governor to "suspend the provisions of *any* regulatory statute prescribing the procedures for conduct of state business"; federal elections are just one example of such a regulatory statute.[211] The most plausible interpretation of the legislature's expectation in passing that statute is that these words would be construed using general state law principles of statutory construction and nondelegation. The same principle would apply to the numerous statutes permitting elections officials to issue regulations modifying elections rules in response to court orders.

An alternative approach would be to read state delegation laws as if they were federal statutes and apply some kind of federal interpretive rule to discern the state legislature's intent. Michael Morley has suggested ***1139** simply applying the federal nondelegation doctrine to Elections Clause delegations, an approach that has the virtue of deploying a body of law well-known to federal courts.[212] But it is not obvious that the scope of delegations permitted by Article I, Section 8 is identical to that permitted by the Elections Clause. That concern would be even more acute if, as some observers expect,[213] the congressional nondelegation doctrine is significantly strengthened in the future, for instance by limiting delegations to factual determinations. Applying such a stringent rule to Elections Clause delegations would be difficult to square with the discretion-laden delegations described above, which go far beyond mere factual determinations. Instead, courts should make clear that Elections Clause delegations are permitted by the Federal Constitution, irrespective of what rules may apply to Congress.

APPENDIX: STATE LAWS GOVERNING FEDERAL ELECTIONS, 1788-1839

This Appendix reorganizes and extends the survey presented in the main body of the paper into a state-by-state survey of early statutory law governing elections. The main conclusions of the survey are summarized in Table A1, below. As I argue in the main body of the Article, virtually every state in the Union delegated significant authority to local elections officials to determine the times, places, and manner of elections. Following the table, I provide a summary of the relevant laws for each state.

A general methodological note worth emphasizing is that many forms of statutory discretion take a negative form: matters *not* specified are impliedly left in the hands of elections administrators. It can be challenging to infer legislative intent from a decision *not* to regulate a certain matter. Accordingly, in the discussion below, I use secondary sources to identify cases where legislative silence was recognized as conferring significant power and thus was less likely to be a merely accidental omission. By contrast, where I could find no evidence that legislative silence was recognized by relevant actors, I decline to draw a ***1140** conclusion about the implications of the underlying law for delegation purposes.

***1141 A1. Varieties of Local Authority to Govern Federal Elections, by State, 1788-1839**

STATE	TIME	PLACE	MANNER
Connecticut	Power to vary the length and exact timing of the freemen's meeting.	Complete discretion; decided by town meeting.	-
Delaware	-	Change polling place in case of inconvenience.	-
Georgia	-	Justices of the Peace in some outlying counties choose polling place.*	No manner prescribed in first law; considerable discretion over *viva voce* and/or balloting process in subsequent laws.

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Maryland	Choose the time of polling on prescribed day; adjourn elections.*	Subdivide counties and choose polling places in each district.*	Considerable discretion over *viva voce* process.*
Massachusetts	Choose closing time of polls; adjourn elections.*	Town custom governs. In towns with more than one meeting place, selectmen can adjourn from one place to the other at will.	Vote is by ballot; most other aspects of the process are discretionary.
New Hampshire	Choose the time of polling on prescribed day.	Town custom governs.	Vote is by ballot; virtually all other details discretionary.*
New Jersey	Choose closing time of polls; adjourn elections.*	Complete discretion; decided by town meeting.*	-
New York	Choose polling times within prescribed period; adjourn elections.*	Complete discretion given to election inspectors.	-
North Carolina	†	-	-
Pennsylvania	-	-	-
Rhode Island	Choose polling times on prescribed day.	Left to the discretion of town meetings.	Possible discretion over ballot secrecy.
South Carolina	†	-	†
Virginia	Choose polling times on prescribed day; adjourn elections.*	-	Considerable discretion over *viva voce* process. Total discretion given to sheriffs in Kentucky region.*

***1142** *Articles:* (1) A dash (-) indicates that statutory law does not contemplate significant discretion. Needless to say, actual practice may have varied in fact. (2) An asterisk (*) indicates that the power mentioned was either created or removed at some point during the survey period. (3) A dagger (†) indicates that I was unable to locate relevant evidence corroborating an apparent grant of discretion. See text for details. (4) Please see accompanying text for citations to supporting authority.

Connecticut

Connecticut politics in the early republic were defined by conservatism and the total domination of a Federalist political machine. [214] Elections were held in town meetings, as elsewhere in New England, but Federalists in the state legislature aggressively regulated some aspects of those meetings to suppress rival votes, especially for the powerful position of governor's assistant (a sort of upper house or executive council). [215] ***1143** Because the congressional election laws required that federal elections be held in the same manner as assistants' elections, Federalist efforts at the state level spilled over to federal elections.

For example, Connecticut law organized voting for assistants so that nominees were announced in order of seniority--incumbents first--with voters announcing their choices for each candidate in succession. [216] That is, the longest-serving incumbent would be announced, and then everyone supporting him would have to submit their votes; then the next candidate; and so forth. The effect of this method was to allow anyone present at the meeting to see who refused to support the incumbents, subjecting the deviants to potential sanction by local religious and political leaders. [217] This method was made even more coercive by the Stand-Up Law, passed in 1801, which required voters to stand or raise their hands when voting. [218] These techniques also reflect the power of local elites, invariably Federalist: all one had to do was force Jeffersonians to declare their support publicly and they would melt away.

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Given the strength of local elite power, it is unsurprising that many of the less salient details concerning the time, place, and manner of elections were left to the control of each town. Beginning in 1784 and in every election law through 1839, towns were expressly empowered to vote wherever they pleased; and while they were required to open the meeting at 9:00 am, there was no regulation on when voting for any specific office was to occur.[219] Some primary sources document the importance of the flexibility of timing. For example, the authors of a Republican circular in 1803 pleaded with party leaders:

***1144** [M]ake every effort to get voters from distant areas to the freemen's meeting on time, because 'every one should remember that the presiding officers are federal, and will open meetings, when they judge safest--that 9 o'clock will not tarry a moment ... that the whole business can be done in two hours.'[220]

Finally, some evidence suggests that the way Connecticut voters actually submitted their votes was a matter of local discretion. Richard Purcell's history of early Connecticut claims that between 1670 and 1814, towns could vote either by acclamation or by ballot.[221] However, the balance of evidence suggests that this flexibility did not extend to congressional elections (or at least that the law did not contemplate such flexibility). For one thing, given that congressional districts spanned many towns, it is unclear how voting by acclamation would have permitted the aggregation of votes across polling places. For another, the 1784 statute specifying the method for electing governor's assistants explicitly requires that "the Votes for election of Assistants shall be a written piece of Paper."[222] Accordingly, I draw no conclusion on the degree of local delegation regarding the manner of election.

Delaware

The available evidence suggests that Delaware was initially unsurpassed in leaving minimal discretion to any local official as to the conduct of elections. Even before the Revolution, Delaware law set out voting procedures in considerable detail: a 1772 law, for example, specified precisely the preparing, painting, and storing of ballot boxes; the casting and counting of ballots; and the timing of elections.[223] Again in 1794, the way ballots were to be written and cast was treated in detail.[224] Polling locations were specified in detail as well; polls for the first federal election, for instance, were held at the county courthouses.[225]

There was one major exception to the general lack of delegation to local officials. Beginning in 1779, the presiding officers at elections were ***1145** entitled to "adjourn the said election from day to day, if he or they find it necessary" because of a disturbance at the polling place.[226] This exception was joined by another in 1825, when Delaware law provided that there would be a polling place in each hundred, which was a subcounty unit (there were about ten hundreds per county).[227] Perhaps owing to the multiplicity of polling sites, the Delaware legislature explicitly delegated authority to local elections officials to "appoint some other place" for the polls if a default location specified in the statute proved "impracticable."[228]

Georgia

Like many other southern states, politics in early Georgia were marked by efforts on the part of a small number of leading families to assert control and were partially structured around local units of government to achieve that end.[229] Unlike in Virginia, however, "the local magistracy was the product of the legislature, not its foundation and not its source of power."[230] The leading families used the legislature to dominate the counties.

Their preferred method for exercising control over local politics was to make participation extremely inconvenient. A 1784 law required all elections to be at the county courthouse, which may have been a considerable challenge to reach for settlers living on newly seized indigenous land.[231] While early Georgia statutes are difficult to find, the first easily accessible state election law, from 1796, also specifies the time of the election with precision.[232] This appears to have been a resounding success; the first congressional election saw "less than one in six white adult males cast a vote" in the six original counties.[233]

While the time and place of elections was tightly controlled, the method appears not to have been. The 1796 law says nothing about how ***1146** the vote is to occur. And while a statute from 1799 provides that elections are to be *viva voce*, [234] it was repealed the same year, leaving on the books only a provision in the 1798 state constitution requiring *viva voce* voting unless "the legislature shall otherwise direct." [235] I could identify no state law between 1799 and 1821 purporting to create any more clarity on the procedures to be used in voting; only in 1821 is an offhand reference made to the procedure needed to "count out the ballots ... taken" by "the justices and freeholders that superintend the election." [236] Given the decision to repeal the *viva voce* provision, it is reasonable to conclude that local magistrates in some locales had switched to ballot-based voting in the ensuing years. No statutory standard I could identify governs that choice or says anything about how such balloting is to take place.

Finally, despite the tight control over the time and place of elections in the original eastern counties of Georgia, the state's early history is defined by its aggressive settlement of indigenous territories. [237] In the thinly populated counties on the state's western periphery, the legislature often made exceptions to general time, place, and manner provisions and delegated additional discretion to local magistrates. For example, an 1801 law governing elections in Jefferson County provided that "the Justices of the Inferior Court ... are hereby authorized and empowered, to fix on some fit and convenient house in the town of Louisville, in which Courts and Elections for said county of Jefferson, shall be held, until a Court-House shall be erected." [238] Thus, local magistrates enjoyed even greater discretion over elections in the hinterlands.

Maryland

The first Maryland law governing federal elections was passed in 1789. It provided that elections were to be held "on the first Wednesday of January next at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of ***1147** delegates ...." [239] This arrangement constrained local discretion in some respects. For instance, the state constitution of 1776 specified that electors should "assemble" at the "court-houses in the said counties, or at such other place as the legislature shall direct." [240] And obviously the date of the election was provided for by statute. Maryland experienced a series of election reforms in the first decades of the republic, moving from the traditional *viva voce* county courthouse elections typical of most southern states, to *viva voce* polls with multiple election sites in 1799, to finally a ballot-based system beginning in 1802. [241]

Within the frame created by these shifting election laws, election officials (first sheriffs, and then dedicated officials called judges, [242] and sometimes commissioners) possessed significant discretion. First, no law I could identify before 1799 specifies the time when polls were required to be opened or closed. At least one secondary source reports that sheriffs in the earliest elections thus enjoyed discretion over at least poll closing times. [243] Further, Maryland elections before 1799 lasted up to four days, [244] and at least in the 1788 elections to the ratifying convention, sheriffs enjoyed the power to adjourn elections when they wished. [245] As to the manner of election, the Maryland Constitution provided that delegates should be "elect[ed] *viva voce*," but said nothing about the procedures to be used at elections. [246] Like other southern states, then, the county courthouse was precisely fixed as the sole *place* of elections, but the time and manner in which those elections took place were prescribed only in broad strokes.

Over the course of the ensuing decades, the legislature changed the arrangement of discretion considerably. On the one hand, it surrendered ***1148** the power to set the location of elections. An 1800 election law appointed a set of commissioners to divide each county into a "number of districts" and to "make choice of a place in each district, at which the elections shall be held, as nearly central as shall be practicable, having regard to ... the accommodation of persons attendant upon such election ...." [247] In the following year, the legislature--apparently dissatisfied with some of the districts--appointed new commissioners in several counties and emphasized that commissioners were to "carefully mak[e] the several districts as nearly equal as possible, having regard to population, extent, and the convenience of the voters" and also to choose polling places within each district "having regard to the circumstances aforesaid." [248]

On the other hand, the legislature set down the time and manner of elections in more detail. The same 1799 statute required balloting to be complete on a single day and fixed poll closing times. And in 1803, polls were required to be open from 9:00 am.

until 6:00 p.m., and congressional elections were also required to be conducted by ballot. [249] The legislature provided detailed instructions for the first time on how votes were to be delivered, stored, and counted by election judges. [250]

This arrangement remained substantially unchanged through the publication of the first Code of Maryland in 1860: commissioners were empowered to set polling places, but the time and manner of elections were detailed by statute. [251] There were, to be sure, occasional exceptions. An 1827 statute, and a similar law passed in 1832, authorized the governor to choose an election day for congressional elections if the President called Congress into special session after the terms of the previous representatives had expired. [252] But apart from these exceptions, legislative control over the time and manner of elections was generally extensive.

Massachusetts

Massachusetts selectmen, sitting atop the storied town meeting, were given great power by the legislature to govern elections. Outside of a few ***1149** baseline requirements set by statute, town selectmen had latitude to regulate every aspect of the electoral process. For example, Massachusetts's 1794 congressional election law states simply that the selectmen shall "cause the inhabitants of their respective Towns and Districts ... to assemble on the first Monday of November ... to give in their votes for their respective Representative, to the Selectmen, who shall preside at said meeting." [253] Other laws specified Election Day and required voters to vote using ballots, but said little else about how the ballots were to be written, cast, counted, or stored. [254] The contrast with states like Delaware and New York is striking.

Further, that selectmen were "in a position to determine the manner in which elections were conducted" was widely understood because they did not hesitate to use their power. [255] For instance, during the Boston elections for state representatives in 1785-86, "the selectmen ordered 'that no Votes would be received but such as are unfolded"' and required that "Persons who Vote for Representatives shall ... enter into the Hall and there remaine, until the Poll is closed," two requirements found nowhere in state law. [256] Likewise, while the polls in most places were required to open past 1100 a.m. on election day, [257] "[t]he polls stayed open as long as the town wished," and the selectmen could bring a motion to the meeting at any time to close them. [258]

Such ample discretion was certainly not limited to Boston. A series of state election disputes from the early nineteenth century show the total consensus around the power of selectmen to alter the time and place of elections. For example, an 1800 state election dispute in the town of Harwich centered around the decision to adjourn a March 19 town meeting, where elections were to occur, until March 28 at a meeting-house on the other side of town. [259] A disgruntled group of citizens and a minority set of selectmen met at the original location and elected an alternative slate of representatives. But the legislature accepted the ***1150** representatives elected at the official session instead with nary a word. [260] Likewise, in 1808, a group of citizens from Standish complained to the General Court that, among other violations, the town selectmen had promised to open voting for state representatives at 11:00 a.m. but ultimately waited until past 3:00 p.m. to do so, allegedly to advantage their partisan allies. [261] But the General Court Committee on Elections simply noted that "these facts, if proved, would not affect the right of the member to his seat," presumably because town control over the time of elections was such a well-recognized principle. [262]

While these precedents emerge from state elections, they practically govern federal elections as well. Federal elections were simply appended to town meetings, and there is no indication that they were treated with any greater formality or reverence. Indeed, the reverse is true: voters cared much more about state politics than about federal elections in the early years. [263] The Massachusetts legislature simply did not determine the actual time, place, or manner of most federal elections.

New Hampshire

In the initial years following New Hampshire's ratification of the Constitution, its statutory election law appeared similar to that of Massachusetts: it provided exceptionally little guidance to the town selectmen in how they were to conduct elections. Voters

were instructed to assemble in their town parishes "on the third Monday of December," but the only specification provided on how the assemblies are to proceed was as follows:

> [T]he Selectmen of the several towns ... shall give fifteen days notice of the design of sd. meeting & shall during the Choice of Representatives preside ... impartially and shall receive the votes of all the Inhabitants ... and shall sort and count the same in the meeting .... [264]

***1151** Selectmen were told nothing about the procedures to be used, much less the precise time and place of the meetings. Indeed, the requirement to publicize the "design of sd. meeting" in advance arguably functions as an express grant of discretion. [265]

The total deference to local preference as to the exact time and place of the polls remained constant for at least the next thirty years. [266] But the manner of election was gradually made clearer. By 1813, an extensive set of regulations--governing how voters were to submit their ballots, how the ballots were to be stored and counted, and how returns were to be remitted--was included in the election law. [267] That this change apparently took nearly two decades to occur emphasizes the scale of the discretion previously granted to town selectmen to "design" election meetings however they wished.

While the scale of local discretion in New Hampshire appears to have been vast, little secondary evidence exists surrounding actual election practices in New Hampshire towns. The state's cultural and physical proximity to Massachusetts, however, and the similarity of the two states' legal frameworks and even jargon suggest that the power granted to town selectmen was not a matter of mere neglect. Rather, it reflects the significance of the town meeting in New England's early political culture.

New Jersey

As is true of New York, the mode of elections in New Jersey has long been prescribed in exacting detail by state legislation. While the first congressional election law was passed in 1788, the governing state election law that actually specified the mode of elections dated to 1779. [268] In it, the legislature specified the location of every poll [269] and, in the ***1152** counties where voting was conducted by ballot, provided an extremely specific process for how ballots would be cast and counted. [270] This aspect of New Jersey elections remained constant throughout the period under study: the mode of balloting was heavily regulated, down to details like whether ballots could be printed, at least through the 1830s. [271]

Regulations concerning the time and place where the polls were to be held were subject to more change. The timing of elections was initially a matter of discretion determined by election judges. For instance, the 1779 election law provided that:

> [T]he Judges of each Election ... shall have full Power to adjourn the Election, from Time to Time, as Occasion may require; and also to close the same when the Votes or Tickets of all the Electors present are delivered in, or a reasonable time for that Purpose shall have been allowed .... [272]

The delegation of power to set the times of elections was universally understood as such--and actively used by political entrepreneurs. [273]

Over the course of the next fifty years, that discretion was gradually limited. A 1790 law required polls to be open by 10:00 am. and prohibited the judges from adjourning the election for longer than half an hour. [274] By 1807, the opening and closing of the polls was governed by explicit statutory rules. [275] Thus, while the exact timing of polls was ***1153** initially a matter delegated almost entirely to the discretion of election judges, the legislature slowly reversed its decision to delegate.

The story of poll locations is just the opposite. The 1779 election law required all elections to be held at a specific place, usually the location of the county-level Courts of General Quarter-Sessions, and every exception was specifically enumerated (and an alternative provided for). [276] But in 1790, the New Jersey Federalists, looking to increase their vote share in statewide races, instituted township-level voting--but only in "the state's seven most Federalist counties." [277] By 1797, Federalists "were no longer able to block demands for the extension of township voting to Republican counties." [278] The result was the dramatic expansion in the number of polling places, making it much more costly for the legislature to set the location of each one in a statute.

The legislature's solution was to simply delegate responsibility for setting the places where elections would be held to the towns themselves. The 1797 law extending township voting to the entire state provides that "the inhabitants of each township and precinct within this state, at their annual town meetings," shall "appoint the place or places, not exceeding two, for holding elections within their respective townships or precincts ...." [279] And while an 1807 congressional election law constrained townships to keeping polling places at the same locations as during the previous elections, [280] a later 1839 revision of the elections code reverted to the rule that each township could put its poll wherever it liked. [281] In short, New Jersey ended the period under study with a firmly established rule delegating the "Place" of federal elections to towns.

New York

Like New Jersey, New York law exhaustively regulated the way voters cast ballots and especially the way those ballots were treated after being cast. As early as 1787, election laws explicitly required that ballots be written and folded in half so as to conceal the writing they contained and ***1154** provided detailed instructions for how the election inspectors were to canvas the vote and report it. [282] These instructions only got more elaborate over time. An 1801 law, for example, required that ballot boxes have a "sufficient lock," that the election judges vote on which of them was to keep the key, and that the box have "a small hole ... sufficient only to receive each ballot, and through which all the ballots shall be put into the box." [283]

One notable area of discretion pertaining to the "manner" of conducting elections was New York's method for resolving election disputes. In the last decades of the eighteenth century, New York law provided that the physical votes for all statewide elections were to be delivered to and counted by a canvassing board consisting of appointees chosen by the state House and Senate. [284] The canvassing board's decision on whether to count ballots was "in all cases, binding and conclusive," [285] a fact which caused a great firestorm in the disputed 1792 gubernatorial election when the board decided to throw out several hundred votes over a technicality, handing the election to George Clinton. [286] The ensuing uproar, however, resulted in the board being stripped of the duty of canvassing individual votes by 1799; thereafter, local officials counted ballots and transmitted certificates of their counts to Albany. [287]

But it was on the matters of time and especially place where New York's grant of discretion to local officials was noteworthy and durable. Election inspectors elected at the local level could determine when polls opened and closed. [288] This power was reaffirmed by statutes in 1801 [289] and 1813. [290] Beginning in 1807, [291] a single exception appeared: the legislature chose to limit discretion over time, but *only* for New York City, where polls were required to be open from 10:00 am. until sunset--strengthening the implication that other localities received intentional ***1155** discretion to determine voting times. New York election inspectors also enjoyed the power to adjourn elections, sometimes for days at a time, [292] and they were held to be "the exclusive judges of the necessity of the adjournment." [293]

The apogee of the New York election inspectors' power was their control over the location of polls. The state's 1787 election law provided that inspectors were to give "eight days notice of the place (which shall be the most public and convenient for that purpose) ... where such election ... then next shall be held ...." [294] That power was repeatedly reaffirmed, first by the 1791 congressional election law, [295] and again in 1792, [296] 1801, [297] and 1813. [298] The New York legislature thus occupied virtually the entire field in determining the manner of elections while leaving the time and place of elections to local officials.

North Carolina

North Carolina's first federal election law provided that the elections were to be held "on the first *Thursday* and *Friday* in *February* next ensuing, at the Places appointed by Law for the annual Elections of Members of the General Assembly, and the same are to be conducted in like Manner with the said annual Elections ...." [299] Like most southern states, North Carolina elections were required by statutory law to be held at county courthouses. [300] Unlike many of its neighboring states, however, North Carolina held its elections by ballot starting at the early date of 1777 and provided detailed instructions on how such votes were to be cast and ***1156** counted. [301] The same 1777 statute provided that polls were to open at 12:00 p.m.. [302] The one possible source of discretion is the time at which polls were to be closed; however, because I was unable to identify significant secondary evidence corroborating variation in closing times, I reach no conclusion on whether power was actually exercised or recognized.

Pennsylvania

The dominant political ideology in post-Revolutionary Pennsylvania was one thoroughly committed to legislative supremacy. [303] Perhaps it is therefore unsurprising that Pennsylvania was far and away the state in which the least discretion was delegated away from the state legislature in the first decades of American independence. The first election law, for example, specified the manner of voting in great detail, requiring each voter to write eight names on a ticket and providing extensive instructions for how ballots would be counted. [304]

The places of voting had long been specified in detail by the legislature. [305] Further, the exact locations where voters would be allowed to vote were specified with such detail that a supplementary law had to be passed in late 1788 allowing voters attending court on the day of the election to cast their ballots at a different precinct within the same county. [306] This trend continued: the index to a statutory compilation covering the years 1803-1805, for example, includes seventy-one separate entries for provisions setting out election districts and the places ***1157** where voting would occur within them. [307] Suffice to say that delegation was not the order of the day.

Finally, the time when polls would be open was also specified by statute. One law from 1777, for instance, required that polls in Philadelphia be held open between 10:00 am. and 2:00 p.m.. [308] To be sure, some secondary literature contains reports of profligate sheriffs disregarding the law and manipulating elections for partisan gain [309] But these instances tell us more about the challenges of governance in a large state than they do about early Americans' understanding of the powers that could be legitimately alienated by the legislature.

All indications suggest that the phenomenon of virtually total legislative control over elections continued throughout the study period.

Rhode Island

It is difficult to characterize early election practices in Rhode Island with great precision. As a background matter, Rhode Island's size meant "that the crucial electoral arena was the colony--later the state--as a unit," [310] so that sub-state institutions were historically weak. [311]

Nonetheless, Rhode Island towns appear to have enjoyed similar reserve powers to govern the times and places of their meetings as did towns elsewhere in New England. The first federal election statute, passed in 1790, provided that elections would be held in "Town meetings legally assembled on the last Tuesday in August next." [312] A statute passed in 1798 [313] provided the same instruction, but further required that the ***1158** election conform to the rules set out previously for state elections in a statute governing town meetings passed in 1762. That 1762 statute was concerned mostly with defining voter qualifications. It laid

down the day when town meetings were to be held but did not specify their precise time or place. [314] Given that Rhode Island towns (like other towns in New England) enjoyed the freedom to set the time and place of their meetings during the colonial period, [315] and given the continuity of Rhode Island's charter following the Revolution, it seems likely that the statutory silence as to the meeting places and opening times of town meetings held for elections implied that towns had discretion to fill in these details. Rhode Island election laws thus seemed to allow some latitude for determining the time and place of meetings.

Some caution is needed in drawing a similar inference with respect to manner. The law provided some instruction on the order of town meetings in which elections were to be held. [316] And a 1762 law, in force throughout the study period, required that electors employ "Proxes"--probably a reference to paper ballots in voting. [317] However, two secondary sources suggest that whether those ballots were secret may have been left to the discretion of towns. Irwin Polishook writes that state law "require[d] a secret vote upon the request of a single freeman and a second to his motion." [318] Consistent with that claim, Chilton Williamson claims that placing the ballot in a sealed envelope was "optional." [319] The power to decide whether voting was secret would represent a significant delegation to towns in the mode of elections, but I could not locate a statute explicitly granting that power.

1159** ***South Carolina

Unfortunately, comprehensive treatments of early South Carolina elections law are difficult to find. For example, *The Documentary History of the First Federal Elections* reports that the engrossed version of South Carolina's first federal election law has not been located; the version in that volume comes from a series of certified copies. [320] The difficulty of finding early South Carolina law makes it difficult to conclude much from the first federal election statute, which provides merely that "the said Elections shall be holden at the times and places and regulated and conducted in the same manner as the Elections for the Members of the House of Representatives of this State at the next general Election." [321]

However, what evidence is available suggests that South Carolina mirrored its neighbors in limiting the discretion of localities to choose the locations of their polls. A 1791 joint resolution by the state legislature, for example, contained a list of every town in the state and specified in great detail where the next general election was to be conducted and by whom. [322] A similar statute appeared in 1797. [323]

As for the time and manner of election, the state constitution of 1778 specified two days for election. [324] I could identify no law, as late as 1814, providing any further guidance on the times when polls were to be open or the mode of conducting elections. This is facially consistent with a great deal of discretion to determine the exact times when polls would be open and consistent with the kinds of discretion given to officers in other states. But because I was unable to identify secondary sources positively confirming the existence of variation in the actual election practices in towns across the state, I reach no conclusion on the discretion delegated by the legislature.

The sole form of discretion that appeared consistently was the authorization for "managers of elections" to verify the qualifications of ***1160** voters in the following manner: "[T]he respective managers of elections ... are hereby empowered, if they think it necessary, to administer the usual oaths to any person or persons, whatever, who shall appear to give their votes at such elections." [325] But this was a form of discretion pertaining to voter qualifications, not time, place, or manner.

Virginia

Apart from the New England town meeting tradition, Virginia was the epicenter of localism in early America. The local gentry exercised "continuing control" over government and were the potent force organizing county elections. [326] Their primary instruments were the justices of the peace, who ran county governments. [327] While theoretically appointed by the Governor, in fact, local justices hand-selected their successors, as well as most of the important county-level officials, including sheriffs. [328]

Their discretion in the realm of elections was profoundly ensconced in the law and society of early Virginia: "There were no institutional checks guaranteeing that the sheriff would use his power impartially," and although appeals could theoretically be lodged with the House of Delegates, "it rarely ruled against [them]." [329] Indeed, it is more helpful to ask what *was not* delegated than to ask what was.

Start with the timing of elections. While the statutes directing the holding of congressional elections provided that elections were to be held on a specific day, Virginia sheriffs held unlimited authority over the times when polls would be open. In the years immediately preceding the Revolution, the sheriff "opened the poll when he pleased and closed it when he pleased, sometimes closing it despite the pleas of a candidate to keep the poll open until more voters could be corralled." [330] The same was true in the first decades of the republic. [331]

***1161** Further, the sheriff could adjourn elections for long periods. In 1785, just before the first federal elections, the legislature passed a law providing that sheriffs could adjourn elections for up to four days if there were too many voters or inclement weather. [332] In practice, a strong presumption of regularity applied to sheriffs' decisions, so that their determination about weather or crowds was effectively unreviewable. [333] Further, the maximum adjournment period appears to have been more suggestion than rule: "In some cases, as in Harrison County in 1790, the sheriff could keep the polls open for as many as eleven days" [334] The importance of the adjournment power did not go unnoticed. It was the subject of constant complaints to the legislature, not to mention the several elections disputes raised before Congress complaining of an unfair extension or closing of the polls in some Virginia county. [335] But in almost every case, the sheriff's power was affirmed. [336]

A similar degree of discretion was afforded in the mode of election. Virtually the only thing prescribed by law was that "no determination shall be had by view," that is by acclamation or show of hands, "but each person qualified to vote shall fairly and publicly poll." [337] Apart from that, "the intentions of the legislature were interpreted in a startling variety of practices." [338] For instance, one account of a *viva voce* election in Kanawha County had the candidates for office lined up in a row facing the place where a voter would announce his decision, the better to thank each voter for his support. [339]

Two additional manner-related issues where significant statutory regulation was imposed were (1) a series of proclamations to be announced at various stages in the polling process and (2) the procedure by which county sheriffs would meet to combine and compute returns for ***1162** congressional districts. [340] Also, statutes beginning at an early date imposed fines on sheriffs for failing to behave impartially or failing to fulfill their responsibilities under the law. But, strikingly, even these mild limits on discretion were waived for sheriffs in the most outlying counties of the state, who were instructed to execute their responsibilities "under the best circumstance which the promulgation of this act will admit of." [341] In short, necessity trumped legislative supremacy.

The one area where Virginia generally left little room for discretion was the location of elections, which were always held at county courthouses. [342] Even here, however, sheriffs had the power to move the polls in emergency circumstances. For instance, the 1785 law provided that if an election needed to be held in a courthouse to count votes, but the town be "infected with any contagious disease, or be in danger of an attack from a public enemy," then the sheriff could move voting to "some other place." [343]

Footnotes

a1 Law clerk to the Hon. Patricia A. Millett, United States Court of Appeals for the District of Columbia Circuit; Ph.D. Candidate, Stanford Political Science Department; J.D., Stanford Law School. This work reflects my views alone. I thank Bernie Meyler, Barbara Fried, Ethan Herenstein, Dan Ho, Greg Ablavsky, Bob Gordon, Brent Salter, Tanner Allread, and other participants in the Stanford Law and History Workshop for their helpful comments. I am grateful to Caroline X. Hardie, Thomas J. Schnoor, Riley K. Segars, Scott Chamberlain, Annabella Waszkiewicz, and the entire

staff of the *Virginia Law Review*, whose superb editing is a credit to this journal. Finally, I thank Jane Kessner for her constant support.

1 U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Constitution contains numerous references to elections, but in this Article, I use the phrase "Elections Clause" to refer specifically to this clause.

2 See Smiley v. Holm, 285 U.S. 355, 368 (1932) (holding that a gubernatorial veto is part of the "legislature" for Elections Clause purposes); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 566, 568 (1916) (holding that the Elections Clause permits Ohio to use a referendum to pass its redistricting plan); see also infra Section I.A (discussing scholars' broad interpretation of "Legislature").

3 Of course, the Secretary of State would still be restrained by a number of other federal constitutional provisions, like the Equal Protection Clause and the Due Process Clause.

4 Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC"), 576 U.S. 787, 808 (2015).

5 Other scholars refer to an "Independent State Legislature Doctrine," see, e.g., Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 Fla. St. U. L. Rev. 731, 732 (2001), though referring to this view as a "doctrine" may lend it too much heft.

6 *AIRC*, 576 U.S. at 825 (Roberts, C.J., dissenting) (alteration in original) (emphasis omitted) (quoting *Smiley*, 285 U.S. at 365).

7 See, e.g., Michael T. Morley, The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, 55 Ga. L. Rev. 1, 8 (2020) ("[S]tate constitutions ... cannot limit a legislature's power to regulate most aspects of federal elections.").

8 See Moore v. Harper, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022) (granting certiorari).

9 531 U.S. 98, 112 (2000) (per curiam). An earlier per curiam decision in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76-77 (2000), had also strongly intimated that the Court was inclined to adopt the Independent State Legislature theory, but the opinion fell short of actually adopting the theory as its holding.

10 *Bush v. Gore*, 531 U.S. at 113-14.

11 *AIRC*, 576 U.S. at 814.

12 I provide more detail on this claim in Section I.A, infra. To briefly summarize that discussion, two prominent scholars have advocated a strict view of statutory delegations. Derek Muller claims in a 2016 piece that "the historical understanding of the power of the 'Legislature' precluded a delegation of its power to another entity," an almost-wholesale repudiation of delegations. Derek T. Muller, Legislative Delegations and the Elections Clause, 43 Fla. St. U. L. Rev. 717, 718 (2016). In some of his writing, Michael Morley has likewise argued against any restrictions on legislative power to set election regulations, including restrictions passed by legislatures themselves. Morley, supra note 7, at 92 (arguing that state legislatures should not be able to restrict their own "inalienable authority granted by the U.S. Constitution" to write elections laws); Michael T. Morley, The New Elections Clause, 91 Notre Dame L. Rev. Online 79, 93-94 (2016) [hereinafter Morley, The New Elections Clause] (criticizing *AIRC* for foreclosing future delegation challenges). Note, however, that a more recent perspective disclaims hostility to delegations. Michael T. Morley, The

Independent State Legislature Doctrine, 90 Fordham L. Rev. 501, 555 (2021) [hereinafter Morley, The Independent State Legislature Doctrine].

13 That is, many scholars expect federal nondelegation doctrine to be significantly tightened in coming years. See, e.g., Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1295-97 (2021) (describing the support for a much more stringent version of the doctrine). If this were to occur, then applying federal nondelegation rules to state elections might prove problematic.

14 Carson v. Simon, 978 F.3d 1051, 1062 (8th Cir. 2020); see infra Section I.B.

15 Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 150 (5th Cir. 2020) (Ho, J., concurring); Wise v. Circosta, 978 F.3d 93, 104 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., dissenting); see infra Section I.B.

16 See infra Section I.A; see also, e.g., Muller, supra note 12, at 718-20 (outlining an argument on legislative delegations rooted in late nineteenth-century congressional precedents and the pre-ratification history of the Seventeenth Amendment).

17 The text of the Elections Clause is susceptible to interpretation by reference to historical practice because it is ambiguous with respect to delegations. See William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 14 (2019).

To see this, first note that the Elections Clause is simply equivalent to a grant of legislative power--no different than the grant of power to Congress in Article I, Section 8. In particular, no special significance should be attached to the appearance of the word "prescribe," a word that the Supreme Court's favorite Founding-era sources treat as synonymous with "make legislation about." See, e.g., 1 William Blackstone, Commentaries *38 (defining law as a "rule of action, which is prescribed by some superior, and which the inferior is bound to obey"); id. at *44 ("Municipal law ... is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state ....'"); id. at *46, *52; see also The Federalist No. 57, at 280 (James Madison) (Terence Ball ed., 2003) (using the phrase "the mode prescribed by the Constitution for the choice of representatives" to refer to the states' control over elections under the Elections Clause); The Federalist No. 75, at 365 (Alexander Hamilton) (Terence Ball ed., 2003) ("The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society."). Because "prescribe" simply means "make law about," the Elections Clause is no different from other grants of legislative power. Does a grant of legislative power preclude delegations?

Virtually everyone agrees that the Constitution's other major grant of legislative power--Article I, Section 8--is textually ambiguous with respect to delegations. See, e.g., Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379, 389 (2017) (noting "[t]here is no explicit textual prohibition on the delegation of legislative power," though "such a rule has long been thought implicit"); Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 274, 324 n.233 (1993) (anchoring the nondelegation doctrine in the Necessary & Proper Clause, not in the grant of power at the outset of Article I, Section 8).

The conjunction of these two facts suggests that the propriety of Election Clause delegations cannot be determined from the text alone. Thus, historical evidence matters. It might either reveal Americans' expectations about what the Clause's text meant or reveal the settlement of their meaning in the first decades of the republic. See Baude, supra, at 14.

18 Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39.

19 See, e.g., Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 318; see also infra Appendix ("New York").

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20 See infra Part III.

21 See infra note 72 and accompanying text.

22 See, e.g., Justin Weinstein-Tull, Election Law Federalism, 114 Mich. L. Rev. 747, 778-80 (2016); Daniel P. Tokaji, The Future of Elections Reform: From Rules to Institutions, 28 Yale L. & Pol'y Rev. 125, 130-31 (2009) (describing the discretion baked into current election administration systems).

23 See generally Gary J. Miller & Andrew B. Whitford, Above Politics 17-22 (2007) (arguing that delegation is key to establishing credibly neutral agencies like the Federal Reserve). As Michael McConnell points out, the issue of neutrality is less pronounced when legislatures make generalized ex ante rules. Michael W. McConnell, Two-and-a-Half Cheers for *Bush v Gore*, 68 U. Chi. L. Rev. 657, 661-62 (2001). But a regime without any delegation at all would inevitably require significant policy choices to be made at a close enough vantage point to an election that the stakes of any decision, and the likely beneficiaries, would be readily apparent.

24 See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC"), 576 U.S. 787, 808 (2015) ("[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking.").

25 As noted below, I thank Greg Ablavsky and Robert Gordon for helping me see this alternative possibility.

26 Hayward H. Smith, Revisiting the History of the Independent State Legislature Doctrine, 53 St. Mary's L.J. 445 (2022) (manuscript at 37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205 [https://perma.cc/78LE-H76B].

27 *AIRC*, 576 U.S. at 824-25 (Roberts, C.J., dissenting); see infra note 69 and accompanying text.

28 Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch J. concurring); id. at 34 n.1 (Kavanaugh, J. concurring); see infra notes 70-71 and accompanying text.

29 Moore v. Harper, 142 S. Ct. 1089, 1089-90 (2022) (mem.) (Alito, J. dissenting from denial of application for stay); id. at 1089 (Kavanaugh, J., concurring in denial of application for stay).

30 Parrillo, supra note 13, at 1302, 1304.

31 Id. at 1301 & n.48.

32 See, e.g., Morley, The Independent State Legislature Doctrine, supra note 12, at 535 ("When plaintiffs allege a violation of their constitutional rights or federal voting-related statutes, they raise a federal question.").

33 See *supra* note 17 for a defense of the view that the language of the Elections Clause is not meaningfully different from that in Article I, Section 8.

34 Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC"), 576 U.S. 787, 808 (2015).

35 See Moore v. Harper, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022) (granting certiorari).

36 *AIRC*, 576 U.S. at 825 (Roberts, C.J., dissenting) (emphasis omitted) (alteration in original) (quoting Smiley v. Holm, 285 U.S. 355, 365 (1932)).

37 For an exception, see James C. Kirby, Jr., Limitations on the Power of State Legislatures Over Presidential Elections, 27 L. & Contemp. Probs. 495, 495 (1962).

38 Michael T. Morley, The Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. 847, 849 (2015) [hereinafter Morley, Intratextual Legislatures] ("[T]he meaning of the term 'legislature' in the Elections Clause and Presidential Electors Clause appears quite clear: it refers to the entity within each state comprised of elected representatives that enacts statutes."); see also McConnell, supra note 23, at 661 (reviewing similar language in the Presidential Electors Clause of Article II); Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": The Outcome in *Bush v. Gore* Defended, 68 U. Chi. L. Rev. 613, 619 (2001) (same).

39 See Morley, Intratextual Legislatures, supra note 38, at 855-60. This argument is also pressed by Chief Justice Roberts's dissent in *AIRC*. 576 U.S. at 829-32.

40 *See AIRC*, 576 U.S. at 831-32 (Roberts, C.J., dissenting); see also Nicholas P. Stabile, Comment, An End Run around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the Method of Distributing Electors, 103 Nw. U. L. Rev. 1495, 1496-97 (2009) (arguing that the use of a ballot initiative to change the method of selecting electors violates Article I).

41 See Morley, Intratextual Legislatures, supra note 38, at 859-60.

42 Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 155-56 (2001).

43 McConnell, supra note 23, at 661-62.

44 576 U.S. at 808 (alteration in original) (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932)).

45 Id. at 807; see also Saul Zipkin, Note, Judicial Redistricting and the Article I State Legislature, 103 Colum. L. Rev. 350, 373-76 (2003) (arguing for a two-step analysis to determine whether a state court may review a decision delegated by the Constitution to a state legislature, in which the second step is to ask whether the power in question is "essentially legislative").

46 Smith, supra note 5, at 743.

47 Id. at 754-56.

48 Id. at 760-63.

49 Smith, supra note 26, at 1.

50 Smith, supra note 5, at 764-66.

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51 Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative, 77 Ohio St. L.J. 689, 715-18 (2016).

52 See Nathaniel Persily, Celebrating the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States, 44 Ind. L. Rev. 85, 85-86 & n.4 (2010) (citing David C. Kimball & Martha Kropf, The Street-Level Bureaucrats of Elections: Selection Methods for Local Elections Officials, 6 Rev. Pol'y Res. 1257, 1257 (2006)).

53 Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 Vand. L. Rev. 89, 89 (2014); see also James A. Gardner, The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections, 29 Fla. St. U. L. Rev. 625, 625 (2001) (discussing how state officials are understood to draw their power from state constitutions).

54 Richard H. Pildes, Constitutionalizing Democratic Politics, *in* A Badly Flawed Election 155, 156 (Ronald Dworkin ed., 2002).

55 See Gary J. Miller & Andrew B. Whitford, Above Politics: Bureaucratic Discretion & Credible Commitment 111-15 (2016) (discussing the bureaucratic machinations that maintained the Federal Reserve's independence, despite its formal weakness as a creature of statute); Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputation, Networks, and Policy Innovation in Executive Agencies, 1862-1928, at 5 (2001).

56 Muller, supra note 12.

57 See, e.g., id. at 723-25 (discussing litigation on the Seventeenth Amendment in the early twentieth century); id. at 730-32 (discussing disputed congressional elections drawn, with two exceptions, from after 1850).

58 Id. at 720-25, 732-33.

59 For this reason, I view Muller's assertion that "there is deeply engrained in the constitutional structure a prohibition on delegation of the electoral power," id. at 739, as lacking a foundation in the original meaning of the text.

60 241 U.S. 565, 566 (1916).

61 285 U.S. 355, 368 (1932).

62 For a critical discussion of the way current precedent forecloses delegation-related challenges, see Morley, The New Elections Clause, supra note 12, at 93.

63 See, e.g., Miller v. Treadwell, 736 F. Supp. 2d 1240, 1242-43 (D. Alaska 2010) (rejecting an Elections Clause challenge to the Alaska Department of Elections's policy on counting write-in votes); Woodruff v. Herrera, No. CV 09-449, 2009 WL 10668512, at *3 (D.N.M. Dec. 11, 2009) (summarily rejecting an Elections Clause challenge to the Secretary of State's decision to allow voters to select a "straight ticket" option, despite the fact that there was no statutory authorization for such an option on the ballot); Moore v. Hosemann, No. 3:08CV573, 2008 WL 11439423, at *1 (S.D. Miss. Sept. 29, 2008) (rejecting an Elections Clause challenge to the Secretary of State's decision to close candidate registration at 5:00 p.m. on the statutory deadline).

64 Baldwin v. Cortes, 378 F. App'x 135, 138-39 (3d Cir. 2010).

65 Id.

66 See 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008).

67 Id. at 1012 (emphasis added).

68 See Moore v. Harper, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022).

69 576 U.S. 787, 829-41 (2015) (Roberts, C.J., dissenting) ("Under the Elections Clause, 'the Legislature' is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process.").

70 Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring).

71 Id. at 34 n.1 (Kavanaugh, J., concurring).

72 That is because the underlying case was about a federal judge applying federal constitutional law. No state constitutional issues were presented. In *Democratic National Committee v. Bostelmann*, a federal judge in Wisconsin granted a preliminary injunction suspending a number of Wisconsin election regulations on Fourteenth Amendment grounds after applying *Burdick* balancing. 488 F. Supp. 3d 776, 799-801, 817 (W.D. Wis. 2020) (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)). The Seventh Circuit stayed the injunction. Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 641 (7th Cir. 2020).

73 See Moore v. Harper, 142 S. Ct. 1089, 1089-91 (2022) (mem.) (Alito, J., dissenting from denial of application for stay) ("[I]f the language of the Elections Clause is taken seriously, there must be some limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for ... federal elections.").

74 Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020, Ballotpedia, https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/699T-VEWV] (last updated Nov. 19, 2020).

75 See Wendy R. Weiser, Dominique Erney, Eliza Sweren-Becker & Anne Glatz, Mail Voting: What Has Changed in 2020, Brennan Ctr. for Just. (Sept. 17, 2020), https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020 [https://perma.cc/DGX6-HARR] (noting that of fourteen states to expand excuses for absentee ballot access, "[f]ive states did so by gubernatorial order, five through action by state election officials, and four legislatively," among many other accommodations won via executive action).

76 See, e.g., Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620, 627-28 (E.D. Wis. 2020) (challenging guidance documents related to the proper interpretation of state law); Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020) (challenging guidance related to signature verification procedures).

77 See, e.g., Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 821 (D. Mont. 2020) (gubernatorial order suspending law limiting absentee voting); Minn. Voters All. v. Walz, 492 F. Supp. 3d 822, 836 (D. Minn. 2020) (alleging that a generally applicable executive order requiring masks in public places violated the Elections Clause as applied to polling places); Singh v. Murphy, No. A-0323-20T4, 2020 WL 6154223, at *6 (N.J. Super. Ct. App. Div. Oct. 21, 2020) (challenging executive order mandating that the election be conducted primarily with mail-in ballots).

78 See, e.g., Carson v. Simon, 978 F.3d 1051, 1054 (8th Cir. 2020) (consent decree extending ballot-receipt deadline); Wise v. Circosta, 978 F.3d 93, 106 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., dissenting) (consent decree extending ballot receipt deadline); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1316-18 (N.D. Ga. 2020) (settlement agreement adding additional process before invalidating ballots); League of Women Voters of Va. v. Va. State Bd. of Elections, 481 F. Supp. 3d 580, 587 (W.D. Va. 2020) (consent decree eliminating witness requirement for absentee ballots).

79 See, e.g., King v. Whitmer, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2020) (alleging that state officials violated the Elections Clause by failing to comply with relevant statutes).

80 See, e.g., Tex. Voters All. v. Dallas County, 495 F. Supp. 3d 441, 449, 461-62 (E.D. Tex. 2020) (arguing that the Elections Clause prohibited counties from accepting COVID-19 relief grants from nonprofit organizations meant to ensure voter safety during 2020 election, and dismissing on standing grounds); Ga. Voter All. v. Fulton County, 499 F. Supp. 3d 1250, 1255 (N.D. Ga. 2020) (dismissing the case for lack of standing).

81 See Lance v. Coffman, 549 U.S. 437, 442 (2007) ("The only injury plaintiffs allege is that the law--specifically the Elections Clause--has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.")

82 See Raines v. Byrd, 521 U.S. 811, 829-30 (1997).

83 See, e.g., Bognet v. Sec'y of Pa., 980 F.3d 336, 345-46 (3d Cir. 2020), vacated as moot sub nom. Bognet v. Degraffenreid, 141 S. Ct. 2508, 2508 (2021); *Wood*, 501 F. Supp. 3d at 1320-21; Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020) (noting that plaintiffs withdrew an Elections Clause challenge because they acknowledged that they lacked standing to pursue it).

84 978 F.3d 136, 139-40 (5th Cir. 2020).

85 Id. at 141-42 (describing the statutory scheme and executive proclamations issued pursuant to it).

86 Id. at 150-54 (Ho, J., concurring) ("In response, the Secretary of State seeks a stay of the preliminary injunction pending appeal. Tellingly, however, nowhere in her stay papers does the Secretary suggest that the preliminary injunction conflicts with Articles I and II of the U.S. Constitution--perhaps because she recognizes that the Governor's proclamations suffer from the same defect.").

87 978 F.3d 1051, 1054 (8th Cir. 2020).

88 Id. at 1060; see also Minn. Stat. Ann. § 204B47 (West 2021) ("When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order. The procedures may include the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order or any other order extending the time established by law for closing the polls.").

89 To take just one example, the Supreme Court said in *United States v. Swift & Co.* that "[w]e reject the argument ... that a decree entered upon consent is to be treated as a contract and not as a judicial act." 286 U.S. 106, 115 (1932).

90 *Carson*, 978 F.3d at 1060.

91 Needless to say, one can imagine plenty of court orders that "prevent a provision of the Minnesota Elections Law" from being implemented without "invalidating" the statute entirely--say, an order in an as-applied constitutional challenge. Cf. Minn. Stat. Ann. § 204B.47 (West 2021).

92 978 F.3d 93, 104-17 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., dissenting).

93 Id. at 96-97 (majority opinion) (describing the history of the initial suit).

94 N.C. Gen. Stat. § 163-27.1(a) (2021).

95 *Wise*, 978 F.3d at 113 (Wilkinson & Agee, JJ., dissenting).

96 Disaster, Black's Law Dictionary (11th ed. 2019).

97 *Wise*, 978 F.3d at 115 (Wilkinson & Agee, JJ., dissenting).

98 Judges Agee and Wilkinson do raise a concern that would be problematic under the current reading of the Elections Clause, which is that the Board's interpretation of the underlying statute would violate a nondelegation doctrine that has been read into the North Carolina Constitution. See id. at 114-15 (citing Adams v. N.C. Dep't of Nat. & Econ. Res., 249 S.E.2d 402, 410 (N.C. 1978)). But current Supreme Court doctrine would place that state constitutional question within the ambit of state courts' primary competence--and a state court issued the underlying consent decree at the basis of the lawsuit.

99 Recent scholarship joins with the opinions mentioned here in hotly anticipating that the Supreme Court will soon adopt the Independent State Legislature theory. See Morley, supra note 7, at 69.

100 For a discussion of anticipatory overruling, see Richard M. Re, Narrowing Supreme Court Precedent From Below, 104 Geo. L.J. 921, 941 n.94 (2016).

101 See Richard R. Beeman, The Old Dominion and the New Nation: 1788-1801, at 34 (1972); see also infra Appendix (discussing Virginia's early election practices).

102 See David Syrett, Town-Meeting Politics in Massachusetts, 1776-1786, 21 Wm. & Mary Q. 352, 363 (1964).

103 Robert J. Dinkin, Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689-1776, at 122 (1977).

104 Id. at 122-23 ("The date of election in each separate town was left to be established by the local selectmen.").

105 See id.; see also Donald Ratcliffe, The Right to Vote and the Rise of Democracy, 1787-1828, 33 J. Early Republic 219, 234-35 (2013) (discussing the use of paper ballots in the colonial era).

106 See Hendrik Hartog, Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American History, *in* Law in the American Revolution and the Revolution in the Law, 229, 234-35 (Hendrik Hartog ed., 1981).

107 Stephen B. Presser, Revising the Conservative Tradition: Towards a New American Legal History, *in* Law in the American Revolution and the Revolution in the Law, supra note 106, at 125.

108 See Gregory Ablavsky, Empire States: The Coming of Dual Federalism, 128 Yale L.J. 1792, 1823-24 (2019).

109 See Chilton Williamson, American Suffrage: From Property to Democracy, 1760-1860, at 135 (1960) ("No state between the end of the Revolution and the Federal Convention divorced property from voting."). See generally Ratcliffe, supra note 105, at 223-30. (discussing how voting was limited and how no effort was made to allow poor men to vote).

110 See generally Caroline F. Sloat, A New Nation Votes and the Study of American Politics, 1789-1824, 33 J. Early Republic 183, 183-86 (2013) (describing Lampi's data and the process by which it was collected).

111 See Ratcliffe, supra note 105, at 228-29.

112 The elections data in this figure are from Philip J. Lampi, A New Nation Votes: American Election Returns 1787-1825, https://elections.lib.tufts.edu/ [https://perma.cc/5VS9-XQEQ] (last visited Feb. 28, 2021). The population data are taken from 1 U.S. Dep't of Com., Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, at 8 ser. A 1-5 (1975). Note that turnout is actually impossible to measure since we have no measure of how many people satisfied property and other qualifications. Nonetheless, even Donald Ratcliffe's account (which argues for a large upward revision in historians' estimates of turnout in early elections) suggests that in the states with the most participation, turnout in the early nineteenth century peaked in the neighborhood of sixty percent. See Ratcliffe, supra note 105, at 241.

113 Dinkin, supra note 103, at 100.

114 Id. at 97.

115 Sean J. Wright, The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections, 81 Alb. L. Rev. 609, 611 & n.14 (2017) (citing Jeffrey A. Jenkins, Partisanship and Contested Election Cases in the House of Representatives, 1789-2002, 18 Stud. Am. Pol. Dev. 112, 115 (2004)).

116 See, e.g., Paul Goodman, The Democratic-Republicans of Massachusetts: Politics in a Young Republic 137-40 (1964) (discussing the power of Massachusetts town selectmen); Richard J. Purcell, Connecticut in Transition: 1775-1818, at 213 (1918) ("On the third Monday of September the freemen met in town meeting to select their representatives and to nominate twenty assistants and fourteen (later sixteen) Congressmen."); see also infra Appendix ("New Hampshire" & "Rhode Island").

117 See Act of June 27, 1794, ch. 24, 1794 Mass. Acts 60, 63 (commanding selectmen to cause their constituents "to assemble on the first Monday of November ... to give in their votes for their respective Representative to the Selectmen, who shall preside at said meeting"); Act of Nov. 12, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788-1790, at 790, 790 (Merrill Jensen & Robert A. Becker eds., 1976) (providing that "the Inhabitants of the several Towns, and Parishes, Plantations and Places [in New Hampshire] ... assemble in their respective Towns, Parishes, or Places on the Third Monday of December, next" with no instruction on polling times); Act of June 12, 1790, *reprinted in* 4 The Documentary History of the First Federal Elections: 1788-90, at 409, 410 (Gordon DenBoer ed., 1989) (providing that a U.S. representative in New Hampshire "be elected by the Freemen of this State, in Town-Meetings legally assembled, on the last Tuesday in August next" under the same rules as applied for state elections); see also infra text accompanying note 310 (discussing how the state was the relevant unit for Rhode Island state elections).

118 Syrett, supra note 102, at 364.

119 See Benjamin F. Thomas, The Town Officer: A Digest of the Laws of Massachusetts in Relation to the Powers, Duties and Liabilities of Towns, and of Town Officers 94 (Worcester, Warren Lazell 1849).

120 Id. at 91.

121 Luther S. Cushing, Reports of Controverted Elections in the House of Representatives of the Commonwealth of Massachusetts, From 1780 to 1852, at 82 (Bos., White & Potter 1853).

122 Id.

123 The opening time of the meetings in which elections were to be held was set at 9:00 a.m. by statute, see Conn. Gen. Stat. (1784) (p. 44-45), but while towns were required to immediately open voting for state representatives, I could identify no similar strictures imposed on federal elections.

124 Bruce P. Stark, Universal Suffrage, the "Stand-up Law," and the Wallingford Election Controversy, 1801-1818, 53 Conn. Hist. Rev. 16, 28-29 (2014) (quoting A Democratic Scheme *Blown* Before it *Budded*, or, *the New Haven Thanksgiving*, Explained, The Visitor (New Haven), Feb. 22, 1803, at 132).

125 See infra Appendix ("New York") (describing the statutes of 1797, 1801, and 1813); infra Appendix ("New Jersey"). Note that in New York, though election inspectors had absolute discretion over polling times during daylight hours, they were not permitted to keep polls open at night: "And the poll of every such election shall only be held open in the day time, and not before sun-rise nor after sun-set." Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 318.

126 Act of Nov. 21, 1788, § 4, 1788 N.J. Acts 477, 480 ("That the said Election for Representatives for this State shall be had by Ballot ... in like Manner as in those Counties where the Elections by Law are directed to be held by Ballot, by the same Officers, and under the same Regulations ....").

127 See Act of Dec. 24, 1779, ch. 15, § 17, 1779 N.J. Acts 34, 37; infra Appendix ("New Jersey") (describing 1779 elections law).

128 Williamson, supra note 109, at 57.

129 Carl E. Prince, New Jersey's Jeffersonian Republicans: The Genesis of an Early Party Machine 1789-1817, at 8 (1967).

130 Act of Feb. 20, 1807, ch. 17, § 1, 1807 N.Y. Laws 18, 18 ("That in all elections for ... representatives to congress ... in the city of New-York, the poll of every such election shall be opened at or before ten o'clock in the morning of every day on which the said election shall be held ....").

131 See infra Appendix ("Maryland" & "Virginia"); David Alan Bohmer, Voting Behavior During the First American Party System: Maryland 1796-1815, at 11 (1974) (Ph.D. dissertation, University of Michigan) (ProQuest) ("Usually the polls closed at dusk, but in a close election the sheriff could influence the results by closing the polls earlier or later, whenever his own favorite was ahead. Such discretionary powers were rarely exercised but their existence helped to ensure that county leaders would control the process."). Note that Maryland created fixed polling times by 1799. Id. at 11-12.

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132 See 3 Annals of Cong. 598 (1794).

133 See Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 44-46 (2016); Wright, supra note 115, at 642-44 (2018).

134 3 Annals of Cong. 598 (1794).

135 Id.

136 Id.

137 See Act of Dec. 24, 1779, ch. 15, § 17, 1779 N.J. Acts 34, 37.

138 See Act of Mar. 28, 1797, ch. 62, 1797 N.Y. Laws 441, 443.

139 Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 33.

140 Beeman, supra note 101, at 34-35.

141 Joseph Tate, Digest of the Laws of Virginia 310 (Richmond, Smith & Palmer 2d ed. 1841).

142 3 Annals of Cong. 598 (1794).

143 L. Marx Renzulli, Jr., Maryland: The Federalist Years 77-78 (1972) (recounting the claims of Antifederalists in the 1788 election that "commissioners of election ... had adjourned the election when they desired").

144 Bohmer, supra note 131, at 4 n. 11.

145 Note that it is possible that towns in New Hampshire and Rhode Island enjoyed an adjournment power similar to those in Massachusetts but that the much sparser secondary literature investigating elections in those two states has simply failed to document it.

146 See Joseph F. Zimmerman, The New England Town Meeting: Democracy in Action 35-36 & n.47 (1999) ("Voters are authorized by general law to adjourn a town meeting from time to time ....").

147 See Cushing, supra note 121, at 38-39.

148 Mason A. Green, Springfield: History of Town and City, 1636-1886, at 480 (n.p., C.A. Nichols & Co. 1888).

149 Id.

150 See Syrett, supra note 102, at 355 (describing the effect of weather on turnout in Massachusetts).

151 In a dispute over an 1868 Missouri election between John Hogan and William Pile, the losing candidate complained "that the county court arranged the voting precincts unfairly, and improperly discriminated against the contestant in so arranging the voting places where his friends were in the majority that the registered vote could not possibly be polled during the day of election." Digest of Election Cases: Cases of Contested Election in the House of Representatives From 1865 to 1871, Inclusive, H.R. Misc. Doc. No. 41-152, at 285 (D.W. Bartlett ed., 1870); Hogan v. Pile, H.R. Rep. No. 62-40 (1868). The complaint was soundly dismissed by the Committee on Elections on the grounds that the state legislature was well within its power to grant plenary authority to the county courts to choose polling locations. H.R. Misc. Doc. No. 41-152, at 285-88.

152 See infra Appendix ("Georgia," "South Carolina," "North Carolina" & "Virginia").

153 Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39.

154 See infra Appendix ("Georgia").

155 Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 317.

156 See infra Appendix ("New York") (noting that statutes passed in 1791, 1792, 1801, and 1813 all explicitly reiterated inspectors' power to choose polling places).

157 See infra Appendix ("Delaware"); Act of Jan. 28, 1825, ch. 257, § 7, Del. Laws 392, 399-400 (1825); Appendix ("Maryland"); Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws.

158 The "hundred" is Delaware's traditional sub-county unit.

159 Act of Jan. 28, 1825, ch. 257, § 1, Del. Laws 392, 394.

160 See Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws.

161 See infra Appendix ("New Jersey").

162 Act of Feb. 22, 1797, ch. 634, § 17, 1797 N.J. Acts 171, 177.

163 Prince, supra note 129, at 8 (noting that during the 1789 state election, "the poll was moved at will in order to favor one faction or another").

164 See, e.g., Act of June 26, 1794, ch. 24, 1794 Mass. Acts 60, 63 (ordering the selectmen of the towns and districts to "cause the inhabitants of their respective towns and districts ... to assemble ... to give in their votes for their respective Representatives ....").

165 See Cushing, supra note 121, at 38-39.

166 Id.

167 Id. at 39.

168 See Appendix ("Connecticut").

169 See Appendix ("New Hampshire").

170 See William C. Dawson, Compilation of the Laws of the State of Georgia, Passed by the General Assembly, Since the Year 1819 to the Year 1830, Inclusive 155-86 (Milledgeville, Grantland & Orme 1831).

171 See infra Appendix ("New York" & "New Jersey").

172 See infra Appendix ("Massachusetts").

173 Syrett, supra note 102, at 362.

174 Id. at 362-63.

175 Act of Nov. 12, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788-1790, supra note 117, at 790.

176 Bohmer, supra note 131, at 2 n.6 ("New Jersey voted viva voce until 1797, ... Rhode Island until 1851 ....").

177 See An Act in Addition to, and Amendment of, the Several Acts Regulating the Manner of Admitting Freemen, and Electing Officers in this Colony, R.I. Laws 192, 195 (1762) ("[T]he Moderator of each Town-Meeting in this Colony, shall receive all the Proxes of the Freemen, legally qualified ....").

178 See Irwin H. Polishook, Rhode Island and the Union: 1774-1795, at 29 (1969).

179 Williamson, supra note 109, at 275 ("Rhode Island used the ballot in much the same way as Massachusetts. It made the use of the sealed envelope optional.").

180 See infra Appendix ("Georgia" & "Virginia").

181 J.R. Pole, Representation and Authority in Virginia from the Revolution to Reform, 24 J.S. Hist. 16, 31 (1958).

182 Robert M. Ireland, Aristocrats All: The Politics of County Government in Ante-bellum Kentucky, 32 Rev. Pol. 365, 368 (1970).

183 Donald A. DeBats, In Practice How Different Were Ticket and Viva Voce Elections? 7 (2016), http://sociallogic.iath.virginia.edu/sites/default/files/BeforeSecret-Compare.pdf [https://perma.cc/JWQ3-PCY6].

184 See Cyrus Harreld Karraker, The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and the Chesapeake Colonies, 1607-1689, at 93 (1930) (quoting a Jamestown court of quarter-sessions).

185 Virginia sheriffs remained firmly ensconced in the state executive branch after the Revolution. Virginia's 1776 Constitution provided that "The Sheriffs and Coroners shall be nominated by the respective courts, approved by the Governor, with the advice of the Privy Council, and commissioned by the Governor." Va. Const. of 1776, ch. II, § 15. Although county courts' recommendations were rarely overruled, see Charles S. Sydnor, Gentlemen Freeholders: Political Practices in Washington's Virginia 83-84 (1952), the 1776 constitution listed sheriffs alongside officers of the state militia and judges as statewide appointees. The 1830 constitution provided for the same arrangement--local nomination, gubernatorial appointment--though sheriffs were now listed as "judicial" officers. Va. Const. of 1830, art. V, § 8. For further discussion of the appointment of Virginia sheriffs, see generally Sydnor, supra, at 78-87 (discussing in detail the process for appointment of Sheriffs in Virginia).

186 New England's powerful town selectmen were elected at town meetings and were agents of the town. See, e.g., Austin DeWolf, The Town Meeting: A Manual of Massachusetts Law 30 (Bos., George B. Reed 1890); Kenneth A. Lockridge & Alan Kreider, The Evolution of Massachusetts Town Government, 1640 to 1740, 23 Wm. & Mary Q. 549, 555 (1966); William F. Willingham, Grass Root Politics in Windham, Connecticut During the Jeffersonian Era, 1 J. Early Republic 127, 137 (1981) (describing results of elections for selectmen). The office of election inspector in New York, holders of which enjoyed total discretion over the location of elections, was filled ex officio by locally elected "town-clerks, supervisors and assessors." See, e.g., Act of Feb. 13, 1787, ch. 15, § 2, 1787 N.Y. Laws 316, 317. New Jersey's Judges of Elections were elected at town meetings, see Act of Feb. 22, 1797, ch. 634, § 18, 1797 N.J. Acts 171, 177, and New Jersey statutory law gave the power to choose polling places directly to town voters in their annual meetings, see id. § 17. Delaware's election inspectors were elected by inhabitants of hundreds in special elections. Act of Nov. 1, 1766, ch. 187, §§ 2-3, 1 Del. Laws 429, 429-31 (1797).

187 Atkin v. Kansas, 191 U.S. 207, 220 (1903).

188 See generally Ablavsky, supra note 108, at 1805 (discussing the importance of quasi-official organizations and authority); Jack P. Greene, Law and the Origins of the American Revolution, *in* 1 The Cambridge History of Law in America 447, 469 (Michael Grossberg & Christopher Tomlins eds., 2008) ("[There was] an underlying preference for a system of authority in which local law, institutions, officials, and populations had ultimate authority over local and provincial matters"); Hartog, supra note 106, at 234-35 (discussing how law came to be viewed as an agency for the exercise of power).

189 Ablavsky, supra note 108, at 1805 (citing 4 William E. Nelson, The Common Law in Colonial America: Law and the Constitution on the Eve of Independence, 1735-1776, at 23-45 (2018)).

190 Ablavsky, supra note 108, at 1820-21.

191 I thank Robert Gordon for articulating this point.

192 An analogous example of such reasoning at work can be found in Hendrik Hartog's history of colonial New York City. When, in 1683, the city government petitioned the governor to recognize its monopoly over ferries to Long Island, this demand was viewed as a request to acknowledge a "preexisting right" stemming from "seventy years of possession of an exclusive franchise"-- not a plea for a new grant of power. Hendrik Hartog, Public Property and Private Power 25-26 (1989). To complete the analogy, just as the charter granting New York's ferry monopoly merely quieted title to a right that already existed after seventy years of consistent usage, perhaps the laws granting local officials the right to determine convenient times and places for federal elections were likewise mere recognitions of local officials' pre-existing rights and not delegations at all.

193 See supra notes 117-19, 164-67, and 172-75 and accompanying text.

194 See, e.g., Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (arguing, in the analogous context of presidential electors, that "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2 of the United States Constitution"). For an example of an advocate of the ISL theory making much of this statement, see Michael T. Morley, The Independent State Legislature Doctrine, supra note 11, at 531.

195 See William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1106-07 (2017).

196 Ablavsky, supra note 108, at 1823-24 & n.163.

197 U.S. Const., art. 1, § 4 (emphasis added).

198 See, e.g., Weinstein-Tull, supra note 22, at 797-98 (2016) (praising the possibility that local control over elections could permit "local governments [to] tailor some parts of the elections process to the needs of their communities").

199 See, e.g., Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 535-36 (2017) (listing examples of scholarship concerned with an overly powerful President and noting that the same concerns might suggest that gubernatorial power "raises significant risks" at the state level). Of course, the highly despotic behavior documented in Part II, above, would seem to belie any such optimism about the virtues of local government.

200 Samuel Issacharoff, Gerrymandering & Political Cartels, 116 Harv. L. Rev. 593, 609 (2002). Indeed, state legislators and local officials are probably *both* far less democratically accountable, in the sense of being electorally responsive to voter opinions, than state executives. David Schleicher, Federalism and State Democracy, 95 Tex. L. Rev. 773, 775-78 (2016).

201 Williamson, supra note 109, at 57.

202 See Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1723 (2002) (proposing the most minimalist nondelegation doctrine possible, while conceding that even their approach would still bar the transfer of de jure legislative powers to other branches).

203 978 F.3d 136, 154 (5th Cir. 2020); see supra Section I.B.

204 See Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39; infra Appendix ("Virginia").

205 John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 401 (2010).

206 See supra Section I.B.

207 See supra Section I.B.

208 See supra Section II.C.

209 Judith Apter Klinghoffer & Lois Elkis, "The Petticoat Electors": Women's Suffrage in New Jersey, 1776-1807, 12 J. Early Republic 159, 172 (1992).

210 Carolyn Shapiro, The Independent State Legislature Claim, Textualism, and State Law, 90 U. Chi. Law Rev. (forthcoming 2023) (manuscript at 49-50), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322 [https://perma.ee/TJE2K-AV7X].

211 Texas Disaster Act of 1975, ch. 289, § 5(g)(1), 1975 Tex. Gen. Laws 731, 733 (emphasis added); see also Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 141-42 (5th Cir. 2020) (discussing the July 27 Proclamation which allowed for early voting in 2020).

212 See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160-61 (2000) (announcing a substantive canon of statutory interpretation disfavoring silent delegations of significant powers).

213 See Parrillo, supra note 13, at 1294-95; Andrew Coan, Eight Futures of the Nondelegation Doctrine, 2020 Wis. L. Rev. 141, 147 (noting it is plausible to imagine the Court adopting Justice Gorsuch's dissent in *Gundy v. United States*).

214 See Purcell, supra note 116, at 175-76.

215 Id. at 188-89.

216 Id. at 193-94.

217 Id. at 194. To circumvent the coercion associated with public voting, some voters began submitting blank ballots in protest, which was a form of protest inscrutable to onlookers, though one specifically forbidden by Connecticut election law. See id.; Conn. Gen. Stat. tit. 55, ch. 1 (1808) (p. 246) (providing that "no unwritten piece of paper shall be given in" during the nominating phase of elections).

218 See Stark, supra note 124, at 22; Act of Oct. 8, 1801, § 4, 1801 Conn. Acts & Laws 565, 567.

219 Conn. Gen. Stat. (1784) (p. 44) ("[A]ll Constables in the several Towns in this State, without further order, shall warn all the Freemen in their respective Towns, to meet together yearly ... on the second Tuesday of September, about nine of the Clock in the Morning, at some convenient Place where they have usually been held, when and where they shall first choose Deputies or Representatives to attend the General Court ...."); see also Act of Jan. 1, 1789, 1789 Conn. Acts & Laws 371, 371-72 (elections to be held at same time and place as state general elections); Conn. Gen. Stat. tit. 28, ch. 1, § 1 (1835) (p. 168) ("[A]nd every town is authorized, at a meeting, when special notice has been given for that purpose, to designate the place of holding electors' meetings.").

220 Stark, supra note 124, at 28-29 (quoting A Democratic Scheme *Blown* Before it *Budded*, or, *the New Haven Thanksgiving* Explained, The Visitor (New Haven), Feb. 22, 1803, at 132).

221 Purcell, supra note 116, at 214 n.70 ("A law of 1670 allowed choice by acclamation, and not until 1814 was it definitely provided that election must be by ballot.").

222 Conn. Gen. Stat. (1784) (p. 45).

223 See Act of June 13, 1772, ch. 207, §§ 2-5, 1 Del. Laws 500, 501-02 (1797).

224 Act of Jan. 27, 1794, ch. 51, 2 Del. Laws 1170, 1170 (1797).

225 Act of Oct. 26, 1790, ch. 188, 2 Del. Laws 931, 931-32 (1797).

226 See Act of June 5, 1779, ch. 44, 2 Del. Laws 665, 665-66 (1797).

227 See Act of Jan. 28, 1825, ch. 257, § 7, Del. Laws 392, 399-400.

228 Id. at 394.

229 See George R. Lamplugh, Politics on the Periphery: Factions and Parties in Georgia, 1783-1806, at 21-22 (1986).

230 William W. Abbot, The Structure of Politics in Georgia: 1782-1789, 14 Wm. & Mary Q. 47, 54 (1957).

231 Lamplugh, supra note 229, at 27.

232 Act of Feb. 22, 1796, *reprinted in* A Digest of the Laws of the State of Georgia 611, 611-13 (Phila., Robert Watkins & George Watkins eds., 1800).

233 Abbot, supra note 230, at 55.

234 Act of Feb. 11, 1799, § 1, *reprinted in* Digest of the Laws of the State of Georgia 199, 199 (Savannah, Horatio Marbury & William H. Crawford eds., 1802).

235 Ga. Const. of 1798, art. IV, § 2.

236 See Act of Dec. 24, 1821, § 5, 1821 Ga. Acts 70, 71.

237 See, e.g., Greg Ablavsky, Book Review, 75 Wm. & Mary Q. 165, 165-66 (2018) (discussing the period "when Anglo-Americans greedily sought to obtain title to vast western acreages").

238 Act of Dec. 4, 1801, § 2, 1801 Ga. Acts 50, 51.

239 Act of Dec. 22, 1789, *reprinted in* 2 The Documentary History of the First Federal Elections: 1788-1790, at 136, 137 (Gordon DenBoer, Lucy Trumbull Brown & Charles D. Hagermann eds., 1984).

240 Md. Const. of 1776, art. II, *reprinted in* 2 The Documentary History of the First Federal Elections, supra note 239, at 140 n.2.

241 Bohmer, supra note 131, at 8-14.

242 Election judges were appointed annually by the county courts. See, e.g., Act of Jan. 25, 1806, ch. 97, § 6, 1805 Md. Laws.

243 Bohmer, supra note 131, at 11.

244 Id. at 10 ("The whole county voted at the Court-house and the election lasted four days.").

245 Renzulli, supra note 143, at 77-78 (recounting the accusations of Antifederalists in the 1788 election that "commissioners of election ... had adjourned the election when they desired").

246 Md. Const. of 1776, art. II, *reprinted in* 2 The Documentary History of the First Federal Elections, supra note 239, at 140 n.2.

247 Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws.

248 Act of Dec. 31, 1801, ch. 59, § 2, 1801 Md. Laws.

249 See Act of Jan. 8, 1803, ch. 66, § 4, 1802 Md. Laws; Bohmer, supra note 131, at 11-13; Act of Jan. 25, 1806, ch. 97, § 7, 1805 Md. Laws.

250 See Act of Jan. 25, 1806, ch. 97, § 8, 1805 Md. Laws.

251 See Md. Code, art. 35 (1860).

252 Act of Mar. 12, 1827, ch. 234, 1826 Md. Laws.

253 See Act of June 26, 1794, ch. 24, 1794 Mass. Acts 60, 63.

254 See, e.g., Act of Feb. 24, 1796, ch. 55, § 1, 1795 Mass. Acts 415, 415-16; Act of June 29, 1798, ch. 31, 1798 Mass. Acts 40, 40-41.

255 See Syrett, supra note 102, at 356, 362.

256 Id. at 362-63 (internal references omitted).

257 See Act of Mar. 15, 1805, ch. 117, § 1, 1804 Mass. Acts 165, 165 (permitting towns with more than 500 voters to open the polls before 11:00 am).

258 Syrett, supra note 102, at 364.

259 See Cushing, supra note 121, at 38-39.

260 Id. at 39.

261 Id. at 82.

262 Id.

263 See Van Beck Hall, Politics Without Parties: Massachusetts, 1780-1791, at 90-92 (1972) (reporting turnout of thirteen percent and sixteen percent for the first two federal elections, but twenty-eight percent turnout for the 1787 gubernatorial elections).

264 Act of Nov. 12, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788-1790, supra note 117, at 790.

265 1 The Documentary History of the First Federal Elections, supra note 117, at 794 (showing warrant for a town meeting issued in New Hampshire that appears similar in key respects to similar warrants from Massachusetts).

266 See Act of Dec. 16, 1824, ch. 60, §§ 3-4, 1824 N.H. Laws 24, 25-26 (same formulation as the 1788 law); Act of June 23, 1813, §§ 3-5, 1815 N.H. Laws 250, 251-52.

267 Act of June 23, 1813, § 3, 1815 N.H. Laws 250, 251 ("[T]he selectmen of the several towns and parishes aforesaid shall provide, at the expense of such towns and parishes, a suitable box, or boxes, to receive the ballots of the legal voters; on which ballots shall be written or printed the name or names of the person or persons voter for; and the ballots shall be given in, in the manner following--that is to say: each voter shall deliver his ballot to the moderator, in open town meeting; and the moderator, on receiving the ballot, shall direct the town clerk to check the name of the voter ....").

268 See Act of Dec. 24, 1779, ch. 15, 1779 N.J. Acts 34.

269 Id. § 1.

270 Id. § 14. In five counties, the legislatures provided that *viva voce* voting would continue, but the congressional elections statute specified that federal elections were to be by ballot, so I omit further discussion of the *viva voce* counties. See Act of Nov. 21, 1788, § 4, 1788 N.J. Acts 477, 480 ("[T]he said Election ... shall be had by Ballot of the Citizens of this State in like Manner as in those Counties where the Elections by Law are directed to be held by Ballot.").

271 See Act of Feb. 23, 1811, § 1, 1811 N.J. Laws 37, 37-38 ("[A]t any future election ... it shall be lawful for any person being entitled to vote at any election hereafter to be held in this state, to vote by delivering to the officers of the election a ticket either written or printed, or partly written and partly printed.").

272 Act of Dec. 24, 1779, ch. 15, § 17, 1779 N.J. Acts 34, 37.

273 See Prince, supra note 129, at 8 (describing that, in the election of 1789, "some polling places remained open indefinitely in order to insure that all possible votes for a given faction were cast").

274 Act of Nov. 18, 1790, ch. 322, §§ 1, 3, 1790 N.J. Acts 669, 669-70 (instructing that the election judges "may at any Time during the Day, adjourn the poll for a short Period, not exceeding half an Hour, in Case no Electors appear to give in their Votes, and shall close the Poll").

275 See Act of Dec. 3, 1807, ch. 9, § 1, 1807 N.J. Acts 40, 40.

276 Act of Dec. 24, 1779, ch. 15, § 1, 1779 N.J. Acts 34, 34.

277 See Klinghoffer & Elkis, supra note 209, at 172-75.

278 Id. at 175.

279 Act of Feb. 22, 1797, ch. 634, § 17, 1797 N.J. Acts 229, 233.

280 Act of Dec. 3, 1807, ch. 9, § 3, 1807 N.J. Acts 40, 41-42 (requiring that elections be held "at the places where the last election for the state legislature shall have been holden in the respective townships").

281 Act of Mar. 12, 1839, § 11, 1839 N.J. Acts 199, 201.

282 See Act of Feb. 13, 1787, ch. 15, § 6, 1787 N.Y. Laws 316, 319.

283 Act of Mar. 24, 1801, ch. 61, § 6, 1801 N.Y. Laws 264, 267.

284 See Act of Feb. 13, 1787, ch. 15, § 11, 1787 N.Y. Laws 316, 323.

285 Id. § 11.

286 See Edward B. Foley, The Founders' *Bush v. Gore:* The 1792 Election Dispute and Its Continuing Relevance, 44 Ind. L. Rev. 23, 35-36 (2010).

287 Id. at 73-75.

288 See Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 318 ("[T]he poll of every such election shall only be held open in the day time, and not before sun-rise nor after sun-set.").

289 Act of Mar. 24, 1801, ch. 61, § 4, 1801 N.Y. Laws 264, 266-67.

290 Act of Apr. 6, 1813, ch. 68, § 5, 1813 N.Y. Laws 241, 243.

291 Act of Feb. 20, 1807, ch. 17, § 1, 1807 N.Y. Laws 18, 18.

292 See Act of Mar. 28, 1797, ch. 62, 1797 N.Y. Laws 441, 443 (elections to be held on the last Tuesday in April, "from which days the same may be respectively continued by adjournment, if necessary, from day to day, not exceeding five days").

293 See George W. McCrary, A Treatise on the American Law of Elections 124 (Chi., Henry L. McCune ed., Callaghan & Co 1897).

294 Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 317.

295 Act of Feb. 10, 1791, ch. 5, § 3, 1791 N.Y. Laws 339, 339.

296 Act of Dec. 18, 1792, ch. 5, § 6, 1792 N.Y. Laws 4, 7.

297 Act of Mar. 24, 1801, ch. 61, § 4, 1801 N.Y. Laws 264, 265-66.

298 Act of Mar. 20, 1813, ch. 61, § 4, 1813 N.Y. Laws 247, 248-49.

299 Act of Dec. 16, 1789, *reprinted in* 4 The Documentary History of the First Federal Elections: 1788-90, supra note 117, at 347.

300 4 The Documentary History of the First Federal Elections: 1788-90, supra note 117, at 349 n.2.

301 Id.; see also An Act Directing the Method of Electing Members of the General Assembly, and Other Purposes, 1 N.C. Pub. Acts 227, 227-28 (1777) (detailing the method of electing members of the state's legislature in a sixteen-section act).

302 An Act Directing the Method of Electing Members of the General Assembly, and Other Purposes, § 10, 1 N.C. Pub. Acts 227, 227 (1777).

303 See Rosalind L. Branning, Pennsylvania Constitutional Development 14-15 (1960).

304 Act of Oct. 4, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections, 1788-1790, supra note 117, at 299-301.

305 See, e.g., Act of June 14, 1777, ch. 757, § 5, 9 Pa. Stat. 114, 116 (dividing Philadelphia County into three electoral districts and providing locations within each district where the election would be held--including one poll "at the public house formerly kept by Jacob Coleman").

306 See Act of Nov. 13, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788-1790, supra note 117, at 337.

307 See 7 Laws of the Commonwealth of Pennsylvania 551-52 (Phila., John Bioren 1806) (listing provisions under the heading "Election Districts"). Strikingly, the same index lists only *ten* provisions related to the general conduct of elections, further highlighting the enormous legislative effort required to avoid delegation over the specifics of election logistics. Id. at 550-51.

308 Act of June 14, 1777, ch. 757, § 5, 9 Pa. Stat. 114, 121.

309 Fed. Gazette, Feb. 2, 1789, *reprinted in* 1 The Documentary History of the First Federal Elections to 1788-1790, supra note 117, at 388 (complaining about the endless delays in holding federal elections in outlying counties).

310 Patrick T. Conley, Democracy in Decline: Rhode Island's Constitutional Development, 1776-1841, at 51 (1977) (quoting Richard P. McCormick, The Second American Party System 76 (1966)).

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311 Id.

312 Act of June 12, 1790, *reprinted in* 4 The Documentary History of the First Federal Elections: 1788-90, supra note 117, at 410.

313 An Act Directing the Mode of Choosing Representatives to Congress, R.I. Laws 25, 25 (1798).

314 See An Act in Addition to, and Amendment of, the Several Acts Regulating the Manner of Admitting Freemen, and Electing Officers in this Colony, R.I. Laws 192, 195 (1762).

315 Bruce C. Daniels, Dissent and Conformity on Narragansett Bay: The Colonial Rhode Island Town 98-100 (1983) (noting that, during the early colonial period, towns usually "rotat[ed] the place of the meeting around the town" and set their meeting times to "make the meeting time as convenient as possible").

316 Id.

317 See An Act in Addition to, and Amendment of, the Several Acts Regulating the Manner of Admitting Freemen, and Electing Officers in this Colony, R.I. Laws 192, 195 (1762) ("[T]he Moderator of each Town-Meeting in this Colony, shall receive all the Proxes of the Freemen, legally qualified ....").

318 See Polishook, supra note 178, at 29.

319 Williamson, supra note 109, at 275.

320 See 1 The Documentary History of the First Federal Elections, 1788-1790, supra note 117, at 169 n.1.

321 Act of Nov. 4, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections, 1788-1790, supra note 117, at 167.

322 See Act of Dec. 20, 1791, 1791 S.C. Acts 52, 54 (instructing that the election for Kingston, S.C., is to be held "at the house of Moses Floyd," and appointing John Sarvis and Thomas Livingston as managers).

323 See Act of Dec. 9, 1797, 1797 S.C. Acts 159, 164.

324 S.C. Const. of 1778, art. XII (commanding that elections be held "on the last Monday in November next and the day fallowings and on the same days of every succeeding year thereafter").

325 Act of Dec. 9, 1797, 1797 S.C. Acts 159, 164; see also Act of Dec. 18, 1801, 1801 S.C. Acts 113, 120 (same); Act of Dec. 11, 1805, 1805 S.C. Acts 105, 113 (same).

326 2 The Documentary History of the First Federal Elections, supra note 239, at 251.

327 See Sydnor, supra note 185, at 78-87.

328 Id. at 83.

329 Beeman, supra note 101, at 35.

330 Sydnor, supra note 185, at 71.

331 Beeman, supra note 101, at 34 ("In the 1780s and 1790s, as in the past, the county sheriff controlled nearly every step of the election process. If he thought most freeholders had voted, he could close the polls after a few hours ....").

332 Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 33.

333 McCrary, supra note 293, at 207. ("In accordance with this rule it has been held that where the law allows the officers of the election, upon the happening of certain contingencies, to adjourn the election for one of more days; and if it be shown that they did in fact adjourn the election; it will be presumed that the adjournment was proper ....").

334 Id.

335 Id. at 35.

336 Id. ("The House of Delegates served as the court of appeal in cases where the sheriff was charged with abusing his power, but it rarely ruled against him.").

337 Act of Nov. 17, 1788, ch. 1, § 3, 1788 Va. Acts 3, 3.

338 Pole, supra note 181, at 31.

339 See Wesley J. Campbell, Whiskey, Soldiers and Voting: Western Virginia Elections in the 1790s, 15 Smithfield Rev. 65, 66 (2011).

340 See, e.g., Act of Nov. 17, 1788, ch. 1, § 4, 1788 Va. Acts 3, 3-4 (requiring that sheriffs meet to count votes within seven days of the election and prescribing the oath that sheriffs had to take to certify the results).

341 Id. § 10.

342 Id. § 2; see also Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39 ("[T]he Sheriff ... shall ... cause the poll to be taken in the Court-house ....").

343 Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39.

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FAILED ELECTIONS AND THE LEGISLATIVE SELECTION OF PRESIDENTIAL ELECTORS

Questions about the state legislative role in determining the identity of presidential electors and electoral slates, and the permissible extent of a departure from regular legislative order, have recently reached peak prominence. Much of the controversy, including several cases to reach the Supreme Court, has concerned the constitutional delegation of power over pre-election rules. But a substantial amount of attention has also focused on the ability of state legislatures to appoint electors in the period between Election Day and the electors' vote.

An asserted legislative role in the post-election period has two ostensible sources: one constitutional and one statutory. The constitutional provision-- the portion of Article II allowing states to appoint electors in the manner the legislature directs--has received substantial scholarly and judicial attention. In contrast, there has been no prominent exploration of the federal statute, 3 U.S.C. § 2, despite text similar to the constitutional provision. This piece is the first to explore that federal statute as an ostensible basis for a legislature's appointment of electors beyond the normal legislative process, in the aftermath of an election that has "failed to make a choice." After reviewing the constitutional controversy, the Essay canvasses the history of the statute and its context. And it discovers a previously unreported historical anomaly, which might well affect construction not only of the statutory text, but also the constitutional predicate, in the event of a disputed presidential election.

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INTRODUCTION

Discussions of (wildly) improbable presidential electoral scenarios reached fever pitch in the 2020 elections. Pre-election, reporters anticipated scenarios in which one candidate did not receive an Electoral College majority and the election would be resolved by ***1053** the House of Representatives; [1] scenarios around a partisan tie in control of state delegations in the House, with the election to be resolved by the Senate; [2] and a number of other scenarios less likely still. Then, in the immediate aftermath of the election--in which ballots counted, canvassed, and confirmed via the normal institutional process produced a substantial Electoral College majority--there were half-baked suggestions, more prominent than they should have been, seeking to derail that majority in favor of the more esoteric fallback dispute resolution procedures not pertinent to the contest at hand. [3]

Some of the pre-election punditry and post-election armchair strategery was likely the inevitable product of a popular rediscovery of some of the more unusual nooks and crannies of our electoral system, and fascination with the less familiar

procedural mechanics at the margins. Some was likely the product of black-swan focus on the election of 2000--resolved by the sort of contestation that accompanies a 537-vote margin in a single, pivotal state--and the fear or hope that 2000-level combat might bear fruit in an election not nearly as close. [4] Some was likely created by a curious view of both electoral litigation and the tallying of votes as subvariants of magical realism, in which legitimate electoral expression could be nullified by the mere incantation of a legal catchphrase. Some was likely simply a projection ***1054** of generalized anxiety or discontent over a deeply divisive election process. [5]

Questions about state legislatures' role in determining the identity of presidential electors and electoral slates have been quite prominent in this mix. Some of the controversy has concerned the constitutional delegation of power over pre-election rules: when and to what degree election procedures set before Election Day apply to the selection of presidential electors, when those procedures are made or shaped by an entity other than the legislature, like an administrative actor or a state court. [6] But a substantial amount of attention has also focused on the ability of state legislatures to appoint electors in the period between Election Day and the electors' vote. [7]

An asserted legislative role in the post-election period has two ostensible sources: one constitutional and one statutory. The constitutional provision-- the portion of Article II allowing states to appoint electors in the manner the legislature directs--has received substantial scholarly and judicial attention. In contrast, there has been no prominent ***1055** exploration of the federal statute, 3 U.S.C. § 2, despite text similar to the constitutional provision. This piece represents the first examination of that federal statute as an ostensible basis for a legislature's appointment of electors beyond the normal legislative process, in the aftermath of an election that "has failed to make a choice." [8] After reviewing the constitutional controversy in Part I, the Essay in Part II canvasses the history of the statute and its context. It unearths a previously unreported historical anomaly that should affect construction of the statutory text. Indeed, as discussed in Part III, a proper understanding of the nineteenth-century statute at issue here might also shed new light on the nineteenth-century jurisprudence purportedly relevant to the determination of the constitutional question in the event of another disputed presidential election.

I THE CONSTITUTION

First, an abbreviated review of the constitutional controversy, much of which has been discussed in more detail in other fora. [9] Article II provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct," electors for President. [10]

***1056** The claim for legislative priority imagines this text as a direct and irrevocable grant of federal authority to a specified state body, purportedly allowing the legislative body plenary dispensation to designate whichever electors it wishes. The strong version of this "independent state legislature" notion imagines the legislature empowered by its federal constitutional designation to select electors free of any substantive or procedural constraints in the state constitution, wholly independent from gubernatorial or state judicial interference. [11]

A weaker version of the doctrine--capturing the attention of three Justices in *Bush v. Gore* [12] --imagines that it prioritizes state statutes, as the embodiment of the will of the legislature, over some but not all interpretations of the state courts. [13] For example, some variants of this form of the doctrine assert that Article II does not free legislatures from procedural constraints in the state constitution (like ***1057** quorum rules or presentation to the governor), but does immunize procedurally proper statutes concerning presidential electors from any substantive state constitutional limits. [14] Other variants might bind state legislatures for Article II purposes to a subset of substantive state constitutional provisions articulated with some degree of specificity (e.g., ballots must be received by a particular enumerated date), but not judicial interpretations of state constitutional provisions that are more vague (e.g., elections must be free and fair).

Extracting state legislatures from their state constitutional context for purposes of setting the rules for presidential elections creates deep problems not far beneath the surface of the text. The strong version of the doctrine, nullifying *all* state limits on the legislature as a body, seems to create a philosophical quandary. A state legislature acting in a legislative capacity derives its existence and shape from its state constitution. Without those limits, it may have the same component legislators, but it is not the same lawmaking institution. [15] If you gather the musicians of the Los Angeles Philharmonic Orchestra and randomly assign their instruments--or remove them from their instruments altogether, as when they play in a softball game--what you have is not the anticipated orchestral manifestation of "the Los Angeles Philharmonic," but merely an assembly of the members

of the Los Angeles Philharmonic, acting in a different way with different capacities. Remove the constituent members from the context in which their familiar institutional identity is shaped, and what you have is a fundamentally distinct entity. [16]

***1058** The strong version of the doctrine also presents extremely difficult jurisprudential questions for any federal court asked to resolve the rules of a presidential election, including questions about the degree to which a legislature with exclusive state authority over presidential elections may permissibly delegate more granular policymaking to administrative entities, or empower state courts to bind future state legislatures via state constitutional provisions the legislature itself has passed. Consider also the intractable questions of statutory interpretation in federal courts divining the meaning of state statutory text passed in light of a background understanding of the requirements of the state constitution or the common law, suddenly cut loose from that state judicial context. [17] Freeing state statutory text from the requirements of the state constitution in the context of regulations for presidential elections involves the use of a decoding system different from the encoding engine the legislature used in the first place, with similar potential for errant translation.

The strong version of the doctrine yields profoundly disruptive practical consequences as well: Bills that were passed and vetoed, statutes superseded by initiative, and statutes struck down by a state court would suddenly be live for purposes of a presidential race but not for state offices. [18] And the commands of these otherwise-invalid legislative vehicles would have to be reconciled with valid statutes that were passed on the assumption that the prior invalid text had no legal effect. Some of these zombie requirements could potentially be handled by separating presidential ballots from ballots for other offices, ***1059** with (perhaps) different rules for eligibility and completing the ballot--and attendant complexities for election administrators and confusion for voters. But other limitations would be even more confounding. Imagine a statutory five-minute mandatory time limit on remaining in the voting booth, construed by state courts based on state constitutional principles to be hortatory. [19] When that rule is resurrected for presidential races but not for state contests, on the understanding that neither state courts nor state constitutions may constrain legislative action in regulating presidential elections, is a voter breaking the law or not breaking the law at minute six?

The weaker forms of the "independent state legislature" doctrine avoid some of the philosophical and procedural conundrums, but many of the same substantive interpretive and practical concerns remain. Federal courts would be repeatedly called to evaluate when state court application of state constitutional principles or interpretation of state statutes differed too greatly from what the *federal* court thought the state legislature had done, premised on interpretive methodologies that may or may not represent how the state legislature would interpret its own statute (even assuming state legislators agreed on the interpretation of text otherwise representing political compromise). It would be surprising if the federal second-guessing did not begin to colonize state law with federal conceptions of nondelegation doctrine or federal canons of statutory interpretation that might or might not find hospitable terrain in the state's own legal traditions. This federal judicial review of a state court's interpretation of the state's own legal principles would occur without any legitimacy conferred by the state or accountability to elected state actors or to state voters directly. And inevitably, federal courts arriving at conclusions distinct from their state counterparts would normally amount to a disfavored federal determination that state courts had gotten state law wrong.

Professor James Blumstein offers an intriguing reading of the constitutional text that distinguishes liability from remedy. In his view, Article II accepts the state legislature as it exists within the state constitutional context, subject to procedural and substantive constraints: In regulating presidential elections as in all other legislation, a state ***1060** legislature may not exceed its capacity under state law. [20] That is, Article II would not prevent a state court from striking down state legislation regulating presidential elections as inconsistent with state constitutional constraints. Presumably, Article II would not prevent a state court from construing or interpreting state legislation regulating presidential elections. But in the event that the state constitution required invalidation of a statute, Article II *would* prevent a state court from creating an affirmative remedy, reserving to the legislature the capacity to author a solution. [21] This version of the doctrine would resolve some questions articulated above. However, when the absence of a remedial replacement for a state statutory provision created federal statutory or constitutional concerns, this version of the doctrine would also notably shift interim remedial authority from state courts to their federal counterparts. [22] And this need for federal court intervention to repair a newly created concern is likely to arise in a hurry in the context of a pending election, leaving the federal courts in a posture the Supreme Court has repeatedly told them to avoid. [23]

Perhaps with at least an eye to these consequences, majority opinions of the Supreme Court lean in a different direction, declining to recognize a doctrine of state legislative regulation interdependent on other state institutions for most purposes but uniquely "independent" of those other institutions for federal elections. [24] The "State," not the "Legislature," is the body to whom the

clear text of Article II grants authority to appoint electors. [25] And the Court's decisions suggest that when this text instructs the state to exercise its appointment power "in such Manner as the Legislature thereof may direct," [26] what ***1061** it means is that the manner of appointing electors is to be determined through the exercise of the normal lawmaking power in that state, defined by state law. That is, to the extent that the legislature is empowered to regulate the choice of the state's electors, it is empowered to do so in the same ways that it is empowered to provide for all regularized policymaking: through law, subject to the guardrail constraints of substantive and procedural state constitutional provisions (including gubernatorial veto, if the state constitution provides for one). [27]

To be fair, the Court has not yet directly confronted this precise question in the context of presidential electors. But the Court *has*, on several occasions, construed the Elections Clause of Article I, which has similar text and is best understood in similar fashion. Article II allows each state to appoint presidential electors "in such Manner as the Legislature thereof may direct." [28] The Elections Clause of Article I directs that at least in the first instance (subject to congressional override), the manner of congressional elections "shall be prescribed in each State by the Legislature thereof." [29] Both provisions tell the legislature to "direct" or "prescribe[]" the rules.

In *Smiley v. Holm*, the Supreme Court determined that the Elections Clause reference to the "Legislature" was, effectively, synecdoche: a reference to the regular lawmaking process rather than a specific body. [30] In that case, the question was whether the Elections Clause granted a state legislature plenary power to draw congressional district lines as an independent body, ignoring a gubernatorial veto built in to the normal state legislative process. [31] The Court said no. The state legislature's function in regulating the manner of congressional elections is a regulatory lawmaking function, and must be pursued in accordance with the lawmaking process designated by the ***1062** state constitution. [32] Similarly, in *Ohio ex rel. Davis v. Hildebrant*, sixteen years earlier, the Court had decided that if a state included in its lawmaking power the process of popular referendum, the Elections Clause provided no special federal dispensation for the state legislature as a body to ignore a referendum in regulating the manner of congressional elections. [33] And in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, eighty-three years later, the Court decided that if a state delegated its lawmaking power to an independent commission for redistricting purposes, the Elections Clause provided no special federal dispensation for the state legislature as a body to ignore that state constitutional delegation in regulating the manner of congressional elections. [34]

What is true of the delegation to the "Legislature" for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors. The Article II delegation, like that of the Elections Clause, describes a lawmaking function. [35] And this is distinct from other functions that the Constitution assigns to state legislatures--like the directly electoral function originally contemplated for the state legislatures in selecting Senators. [36] The functional distinction between regulatory or lawmaking functions and direct electoral functions is present in the text. The provision for selecting Senators in the ***1063** Constitution of 1789 provides that two Senators from each state would be "chosen by the Legislature thereof": the legislature, directly, does the choosing. [37] Article II, in contrast, provides that the "State" appoints presidential electors, "in such Manner as the Legislature thereof may direct"; Article I similarly determines that the manner of holding congressional elections "shall be prescribed in each State by the Legislature thereof." [38] In these latter provisions, the legislature directs or prescribes procedures rather than making an unmediated choice. We've got a modern word for how a legislature directs or prescribes procedures for others to follow. It's the process of lawmaking. [39]

Proponents of the theory that Article II grants, in appointing electors, special legislative dispensation to ignore the normal lawmaking process or substantive state constitutional constraints look primarily to two cases beyond the Elections Clause cases above. The first is *McPherson v. Blacker*. [40] *McPherson* concerned a Michigan statute appointing two presidential electors based on the plurality winners of two districts each comprising half of the state, and the remaining electors based on the plurality winners of each congressional district; the claim in the case was that the state could not appoint electors by district rather than based on plurality totals statewide (because only statewide totals ostensibly represented the appointment of "the state"). [41] That is, *McPherson* did not confront the question whether the legislature had authority to appoint electors outside of the lawmaking process, or whether it could ignore substantive state constitutional constraints in so doing. [42] The Michigan legislature had passed a ***1064** statute that was under attack. And the Court asked whether the Constitution placed any federal geographic limits on the state's power to appoint electors (through its regular lawmaking process), or whether the Constitution guaranteed the state free rein to appoint electors (through its regular lawmaking process) as it wished.

The Court determined that the *state's* power under Article II was not subject to federal court second-guessing, unless the state's choices had violated another provision of the federal constitution.[43] But this holding does not mean that the Constitution granted the state *legislature* plenary power as a distinct body, beyond the lawmaking process.

To be sure, *McPherson* also contains passages in dicta that, excised from context, support the claim that the Court granted plenary power over electors to the state legislature as a body, distinct from the power granted to the state through the lawmaking process.[44] But the Court also cited, with approval, federal statutes directing the selection of electors by law rather than legislative fiat, and without any intimation that those statutes might intrude on a constitutional privilege.[45] The absence of such commentary would have been quite odd had the Court been addressing the purported issue of legislative supremacy beyond the regular lawmaking process. Rather than determining that Article II settled the locus of legislative power within the state--which was not at issue in the case--the better read of *McPherson* is that it determined that Article II settled the *state's* authority to provide for the appointment of electors as it wished.

The second case to which proponents of an independent state legislature doctrine turn is *Bush v. Palm Beach County Canvassing Board*.[46] It also does not stand up to the weight that doctrine proponents would have it carry. The case, arising out of the 2000 election, was prompted by the Florida Supreme Court's construction of a Florida statute in light of the Florida Constitution. Petitioners raised a question about purported plenary legislative authority: specifically, the degree to which the Florida Constitution could constrain the Florida legislature when the legislature was regulating the appointment of presidential electors.[47] And the U.S. Supreme Court flagged the argument, noting that the Florida Supreme Court may not have ***1065** considered whether it might have exceeded its authority to constrain the state legislature under Article II--a flag that itself implies the federal Constitution *might* impose a relevant limit.[48] Proponents of the independent state legislature doctrine find great import in this passage.[49] But though the U.S. Supreme Court mentioned the potential issues, at considerable grammatical distance, it did not resolve them. After a bit of throat-clearing, the Court remanded to the Florida Supreme Court to better explain the degree to which its opinion was consistent with *whatever* power was granted to the Florida legislature under Article II.[50] The Court specifically "decline[d] at this time to review the federal questions asserted to be present"--that is, it declined to review the extent to which Article II granted power to the legislature as a body, free from state constitutional limits--until after remand.[51] The Florida Supreme Court returned a new opinion, relying more extensively on the legislature's statutory text.[52] But in the meantime, *Bush v. Gore* interceded,[53] and a Court majority never returned to the Article II question.[54]

***1066** Since these two opinions, the Court has not spoken as a whole.[55] Individual Justices have offered initial thoughts in the context of denials of certiorari or emergency applications to issue or vacate equitable stays or expedite briefing.[56] The Eighth Circuit also entered the discussion in 2020, in a similarly emergent and preliminary posture.[57] And while the court of appeals panel majority cited *McPherson* and *Palm Beach County Canvassing Board*, it did not confront the context of the cases, the precedent construing the Article I Elections Clause, the textual parallels between the Article I and Article II cases, or the jurisprudential or practical difficulties attending its strong version of the legislature's exclusive role.[58] The constitutional reading more consistent with precedent, and less prone to radical upheaval, considers Article II's delegation to the legislature in the context of the regular lawmaking power.

To be sure, the Constitution preserves ample discretion for the deployment of this lawmaking power. The Supreme Court has made clear that Article II allows the selection of electors by means other than a popular election, if state law provides for means other than a popular election.[59] And it is equally clear that Article II poses no barrier ***1067** to a legislature reclaiming for *itself*, as a body, the ability to select presidential electors--as long as it does so through the regular lawmaking process.[60] Indeed, in the first presidential election, South Carolina did exactly that: the state legislature exercised its lawmaking power, allocating the legislature as a body the right to choose presidential electors directly.[61] New Jersey determined, by statute, that the governor and upper legislative chamber would choose electors.[62] Five other states determined that some form of popular vote would determine presidential electors.[63] Massachusetts determined that the popular ***1068** vote would put forward two candidates from each congressional district, and that the legislature would choose from among those two candidates.[64] In each of these states, the regular lawmaking process--different in each state, according to the different procedures in each state's constitution[65]--set forth the manner in which electors would be appointed.[66]

Now, of course, each state has a statute in place providing that electors will be appointed based on the result of a popular vote. In forty-eight states, the plurality winner of the statewide popular vote wins all of the states' electoral votes. [67] In Maine and Nebraska, the plurality winner of the statewide popular vote wins two of the states' electoral votes, and the plurality winner of each congressional district wins the additional electoral vote associated with that district. [68] These are not the only available options: Article II would impose no obstacle if a legislature were to pass a statute modifying that process. And Article II does not speak to internal state lawmaking procedure: If a state's constitution granted its legislature lawmaking power for presidential ***1069** selection outside of the statutory process, by concurrent resolution or some alternative process, Article II would similarly impose no barrier. But by the same token, Article II does not affirmatively authorize an express lane (or secret loophole) for a legislature to rewrite the rules for selecting presidential electors outside of the state's own designated lawmaking procedure.

The discussion above considers and responds to claims that federal law affirmatively *authorizes* a state's legislature to appoint electors, outside of (and despite) a state's regular lawmaking process. It concludes that Article II grants plentiful power to the state to modify the terms by which presidential electors are appointed if that modification proceeds via a state's regularized lawmaking process, and no authorization to pursue an appointment beyond that lawmaking process. But it seems worth a reminder that regardless of whether Article II grants states normal lawmaking discretion or delegates extraordinary discretion to a legislative body ripped from normal context, the discretion granted by Article II is not plenary. Like any other delegation of power in the 1789 Constitution, it is also constrained by further constitutional developments and federal statutes passed under the authority of those Amendments. For example, a state statute (passed by normal means) that changed the appointment process to weight some votes within a state more heavily than others might be entirely consistent with Article II but violate the Equal Protection Clause of the 14th Amendment. Similarly, a state statute providing for the appointment of presidential electors from designated districts might be consistent with Article II but run afoul of the Equal Protection Clause or the Voting Rights Act if those districts were drawn in racially discriminatory fashion.

The notion that state legislatures might seek to appoint electors *after* Election Day raises similar constitutional concerns--concerns that became particularly salient during the 2020 election. [69] In the fall and winter of 2020, there were an alarming number of public musings about the capacity of legislative bodies to simply appoint slates of electors, claiming authority under Article II. [70] Recently disclosed ***1070** emails now reveal that there were alarming private musings as well, including a renegade plan by a top Department of Justice official to encourage legislatures to act unilaterally. [71] These fears did not come to fruition. Every state has a structure, set by the state constitution, state statute, or both, for determining the state's presidential electors through the outcome of a popular vote. And no legislative house took steps in 2020 after Election Day to appoint electors outside of that structure, whether by purported legislative resolution or through the regular legislative process. [72] Indeed, several state legislative leaders publicly declared that they had no such lawful power and wanted no part of antidemocratic rumormongering to the contrary. [73]

***1071** Constitutional constraints provide a rationale supplementing these legislators' normative republican commitments. Whatever the object of Article II's delegation, the Due Process Clause would be implicated in any attempt to replace, after the election had begun, the popular election processes currently authorized by statute with another means of elector selection. [74] And while it is difficult to definitively rule out the notion that there might exist some post-election legislation able to overcome due process concerns, an effort to replace the known outcome of a popular vote--after that vote has already been held--with some entirely different process of appointing electors would involve the sort of fundamentally unfair upsetting of settled expectations that signify due process violations. [75] Though untested (because no legislature has yet been so brazen), the Due Process Clause would seem to deny legislative Lucy any lawful authority to pull an electoral football away from the Charlie Brown electorate after the election has already begun. [76]

II THE STATUTE

For the reasons mentioned above, the best reading of precedent, practice, and judicial prudence is that Article II grants no federal legal ***1072** imprimatur to action by the legislature as a body, outside of the lawmaking process, to designate the manner in which electors are to be chosen. But Article II is not the only provision of federal law likely to attract attention if state legislators become excitable in a post-election context.

3 U.S.C. § 2 provides: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." This language reflects the language of Article II, albeit in the specific context of electoral "failure." And to the extent that--contrary to the analysis above--Article II is found to reserve plenary authority for a state legislature to appoint electors free from normal lawmaking process, 3 U.S.C. § 2 obviously would not (and could not) stand in the way of that constitutional command.

If, however, the constitutional command is not so absolute, a textual examination of the progenitors of 3 U.S.C. § 2 firmly fights against the notion that the statute provides any independent source of federal authority for a state legislature to act on its own. It is no break-glass-in-case-of-emergency provision empowering state legislators to take control beyond the lawmaking process if a state's election process should fail to yield a reliable answer. [77] Indeed, a careful review of the textual origins of 3 U.S.C. § 2 reveals that the mid-nineteenth-century Congress that passed the statute empowered the state to act only through its regular lawmaking process. And in so doing, this history provides something of a counterpoint to the purported ***1073** congressional support cited in *McPherson v. Blacker* for the notion of a strong "independent state legislature" doctrine. [78]

Before turning to the entities empowered to act under the statute, it is first worth a short discussion of the conditions under which the statute empowers action. This must begin with a note that should be obvious: 3 U.S.C. § 2 *cannot* mean that a state legislature is empowered to change the appointment process for presidential electors whenever the outcome is unclear at the end of Election Day. [79] The triggering text of the statute refers to the state's failure to "make a choice" on Election Day--through the voters participating in the election--but there is no suggestion that the identity of that choice must be immediately apparent. If I choose an object behind door number three, I have made a choice at the moment I expressed my preference, even if I don't find out what lies behind door number three until much later. Each state has a series of processes for tallying votes and canvassing vote tallies along the way to certification; those processes all linger long beyond Election Day (and have done so since the first popular votes for presidential electors). No state has yet thought that this fact triggered any incremental authority or responsibility under 3 U.S.C. § 2. It cannot be that each of our elections has "failed" in the sense of 3 U.S.C. § 2 just because the choice was not formally confirmed until after Election Day itself. [80]

Other federal laws also confirm that 3 U.S.C. § 2 cannot plausibly demand a result on Election Day. 3 U.S.C. § 5--the infamous "safe harbor" provision much examined in *Bush v. Gore*--provides that a state's determination of electors shall be conclusive if the laws enacted prior to Election Day, and the tally process and dispute resolution system embodied in those laws, yield a final result at least "six days prior to [the] time of meeting of the electors." [81] The meeting of the electors is currently set (again, by federal law) to be several weeks after Election Day--in 2020, that date was December 14. [82] In 2020, ***1074** the 3 U.S.C. § 5 "safe harbor" date was December 8. That is, 3 U.S.C. § 5 expressly contemplated that a state in 2020 might have encountered a dispute about the nature of the choice made on November 3, and expressly guaranteed exclusive congressional respect for the state's dispute resolution process as long as the dispute was resolved by December 8. Section 5 and section 2 must be read together. [83] A state cannot have "failed to make a choice" on Election Day for purposes of federal law, based solely on the absence of a known answer on Election Day, if federal law also affirmatively protects that choice after the resolution of disputes yields a final answer several weeks later.

So 3 U.S.C. § 2 does not plausibly demand a result on Election Day. [84] However, as the meeting of the electors approaches, if the state dispute resolution process does not produce a final certified answer, there will be growing pressure to declare that the state has held an election but failed to make a choice.

Some state laws expressly contemplate this sort of turmoil and provide--by laws established well before Election Day itself, mitigating any Due Process concern--for a release mechanism. In North Carolina, for example, if the State Board of Elections has not proclaimed a winner by the federal "safe harbor" deadline, state statutes specifically authorize the legislature (as a body) to appoint electors through a special legislative session, convened with the support of sixty percent of the members of each state legislative chamber, [85] and acting "in accord with their best judgment of the will of the electorate." [86] If the legislature has not acted by noon of the day before the meeting of the electors, the statutes specifically authorize the Governor to appoint electors instead, "in accord with [her] best judgment of the will of the electorate." [87] And if the State Board of Elections returns a winner, under the normal dispute resolution process, before noon on the day the electors actually meet, *that* proclamation controls, even if the Governor or legislature has already appointed alternatives. [88]

***1075** But that structure--all set by statute, through the regular lawmaking process, and in place well before Election Day--does not exist in many states. North Carolina is the only state of which I am aware that expressly references 3 U.S.C. § 2 in its authorized process for selecting presidential electors. [89] And it is likely that an absence of specific procedures in state law could generate claims that 3 U.S.C. § 2 provides affirmative federal authorization for unilateral legislative action as the meeting of the electors approaches. [90]

Given this context, then, it is worth examining exactly which state entities 3 U.S.C. § 2 does and does not empower. Prior examination of this statute has seemed to revolve around what it means for a state to have held an election but failed to make a choice. In 2000, for example, the Florida House passed a concurrent resolution on December 12, citing 3 U.S.C. § 2 and purporting to appoint electors when no conclusion to the litigation battles appeared forthcoming on the date of the 3 U.S.C. § 5 "safe harbor" deadline. [91] The debate in the Florida House revolved primarily around whether the state had failed to make a choice for purposes of the federal statute. The Florida House seemed simply to assume that if the state *had* failed to make a choice, the legislature had the power under the federal statute to appoint electors by concurrent resolution. [92] That assumption was never validated by the Florida Senate, and there was never significant debate about the sorts of additional procedures that might or might not be legally required. To the extent that concurrent resolution procedures in Florida depart from the regular state lawmaking procedure, the text of the federal statute does not unequivocally support such a reading--and a textual examination of its origins leans decidedly in the opposite direction.

If the state holds an election but fails to make a choice on Election Day--or, at least, if the state fails to make a choice on ***1076** Election Day that can eventually be discerned--3 U.S.C. § 2 provides that the electors may be appointed "in such a manner as the legislature of such State may direct." [93] That language directly reflects the constitutional authority of Article II, authorizing the state to appoint electors "in such Manner as the Legislature thereof may direct." [94] To the extent that the constitutional provision reflects an understanding that the ability to select electors depends upon the exercise of a regular lawmaking power (via regular lawmaking process, subject to regular lawmaking constraints), the federal statute goes no further. Put differently: If the Constitution does not affirmatively authorize a legislature to ignore state process in appointing electors, neither does 3 U.S.C. § 2.

Indeed, the origins of 3 U.S.C. § 2 reveal that Congress did not intend the legislature, as a body, to have special appointment authority for presidential electors outside of the regular legislative process. 3 U.S.C. § 2 is derived from an 1845 statute. [95] That statute's text, in full, is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed: *Provided*, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote: *And provided, also*, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide. [96]

Professor Michael Morley has written the most comprehensive treatment of the history behind this statute's passage, and I agree with his conclusion that the legislation was largely designed to establish a uniform election date, while also accommodating individual state idiosyncrasies and emergency conditions. [97] Some states--like New Hampshire, for example--had majority-winner requirements for ***1077** appointing electors. [98] It was certainly possible that one candidate's electoral slate could win a majority on a single national Election Day. But it was also possible that a candidate's slate would win only a plurality, requiring a runoff under state law at a later date. And Virginia's legislature had been forced to extend elections in the past, when flooding made passage to the polls impracticable on the principal designated day. [99] Congress wanted to allow states the flexibility to address these and similar quirks without defeating the point of the uniform election day. [100]

In sum, the statute set a single Election Day for the country. But the mandate for a single federal Election Day would not preclude the state from providing for contingencies for an alternative process, if a state held an election on that day and for some reason that election failed to yield a choice under state law. In most of the legislative debate, the focus was not on *who* should make the

rules, or *how* they should do so, but on *when* votes for the presidential electors should be cast (and when votes cast for electors should be authorized when cast beyond the national Election Day). [101]

***1078** That said, the original 1845 statute was unequivocal in its assignment of the authority to rectify a failed election. "[W]hen any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day *in such manner as the State shall by law provide.*" [102] This was the same as the process designated for replacing unavailable presidential electors, settled in the statute's previous sentence, and which remains in the statute to this day: "[E]ach State may *by law* provide for the filling of any vacancy or vacancies ...." [103]

The "State" was the body empowered to fill vacancies or compensate for a failed Election Day, choosing make-up electors as provided *by law*. [104] And, indeed, that delegation to the state through the regular statutory process reflects consistent state practice at the time. In 1844, the South Carolina legislature chose its own electors, and all other states chose electors through popular elections--but every state (even South Carolina) established its process through a statute. [105] There was no suggestion in the 1845 federal statute that the state legislature had any authority whatsoever beyond its capacity as a lawmaking body, unless state law assigned it that role. Indeed, had the Constitution reserved special power to the state legislature to act outside of the regular legislative process in fulfilling an Article II role, the 1845 delegation to the state to act "by law" would have been unconstitutional. [106] Had Congress understood the Constitution in this way in 1845, one might have expected the conflict between the statutory text and the purported constitutional mandate to have occasioned at least one pertinent objection in debate. The legislative record reveals none.

The language of the "failed election" provision changed by the mid-1870s, when the statute took its present form, providing that electors may be appointed "as the legislature of such State may direct." [107] But there is little contemporaneous evidence that the change was intended to reflect a considered alteration in the body empowered to ***1079** choose electors. Instead, the change appears to have been a codifier's revision, altered without explanation.

In 1866, Congress authorized the first codification of the United States statutes promulgated to date, appointing a three-person commission to "revise, simplify, arrange, and consolidate" the statutory substance. [108] Before 1866, the statutes had been assembled only chronologically, and it was quite difficult to determine which had been modified, or repealed, or superseded; the codification was an attempt to bring order to the whole. [109] The commissioners turned over their work product in 1873 to a joint congressional committee, but Congress rejected the draft: "It was the opinion of the joint committee that the commissioners had so changed and amended the statutes that it would be impossible to secure the passage of their revision." [110]

Thomas Jefferson Durant took over the codification process, [111] with the task of "cutting out all amendments and restoring the bill to the original law, when it passed." [112] While his monumental work was an improvement, it was not a perfect success. Even after he had submitted his revised proposed codification, hundreds of errors were discovered. [113] Per the pithy description of renowned law librarians J. Myron Jacobstein and Roy M. Mersky: "As is noted in all standard treatises on legal bibliography, this revision caused much dissatisfaction because of many errors as well as suspicion that the revisors had frequently exceeded their authority." [114] And although Durant apparently presented a report on the changes he had made to Congress, there appears to be no extant copy of that report. [115]

Nevertheless, Durant's revision--now known as the Revised Statutes of 1873--was enacted into law on June 22, 1874. [116] ***1080** Section 5596 of those Revised Statutes repealed all prior statutes embraced in part in the 1874 Revision. [117] That repeal, of course, includes repeal of the 1845 statute providing for the appointment of electors if the state failed to make a choice on Election Day. [118] The 1845 statute is no longer operative. But to the extent that the revised text is ambiguous, courts and commentators have routinely looked to the progress of legislation from before 1874 to interpret the text in the revision. [119]

It appears that the language of the 1845 statute that would become 3 U.S.C. § 2 changed in the process of the mid-1870s revisions. Recall that the original statute had three clauses:

> [1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed:
>
> [2] *Provided*, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote:
>
> [3] *And provided, also*, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide. [120]

The pre-Durant revision of 1873, rejected by Congress as exceeding the revision commissioners' authority, brings the 1845 statute into three separate codified sections. The first clause of the statute, setting the first Tuesday after the first Monday in November as Election Day, appears relatively unscathed as Title III, chapter 1, section 1: "[T]he electors of President and Vice-President shall be appointed, in each State, on the Tuesday next after the first Monday in ***1081** November, in every fourth year succeeding every election of a President and Vice-President." [121]

The second clause of the statute appears almost verbatim as Title III, chapter 1, section 3: "Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote." [122]

But the third clause, appearing in Title III, chapter 1, section 4, is changed to resemble its current form: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct." [123]

The commissioners tasked with revision gave no indication of any reason for making the change from "in such manner as the State shall by law provide" [124] to "in such manner as the legislature of such State may direct." [125] In several other portions of the code--including immediately subsequent portions of the code relating to the conduct of presidential electors--the commissioners annotated substantive changes that they had made and that apparently felt sufficiently momentous to warrant annotation. [126] There are no such annotations accompanying the relevant change here.

It is also difficult to believe that the change was made for substantive reasons, as a deliberate choice to remove the power to appoint electors from the state's lawmaking process and reassign it to the purported plenary power of the legislature as a body. Had the commissioners believed that the legislature enjoyed such an exclusive appointment privilege--from the Constitution or simply as a matter of federal policy--there would be no reason to make the modification in one instance of appointing electors and not another. They made the change for electoral failure, but not for the previous sentence, governing vacancies. That is, there is no apparent reason to deliberately grant the legislature (as a body, independent of the lawmaking process) exclusive authority to appoint electors when the state fails to ***1082** make a choice on Election Day (§ 4), but to deny such privilege to the legislature when appointing electors to fill vacancies (§ 3). [127]

Instead, given the absence of any explanation for the change, and the absence of any logical distinction between the instances where the change was made and those where it was not, it is more likely that the change reflects a stylistic choice rather than a substantive one. That is, it is more likely that the revision commissioners believed that the manner of appointing electors that a "legislature ... may direct" [128] is simply another way of describing the manner of appointing electors provided by a "[s]tate ... by law." [129] Occam's razor suggests that the two phrases provide the same rule. The appointment of electors is given by federal statute to the state lawmaking process.

These changes, introduced in the pre-Durant revision of 1873, persisted in Durant's edition of the Revised Statutes of 1873 ultimately enacted by Congress. The relevant portions of Title III, ch. 1, § 1 of the pre-Durant revision became, verbatim, § 131 of the Revised Statutes. [130] Title III, ch. 1, § 3 of the pre-Durant revision became, verbatim, § 133 of the Revised Statutes. [131] And the statute of interest here--Title III, ch. 1, § 4 of the pre-Durant revision--became, with the exception of the addition of an irrelevant indefinite article, § 134 of the Revised Statutes. [132] And each has been retained in precisely the same form in the modern United States Code. [133]

***1083** In sum, 3 U.S.C. § 2 now authorizes, in the event that a state fails to choose electors in the election held on the federally mandated presidential election date, the appointment of electors on some later day "in such a manner as the legislature of such State may direct." [134] But that statute began as a provision authorizing, in the event of failure, the appointment of electors "in such manner as the State shall by law provide." [135] The textual change was made in the course of an error-laden 1873 codification project, without any contemporaneous recognition that the change was intended to be substantive (or, indeed, in any way remarkable). A neighboring statutory provision, also concerning the selection of electors, retained the original direction to appoint electors "by law," without any indication that the lawmaking process would be thought to intrude on the unique prerogative of the state legislature as a body empowered to act beyond lawmaking. [136]

The most natural implication is that the textual change in the statute that became 3 U.S.C. § 2 was not meant to connote any difference in meaning: that the manner in which a state provides for the appointment of electors "by law" is simply another way to describe the manner by which a state legislature "directs" how electors are to be appointed. And at the least, if the text of 3 U.S.C. § 2 is ambiguous with respect to its reference to either a regular lawmaking power or to a special source of power in the legislature beyond the lawmaking process, the 1845 precursor ought to inform any modern reading of the statute.

III THE STATUTE AS AN INTERPRETIVE DEVICE FOR THE CONSTITUTION

Indeed, the historical precursors of 3 U.S.C. § 2 canvassed above might--in an unusual way--shed some light on the best reading of the constitutional provision. Of course, the extent to which post-ratification history may be relevant--here, specifically, the extent to which nineteenth-century statutes may provide interpretive guidance for the construction of eighteenth-century constitutional provisions-- ***1084** is a matter of abiding dispute in constitutional theory. This essay neither engages that voluminous literature nor takes sides in the debate. But Part I, above, mentioned *McPherson v. Blacker*, and its seeming influence on at least some readings of the Article II delegation. *McPherson*, in turn, relies heavily on a nineteenth-century congressional committee report in explaining Article II. [137] The origins of 3 U.S.C. § 2, above, may help put the most frequently cited passage of *McPherson* in some perspective.

McPherson's discussion of any legislative role in prescribing the manner of appointing electors distinct from the normal legislative process is, as explained above, dicta. [138] The case concerned a statute, passed through the normal legislative process, and there was no claim that this statute was in any way in conflict with state courts or the state constitution. But within the dicta of the case, several statements suggest a more robust Article II role for the legislature than the normal legislative process provides. The starkest articulation of this theory--a full-throated strong version of the "independent state legislature" notion--appears in *McPherson*'s citation of an 1874 Senate committee report on a (failed) proposed constitutional amendment to effectuate a popular vote for presidential electors. [139] The complete passage is as follows:

> [O]n the 28th of May, 1874, a report was made by Senator Morton, chairman of the senate committee on privileges and elections, recommending an amendment dividing the states into electoral districts, and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions

> may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature ***1085** to resume the power at any time, for it can neither be taken away nor abdicated." [140]

This committee report asserts that state legislatures cannot for these purposes be bound by any state limitations, including the state constitution--thereby requiring Senator Morton's constitutional amendment to make a presidential popular vote durable.

In *McPherson*, the citation of this report is the culmination of a lengthy passage about the history of state flexibility to choose districted elections, at-large elections, or some other mechanism to appoint electors (which was, of course, the actual issue in the case). [141] But much has been made of the rhetorical swell at the close, quoting a report singling out the state legislature for a special role free of state constitutional context. When proponents of a strong "independent state legislature" notion cite *McPherson*, this is the muscular language they cite. [142]

It is not clear why a congressional committee report from a failed constitutional amendment promulgated in 1874 should be particularly persuasive in assessing the meaning of an Article II delegation to the states. And Hayward Smith has documented the ways in which the author of that committee report-- with, inter alia, a stake in aggrandizing the need for his proposed constitutional amendment--may be a particularly unreliable representative narrator. [143] But if we take the *McPherson* method seriously, it implies that mid-nineteenth-century congressional views should be meaningful in construing the constitutional provision. And if that premise bears weight, the historical progression of statutory text discussed in this article provides far stronger evidence that Congress as a whole did *not* seem to believe in an independent state legislature doctrine allowing the legislature as a body free reign to act beyond regular state lawmaking procedures. [144]

***1086** In 1845, as shown above, Congress passed a statute authorizing the State, in the event that the state failed to make a choice on Election Day, to provide the manner of appointing electors--by law. [145] No member of Congress suggested that this mode of appointing electors--regular statutory procedure, under regular state constitutional constraints--was in any way improper or unconstitutional. [146] The legislative history reveals various alternative, rejected, proposals that more closely mirrored the constitutional text (allowing the "legislature" to "direct" the appointment of electors), but no member of Congress remarked on that distinction as reflecting a choice of decisionmaker different from the designation "by law" in the final statute. [147] The implication is that, at least in 1845, Congress thought that allowing states to direct the manner of appointing electors by law, and allowing the state legislature to direct the manner of the appointment of electors, amounted to the same thing: normal state lawmaking power and constraint. [148] And that both were perfectly consistent with Article II.

By 1873, the 1845 text providing for the appointment of electors in the event that the state had failed to make a choice on Election Day had changed. [149] But the text providing for the states to fill vacancies among the electors--by law--had not. [150] The argument in Part II above suggests that the textual change in the provision to become 3 U.S.C. § 2 was inadvertent, and should not be read as particularly meaningful. [151] But independent of the merits of that argument, the *absence* of a change in the vacancies portion of the statute shows that Congress, when it passed the Revised Statutes in 1874, still apparently believed that states could provide for the filling of electors' vacancies "by law," [152] and that this was in no way inconsistent with the role of the state legislatures under Article II. Indeed, that delegation, reliant on the normal lawmaking process of the state, remains in the code today. [153]

***1087** It is not my intention to overstate the significance of this argument. The views of a mid-nineteenth-century Congress may offer some guidance, but do not likely hold particularly magical import, for the proper interpretation of Article II's designation of the power to direct the manner of appointing electors. But the dicta in *McPherson* seems to be surprisingly potent in present discourse. And to the extent that this *McPherson* dicta takes its strength from the expression of the views of a lone committee report from 1874, the actual contemporary congressional work-product, manifest in statutes, suggests a very different congressional assessment of the legal merits of state legislative action to appoint electors divorced from the regular lawmaking process.

Footnotes

a1 Copyright © 2021 by Justin Levitt, Professor of Law and Gerald T. McLaughlin Fellow, Loyola Law School, Los Angeles. I am grateful to Jim Blumstein, Ned Foley, Rick Hasen, Marty Lederman, Richard Pildes, William Popkin, Cameron Schroeder, Laurence Tribe, the faculty of the Washington University in St. Louis School of Law, and particularly Michael Morley for their helpful comments and suggestions, and to Lexi Ibrahim for her research assistance. All errors, of course, are my own. Nothing herein should be construed to reflect the views of any organization or government agency with which I am, or have been, affiliated.

1 *See* U.S. CONST. amend. XII (providing, in the event that one presidential candidate failed to secure an Electoral College majority, for the House of Representatives to select the President from the top three Electoral College contenders, with each state's delegation having one vote); John Bresnahan, Kyle Cheney & Heather Caygle, *Pelosi Begins Mustering Democrats for Possible House Decision on Presidency*, POLITICO (Sept. 27, 2020, 7:17 PM), https://www.politico.com/news/2020/09/27/pelosi-mobilizes-democrats-house-decision-on-presidency-422359.

2 *See* Ed Kilgore, *Pelosi Makes Plans for House Election of President*, N.Y. MAG.: INTELLIGENCER (Sept. 28, 2020), https://nymag.com/intelligencer/2020/09/pelosi-makes-plans-for-house-election-of-president.html. Mechanically, in the event that no Presidential candidate received a majority of Electoral College votes, *and* the event that no majority of state delegations in the House chose the President, *and* the event that no Vice-Presidential candidate received a majority of Electoral College votes, the Senate would choose a Vice President to act as President. U.S. CONST. amend. XII.

3 *See, e.g.*, Complaint for Expedited Declaratory and Emergency Injunctive Relief at 5, Gohmert v. Pence, No. 20-cv-00660 (E.D. Tex. Dec. 27, 2020) (claiming that when a state submits two or more presidential electoral slates, the Vice President exercises sole authority to determine which if any of those slates to count--in the context of an election in which no authorized state body submitted more than one presidential electoral slate).

4 The undue focus on a contested election along the lines of the 2000 election was likely also fueled by President Trump's contention that the sprint to confirm Justice Amy Coney Barrett was necessary in part to resolve disputes over the coming election. *See* Peter Baker, *Trump Says He Wants a Conservative Majority on the Supreme Court in Case of an Election Day Dispute*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/elections/trump-supreme-court-election-day.html.

5 *See, e.g.*, Justin McCarthy, *Confidence in Accuracy of U.S. Election Matches Record Low*, GALLUP (Oct. 8, 2020), https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx (stating low confidence in election processes rising in part from concerns that differed across partisan lines); CRAIG M. BURNETT, KALIKOW SCHOOL POLL AT HOFSTRA UNIVERSITY: EXECUTIVE SUMMARY AND ANALYSIS 7-9 (2020), https://www.hofstra.edu/pdf/academics/colleges/hclas/gov-policy-international/kalikow-poll-0920.pdf (describing concern about foreign influence and mail-in voting, belief in rates of fraud, and acceptance of election results if the results are not clear on November 3). *See generally Voter Confidence*, MIT ELECTION DATA + SCI. LAB, https://electionlab.mit.edu/research/voter-confidence (last updated Apr. 2, 2021) (reviewing factors that influence voter confidence and noting that political outcomes can influence people's confidence in elections).

6 *See, e.g.*, Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 21-22, Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (No. 20A53), 2020 WL 5898732 (arguing that state court interpretations of statutes passed by the Pennsylvania State Legislature are not binding in determining rules for federal elections); Justin Levitt, *Pennsylvania Legislators Invite Some Extra SCOTUS Chaos This Election Season*, TAKE CARE (Sept. 29, 2020), https://takecareblog.com/blog/pennsylvania-legislators-invite-some-extra-scotus-chaos-this-election-season (reviewing the significant downstream consequences of exempting state legislatures from state constitutional constraints for purposes of federal elections); Carson v. Simon, 978 F.3d 1051, 1059-60 (8th Cir. 2020)

(finding that a consent decree issued by a state court at the request of the Secretary of State, to settle litigation concerning a statute passed by the Minnesota State Legislature, is not binding for purposes of federal elections).

7 *See, e.g.*, Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/article/electors-vote.html; Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020), https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424; Charles L. Zelden, *Guest Opinion: Legislatures Picking Electors to the Electoral College: It Could Not Only Happen, It Almost Did*, USA TODAY (Sept. 28, 2020, 6:01 AM), https://www.news-press.com/story/opinion/2020/09/28/electoral-college-presidential-election-2020-trump-biden-charles-zelden/3537063001.

8 3 U.S.C. § 2.

9 *See, e.g.*, Memorandum from Grace Brosofsky, Michael C. Dorf & Laurence H. Tribe, State Legislatures Cannot Act Alone in Assigning Electors (Sept. 25, 2020), https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view [https://perma.cc/EX4F-AALD [hereinafter Brosofsky, Dorf & Tribe Memorandum] (discussing the independent state legislature doctrine); Grace Brosofsky, Michael C. Dorf & Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors*, DORF ON LAW (Sept. 25, 2020), http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html (presenting an abbreviated version of the same); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020) [hereinafter Morley, *Independent State Legislature*] (discussing the independent state legislature doctrine); Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO STATE L.J. 689 (2016) (same); Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 HARV. J.L. & PUB. POL'Y 341 (2016) (same); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847 (2015) [hereinafter Morley, *Intratextual Independent Legislature*] (same); Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599 (2008) (same); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. STATE U. L. REV. 811 (2001) (same); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. STATE U. L. REV. 731 (2001) (same); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended*, 68 U. CHI. L. REV. 613 (2001) (same); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001) (same); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495 (1962) (same).

10 U.S. CONST. art. II, § 1, cl. 2.

11 *See, e.g.*, *Carson*, 978 F.3d at 1060 ("In fact, a legislature's power in this area is such that it 'cannot be taken from them or modified' even through 'their state constitutions.'" (quoting McPherson v. Blacker, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395, at 9 (1874)))); Smith, *supra* note 9, at 734.

12 *See* 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring). Specifically, Rehnquist asserted that

> the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State ... and to state circuit courts .... In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate .... [We would] hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.

Id. at 114-15.

13 *See, e.g.*, Smith, *supra* note 9, at 734-35 (noting that a weaker version of the doctrine might allow state constitutions to place "minimal" restrictions on the legislature, but not "more intrusive" ones); Epstein, *supra* note 9, at 619-20 (proposing a version of the doctrine permitting renderings of state statutes "within the boundaries of acceptable interpretation" but not "gross deviation[s]" from a statutory scheme, but giving short shrift to the role of a state constitution in that balance); Friedman, *supra* note 9, at 834-41 (articulating a version of the doctrine allowing state constitutions to impose procedural rules but not substantive ones, and granting the state judiciary "substantial deference" to interpret state statutes in all but "clearly implausible" ways); Morley, *Intratextual Independent Legislature*, *supra* note 9, at 866 (arguing for a version of the doctrine that does not subject state legislatures to the substantive constraints of a state constitution, thereby implying procedural constraints still apply); Morley, *Independent State Legislature*, *supra* note 9, at 24-25, 69, 91-92 (explaining a version of the doctrine subjecting state legislatures to ordinary lawmaking procedure, exempting legislatures from state constitutional substantive constraints, and holding courts to a "super-strong plain meaning approach" in construing legislative text).

14 *See, e.g.*, Kirby, *supra* note 9, at 503-04 (arguing that state legislatures are limited by procedural but not substantive provisions of the constitution); Morley, *Independent State Legislature*, *supra* note 9, at 25-27, 41-45, 69, 91-92 (urging this view, and chronicling support in several nineteenth-century state supreme court decisions, and in several Reconstruction Congress evaluations of congressional elections).

15 The procedural and substantive limitations that a state constitution places on its own legislature might, in this context, be seen as "nonseverable" components of the power the legislature is granted to act as the state's legislative organ; they are the commitments upon which the authority to act as a legislature is predicated.

16 The Court has held that different constitutional delegations to the "Legislature" have different referents dependent on their context, and the distinct constitutional function fulfilled. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015) ("[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise." (alterations in original) (quoting Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932))). *But cf.* Morley, *Intratextual Independent Legislature*, *supra* note 9 (arguing that the referents should be the same). Article I, § 4 calls for a regulatory function, and so the Court has held that the constitutional provision refers to the entities entrusted by state law with lawmaking. *See infra* text accompanying notes 29-38 and note 35. Article I, § 3 and Article V call for electoral functions (the selection of Senators and the ratification of amendments, respectively), and so the Court has held that these constitutional provisions refer to the legislators acting as an exclusive collective body. *See infra* note 35.

The electoral manifestation of the "Legislature"--a legislature acting to select Senators or ratify amendments--is an unusual function for a body more normally tasked with generally applicable regulation. To extend the analogy in the text, it asks something different of "the members of the Los Angeles Philharmonic" than the normal way in which the orchestra produces a musical performance. This is not particularly troublesome as a matter of linguistic practice. In referring to "the Supreme Court," we understand that the institution has certain rules when it is acting in its usual judicial capacity, and count on normal practice for the granting of certiorari and handing out opinions--even as we understand that those rules may not govern when "the Supreme Court" orders lunch or appears at dignitary events.

17 *See* Jack Michael Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes* 6, 35-36 (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Paper No. 21-07, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3795421 (noting that a strictly textualist reading of a statute abstracted from context may--or may not--comport with any particular state legislature's preferred legislative approach to statutory interpretation).

18 *See, e.g.*, Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 69-70 (2021) (noting the disruptive impact of revivified vetoed bills).

19 *Cf.* Stuart v. Anderson Cnty. Election Comm'n, 300 S.W.3d 683, 688, 689-92 (Tenn. Ct. App. 2009) (construing the votes of those exceeding Tennessee's mandatory five-minute time limit to be something other than illegal votes, and thereby affirming the decision of a lower court that had reached that conclusion in part because of the state constitution).

20 *See* Letter from Professor James F. Blumstein, Vanderbilt L. Sch., to Hon. Keenan Keller, Senior Couns., House Comm. on the Judiciary (Sept. 12, 2019) (submitted for *Discriminatory Barriers to Voting: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 116th Cong. (2019)), https://docs.house.gov/meetings/JU/JU10/20190905/109887/HHRG-116-JU10-20190905-SD001.pdf (suggesting such an interpretation in the context of congressional apportionment and the Elections Clause).

21 *See id.*; *cf. infra* note 27.

22 *But see* Growe v. Emison, 507 U.S. 25, 33-34 (1993) (urging state court priority over federal courts in the context of congressional apportionment).

23 *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay) (reprimanding a federal trial court for "interven[ing] in the thick of election season" to issue an injunction remedying a violation of federal law, and implying that federal court "intrusion" raised enhanced concerns in this context).

24 *See, e.g.*, Morley, *Independent State Legislature*, *supra* note 9, at 22, 41-45 (noting the approach of the Supreme Court throughout much of the twentieth century, and contrasting that approach with state judicial examples of the nineteenth century).

25 U.S. CONST. art. II, § 1, cl. 2 ("*Each State shall appoint*, in such Manner as the Legislature thereof may direct, a Number of Electors ...." (emphasis added)).

26 *Id.*

27 *See* Brosofsky, Dorf & Tribe Memorandum, *supra* note 9. It is conceivable that the federal constitutional textual delegation to the legislature, as a proxy for the process of regular lawmaking, would (for example) preclude a state court from simply arrogating to itself, without any reasonable state constitutional or statutory delegation of such an authority, a state common-law right to select electors. Friedman, *supra* note 9, at 837. But the notion that some arrogations of non-legislative authority might amount to a violation of Article II does not imply that Article II grants plenary power to the legislature as a body to ignore the normal legislative process.

28 U.S. CONST. art. II, § 1, cl. 2.

29 *Id.* art. I, § 4.

30 285 U.S. 355, 365-66 (1932). Synecdoche is a linguistic or semiotic term denoting the use of a part to refer to the whole, or the use of the whole to refer to a part. Depending on the context, for example, references to "the Crown" may mean a particular monarch, the government led by a monarch, a monarchical system, a state ruled by monarchy, or the realm under a monarch's control, in addition to a particular piece of headgear.

31 *Id.* at 361-62.

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32 *Id.* at 367-68 ("We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted."). Of course, if a state's constitution does not provide for a gubernatorial veto in the lawmaking process, *Smiley* does not require one. Nor does it preclude a state from establishing in its state constitution one lawmaking process for some subjects, and a distinct lawmaking process for others. *See, e.g.*, N.C. CONST. art. II, § 22 (establishing a default process for lawmaking, and then establishing a distinct lawmaking process for certain enumerated subjects).

33 241 U.S. 565, 569-70 (1916).

34 576 U.S. 787, 807-08, 816-18 (2015).

35 *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 29 (1968) ("There, of course, can be no question but that [Article II, § 1] does grant extensive power to the States *to pass laws* regulating the selection of electors." (emphasis added)); U.S. Term Limits, Inc., v. Thornton, 514 U.S. 779, 804-05 (1995) (noting the parallel "delegations of power to the States" in both clauses).

36 The process by which legislatures directly elected Senators, established in Article I, Section 3, was superseded by the Seventeenth Amendment's instruction that Senators be elected by the people, instead. The Court similarly held that the function of state legislatures in ratifying constitutional amendments is distinct from the lawmaking function. *See, e.g.*, Hawke v. Smith, 253 U.S. 221, 230-31 (1920); Leser v. Garnett, 258 U.S. 130, 137 (1922); *Arizona State Legislature*, 576 U.S. at 805-08; *see also* Seth Barrett Tillman, *Sometimes "People" = "Legislature,"* ORIGINALISM BLOG (May 24, 2016), https://originalismblog.typepad.com/the-originalism-blog/2016/05/sometimes-people-legislatureseth-barrett-tillman.html (citing founding-era documents discussing distinctions in the referent for "the Legislature" based on function).

37 U.S. CONST. art. I, § 3, cl. 1.

38 U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4, cl. 1.

39 Nathaniel Rubin makes the further compelling argument that just as the Constitution assigns regulatory authority for the manner of selecting presidential electors to the state "Legislature," the Constitution frequently assigns regulatory powers or responsibilities to "Congress." But when the Constitution grants "Congress" the power or responsibility to act in a lawmaking manner, it does so subject to all other substantive and procedural constitutional constraints, and not as a body excised from (or shielded against) its constitutional context. Rubin, *supra* note 18, at 66-67. That is, the Constitution specifies that "Congress" has the power to regulate interstate commerce, U.S. CONST. art. I, § 8, cl. 3. If that power is subject to the normal constraints on congressional lawmaking--including procedural constitutional requirements like an executive veto and substantive constitutional requirements like compliance with the Equal Protection Clause-- it stands to reason that a specification that the state "Legislature" has the power to regulate the manner of selecting presidential electors is similarly subject to the normal constraints on state legislative lawmaking.

40 146 U.S. 1 (1892).

41 *Id.* at 4-5, 24-25.

42 *See* Smith, *supra* note 9, at 775-76 (recognizing the limits of the claim in *McPherson*).

43 *McPherson*, 146 U.S. at 35, 37.

44 *See, e.g.*, *id.* at 25, 27, 29; *id.* at 34-35 (citing a congressional committee report for a failed constitutional amendment); *see also* Smith, *supra* note 9, at 775-79 (explaining the history leading to these passages).

45 *See McPherson*, 146 U.S. at 40-41 (citing multiple acts of Congress addressing elector votes).

46 531 U.S. 70 (2000).

47 *Id.* at 73, 75, 76-77.

48 *Id.* at 77 ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'" (quoting *McPherson*, 146 U.S. at 25)).

49 *E.g.*, Morley, *Independent State Legislature*, *supra* note 9, at 80-82.

50 *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 78.

51 *Id.* It is unusual for the Supreme Court to vacate a state court opinion and remand for further clarification, without first finding error or recognizing an interceding legal development. But it is not unknown for the Court to do so, even simply to receive the benefit of the views of the state court on a pending question the Court is not yet prepared to answer. *See, e.g.*, Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (vacating and remanding a West Virginia Supreme Court of Appeals decision on a federal *Brady* claim); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs--And an Alternative*, 107 MICH. L. REV. 711, 718 (2009) (discussing elucidatory grant, vacate, remand orders). *But see Youngblood*, 547 U.S. at 870-72, 874 (Scalia, J., dissenting) (protesting the practice). And in this instance, the Court complained that it could not determine the extent to which the Florida Supreme Court's opinion was premised on an interpretation of the state statutes (which might have deprived the Supreme Court of jurisdiction), or an interpretation of the state statutes in light of the state constitution and/or 3 U.S.C. § 5 (which might have implicated an Article II question, even if the answer revealed no error). *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 78; *cf.* Bruhl, *supra*, at 718 n.23 (noting the *Bush v. Palm Beach County Canvassing Board* decision was similar to other "GVRs," but different in that it was made after the certiorari stage).

52 Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273, 1281, 1283-84 (Fla. 2000).

53 531 U.S. 98 (2000).

54 Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, joined by Justices Scalia and Thomas, articulated a somewhat weak form of the "independent state legislature" doctrine, and is also held up as support for the idea. *Id.* at 112-13 (Rehnquist, C.J., concurring). It claimed that Article II's delegation to the legislature warranted federal review of a "significant departure from the legislative scheme for appointing Presidential electors." *Id.* at 113. The opinion acknowledged that this review required second-guessing the state court's interpretation of state law, *id.* at 114, but although it engaged in extensive reading of the relevant state statutes, it gave short shrift to the state constitutional provisions shaping the permissible outer bounds and proper construction of those statutes. And the concurrence did not explain how a reading of state statutes passed with the expectation that those statutes would be construed consistent with the state constitution in all other elections also followed legislative expectations when construing the statute to ignore the state constitution in a presidential election. *Id.* at 111-22.

55 The Court's most recent flirtation with the doctrine was a denial of certiorari in a 2020 election dispute over Pennsylvania's deadline for submitting absentee ballots. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021). The case presented the question whether the Pennsylvania Supreme Court had trodden on any protected federal

constitutional ground in holding that 2020's extraordinary circumstances--including the pandemic and significantly delayed postal delivery--required state statutory deadlines temporarily to yield, in modest fashion, to state constitutional protections for voters. *Id.* at 732-33 (Thomas, J., dissenting from denial of certiorari). The ballots in dispute would not have determined the outcome of any relevant election, and the Court denied certiorari, but three Justices, dissenting, would have heard the case. *Id.*; *id.* at 738 (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari).

56 *See id.* at 733 (Thomas, J., dissenting from denial of certiorari); *id.* at 738-39 (Alito, J., dissenting from denial of certiorari); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (Alito, J.).

57 Carson v. Simon, 978 F.3d 1051, 1051, 1054, 1059-60 (8th Cir. 2020) (finding, upon cursory analysis in a decision rendered five days before election day, that plaintiffs had likely established that a state court violated Article II by recognizing a state-law consent decree's exception to a statutory absentee ballot deadline during the extraordinary circumstances of 2020).

58 *Id.* at 1059-60.

59 *Bush v. Gore*, 531 U.S. at 104.

60 *See id.*; McPherson v. Blacker, 146 U.S. 1, 28-33 (1892) (reviewing the "various modes" by which states determined the appointment of electors, including several different procedures by which statutes granted legislatures direct selection power).

61 *See* An Act for Prescribing on the Part of this State, the Times, Places, and Manner of Holding Elections for Representatives in the Congress, and the Manner of Appointing Electors of a President of the United States, § 4 (1788), *reprinted in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 462, 462-63 (John Faucheraud Grimke, ed., Philadelphia, R. Aitken & Son, 1790), https://archive.org/details/publiclawsofstat1790john/page/462/mode/2up.

62 *See* An Act for Carrying into Effect, on the Part of the State of New-Jersey, the Constitution of the United States, Assented to, Ratified and Confirmed by this State, ch. 241, § 8, (1788), *in* ACTS OF THE THIRTEENTH GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 477, 477-82 (Trenton, Isaac Collins 1788), https://njlaw.rutgers.edu/cgi-bin/diglib.cgi?collect=NJleg&file=013&page=0477.

63 *See* An Act Directing the Time, Places and Manner of Holding Elections for Representatives of this State in the Congress of the United States and for Appointing Electors on the Part of this State for Choosing a President and Vice-President of the United States, ch. 1373 (1788) (appointing as electors the ten people receiving the most votes, with each voter casting ten votes), *in* 13 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 140, 140-45 (Harrisburg Publishing Co. 1908), https://www.palrb.us/statutesatlarge/17001799/1788/0/act/1373.pdf; An Act Directing the Time, Places, and Manner, of Holding an Election for a Representative of this State in the Congress of the United States; and for Appointing Electors, on the Part of this State, for Choosing a President and Vice-President of the United-States (1788) (appointing as electors the three people receiving the most votes, with each voter casting one vote), *in* LAWS OF THE DELAWARE STATE 3, 3-6 (Frederick Craig & Co. 1788); An Act, For Carrying into Effect an Ordinance of Congress of the Thirteenth of September Last, Relative to the Constitution of the United States (1788) (appointing as electors the five people receiving the most votes, with each voter casting five votes), *in* THE PERPETUAL LAWS OF THE STATE OF NEW HAMPSHIRE 473, 473-76 (John Melcher ed. 1789); An Act for the Appointment of Electors to Choose a President Pursuant to the Constitution of Government for the United States, ch. 1, § 2 (1788) (appointing as electors the person receiving the most votes in each of twelve districts, with each voter casting one vote in their district), *in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 3, 3-4 (Richmond, Dixon, Davis & Nicolson 1788); An Act Directing the Time, Places and Manner, of Holding Elections for Representatives of this State in the Congress of the United States, and for Appointing Electors on the Part of this State for Choosing a President and Vice-President of the United States, and for the Regulation of the Said Elections, ch. X (1788) (appointing as electors

five people receiving the most votes from a western district and three receiving the most votes from an eastern district, with each voter casting five votes for candidates from the western district and three for candidates from the eastern district), *in* LAWS OF MARYLAND 326, 326-29 (Annapolis, Frederick Green 1788), http://aomol.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/003181/html/m3181-0321.html.

64 Resolve for Organizing the Federal Government, ch. 49 (1788), *in* ACTS AND RESOLVES OF MASSACHUSETTS, 1788-89, at 256, 256-58 (Wright & Porter Printing Co. reprt. 1894) (Boston, Adams & Nourse 1788), https://archive.org/details/actsresolvespass178889mass/page/256/mode/2up. *See generally* Smith, *supra* note 9, at 759-60.

65 For example, at the time, only New York and Massachusetts provided for the possibility of a veto (in New York, by the executive/judicial Council of Revision, and in Massachusetts, by the governor) in the regular state lawmaking process. Smith, *supra* note 9, at 759-60; Rubin, *supra* note 18, at 67-68. Both states respected the role of this veto in the regular lawmaking process in fulfilling responsibilities of the state "Legislature" under Articles I and II. Smith, *supra* note 9, at 759-60; *see also* Smiley v. Holm, 285 U.S. 355, 369-70 (1932) (holding that Article I's delegation to the "Legislature" included an executive veto procedure where state law provided for the possibility of an executive veto in regular lawmaking). Professor Michael Morley notes that a few decades later, in debates at Massachusetts's Constitutional Convention of 1820, state delegates successfully argued against *substantive* state constitutional constraints on the state legislature on the premise that those substantive constraints would violate Articles I and II. *See* Morley, *Independent State Legislature*, *supra* note 9, at 38-40 (discussing the debate over the proposed constraints).

66 Connecticut and Georgia were the two remaining states participating in the 1788 election; the legislature chose electors directly in those states, albeit beyond the normal statutory process (and in Georgia, at least, in somewhat more haphazard fashion). *See* Brosofsky, Dorf & Tribe Memorandum, *supra* note 9, at 7-8 (discussing how the two states chose electors). Still, it appears that each legislature chose electors in a manner permitted by the respective state's constitution, and not in defiance of state constitutional constraints. *See id.* at 7-8, 7 n.9 (commenting that both the Connecticut and Georgia legislatures appear to have acted within the bounds of their constitutions).

67 *Distribution of Electoral Votes*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/allocation (Mar. 6, 2020).

68 *Id.*; ME. STAT. tit. 21-A, § 802; NEB. REV. STAT. § 32-710.

69 In addition to the constitutional concerns, some commentators have suggested that a legislature's appointment of its own electoral slate after Election Day would violate 3 U.S.C. § 1, the federal statute establishing a uniform day for the appointment of electors, on the first Tuesday after the first Monday in November. NAT'L TASK FORCE ON ELECTION CRISES, A STATE LEGISLATURE CANNOT APPOINT ITS PREFERRED SLATE OF ELECTORS TO OVERRIDE THE WILL OF THE PEOPLE AFTER THE ELECTION 2 (2020), https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f625c790cef066e940ea42d/1600281722253/State_Legislature_Paper.pdf.

70 *See, e.g.*, Gellman, *supra* note 7 (discussing the possibility that the Trump campaign might marshal legislatures in Republican states to appoint their own preferred electors); Maggie Haberman, Jim Rutenberg, Nick Corasaniti & Reid J. Epstein, *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/politics/trump-michigan-election.html (discussing Trump's efforts to do the same).

71 E-mail from Jeffrey Clark, Assistant Att'y Gen., Env't and Nat. Res. Div., U.S. Dep't of Just., to Jeffrey Rosen, Acting Att'y Gen., U.S. Dep't of Just., and Richard Donoghue, Acting Deputy Att'y Gen., U.S. Dep't of Just. (Dec. 28, 2020) [hereinafter Assistant Att'y Gen. Clark E-mail] (internal DOJ email containing draft DOJ letter to Georgia officials, proposed by Jeffrey Clark), https://www.scribd.com/document/518696576/DOJ-docs. The plan was thoroughly rejected by the acting Attorney General and Deputy Attorney General. E-mail from Jeffrey Rosen, Acting Att'y Gen., U.S. Dep't

of Just., to Richard Donoghue, Acting Deputy Att'y Gen., U.S. Dep't of Just. (Jan. 2, 2021), https://www.scribd.com/document/518696576/DOJ-docs.

72 The closest any state legislature came to such an appointment of electors was not particularly close. On December 14, 2020, several sitting Arizona legislators and a legislator-elect signed a purported "joint resolution." The finished product explicitly requested that Arizona's eleven "electoral votes be accepted for to [sic] Donald J. Trump." Complaint at Exhibit A, Gohmert v. Pence, No. 20-cv-00660 (E.D. Tex. Dec. 27, 2020). This document is not, however, a document of the state legislature: it was not signed or passed by a majority of either state legislative house, was signed by a legislator-elect with no authority to act on behalf of the state at the time, and does not appear to have been submitted through the legislative process since it has no bill number or date of introduction. A later version of the resolution appears in the 2021 legislative session as Ariz. S. Con. Res. 1002, first read in the state legislature more than six months later; it has not been put to a vote of any legislative chamber. *See* S. Con. Res. 1002, 55th Leg., Reg. Sess. (Ariz. 2021); *Bill History for SCR1002*, ARIZ. LEGISLATURE, https://apps.azleg.gov/BillStatus/BillOverview/74333 (last visited Sept. 23, 2021). Whatever the capacity of the "legislature" to act to appoint electors, there is no reason to believe that a subset of legislators without authorization by the body possesses any power to act on the legislature's behalf.

73 *See, e.g.*, Sen. Jake Corman & Rep. Kerry Benninghoff, *Pennsylvania Lawmakers Have No Role to Play in Deciding the Presidential Election*, CENTRE DAILY TIMES (Oct. 19, 2020, 8:00 AM), https://www.centredaily.com/opinion/article246527648.html; Press Release, Senate and House Republican Leadership Announce Plans to Restore Confidence in Voting System (Dec. 3, 2020), https://www.pasenategop.com/blog/senate-and-house-republican-leadership-announce-plans-to-restore-confidence-in-voting-system; Press Release, Rusty Bowers, Speaker, Arizona House of Representatives, Speaker Bowers Addresses Calls for the Legislature to Overturn 2020 Certified Election Results (Dec. 4, 2020), https://www.azleg.gov/press/house/54LEG/2R/201204STATEMENT.pdf; Press Release, Brian P. Kemp, Governor, State of Georgia, Gov. Kemp, Lt. Gov. Duncan Issue Statement on Request for Special Session of General Assembly (Dec. 7, 2020), https://gov.georgia.gov/press-releases/2020-12-07/gov-kemp-lt-gov-duncan-issue-statement-request-special-session-general; *House Speaker Lee Chatfield Issues Statement on 2020 Presidential Election*, UPNORTHLIVE (Dec. 14, 2020), https://upnorthlive.com/news/local/house-speaker-lee-chatfield-issues-statement-on-2020-presidential-election.

74 *See, e.g.*, Roe v. Alabama, 43 F.3d 574, 580-81 (11th Cir. 1995) (reviewing alleged post-election changes for "fundamental unfairness"); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 696, 710-11 (2001) (discussing the due process violation decided in *Roe*); *cf.* Angela J. Scott, *Advocate's Report*, 107B A.B.A. SEC. CIV. RTS. & SOC. JUST. REP. (2021), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/107b-midyear-2021.pdf (adopting an ABA resolution urging states to recognize that the laws and regulations in effect at the time of voting should be dispositive for the selection of electors in that election).

75 *See, e.g.*, *Roe*, 43 F.3d at 580-82.

76 A new Arizona bill introduced in 2021 presents a curious twist challenging the bounds of due process: by statute passed *before* an election, a popular vote would still be held for presidential electors, but the legislature would expressly retain the power to ignore the popular vote and install its own presidential electors by simple majority. *See* H.B. 2720 § 3, 55th Leg., Reg. Sess. (Ariz. 2021). That is, the public would know, well before the popular vote, that its vote was essentially advisory. Is it still a due process violation if Lucy expressly tells Charlie Brown, before the attempted placekick, that she reserves the power to pull the football away at the last minute? The notion that settled expectations might nevertheless be upset despite an express disclaimer of reliance on any settled expectations represents an intriguing constitutional conundrum beyond the scope of this article. *Cf.* Perry v. Sindermann, 408 U.S. 593, 599-603 (1972) (finding the potential for reasonable expectations in continued employment despite an expressly finite contractual term).

77 Supporters of such a reading have raised the policy argument that the legislature is an appropriate body to fill this backup role because the legislature is a representative body and can represent the voice of the people when the people are otherwise unable to express their preference. *See* FLA. J. OF THE H. REP., 1st Special Sess., at 24 (Dec. 12, 2000) (statement of Rep. Hogan), http://www.leg.state.fl.us/data/session/2001/house/journals/pdf/bound/hj1212a.pdf

(emphasizing, in urging support for legislative selection of Florida's presidential electors in the disputed 2000 election, that the legislators "were elected by the people of [their] respective districts to represent their interest and to vote on their behalf on issues that impact their communities, the State of Florida and the Nation"); *id.* at 42 (statement of Rep. Kyle) (noting that the legislators were not purporting to act on behalf of the Bush campaign but on behalf of Florida voters). Given the Supreme Court's determination that the federal courts are unavailable to confront even extreme partisan gerrymandering of legislative district seats, *see* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding "that partisan gerrymandering claims" are "beyond the reach of the federal courts"), the degree to which the partisan composition of a state legislature actually reflects the partisan preferences of voters in a statewide contest will vary significantly from state to state. The preference of a statewide elected official may be at least as valid a proxy for the preferences of a statewide electorate.

78 *See* sources cited *supra* note 44 and accompanying text.

79 *Cf.* Trip Gabriel, *This Is Democrats' Doomsday Scenario for Election Night*, N.Y. TIMES, (Sept. 3, 2020), https://www.nytimes.com/2020/09/02/us/politics/voting-election-day.html (noting that some suggested this possibility in 2020); Donald Trump @realDonaldTrump, TWITTER (Jul. 30, 2020, 1:22 PM), https:// web.archive.org/web/20200730202309/https://twitter.com/realdonaldtrump/status/1288933078287745024 ("Must know Election results on the night of the Election, not days, months, or even years later!").

80 *See, e.g.*, Friedman, *supra* note 9, at 816 (arguing that 3 U.S.C. § 2 cannot be read to mean that a state legislature can intervene and choose electors if the election result takes a long time to determine).

81 3 U.S.C. § 5.

82 *See* 3 U.S.C. § 1 (establishing Election Day as the "Tuesday next after the first Monday in November"); *id.* § 7 (establishing the meeting of the electors as "the first Monday after the second Wednesday in December").

83 *See, e.g.*, Branch v. Smith, 538 U.S. 254, 281 (2003) (Scalia, J., plurality opinion) (explaining the canon that statutes relating to the same subject, in pari materia, ought to be construed together).

84 *See* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 209 (2020).

85 N.C. CONST. art. II, § 11 (specifying the procedure for calling an "extra session" of the legislature).

86 N.C. GEN. STAT. ANN. § 163-213(a), (c) (West 2019).

87 *Id.* § 163-213(b)-(c).

88 *Id.* § 163-213(d); *see id.* § 163-210.

89 Michigan law, for example, provides that in the event that two candidates for federal, statewide, or state office spanning more than one county receive an equal number of votes, or if the determination of the state board of canvassers "is contested, the legislature in joint convention" decides the winner. MICH. COMP. LAWS § 168.846. But it does not mention 3 U.S.C. § 2 or otherwise rely on a claim that the election has "failed."

90 *See* Assistant Att'y Gen. Clark E-mail, *supra* note 71 (attaching a draft DOJ letter to Georgia officials that relies on 3 U.S.C. § 2).

91 *See* FLA. J. OF THE H. REP., 1st Special Sess., at 20-21 (Dec. 12, 2000), http://www.leg.state.fl.us/data/session/2001/house/journals/pdf/bound/hj1212a.pdf.

92 *See, e.g., id.* at 32, 42, 52 (debating a concurrent resolution that would purport to appoint electors on grounds that the public had failed to make a choice); *cf.* Bruce Ackerman, Opinion, *As Florida Goes* ..., N.Y. TIMES (Dec. 12, 2000), https://www.nytimes.com/2000/12/12/opinion/as-florida-goes.html (assuming that the legislature, presumably as an independent body, would have appointment power in the event of electoral failure).

93 3 U.S.C. § 2.

94 U.S. CONST., art. II, § 1.

95 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

96 *Id.*

97 *See* Morley, *supra* note 84, at 185-91, 193-94 (discussing the legislative history). Different federal election days in different states had created concern over voters who could vote in one state on one day and then travel to another state to vote on another day. *See id.* at 185-86, 186 n.33 (discussing alleged fraud in the election of 1840).

98 CONG. GLOBE, 28th Cong., 2d Sess. 14 (1844) (statement of Rep. Hale). For a summary of these sorts of majority-win provisions (in various states, for various offices), see Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773 (Oct. 2021) (manuscript at 128-43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563257.

99 CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844) (statement of Rep. Chilton).

100 *See, e.g., id.* at 30 (statement of Rep. Elmer); *see also* Friedman, *supra* note 9, at 815-17 (discussing Congress's intent regarding the 1845 statute). There are, of course, other conditions that might be said to lead to electoral "failure" in a particular state, with no indicia that Congress contemplated these conditions in this 1845 statute. I do not include colloquial "failures" that represent public dissatisfaction with the results, like a lack of faith in a resolution of the electoral contest conducted pursuant to adequate legal process, or simply modest delay in the delivery of results. *See supra* text accompanying notes 80-85. But it is conceivable that, for example, a widespread destruction of ballots might render results not only undetermined, but indeterminable. Such a circumstance might amount to failure in the sense intended by the text, if not expressly contemplated by the 1845 Congress.

101 In the legislative debate, there were several amendments offered (and rejected) that, inter alia, assigned authority to "the legislatures of the several States" to "direct[] the appointment of electors" in the event of electoral failure or electors' vacancy. *E.g.*, CONG. GLOBE, 28th Cong., 2d Sess. 14 (1844) (statement of Rep. Elmer); *id.* at 28 (statement of Rep. Dromgoole). But these amendments were largely offered for the substance of what to do in the case of vacancy or electoral failure, and not who should be authorized for the doing; there was little to no discussion indicating that these amendments were designed to designate a body (or process) distinct from the general lawmaking process of the state. Indeed, the few fleeting references to legislative authority seemed to confirm that the proper path to legislative selection

of electors was through a statute making that designation, precisely as South Carolina had done. *See, e.g.*, *id.* at 30 (statement of Rep. Elmer) (noting the States whose "laws now authorized their choice of electors by the legislature").

102 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721 (emphasis added).

103 *Id.*; *see also* 3 U.S.C. § 4 ("Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.").

104 *See, e.g.*, CONG. GLOBE, 28th Cong., 2d Sess. 21 (1844) (statement of Rep. Duncan) (suggesting an amendment wherein the States, by law, would fill vacancies).

105 *E.g.*, An Act for Prescribing on the Part of this State, the Times, Places, and Manner of Holding Elections for Representatives in the Congress, and the Manner of Appointing Electors of a President of the United States § 4 (1788), *supra* note 61 (South Carolina).

106 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

107 3 Rev. Stat. § 134 (1875).

108 Act of June 27, 1866, ch. 140, 14 Stat. 74.

109 Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes--Their History and Use*, 22 MINN. L. REV. 1008, 1012-13 (1938).

110 *Id.* at 1013.

111 *Id.* at 1013-14.

112 65 CONG. REC. 639 (1924) (statement of Rep. Little).

113 Dwan & Feidler, *supra* note 109, at 1014; Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, IN CUSTODIA LEGIS: L. LIBRS. CONG. (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code.

114 J. Myron Jacobstein & Roy M. Mersky, *Introduction* to 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, at iii (Washington, D.C., Gov't Printing Off. 1981) (1872).

115 *Id.* at v.

116 Dwan & Feidler, *supra* note 109, at 1012; Wright v. United States, 15 Ct. Cl. 80, 86 (1879). It appears that after the Revised Statutes of 1874 were passed, in part due to the various errors therein, Congress rarely adopted or enacted revised compilations of the code. *See* Dwan & Feidler, *supra* note 109, at 1014-23 (chronicling this dynamic and noting, as rare exceptions, the Criminal Code and Judicial Code, enacted in 1909 and 1911). Instead, later Congresses were

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more likely to provide that codifications could constitute prima facie evidence of law, but that the original enactments remained law in the event of any discrepancy. *Id.*

117 74 Rev. Stat. § 5596 (1875); United States v. Claflin, 97 U.S. 546, 548 (1878); Dwan & Feidler, *supra* note 109, at 1014-15.

118 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

119 *E.g.*, *Wright*, 15 Ct. Cl. at 87 ("In case of ambiguous language in the Revised Statutes, or uncertainty as to the true construction to be given to the words of any section, previous acts on the same subject may be referred to and examined for light on the object and intent of Congress as shown by the course of legislation, in the same manner as statutes *in pari materia* relating to the same subject may always be taken, compared, and construed together."); Dwan & Feidler, *supra* note 109, at 1015.

120 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

121 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 61.

122 *Id.*

123 *Id.* at 62.

124 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

125 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 62.

126 *See, e.g.*, *id.* at 62-67 (providing annotations to §§ 8, 10-11, 14-16, 18, 20).

127 Similarly, there is no indication that the approach to the particular governmental body entrusted with remedying electoral failure had changed notably since 1845. In 1872, Congress passed a similar provision providing for the contingency of "a failure to elect" a congressional representative upon the single election date then established for federal congressional elections. Act of Feb. 2, 1872, Pub. L. No. 42-11, § 4, 17 Stat. 28, 29 (codified as amended at 2 U.S.C. § 8(a)). As mentioned above, Article I provides that the rules for congressional elections "shall be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. And yet, when providing for a failure to elect congressional representatives on the single day designated by federal law, Congress allowed the states to provide another election to resolve the vacancy, not at any time preferred by the legislature (beyond the lawmaking process), but "at such time as is or may be provided by [state] law." § 4, 17 Stat. at 29. That is, the 1872 Congress seemed to have the same approach to the body empowered to resolve electoral failure for congressional representatives that the 1845 Congress had to resolve electoral failure for presidential electors.

128 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 62.

129 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

130 3 Rev. Stat. § 131 (1875).

131 *Id.* § 133.

132 *Id.* § 134. Section 134 reads: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such *a* manner as the legislature of such State may direct." *Id.* (emphasis added).

133 *Compare id.* § 131, *with* 3 U.S.C. § 1; *compare* 3 Rev. Stat. § 133, *with* 3 U.S.C. § 4; *compare* 3 Rev. Stat. § 134, *with* 3 U.S.C. § 2.

134 3 U.S.C. § 2.

135 Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721.

136 3 U.S.C. § 4. In addition to the instruction in 3 U.S.C. § 4 that elector vacancies be resolved "by law," other portions of the statutes providing for delivery of elector results further support the notion that those results are to be obtained through procedures determined by normal lawmaking process and not by the legislature as a distinct body. For example, 3 U.S.C. § 6 requires the state executive to deliver to the United States Archivist a certificate of the electors appointed once the identity of those electors has been ascertained--and provides that this ascertainment is to take place "under the laws of such State," not pursuant to the unilateral direction of the state legislature. 3 U.S.C. § 6.

137 *Supra* Part I.

138 *Supra* text accompanying notes 42-45; Smith, *supra* note 9, at 775-76.

139 McPherson v. Blacker, 146 U.S. 1, 34-35 (1892).

140 *Id.* (quoting S. REP. NO. 43-395, at 9 (1874)).

141 *Id.* at 28-35.

142 *See, e.g.*, Carson v. Simon, 978 F.3d 1051, 1060 (8th Cir. 2020) ("Simply put, the Secretary has no power to override the Minnesota Legislature. In fact, a legislature's power in this area is such that it 'cannot be taken from them or modified' even through 'their state constitutions.'" (quoting *McPherson*, 146 U.S. at 35)).

143 Smith, *supra* note 9, at 777-79.

144 Professor Morley has catalogued several other examples of nineteenth-century articulations of this principle in several state supreme courts and a few instances in which Congress acted in its role to resolve the elections of its members. Morley, *Independent State Legislature*, *supra* note 9, at 38-45, 69. These other examples seem, at best, to show nineteenth-century support for a weaker form of the "independent state legislature" doctrine, holding the state legislative process to state constitutional procedural requirements while freeing it of some or all substantive constraints. None exhibits the full-throated articulation of plenary authority asserted in the committee report *McPherson* cites.

145 *See supra* text accompanying notes 96, 102-04.

146 *See supra* text accompanying notes 104-06.

147 *See supra* note 101.

148 *See supra* note 101.

149 *See supra* text accompanying note 123.

150 *See* 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 61.

151 *See supra* text accompanying notes 132-36.

152 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, *supra* note 114, at 61.

153 3 U.S.C. § 4; *cf.* 2 U.S.C. § 8(a) (allowing state law, not "the legislature," to prescribe the time for holding a congressional election to fill a vacancy, following an 1872 statute with the same language).

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June 2022 draft – comments welcome

Textualism, Judicial Supremacy, and the Independent State Legislature Theory

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Abstract

This piece offers an extended critique of one aspect of the so-called "independent state legislature" theory. That theory, in brief, holds that the federal Constitution gives to state legislatures, and withholds from any other state entity, the power to regulate federal elections. Proponents ground their theory in two provisions of the federal constitution: Article I's Elections Clause, which provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," and Article II's Presidential Electors Clause, which provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Proponents defend the theory as consistent with the text and structure of the Constitution, as well as some nineteenth-century practice.

At base, however, the independent state legislature theory (ISLT) is best understood as primarily a claim of authority on the part of federal courts. While the doctrine purports to elevate state legislatures in the name of popular sovereignty and democracy, in fact it dramatically expands the power of the federal judiciary at the expense of both. Indeed, the ISLT, properly understood, inverts a core principle of judicial federalism and maintains that the federal Constitution empowers federal courts to override the judgments of state courts, state executive-branch officials, and state voters about the meaning of state law. And, in the hands of the current Supreme Court, this assertion of interpretive supremacy imposes on the states a narrow mode of statutory interpretation—textualism—whose key justifications are largely inapplicable to the states, with their myriad and varied institutional arrangements.

The ISLT is fatally inconsistent with basic precepts of both federalism and the separation of powers. But more than that, the ISLT is a lawless power grab by the federal courts masquerading as deference to a romanticized vision of the state legislature that fails to take state institutional design choices seriously on their own terms.

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Introduction

This piece offers an extended critique of one aspect of the so-called "independent state legislature" theory. That theory, in brief, holds that the federal Constitution grants to state legislatures, and withholds from any other state entity, the power to regulate federal elections. Proponents ground the theory in two provisions of the federal Constitution: Article I's Elections Clause, which provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,"[1] and Article II's Presidential Electors Clause, which provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[2] Beyond this constitutional text, defenders of the theory invoke "the structure and political theory underlying the Constitution,"[3] as well as some nineteenth-century practice, as support for the view that the legislature is the only organ of state government that may regulate federal elections.[4]

At base, however, the independent state legislature theory (ISLT) is best understood not as a claim of authority on the part of state legislatures, but primarily as an assertion of interpretive primacy on the part of federal courts. While the doctrine purports to elevate state legislatures in the name of popular sovereignty and democracy, in fact it dramatically expands the power of the federal judiciary at the expense of both. It also overrides basic precepts of federalism and the separation of powers. Indeed, a core component of the ISLT, properly understood, is that the federal Constitution empowers federal courts to override the judgments of state courts, state executive-branch officials, and state voters about the meaning of state law. In the hands of the current Supreme Court, this assertion of power entails the imposition of a narrow mode of statutory interpretation—textualism—that, whatever its merits in the federal system, is an exceedingly poor fit with the myriad and varied institutional arrangements in the states.

As we show in what follows, the ISLT is fatally inconsistent with basic principles of both federalism and the separation of powers. But more than that, the ISLT is a lawless power grab by the federal courts masquerading as deference to a romanticized vision of the state legislature that fails to take state institutional design choices seriously on their own terms.

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[1] U.S. CONST. art. I § 4 cl. 1. The clause goes on to provide that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[2] U.S. CONST. art II § 1 cl. 2.

[3] Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions,* 55 GA. L. REV. 1, 14 (2020).

[4] *Id.* During the 2020 election cycle, four members of the current Supreme Court seemed to indicate their approval of the theory. *See* Richard Hasen, *Identifying and Minimizing the Risk of Election Interference,* 135 HARV. L. REV. F. 266 (2022); *see infra* at ___.

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We should note that in this short piece, we bracket the many forceful critiques of the ISLT grounded in constitutional structure, history, and political theory.[5] Our focus is primarily on interpretive methods and their interaction with institutional design and constitutional structure. For that reason, we discuss constitutional structure as it relates to the ISLT only to the extent that separation-of-powers and federalism problems follow from imposing a particular interpretive method on the states.

In addition, we do not offer a direct critique of a potential scenario in which a state legislature, relying on Article II, seeks to assign to itself the power to directly appoint presidential electors, including *after* voters have cast their votes. That would, without doubt, represent one of the most high-stakes, antidemocratic, and lawless contexts in which a version—to be sure, a fringe version—of the ISLT might be deployed. But, as far as we understand the rationales for such a move—which was reportedly considered and urged by a number of Trump advisors and supporters, including Ginni Thomas, in the aftermath of the 2020 election[6]—they do not entail claims that state entities have misinterpreted state laws. They rest instead on the distinct claim that state legislatures' authority to prescribe the method of appointing presidential electors is plenary and unconstrained by basic notions of due process, democracy, or constitutional protections of the franchise. As profoundly misguided as such a claim is,[7] debunking it is not our project here. Our focus is the independent state legislature theory, not its warped variant, the anti-democratic state legislature theory—which might be better described as the state-legislature-as-the-end-of-democracy theory.

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[5] *See, e.g.*, Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, __ U. CHI. L. REV. __ (forthcoming 2022); Akhil Amar & Vikram Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislative Notion and Related Rubbish*, 2021 S. CT. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=; Michael Weingartner, *Liquidating the Independent State Legislature Theory*, __ HARV. J. L. P. POL'Y (forthcoming 2023); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997 (2021); Mark Krass, *Debunking the Non-Delegation Doctrine for State Regulations of Federal Elections*, __ VA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902163.

[6] Barton Gellman, *The Election That Could Break America*, THE ATLANTIC (Sept. 23, 2020), https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/ (quoting the Pennsylvania state Republican party chairman as describing directive legislative appointment of electors as "one of the options. It is one of the available legal options set forth in the Constitution," and a state Republican party leader reporting conversations about legislative appointment with the Trump national campaign); Emma Brown, *Ginni Thomas, wife of Supreme Court Justice, pressed Ariz. Lawmakers to help reverse Trump's loss, emails show*, Wash. Post (May 20, 2022), https://www.washingtonpost.com/investigations/2022/05/20/ginni-thomas-arizona-election-emails/.

[7] J. Michael Luttig, *The Republican Plan to Steal the 2024 Election* CNN.com, https://www.cnn.com/2022/04/27/opinions/gop-blueprint-to-steal-the-2024-election-luttig/index.html.

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Putting to one side this warped variant, the ISLT may be invoked in a number of different ways. Our critique is implicated most when a federal court considers a claim that a state court or state agency has exceeded its authority by misinterpreting and therefore departing from a state statute regulating federal elections, at least as the federal court interprets the state statute. This might happen where a state agency takes some action that it believes is authorized by a state statute regulating federal elections, or where a state court interprets such a statute. Often, this variety of the ISLT is invoked when a state court or state executive-branch official interprets the state statute in light of a state constitutional provision related to voting, or even concludes that a state statute is invalid on the basis of a state constitutional provision related to voting, and the federal court concludes that the state interpreter failed to sufficiently adhere to the state statute as the federal court understands it. That is the posture in which the doctrine has been deployed in a number of recent cases.

The dynamics may be somewhat distinct under other circumstances—where, for example, a state court has drawn maps that will be used for federal congressional elections after the political process has failed to produce a viable or legally sound map, and the allegation is that under the federal Constitution, only the legislature is constitutionally authorized to create such a map.[8] Such claims often sound in the idea at the core of the ISLT—namely, that state entities other than the legislature lack the authority writ large to regulate federal elections—without alleging a misinterpretation or misapplication of state law. But our focus is on cases where federal courts believe that a state entity or official has misinterpreted or departed from a state statute as the federal courts understand it.

I. The Emergence of the ISLT

Before turning to our critique of the ISLT, we first provide a brief overview of its origins. The theory traces back to the litigation over the 2000 presidential election in the state of Florida, and in particular to Chief Justice Rehnquist's concurring opinion, which both Justice Scalia and Justice Thomas joined, in *Bush v. Gore*.[9] The per curiam opinion in that case held that what it described as "standardless manual recounts" violated the equal protection clause, and a bare majority of 5 Justices stopped the recounts and handed George W. Bush the victory on that basis.[10] Because of that disposition, the Court did not address the first question on which it had granted cert: "Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State 'in such Manner as the Legislature thereof may direct.'"[11]

[8] The Supreme Court has a pending cert petition from North Carolina raising this issue. *See* Petn for Certiorari in Moore v. Harper, No. 21-1271.
[9] Bush v. Gore, 531 U.S. 98 (2000).
[10] Bush v. Gore, 531 U.S. 98, 103 (2000).
[11] Brief for Petitioner, Bush v. Gore, 2000 WL 1810102.

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Chief Justice Rehnquist's concurring opinion, however, did address that question, arguing that Article II supplied an additional basis on which to reverse the Florida Supreme Court. Pointing to the importance of the election of the president and vice president, "the only elected officials who represent all the voters in the Nation,"[12] together with Article II's provision that "'[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President,"[13] the concurrence concluded that "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[14] The concurrence reasoned that because this was one of the rare instances in which "the Constitution imposes a duty or confers a power on a particular branch of a State's government"[15]—here, the state legislature—"the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[16] The concurrence offered no support from case law or principles of constitutional interpretation for this startling assertion.

Many informed commentators, as well as several federal judges, assumed that *Bush v. Gore,* including the Rehnquist concurrence, was essentially a ticket good for one case and one case only.[17] At least until the 2020 election.[18]

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[12] Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring).
[13] *Id.* (emphasis Rehnquist's).
[14] *Id.* at 113.
[15] *Id.*
[16] *Id.*
[17] *See* Bush v. Gore, 531 U.S. 98, 109, (2000) ("Our consideration is limited to the present circumstances"). *See, e.g.*, Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 Fla. St. Univ. L. Rev. 377, 378-79, 387 (2001) ("Nor was the Court merely silent on the issue of Bush v. Gore's precedential value. It expressly denied the case had any precedential value, something the Court could have suggested more subtly in distinguishing Bush v. Gore's facts in future cases to come before it."). One court of appeals invalidated a state's voting practices in light of *Bush v. Gore* over a dissent that "question[ed] the precedential value of *Bush v. Gore*." *Stewart v. Blackwell*, 444 F.3d 843, 881 (6th Cir. 2006) (Gilman, J., dissenting). The case went en banc before becoming moot and the panel opinion was vacated. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007).
[18] Even before 2020, however, several Supreme Court Justices invoked the ideas underlying or adjacent to the ISLT when deciding constitutional questions. First, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Supreme Court held, by a vote of 7-2, that the federal National Voter Registration Act preempted Arizona's proof-of-citizenship requirement for voting. 570 U.S. 1 (2013). But in dissent, Justice Thomas raised the question whether the NVRA infringed on state legislatures' ability to set conditions or qualifications on voting in violation of Article I, § 4. *Id.* at 29, 36 (Thomas, J., dissenting). He would not have reached that question because it had not been raised, but he argued that the constitutional issues he identified required construing the federal statute more narrowly. Then in 2015, the Court upheld a state constitutional provision that assigned the power to draw districts to an independent redistricting commission. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015). Chief Justice Roberts, writing for four dissenters, would have held that the Elections Clause, Article I, § 4 of the Constitution, required the legislature, rather than an independent commission, to draw districts. *Id.* at 824-25 (Roberts, C.J., dissenting).

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Some Justices first signaled a renewed interest in the ISLT in litigation arising out of Wisconsin. In the first round of the litigation, in April 2020, the Supreme Court stayed a district court order that had extended an absentee-ballot-return deadline to account for COVID concerns; the Court's per curiam opinion staying the injunction made no mention of the ISLT, primarily relying instead on the *Purcell* principle.[19] As the general election approached later that year, and with the COVID pandemic still raging, the Wisconsin Elections Commission decided to send absentee ballot applications to every voter. In light of the likely increase in the number of absentee ballots cast, as well as postal service delays and the state's experience with the April primary, a district court again extended the deadline for receipt of absentee ballots. The Seventh Circuit stayed the injunction, and in October, the Supreme Court denied the request to vacate the stay.[20] The Supreme Court's October order produced no majority opinion, but two Justices in the majority wrote separately to invoke the ISLT. Justice Gorsuch's concurrence suggested there was a possible constitutional problem with the Wisconsin Elections Commission's decision to accommodate voters in light of the pandemic because "The Constitution provides that *state legislatures*—not federal judges, not state judges, not state governors, *not other state officials*—bear primary responsibility for setting election rules."[21] And Justice Kavanaugh's concurrence explicitly invoked the ISLT, favorably citing Chief Justice Rehnquist's concurrence in *Bush v. Gore*[22] and asserting federal-court authority to review state courts' interpretations of state election law: "[T]he text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[23]

Several Justices subsequently invoked the ISLT in a case out of North Carolina. Just as happened in Wisconsin, the postal service announced that it might be unable to timely deliver completed absentee ballots that had complied with North Carolina's rules for absentee voting; in light of that statement, several plaintiffs sued the North Carolina Board of Elections in state court, seeking an injunction to extend the receipt deadline for absentee ballots.[24] The plaintiffs invoked the state constitution as the basis for the injunction they sought. The plaintiffs and defendants ultimately settled on an agreement to extend the absentee ballot receipt deadline, and the state court signed off on that agreement.[25] A group of state legislators then sought to intervene, arguing that the state court lacked the authority to approve the settlement without their consent because the legislature had to set the rules regarding federal elections. They sought a stay from the U.S. Supreme Court, and the Court denied the stay over noted dissents by Justices Alito, Gorsuch, and Thomas.[26] The legislators then

[19] Republican Nat'l Committee v. Democratic Nat'l Committee, 140 S. Ct. 1205 (2020).
[20] Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 29 (2020).
[21] *Id.* at 29 (Gorsuch, J., concurring).
[22] *Id.* at 34 n.1 (Kavanaugh, J., concurring).
[23] *Id.*
[24] *North Carolina Alliance for Retired Americans v. North Carolina State Bd. Of Elections*, 2020 WL 10758664, *1 (N.C. Super. Ct. 2020).
[25] Wise v. Circosta, 978 F.3d 93 (4th Cir. 2020).
[26] Berger v. North Carolina State Bd. Of Elections, 141 S. Ct. 648 (2020). The state supreme court also denied a stay. North Carolina Alliance for Retired Americans v. North Carolina State Bd. Of Elections, 848 S.E.2d 496, 497 (N.C. 2020).

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challenged the state court judgment in federal court; once again, the federal courts, including the Supreme Court, declined to stay the state court's decision. Justice Gorsuch, joined by Justice Alito, dissented, once against invoking the ISLT.[27]

The ISLT also surfaced in litigation in Pennsylvania. There a group of voters obtained an injunction from the Pennsylvania Supreme Court, which concluded that the state constitution required the secretary of state to extend the deadline for receipt of absentee ballots. In the period following Justice Ginsburg's death but before the confirmation of Justice Barrett, the U.S. Supreme Court divided 4-4 over whether to stay that decision; because the Court was evenly divided, no stay issued. In the statement explaining the reasons Justices Alito, Thomas, and Gorsuch had voted to grant the stay, Justice Alito explicitly invoked the ISLT, writing that "The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could overrule the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."[28]

II. Textualism and the ISLT

A. *Textualism: An Overview*

With that groundwork laid, we can turn now to our critique of the ISLT. We begin with a brief overview of textualism, which in recent years has emerged as the nominal winner of the long-standing "statutory interpretation wars"[29] on the United States Supreme Court. The strain of textualism that now claims dominance is sometimes referred to as "new textualism,"[30] and it is of fairly recent vintage. Although new textualism has been around in some form since the 1980s,[31] when Justice Antonin Scalia joined the Supreme Court, what is arguably its key text today, Scalia & Garner's *Reading Law*, was not published until 2012.[32] And, despite Justice Elena Kagan's famous 2015 line "we are all textualists

[27] Moore v. Circosta, 141 S. Ct. 46, 47 (2020)(Gorsuch, J., dissenting).
[28] *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020) (Alito, J., statement). After the election was over, Justices Alito, Gorsuch, and Thomas would have granted certiorari to hear the case and address ISLT issues. *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 732 (20201) (Alito, J., dissenting from denial of certiorari); *id.* at 734 (Thomas, J., dissenting from denial of certiorari).
[29] Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1555 (2020); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732 (2010).
[30] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 623 (1990).
[31] *Id.*
[32] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

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now,"[33] it was not until former President Trump managed to appoint three new justices to the Supreme Court that there was anything approaching a solid textualist majority on that court.[34]

The new justices have changed the landscape dramatically. Justices Gorsuch, Kavanaugh, and Barrett were all avowed textualists before joining the Court. As a nominee, Neil Gorsuch was hailed by the conservative legal establishment as an "ardent textualist" and a "worthy heir to Justice Scalia."[35] After his first full term on the Court he published "A Republic, if You Can Keep It," which defended textualism at length.[36] As a judge on the D.C. Circuit, Brett Kavanaugh wrote in the *Harvard Law Review* that, thanks to the "extraordinary influence of Justice Scalia," statutory interpretation had "improved dramatically over the last generation."[37]Amy Coney Barrett, whose academic writings marked her as a clear textualist,[38] proudly proclaimed about Justice Scalia, "his judicial philosophy is mine too."[39]

The key claim of the new textualism—a once-insurgent,[40] now dominant, method—is that judges interpreting statutes should limit themselves to the "plain meaning" of the words of the statute in question. As Scalia and Garner wrote in *Reading Law*: "Textualism . . . begins and ends with what the text says and fairly implies."[41] In the words of Dean John Manning, another textualist, "textualists

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[33] Harvard Law School, The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes, Nov. 25, 2015, Youtube, *available at* https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_title

[34] *See, e.g,* Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism,* 119 YALE L.J. 1750, 1758 (2010)("textualism, . . . despite its significant impact on modern statutory interpretation, has failed to emerge as the dominant methodology in the U.S. Supreme Court's interpretive battles."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29 (2006)("Justices Scalia and Thomas are the only self-identified textualists on the Supreme Court").

[35] Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Justice Scalia,* THE NATIONAL REVIEW (Jan. 30, 2017), https://www.nationalreview.com/2017/01/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir/

[36] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("Textualism honors only what's survived bicameralism and presentment and not what hasn't. The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's policy preferences.").

[37] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

[38] *See, e.g.*, Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) ("Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal--the people--would understand them.")

[39] Marcia Coyle, *"His Judicial Philosophy is mine": Amy Barrett touts Scalia in Remarks from Rose Garden*, Law.com (Sept. 26, 2020), https://www.law.com/nationallawjournal/2020/09/26/his-judicial-philosophy-is-mine-amy-barrett-touts-scalia-in-remarks-from-rose-garden/?slreturn=20220021175107.

[40] Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 120 ("Not too long ago, textualism was an insurgent methodology.").

[41] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

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choose the letter of the statutory text over its spirit."[42] In Justice Gorsuch's formulation in *Bostock v. Clayton County*, "[o]nly the written word is the law."[43]

Proponents of textualism offer their method as an alternative to once-dominant modes of statutory interpretation like purposivism or intentionalism. They define textualism largely by what it does *not* permit: in its pristine official formulation, textualism does not permit inquiry into the intent or purpose of drafters, nor does it allow for consideration of the consequences of adopting different interpretations. Scalia and Garner argue that when interpreting a statute, judges should "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."[44] When it comes to interpretive tools, legislative history is anathema; dictionaries and interpretive canons are revered.[45]

These textualist precepts contrast sharply with the basic principles of purposivism. As leading purposivists Henry Hart and Albert Sacks once argued, a court should "[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can, making sure, however, that it does not give the words . . . a meaning they will not bear."[46] More recently, Judge Robert Katzmann's book-length defense of purposivism emphasized that statutes have "purposes or objectives that are discernible" and that "the task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes,"[47] including by examining context and legislative history. And Victoria Nourse has defended a mode of "realist purposivism"[48] that is clear-eyed about the challenges of ascribing a single purpose to any congressional enactment, but nevertheless takes seriously congressional process and what she terms "legislative evidence."[49]

Textualists do not merely reject other modes of statutory interpretation, like Hart & Sacks-style purposivism,[50] and pragmatic[51] or dynamic[52] modes of statutory interpretation. They go much

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[42] John F. Manning, *Textualism & Legislative Intent*, 91 Va. L. Rev. 419, 420 (2005).
[43] Bostock v. Clayton County, 140 S.Ct. 1731 (2020).
[44] Reading Law __
[45] *See* Ryan Doerfler, *Late-Stage Textualism*, 2022 Sup. Ct. Rev. __, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3969398.
[46] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1371 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).
[47] ROBERT KATZMANN, JUDGING STATUTES 31 (2014); *see also* John Paul Stevens, *Law Without History?* N.Y. Rev. of Books (Oct 27, 2014).
[48] VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 50 (2016).
[49] *Id.*
[50] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1371 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (suggesting that courts "[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can, making sure, however, that it does not give the words . . . a meaning they will not bear.").
[51] Hively v. Ivy Tech Community College, 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring).
[52] William N. Eskridge, Jr., *Dynamic Statutory Interpretation,* 135 U. Pa. L. Rev. 1479, 1538 (1987).

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further, insisting that their method alone can guarantee both "interpretive predictability" and "cabined judicial discretion."[53] Some textualists maintain, in addition, that certain features of our system of separated powers essentially *require* the federal courts to use textualism.[54] On this view, only textualism is consistent with the constitutionally prescribed process for enacting federal legislation—bicameralism and presentment[55]—and it is the only method that respects the limited role of unelected judges in the federal system.

Textualists make two related claims for the constitutional imperative of textualism (and its close corollary, the constitutional prohibition on the use of legislative history). The first focuses on the lawmaking process prescribed in Article I, Section 7. In Judge Frank Easterbrook's formulation, because "the Constitution limits what counts as 'law' through the structure of our Constitution," namely agreement by both houses and the president,[56] the Constitution commands that judges limit themselves to the text that emerges from that process, refraining from speculation about purposes or consequences and refusing to consider sources other than the enacted text itself.

The second strain of the claim that textualism is constitutionally required is grounded in nondelegation principles; it suggests that judicial consultation of legislative history, particularly of sources like committee reports, raises concerns from the perspective of the separation of powers, and specifically the nondelegation doctrine.[57] On this view, when courts credit the articulated views of a

("Dynamic statutory interpretation offers quite a different focus from traditional theories of statutory interpretation . . . it treats the evolutive context as a persuasive source of statutory meaning which should be considered in addition to the statute's text and legislative history.")

[53] Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762 (2010). Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020) (describing that argument that textualism "is the method that is most capable of "constrain[ing] judicial discretion and thus a judge's proclivity to rule in favor of the wishes of the political faction that propelled her into power."). As Jon Molot has argued, "textualist criticism of strong purposivism resembled *Erie's* criticism of *Swift*. Just as the general federal common law came to be viewed as "little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject," so too did textualists highlight the way in which purposivist readings of statutes tend to confuse Congress's statutory instructions with the policy preferences of purposivist judges." Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29 (2006).

[54] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation,* 17 HARV. J.L. & PUB. POL'Y 61, 68–69 (1994).

[55] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation,* 17 HARV. J.L. & PUB. POL'Y 61, 68–69 (1994) (""the Constitution limits what counts as "law," which is limited to text enacted "by two Houses of Congress and one President"); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1349 (2019).

[56] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994). Easterbrook, of course, does not include the qualifier "federal" in his absolutist characterization of "law," and this elision is characteristic of many textualist works: law is, in its essence, the product of a two-house-plus-president-or-override process.

[57] John F. Manning, *Textualism As A Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997).

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subset of Congress, like a congressional committee, they are allowing Congress to self-delegate in contravention of constitutional nondelegation principles.[58]

In the next Part, we offer an extended refutation both of the applicability of these arguments to the states, and of the suggestion that federal courts have license to correct insufficiently textualist decisions by entities like state courts. But it's worth pausing to note that, despite this general sketch of the professed interpretive philosophies of a majority of members of the contemporary Supreme Court, it's impossible to miss that probing beneath textualism's surface claims reveals significant variety, as well as remarkable inconsistency, in actual practice.[59] Consider self-styled leading textualist Neil Gorsuch's "stunningly atextual"[60] opinion concurring in the Court's decision to enjoin a Covid-19 vaccine-or-testing mandate issued by the Occupational Safety and Health Administration (OSHA):[61] over the course of seven pages, the opinion made one passing reference to the statute that gives OSHA the authority to issue emergency temporary standards, and entirely failed to cite the statutes that give the agency the general authority to regulate workplace safety. Rather than ask about the meaning of the relevant statutes, it framed the question as "whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people." In answering that question, the opinion relied on a failed Senate vote—a particularly unreliable form of legislative history, even for those inclined to consider legislative

[58] For a refutation of both of these arguments, see Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 325 (2014).

[59] *E.g.*, Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 125 (2021) ("[T]extualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory interpretation."); *id.* ("Textualism and public meaning originalism do not offer more objectivity or determinacy than their more explicitly dynamic counterparts, however. What they offer is the illusion of those characteristics."); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism,* 96 N.Y.U. L. Rev. 1718, 1733 (2021); *see also* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 284 (2021) ("judicial populism insists that there are clear, correct answers to complex, debatable problems. It disparages the mediation and negotiation that characterize democratic institutions and rejects the messiness inherent in a pluralistic democracy. Instead, it simplifies the issues legal institutions address and claims special access to a true, single meaning of the law."); Anita S. Krishnakumar, *Backdoor Purposivism,* 69 Duke L.J. 1275, 1278 (2020) ("those Justices commonly considered textualist or textualist leaning at times engage in a form of backdoor purposivism, or at least speculation about legislative intent, that looks surprisingly similar to the intent speculation inherent to traditional purposivism."). *See also* Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012)("Judges tend to deny the creative—the legislative—dimension of judging, important as it is in our system, because they do not want to give the impression that they are competing with legislators, or engaged in anything but the politically unthreatening activity of objective, literal-minded interpretation, using arcane tools of legal analysis."); Anita Krishnakumar, *Some Brief Thoughts on Gorsuch's Opinion in FNIB v. OSHA*, ELECTIONLAWBLOG.COM, https://electionlawblog.org/?tag=statutory-interpretation.

[60] Anita Krishnakumar, *Some Brief Thoughts on Gorsuch's Opinion in FNIB v. OSHA*, ELECTIONLAWBLOG.COM, https://electionlawblog.org/?tag=statutory-interpretation.

[61] NFIB v. OSHA, 595 U. S. ____ (2022).

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history—a dubious characterization of an OSHA brief in an earlier case,[62] and most importantly, what it viewed as the requirements of what is sometimes called the "major questions" doctrine, a doctrine that substantially disempowers agencies from addressing whatever a court might deem "issues of vast economic and political significance,"[63] even where Congress has enacted statutes whose text and purpose seem to empower agencies to do just that.

Or take the case of *Bostock v. Clayton County*, in which each opinion—Gorsuch's opinion for the Court, and the separate dissents by Justices Alito and Kavanaugh—claimed the mantle of textualism, and yet offered entirely different analyses and reached entirely different conclusions. To the extent that one of textualism's key selling points has long been that it offers predictability and constrains judicial discretion, the many textualisms on display in *Bostock* should give serious pause.[64] Henry Hart and Albert Sacks once famously observed that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[65] That is, if anything, more true than ever in the context of today's "textualist" court.[66]

B. *Textualism's Inapplicability To State Courts*

As detailed above, textualism justifies itself in large part by reference to core structural features of the federal system: judges are unelected; legislators are democratically accountable; the lawmaking process is governed by some clear constitutional commands (bicameralism; presentment) and some unarticulated yet significant constitutional principles (separation of powers; nondelegation). These structural features by no means apply in all their particulars to the states.[67] And yet the ISLT would project onto the states the current Supreme Court's preferred version of textualism even though the structural arguments for textualism in the federal system do not mechanically apply—and in some instances do not apply at all—to the states. The ISLT thus appears to require the state courts to adopt textualism without adequate justification.

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[62] *Id.*

[63] *Id.* (Gorsuch, J., concurring) (slip op. at 2).

[64] *See* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 125 (2020)

[65] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[66] In addition, empirical studies have cast doubt on textualism's assumptions about the drafters of legislation. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside--An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575 (2002).

[67] *See generally* JEFFREY SUTTON, WHO DECIDES? (2022).

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To start, in the vast majority of the states, judges of the highest court stand for election—some partisan, some nonpartisan, some retention.[68] In those states in which judges run for office statewide, they are selected by many more voters than the average member of a state legislature, or even in many cases than the voters who selected a majority of the state legislature. The point is not that elected judges "represent" voters in precisely the same way legislative representatives do,[69] or are imagined to do.[70] But the judicial selection procedures in the states do not reflect the same choices and values as the decision to insulate federal judges from popular selection and direct political accountability, which is one of the justifications for textualism in the federal system.

States deviate in countless other ways from the federal system when it comes to the allocation of power and authority. To take just a few examples, some state courts routinely render advisory opinions;[71] some state courts exercise enforcement discretion; and state courts serve a range of administrative and even quasi-legislative functions[72] that would be unimaginable in the federal system. In contrast to the federal executive, all state executives are to some degree plural:[73] citizens in most states vote for multiple statewide officials, sometimes "scores" beyond the governor and lieutenant governor.[74] In contrast to the federal system, many state legislators are subject to term limits.[75] And as Miriam Seifter and Jessica Bulman-Pozen have shown, state constitutions deviate from the federal constitution in the degree to which they embrace, sometimes explicitly, notions of "popular sovereignty, majority rule, and political equality."[76]

States also deviate from the federal system in ways more directly relevant to questions about methods of interpretation. First, the lawmaking process, which is central to the justifications for textualism in the federal system, looks fundamentally different in many states from the federal model.

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[68] BOOK OF THE STATES (2020) at 206, https://issuu.com/csg.publications/docs/bos_2020_web; JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY (2012).
[69] David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 (2010).
[70] Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1756 (2021).
[71] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 (2001).
[72] Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. Rev. 719, 730 (2021).
[73] William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive,* 115 Yale L.J. 2446, 2448 (2006) ("The states ... employ a divided executive that apportions executive power among different executive officers not subject to gubernatorial control."); Katherine Shaw, *Constitutional Nondefense in the States*, 114 Colum. L. Rev. 213, 282 (2014).
[74] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 (2001).
[75] National Conference of State Legislatures, *The Term-Limited State, https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx; compare* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).
[76] Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 Wis. L. Rev. __ (forthcoming 2022); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions,* 119 Mich. L. Rev. 859 (2021).

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Unlike the president, most governors can use the "item veto" to disapprove portions of at least appropriations bills and sometimes other legislation.[77] This means that the product that emerges from state legislative processes is not the pristine result of a set of fixed rules of procedure or allegedly unknowable compromises and legislative bargains to which the chief executive has either agreed in toto or had a veto overridden. Instead, the text of the enacted law itself may reflect only a subset of the larger bill initially passed by the legislature. Similarly, bicameralism, a core feature of the federal lawmaking process, is not invariably a feature of state lawmaking, as Nebraska's unicameral legislature makes clear. In addition, principles of nondelegation have long operated differently in the states from the federal system, with some states enforcing the nondelegation doctrine more vigorously than the federal courts, sometimes with different sorts of justifications offered than those invoked in the federal system.[78]

The point of all of this is not that every state's structural features are profoundly different from the federal system; indeed, many state institutions and procedures closely mirror their federal counterparts. But there is no requirement that they do so, and there is likewise no basis for the assumption that the rules, principles, and doctrines developed with specific reference to features of the federal system apply to the states.

At a more fundamental level, many of the institutional-design choices reflected in the federal system were animated by a desire to restrain the legislature vis-a-vis other branches. In the words of Federalist 48, the legislature, "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex," was most in need of restraint; it was "against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."[79]

In response to these concerns, the Constitution both imposed substantive limits on congressional powers and adopted lawmaking procedures that were, in the words of the Supreme Court, "finely wrought and exhaustively considered."[80] On the substantive side, the Constitution granted a set of powers to Congress. On the procedural side, Congress's ability to effectuate those powers was constrained by the requirement of bicameralism, ensuring double review of legislation and support from majorities (or today a Senate supermajority) of the members of two very differently composed chambers. In addition, the requirement of presidential approval (or large supermajorities in each chamber to override) was designed to serve as yet another check or limitation on the process of lawmaking. These substantive and procedural limitations have both federalism and separation of powers dimensions: they restrain the federal legislature both from intruding upon the states and from undermining liberty. And beyond these limitations, the Constitution's broader separation-of-powers

[77] Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171 (1993).
[78] Miriam Seifter, *Countermajoritarian Legislatures,* 121 COLUM. L. REV. 1733, 1747 (2021).
[79] The Federalist 48.
[80] I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

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principles have been interpreted as largely restraining the extent to which any branch of the federal government may intrude upon or exercise the powers of another.[81]

But these concerns and dynamics do not apply wholesale to the states. To begin, states *do* possess general police power: "[T]he state legislatures are not limited, even in theory, to any listing of enumerated powers."[82] Second, separation-of-powers dynamics are entirely distinct in the states, as the United State Supreme Court has acknowledged.[83] In contrast to the federal Constitution's implicit separation-of-powers principle, the majority of state constitutions contain explicit separation-of-powers clauses,[84] and those clauses have been interpreted in ways that deviate significantly from the federal system. And in many states, an important check on the legislature comes not through other formal institutions of government but from the people directly, who act through various mechanisms of direct democracy, like ballot initiatives and referenda, that are entirely absent in the federal system.[85]

Despite these distinctions, assumptions about lawmaking from the federal system permeate and are inextricable from the ISLT, which disregards entirely these significant state/federal differences. The ISLT's insistence on textualism as the one true method—despite the absence in the states of the articulated constitutional bases for the theory—illustrates the theory's lawlessness.

The ISLT makes a constitutional issue out of state courts' apparent departures from the federal courts' rigid form of textualism without much if any justification. Consider, for example, Chief Justice Rehnquist's non-sequitur in *Bush v. Gore*, which maintained that, under the Election Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[86] But why would that be? The Article II provision he invoked says only that "'[e]ach

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[81] Chadha, 462 U.S. 919 (1986); Bowsher v. Synar, 478 U.S. 714 (1985).

[82] John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions,* 66 TEMP. L. REV. 1205, 1226 (1993). *See also* Daniel Rodriguez, *Unreasonable Regulation: Interpreting the Police Power in American Constitutional Law,* 2022 Wisc. L. Rev. (forthcoming).

[83] *See, e.g.,* Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (plurality opinion) ("[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."); Supreme Court Prentis v. Atlantic Coast Line R.R., 211 U.S. 210, 255 (1908) ("We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."); *but see* with Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 54 (1998) ("[I]t is something of an overstatement to say that the principle of separation of powers has *no* application to the states.").

[84] Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 230–31 (2014).

[85] Seifter & Bulman-Pozen, supra, at __ ("To elevate the people above their legislative representatives, state constitutions . . . provide opportunities for direct popular lawmaking. . . .Today, direct democracy permeates state constitutions in the form of provisions for constitutional or statutory initiative, legislative or popular referendum, recall, and constitutional convention.").

[86] *Id.*

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State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President."[87]

But what if the state legislature has directed that state courts should *not* interpret a state's election laws in accordance with textualism? As the next section shows, some state legislatures have done just that. And that reality illustrates how Article II does not and cannot mean that "the text of the election law itself … takes on independent significance." A state legislature might direct that state courts adopt a more flexible, purposive style of statutory interpretation. Or a state legislature might willingly incorporate state constitutional law as a background principle or constraint on state legislation, including state election law. Either way, the state legislature has directed that the text of the election law is not independently significant. The entire conceit of this version of the ISLT is that a state *legislature* is the entity tasked with creating a state's election rules and governing structures. But in reality, this version of the ISLT gives to the *federal courts*, not the state legislature or any other state office, the power to construe a state's rules regarding federal elections.

C. Affirmative Separation of Powers Concerns With the ISLT

The separation of powers principles undergirding textualism do not map neatly onto the states; and they accordingly do not justify a requirement that states adhere to textualism as an interpretive methodology (including when it comes to the law regarding federal elections). The ISLT also carries with it constitutional problems that sound in the separation of powers since, under the ISLT, the federal courts would effectively require state courts to adhere to the federal courts' preferred methodology of interpreting statutes when the state courts interpret state law governing elections.

As this section explains, statutory interpretation "methodologies," how courts interpret statutes, are properly understood as a type of judge-made common law. Judges craft rules about how statutes should be interpreted, including under the methodology of textualism. These rules might include the idea that courts should presume that a legislature's failure to explicitly mention one remedy or one contingency means that the law does not provide for that remedy or that contingency; the rules might also include the notion that courts should not presume that a legislature gave an agency the authority to decide a question of vast economic or political significance. These rules do not derive from some codified legal text; they are, instead, judge-made, common-law rules about the interpretation of legal texts. And it is one thing for federal courts to adopt and apply this sort of federal common law to federal cases involving federal statutes and federal law. But it is entirely another for federal courts to require state courts to adopt federal common law, rather than the states' own body of judge-made common-law rules about how state statutes should be interpreted. Doing so represents an unwarranted and unjustified assertion of law-making authority by the federal courts.

[87] *Id.* (emphasis Rehnquist's).

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The separation of powers concerns with federal courts projecting common-law type rules of statutory interpretation onto the states arise from the relationship between the methodologies of statutory interpretation and federal common law. Federal common law refers to federal law that has not been codified in a written enactment.[88] The Supreme Court's canonical decision in *Erie Railroad v. Tompkins* established that there is no general common law, and that federal courts should not freely make federal common law.[89] Subsequent cases have clarified that federal courts should not exercise the power to make federal common law unless a matter implicates an important federal interest, and there is the potential for a substantial conflict between the federal interest and the application of state law.[90]

Today, the reasons for skepticism about federal common law sound largely in the separation of powers. Making law is generally thought to be a legislative act better suited for Congress; federal courts accordingly try to abstain from exercising the power to make law absent compelling reasons to do so. A stronger version of this claim is that the Constitution vests the legislative power, the power to make law, in Congress, and not the federal courts; and therefore, when federal courts engage in unauthorized, unwarranted exercises of federal common lawmaking, they offend the constitutional allocation of authority by exercising a power that is lodged in another branch of the federal government. Justice Thomas summarized this view in a 2020 concurrence describing the Court's 1971 *Bivens* opinion as "a relic of the heady days in which this Court assumed common-law powers….' … exercising legislative power vested in Congress."[91]

But something similar could be said about the federal courts requiring state courts to adopt a particular methodology for interpreting state statutes; there too, the federal courts would be "exercising legislative power" by projecting federal common law, judge-made law, onto the states. Abbe Gluck has forcefully argued that there are aspects of "statutory interpretation methodology," including the methodology that calls itself textualism, that are best understood as "some kind of judge-made law."[92] As Gluck has recounted, "many of" the "canons of statutory interpretation," including

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[88] Richard H. Fallon, Jr. et al, Hart and Wechsler's The Federal Courts and the Federal System 607 (7th ed.) (noting that modern scholars "have offered a range of definitions of federal common law," but using the term to mean "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to [written federal laws]").

[89] 304 U.S. 64, 79 (1938).

[90] *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-06 (1988); Clearfield Trust Co v. United States, 318 U.S. 363, 366-67 (1943). Under that framework, federal courts may exercise federal common lawmaking powers where the liability of federal officers is at stake, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), or the rights and duties of the United States are; those are instances where the application of 50 different legal standards and the resulting disuniformity would be particularly worrisome. Clearfield Trust, 318 U.S. at 366-67.

[91] *See* Hernandez v. Mesa, 140 S. Ct. 735, 750, 752 (2020) (Thomas, J., concurring)

[92] Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 757-58 (2013); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" And the* Erie *Doctrine*, 120 Yale L.J. 1898 (2011). *See also* Aaron-Andrew Bruhl, Statutory

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those utilized by the modern day textualists, "bring external, judge-created legal norms into the decision-making process for statutory cases."[93] Gluck has accordingly encouraged "a common law conceptualization of interpretive methodology," [94] pointing specifically to the canons and the interpretive framework described in Scalia and Garner's *Reading Law*.[95]

Gluck's argument that statutory interpretation methodologies are a species of federal common law supplies an additional layer to the separation of powers analysis of the independent state legislature doctrine. The ISLT appears to effectively require states to adopt a particular methodology—the one selected by the federal courts—when interpreting state law. And that produces an arrangement that runs squarely counter to *Erie*. Under Gluck's conceptualization, many aspects of statutory interpretation methodologies, including textualism, reflect judge-made common law. Accordingly, under *Erie*, when federal courts interpret state laws, they should adopt state methods of statutory interpretation. Doing otherwise, Gluck suggests, would fail to apply the (common) law of the states when federal courts decide a question of state law.[96] Yet the ISLT, rather than requiring federal courts to apply state interpretive methodologies when federal courts interpret state law, would require states, when interpreting state law, to use federal methods of statutory interpretation.[97]

Indeed, under the ISLT, the federal courts may be displacing more than just state common law. They may be displacing state legislative enactments as well. Some state legislatures have enacted statutes that provide for state courts to use particular methods of statutory interpretation when interpreting state laws.[98] Some state courts have likewise created guidelines for how state statutes

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Interpretation's *Erie* Problem, _ Notre Dame L. Rev. _ (forthcoming 2022), *available at* file:///Users/katherineshaw/Downloads/SSRN-id3978040.pdf.

[93] *Id.* at 762. *See also* Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. Chi. L. Rev. 825, 826-27, 829-30 (2017).

[94] Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 757-58 (2013); *id.* at 809 ("*Erie*'s animating concerns about forum shopping, outcome determinacy, and vertical uniformity … arise when federal courts decide what interpretive methodology applies to state statutes."); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" And the* Erie *Doctrine*, 120 Yale L.J. 1898 (2011). Other scholars have disputed this. Connor Raso & William N. Eskridge, Jr., Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1810 (2010).

[95] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL Texts (2012). As of January 23, 2022, the Supreme Court has cited *Reading Law* 52 times. The book's impact has been still more profound outside of the Supreme Court; as of January 30, 2022, the book had been cited in over 1100 federal cases, and nearly 1000 state cases.

[96] Gluck, *Federal Common Law*, supra note ___

[97] *See, e.g.*, Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 Loy. U. Chi. L.J. 89, 93 (2002); Amar & Amar, supra note TK, at 55 ("[T]here is in this domain no general federal interest in implementing any particular intra-state separation-of-powers regime or any specific textual interpretive methodology.").

[98] *See infra* sources cited note TK.

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should be interpreted.[99] The ISLT displaces both state legislative enactments and state judicial decisions about how state statutes should be interpreted—arrogating massive and unjustified authority to the federal courts without sufficient constitutional authorization. And these variations on state interpretive authority underscore how the ISLT, despite its claims, does not elevate state legislatures. It elevates the federal courts and their preferred approach to statutory interpretation and election law.

III. Federalism and the ISLT

In addition to the concerns that sound in the separation of powers, there are also potent federalism problems that arise from the ISLT requiring states to adopt a particular method of statutory interpretation in the domain of election law. The ISLT upends the deeply rooted principle that states should be the final arbiters of the meaning of state law.[100] The thinness of the arguments for the independent legislature theory—from text, history, and elsewhere—are even more apparent when the constitutional provisions are read against that principle.[101] Given the well-established and foundational rule that states are the final arbiters of the meaning of state law, one would expect the constitutional text to be clear if it granted federal courts the authority to serve as the final arbiters of the meaning of state law. Yet nothing about the text of the Elections Clause or Presidential Electors Clause purports to elevate the federal courts above state courts or other state interpreters. There are also federalism concerns that arise from the ISLT because it effectively requires states to allocate decisionmaking authority within the state in a particular way, which flies in the face of the idea that states have considerable latitude in structuring their governmental system. The ISLT also represents a hypocritical about face from how the Supreme Court has limited federal court review of state decisions that inhibit citizens' ability to elect the candidates of their choice. In the hands of the current Court and currently gerrymandered state legislatures, the ISLT operates as something like a one-way ratchet that would allow the federal courts to seize authority to review state decisions that expand citizens' ability to elect the candidates of their choice. No sensible conception of federalism supports that lopsided scheme.

A. Federalism and Interpretive Authority Over State Law

Requiring state courts to adopt a particular methodology when interpreting state laws is in considerable tension with the division of interpretive authority between state and federal courts with respect to state law. One foundational and enduring principle of federalism is that state courts are supreme when it comes to the meaning of state law as compared to federal courts, including the United States Supreme Court. This principle was reflected in the Judiciary Act of 1789, the first statute enacted

[99] *See* Gluck, supra note TK.

[100] *See* Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, __ Sup. Ct. Rev. __, manuscript at 22 ("[I]t does not mean business as usual, in which federal courts almost invariably accept state law as pronounced by state adjudicatory entities.")

[101] *See* sources cited supra note TK. (Krass, Shapiro, et al.)

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by the first Congress regarding the federal courts.[102] In the provision granting the Supreme Court jurisdiction over certain state court judgments, Congress specified that the Supreme Court could review a claim under the "Constitution, treaty, statute, or commission," but that "no other error shall be assigned or regarded as a ground for reversal," a restrictive clause that limited the Supreme Court's ability to review questions of state law.[103] Subsequent cases make clear that this principle is part of the constitutional system. In *Murdock v. City of Memphis*, the Supreme Court addressed the effect of the 1867 Reconstruction Congress's amendments to the 1789 Judiciary Act,[104] which deleted the restrictive clause that prohibited the Supreme Court from reviewing non-federal claims of error.[105] The Court concluded that the amended statute still did not authorize the Supreme Court to review, as a general matter, state law questions decided by state courts. The Court intimated that "there were those [in Congress] who believed that the Constitution gave no right to the Federal judiciary to go beyond the line marked by the omitted clause"[106]—that is, that the Constitution did not allow the Supreme Court to freely review questions of state law in state court cases. The Court underscored that it would not attribute to Congress the choice to authorize a federal court to review a state court's interpretation of state law because "[t]he State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."[107] The strength of that principle led the Supreme Court to (essentially) render a statutory amendment as having no effect—and to attribute to the Reconstruction Congress an unlikely desire to preserve state courts' authority. And that principle remains reflected in modern adequate and independent state ground doctrine, which holds that the United States Supreme Court will not review state court judgments that rest on independent state law grounds that are adequate to support the state court judgment. This doctrine recognizes that the state courts are comparative experts in state law and state law may rightfully diverge from federal law.[108]

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[102] The 1789 Act has been called "probably the most important and satisfactory act ever passed by Congress." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 52 (1923) (quoting Henry B. Brown, *The New Federal Judicial Code*, 36 A.B.A. Rep. 339, 343 (1913)). *See* Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 Notre Dame L. Rev. 1739, 1742 (noting that "a good deal of federal courts scholarship and jurisprudence focuses on the … first Judiciary Act of 1789 in particular[] as enormously important, if not determinative of many questions at the heart of the federal courts canon").

[103] Judiciary Act of 1789, ch. 20, 25, 1 Stat. 73, 76-79. Note that the Supreme Court may conduct a limited review so called antecedent questions of state law that tee up, are a threshold to reaching, a federal question. *Martin v. hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Hart & Wechsler 487-88 ("[W]here a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination.").

[104] 87 U.S. (20 Wall.) 590 (1875).

[105] Act of Feb. 5th, 1867, § 2, 14 Stat. 385.

[106] 87 U.S. (20 Wall.) at 618-19.

[107] 87 U.S. (20 Wall.) at 626.

[108] *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) (explaining that "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally

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A wide range of doctrines and statutes reinforce the point that it is for state courts, not federal courts, to decide how to interpret state law.[109] Abstention doctrines allow the federal courts to decline to hear cases that raise unsettled questions of state law. In *Railroad Commission of Texas v. Pullman Co.*, the Supreme Court held that federal courts should decline to adjudicate cases where the resolution of an ambiguous question of state law could obviate the need to decide a federal constitutional question.[110] Such cases, the Court reasoned, were more properly heard first by state courts: "Reading the [state] statutes and the [state] decisions as outsiders without special competence in [state] law" was not preferred because "the last word on the statutory authority … belongs neither to us nor to the district court but to the [state] supreme court."[111] The scope of permissible suits against state officers for injunctive relief also reflects the principle that questions about the meaning of state law belong in the state court system. While private citizens can obtain prospective injunctive relief against state officers for violating federal law,[112] they cannot obtain similar injunctive relief against state officers for violating state law.[113] One reason for that dichotomy is, according to the Court, because it is "difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."[114]

The importance of the idea that state courts, not federal courts, should interpret state law is difficult to overstate.[115] A simple contrast underscores the point: There is no similar presumption that federal courts, rather than state courts, should adjudicate questions of federal law. Indeed, if anything, there is the opposite presumption: Many aspects of the federal system suggest that state courts are presumptively competent to adjudicate questions of federal law. The Constitution reflects the so-called Madisonian compromise, under which Congress need not create any lower federal courts at all, in which case state courts would be the primary adjudicators of federal claims. In part for that reason, there is a muscular presumption of concurrent jurisdiction, under which state courts may adjudicate federal claims unless Congress has explicitly precluded them from doing so, or (perhaps) where there

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unfamiliar" and so "[r]espect for the independence of state courts … ha[s[been the cornerstone[] of this Court's refusal to decide cases where there is an adequate and independent state ground").

[109] *See, e.g.*, *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 293 (1832) (holding that federal courts must respect state courts' interpretations of state statutes).

[110] 312 U.S. 496 (1941).

[111] *Id.* at 499.

[112] *Ex Parte Young*, 209 U.S. 123 (1908).

[113] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

[114] *Id.* at 106.

[115] It is also the principle that proponents of ISL eagerly and straightforwardly abandon. *See, e.g.*, *Moore v. Harper*, 595 U.S. ___ (2022) (Alito, J., dissenting), slip op at 3 (arguing that the North Carolina state courts incorrectly interpreted provisions in the North Carolina constitution because the court's "explanations have the hallmarks of legislation").

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is an unmistakable implication from legislative history to preclude state court jurisdiction, or a clear incompatibility between state-court jurisdiction and federal interests.[116]

Yet the ISLT would interpose the federal courts between state courts and state law, arrogating to the federal courts the authority to interpret state law, and to do so according to the federal courts' preferred methodology. That much is readily apparent from even the most general statements of the ISLT in judicial opinions. Chief Justice Rehnquist's concurrence in *Bush v. Gore* loudly proclaimed that, under ISLT, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[117] And invoking that concurrence, Justice Kavanaugh likewise insisted that the ISLT "requires federal courts to ensure that state courts do not rewrite state election laws."[118]

B. Federalism and State Governance Structures

The idea that states enjoy interpretive primacy over questions of state law reflects another, related principle of federalism that the ISLT also upends—that the states enjoy considerable autonomy in how they choose to structure their government systems, including their courts. As Part I explained, how a state chooses to structure its court system has implications for how state law is and should be interpreted. Here too, many doctrines reflect the understanding that states enjoy substantial latitude in allocating decisionmaking authority within and between state institutions. Consider the Supreme Court decisions grappling with whether a state court's interpretation of a state criminal statute applies retroactively to cases that have become final.[119] Federal court interpretations of federal criminal statutes necessarily apply retroactively because, in the federal system, Congress and not the courts makes criminal law.[120] But in a series of cases, the Court has made clear that, because state judicial systems may be structured differently than the federal one, the same principles of statutory interpretation and retroactivity do not straightforwardly apply to the state court system.[121] In *Metrish v. Lancaster*, the Supreme Court held that a habeas petitioner was not entitled to relief after the state

[116] Tafflin v. Levitt, 493 U.S. 455 (1990). As Justice Scalia's concurrence in the case indicated, the Court not really relied on the latter two factors. And more recent cases suggest they may not be sufficient to displace state court jurisdiction. *See* Yellow Feright System, Inc. v. Donnelly, 494 U.S. 820 (1990).
[117] Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, J., concurring).
[118] Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 34 n.1 (2020).
[119] Fiore v. White, 531 U.S. 225 (2001).
[120] Bousley v. United States, 523 U.S. 614 (1998).
[121] Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 Va. L. Rev. 417, 492 & n.353 (2018). *Fiore v. White* did not end up deciding the retroactivity question, because there, the U.S. Supreme Court certified the question to the Pennsylvania Supreme Court, which determined that the state court's interpretation of state law did not announce a new rule, but rather had determined what the criminal law meant at the time Fiore's conviction became final (such that everyone conceded that the Due Process Clause required the state to establish those elements beyond a reasonable doubt). Fiore v. White, 528 U.S. 23 (1999) (certifying question); *Fiore*, 531 U.S. 225 (resolving based on certified answer). The Court arrived at a similar conclusion in Bunkley v. Florida, 538 U.S. 835 (2003).

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supreme court retroactively abolished the diminished capacity defense to murder that had been consistently adopted by the state's lower courts.[122] *Metrish* relied extensively on *Rogers v. Tennessee*, where the U.S. Supreme Court upheld a Tennessee murder conviction in which the state supreme court had abolished the common law "year and a day" rule that had previously limited criminal liability for murder to cases where death resulted within a year of the defendant's actions.[123] *Rogers* pointed to the various structural features of state courts that differentiated them from their federal counterparts—including how "state courts act[] in their common law capacity act much like legislatures in the exercise of their lawmaking function."[124] "Such judicial acts," the Court explained, "whether they be characterized as 'making' or 'finding' the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements."[125] Because state courts perform different functions than their federal counterparts, the Court declined to impose strict *ex post facto* principles on state courts interpreting state criminal law, opting for more flexible due process standards requiring only fair notice.[126]

The different retroactivity principles that apply to state court interpretations of state law on the one hand reflect the idea that the state and federal court systems may be structured in different ways and organized around different conceptions of the separation of powers. As *Rogers* and other cases recognized, the general idea of separated powers does not mechanically translate to the state court system where state courts may engage in common law making, even in criminal cases. Because of states' autonomy to structure their court systems, the Court has, in other areas of law, recognized that the principles governing how federal courts interpret federal law should not be automatically imposed on to the states.

Even doctrines that impose some limits on states' ability to structure their court systems recognize that states retain considerable latitude in those structural decisions. Under the valid excuse lines of cases, state courts may not decline to hear federal claims unless the courts have a valid excuse for doing so.[127] But the cases recognize that "states retain substantial leeway to establish the contours of their judicial systems,"[128] which allows them to structure their courts in ways that may lead the

[122] 569 U.S. 351 (2013).
[123] 532 U.S. 451 (2001).
[124] 532 U.S. at 460 (summarizing defendant's argument before adopting it as a premise in subsequent reasoning).
[125] *Id.* at 461. *See generally* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 Va. L. Rev. 965 (2019) (debunking the idea that there are no common law crimes in the United States).
[126] *Id.* at 459-62.
[127] Testa v. Katt, 330 U.S. 386 (1947); Haywood v. Drown, 556 U.S. 729 (2009). A "valid excuse" does not include a state rule that discriminates against federal law or substantively disagrees with the policy underlying federal law.
[128] *Haywood*, 556 U.S. at 736.

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courts to decline to hear federal claims.[129] Recent scholarship has underscored the wide variation that exists among state and local court systems, which further strains analogies to federal judicial counterparts.[130] Alexandra Natapoff's study of municipal courts, for example, highlighted how much criminal municipal courts have in common with state executive or legislative departments—commonalities that outweigh their similarities to federal courts—as well as demonstrating municipal courts' departure from the structural principles governing federal courts.[131]

The principle that states may structure state judicial systems in ways that depart from the organization of the federal judicial system reflects several basic features of federalism. First are the benefits that flow from diversity of arrangements in how state governance systems, including state judicial systems, are structured and how state governments allocate interpretive authority over state law.[132] While the literature on federalism is often couched in terms of the benefits that result from state systems producing different substantive policies, there are also benefits that flow from having state systems that reflect different processes for making policy choices, and for interpreting state law.[133] Second is expertise. State laws are better understood by the people familiar with them, including familiarity with how decisionmaking authority and interpretive authority are distributed within the state. Third is sovereignty; while sovereignty may be a grossly over-inclusive and often imperfect term to describe the states,[134] here it means only that the states have the authority to create laws and to create systems for interpreting and implementing those laws. All of the doctrines and statutes surveyed in this section reflect the importance of these principles—and demonstrate that states have, and should have, interpretive primacy over state laws, including the authority to decide how they should be interpreted.[135]

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[129] They may decline to hear claims by out-of-state residents, even when they involve federal law, 279 U.S. 377 (1929). And local courts with similarly limited jurisdiction may bounce federal law claims as well. Herb v. Pitcairn, 324 U.S. 117 (1945).

[130] *See, e.g.*, Justin Weinstein-Tull, *The Structures of Local Courts*, 106 Va. L. Rev. 1031 (2020).

[131] Alexandra Natapoff, *Criminal Municipal Courts*, 134 Harv. L. Rev. 964 (2021); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 613 (2014); *See also* Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. Rev. 719, 724 (2021) ("State court judges engage in decisionmaking in a whole host of non-adversarial settings outside of the traditional context of dispute resolution.").

[132] *Cf.* Heather K. Gerken, *Second-Order Diversity*, 118 Harv. L. Rev. 1099, 1102-03 (2005) ("Second-order diversity involves variation among decisionmaking bodies, not within them. It favors interorganizational heterogeneity not intraorganizational heterogeneity.").

[133] *See id.; see also* Jeffrey Sutton, Who Decides? (2021).

[134] Don Herzog, *Sovereignty, RIP* (2020).

[135] One might say that these doctrines suggest that states should get final say over the interpretation of any particular state law, but are agnostic about whether states get to choose how to interpret any state law – i.e., about the process states use for interpreting state law. But deciding what a state law means entails making a choice about how the law should be interpreted, according to which method, which sources to consult, and other considerations. So it would be odd to cleave off choices about what interpretive methodology states use to interpret state laws from a decision about the meaning of any particular state law. Indeed, the cases seem to suggest there is value to letting the process of

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This backdrop helps to underscore why the ISLT does not, as some defenders insist, ensure the primacy of the legislature. Rather, it imposes the federal courts, and their preferred method of statutory interpretation, on the states, rather than elevating the state legislature vis-a-vis other state entities or offices.[136] For example, some state legislatures have enacted statutes that require state courts to adhere to particular methods of interpretation when interpreting state statutes that do not correspond to the federal courts' preferred method of statutory interpretation.[137] The ISLT would prevent the legislature from making that choice by manufacturing a constitutional issue any time the state courts did not apply a particular species of textualism when interpreting state election laws; the textualist-enthusiastic federal courts could claim that the state courts "rewrote" state election law because they had deigned to apply the statutory interpretation methodology established by the state legislature.

That is far from the only scenario in which the ISLT, rather than elevating the state legislature, instead establishes the federal courts as superintendents of the state election apparatus (at least for federal elections). For example, a state legislature could have incorporated state constitutional provisions into state legislative enactments.[138] Or it could have made any number of other decisions to share authority over election rules, such as by authorizing independent redistricting commissions to draw districts, which the independent state legislature theory might forbid the state legislature from doing.[139] Far from reinforcing popular sovereignty and democracy, as proponents of the ISLT have suggested, the ISLT jettisons them on the basis of the federal courts' preferred method of statutory interpretation.

Even if the ISLT did empower the state legislature vis-a-vis other arms of the state, that would carry its own federalism concerns.[140] Federal courts do not have the general authority to restructure state governments and allocate decisionmaking authority within the states. Indeed, the Court has

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interpretation play out in the state system; the reasons why states interpret state law are about more than just what it means by way of the final result about the meaning of state law.

[136] *Cf.* Amar & Amar, supra note TK, at 23 ("The theory gives near carte blanche to *federal* judges, when the key point of Article II's election language … was to empower *states*.").

[137] *See, e.g.*, 1 Pa. C.S. 1921(a) (requiring more purposivist interpretation in some circumstances); Or. Rev. Stat. § 174.020(3) (2009) (limiting consideration of legislative history); Tex. Gov't Code Ann. § 311.023 (Vernon 2005); *id.* 312.006(a), 312.005; See H.R. 5033, 2003 Gen. Assem., Reg. Sess. (Conn. 2003); Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation*, 119 Yale L.J. 1750, 1786 ("Every state legislature in the nation has enacted a number of canons of construction.").

[138] Carolyn Shapiro, *The ISLC, Textualism, and State Law*, manuscript at 5; Amar & Amar, supra note __, at 32.

[139] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting).

[140] *See, e.g.*, Merritt, supra note TK, at 41 ("The guarantee clause, moreover, restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents.").

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suggested there are unique constitutional federalism concerns with Congress or the courts tinkering with the state's governance structures, including how the state makes policy decisions, and how the state chooses to allocate governing authority within state government.[141] Scholars have made a similar claim, arguing that congressional and judicial efforts to elevate some state decisionmakers over others pose particular federalism concerns.[142]

Yet that is precisely what the independent state legislature theory would do—mandate that states structure their governmental systems in particular ways. The theory could forbid states from adopting a governmental system (like the federal one) under which state laws are subordinate to state constitutional provisions.[143] One possible variant of this strand of the ISLT, floated recently by Justice Alito in a dissent from denial of certiorari, would be that state courts could not subordinate state laws to general or vague state constitutional provisions.[144] (As a side note, the sheer number of proposed variants of the ISLT suggests that the ISLT is an idea in search of a legal basis.)

This particular iteration of the ISLT would place federal courts in the absurd position of determining when particular state constitutional provisions are open and vague, meaning state courts exceed their authority when they rely on them to construe state statutes.[145] This inquiry is not capable of being administered in a principled or coherent way, in part because it would require the Justices to assess each individual state constitutional provision—a matter they are concededly not expert in. State constitutional provisions may also be permissibly interpreted by state courts even when the provisions are framed at higher levels of generality. Yet this iteration of the theory imagines that the federal courts could create some sort of federal constitutional line distinguishing narrow and specific state constitutional provisions from more open-ended ones. The constitution makes no such distinction, and federal courts should not invent one. This variant of the ISLT would be yet another mechanism for the federal courts to restrict state institutional design choices in the

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[141] *See, e.g.*, Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by. State among its governmental organs is commonly, if not always, a question for the state itself."); *Missouri v. Lewis*, 101 U.S. 22, 30 (1880) ("Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.").

[142] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988); Bridget A. Fahey, Consent Procedures and American Federalism, 128 Harv. L. Rev. 1561 (2015).

[143] *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 732 (2021) (Alito, J., dissenting from denial of certiorari) (raising constitutional concerns about a state supreme court decision invalidating an election law provision on state constitutional grounds). *See* Amar & Amar, supra note TK, at 26 ("So too, as a backdrop principle, state people and state constitutions are masters of state legislatures.").

[144] Moore v. Harper, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from denial of certiorari) (criticizing NC Supreme Court for relying on constitutional provisions that don't "say[] anything about partisan gerrymandering, and all but one makes no reference to elections at all").

[145] *See* Petn for Certiorari in Moore v. Harper, No. 21-1271, at 4 (arguing that state courts may not rely on "on vague and abstract state constitutional language requiring "free" or "fair" elections to essentially create their own election code.").

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name of the federal courts' preferred interpretive approach; here, the ISLT would prevent states from adopting and state courts from enforcing generally worded constitutional provisions in the context of federal elections.

Or consider the question of state institutional-design choices around election administration more specifically. As a matter of practice, state legislatures devolve nearly all of their administrative authority for election administration, on everything from where to site voting locations to what kind of opportunity to give voters to cure ballot defects to how far from vote-counting official election observers must remain, to local authorities or to state administrative agencies.

Under the independent state legislature theory, the legislature must be the body to make election law—not the people through state constitutional provisions, not state courts interpreting those provisions, not agencies or local administrators exercising authority delegated by the legislature or conferred by the state constitution. The theory could forbid states from structuring a governmental system in a way that gave state courts interpretive latitude over state law, and envisioned that legislative enactments would be authoritatively construed by state courts.[146] The theory could forbid states from structuring their governmental system in a way that allowed state or local officials to exercise delegated authority to conduct elections.[147] And it could require state actors performing their roles under a state's election-administration scheme to interpret state statutes using the current U.S. Supreme Court's preferred textualist method and tools.

The independent state legislature theory would effectively commandeer the states to structure and even operate their governments in particular ways—with a legislature divorced from other decisionmaking bodies and also supreme to those other bodies. It is worth considering how the Court might react to a federal statute that sought to do the same thing. What would the Court do if Congress were to enact a law directing states to make all policy decisions through the legislature, rather than through state constitutions, state courts, or state executive branches, notwithstanding state constitutional provisions to the contrary?[148] It is difficult to imagine that the Court would uphold the

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[146] *See* Shapiro, supra note TK, at 29 (critiquing ISL case on the ground that they 'failed to address what the state legislatures actually did when they passed election laws," including whether the legislatures incorporated state constitutional provisions and principles into laws).

[147] Democratic Nat'l Committee v. Wisconsin State Legislature, 141 S. Ct. 28, 29 (2020)(Gorsuch, J., concurring in denial of vacatur of stay) (raising constitutional concerns with Wisconsin Elections Commission's decisions to send absentee ballot applications because "the constitution provides that state legislatures … not other state officials … bear primary responsibility for setting election rules"); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., concurring) (questioning whether the legislature 'could delegate its Election Clause authority to" the Board). But see Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. __ (forthcoming 2022).

[148] Cf., e.g., Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control*, 97 Mich. L. Rev. 1201 (1999) (cataloguing constitutional and policy

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statute. And for good reason: such a statute would fly in the face of the notion that states enjoy broad autonomy and flexibility to structure their governmental systems.[149]

There are also serious reasons to doubt that the Framers would have empowered the state legislatures in particular vis-a-vis all other state offices, as the ISLT purports to do. Recall Madison's famous fears about factions, where "a number of citizens, whether amounting to a majority or a minority of the whole, … are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[150] Factions may be more of a problem in state legislatures than in the federal legislature, and also more of a problem in state legislatures than in state executive offices or judicial ones. Federalist No. 10 warned of the "violence of faction," a "dangerous voice" that produces "instability, injustice, and confusion introduced into the public councils."[151] The Guarantee Clause also obligates the United States to guarantee every State a Republican form of government.[152] Both suggest some hesitation or fear on the part of the constitutional drafters of empowering the state legislature so dramatically.

The ISLT represents a federalism about-face in more ways than one. Consider the ISLT alongside the Court's partisan gerrymandering decision, *Rucho v. Common Cause*, which held that partisan gerrymandering presented a nonjusticiable political question for the federal courts.[153] Discussing the history of "electoral district problems," *Rucho* declared, "At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing."[154] Proponents of the ISLT position the federal courts as the arbiters of how states may conduct federal elections, even though, according to the *Rucho* Court, the Framers had apparently never "heard of courts doing such a thing."[155] Indeed, *Rucho* specifically maintained that while *federal courts* could not address partisan gerrymandering, *state courts* could do so, and by relying on state constitutions no less: "Provisions in state statutes and *state constitutions* can

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arguments for and against federal law being able to delegate federal powers to specific state or local institutions in contravention of the state legislature).

[149] By way of an example: The Supreme Court has held that it violates the principle that states can structure their own governments for Congress *to select the location of a state's capitol*. Coyle v. Smith, 221 U.S. 559, 565 (1911) ("The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers."); Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207, 1216-29 (2016) (explaining why *Coyle* should be read as a Tenth Amendment case). If the Tenth Amendment does not permit the federal government to tell the states where to locate their state capitol, it probably does not permit the federal government to tell the states how to structure their governmental bodies and allocate decisionmaking authority among them.

[150] *See* Fed. No. 10.

[151] *Id.*

[152] U.S. Const. art. IV, § 4.

[153] 139 S. Ct. 2482 (2019).

[154] *Id.* at 2496.

[155] *Id.*

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provide standards and guidance for *state courts* to apply."[156] In other words, *Rucho* assured the country that while it was a problem for federal courts to address partisan gerrymandering, state courts could continue to do so. The ISLT is fatally inconsistent with that discussion in *Rucho*, and for the Court to embrace it would represent a blatant federalism bait and switch. With one hand, the Court would be saying that it is a problem for federal courts to review state legislative actions that impede citizens' ability to elect the candidates of their choice, but, with the other, that it is somehow a constitutional *requirement* for federal courts to review state executive or state judicial actions that enhance citizens' ability to elect the candidates of their choice. That is not a coherent—much less a defensible—vision of judicial federalism.

C. Federalism and Democracy

Finally, there may be particular concerns with imposing uniformity on the states here – and requiring this particular method of interpretation with respect to election law. Several scholars of interpretation have forcefully argued that the Supreme Court's wooden brand of textualism obscures various choices that courts make in the course of interpreting legal texts. Bill Eskridge and Victoria Nourse have labeled one such device "textual gerrymandering," which occurs when courts choose what text they are interpreting (i.e., a discrete word or a larger phrase), as well as the context in which to read the text (in light of the whole act, whole code, and/or larger corpus of statutory law).[157] Cary Franklin highlighted a similar practice in the Supreme Court's decision in *Bostock v. Clayton County*,[158] which interpreted Title VII to prohibit discrimination on the basis of sexual orientation and gender identity.[159] Franklin, too, exposes the "shadow decision points" at which courts make "generally unacknowledged, often outcome-determinative choices about how to interpret statutory text,"[160] allowing the Court to "mask" its exercise of discretion, "render[ing] the exercise of that discretion [less] visible and thus [less] professionally and democratically accountable."[161]

Obscuring or masking the choices that courts make in interpreting legal texts is problematic enough in the federal system. But it has additional negative consequences in state court systems where many judges are supposed to be democratically accountable for their decisions.[162] State court judges

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[156] *Id.* at 2507.

[157] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809925. *See also* Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 Fla. L. Rev. 1409, 1412, 1409 (2017). Victoria Nourse, *Reclaiming the Constitutional Text from Originalism*, 106 Calif. L. Rev. 1 (2018) (identifying the related phenomenon of "enriching" text).

[158] Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119.

[159] 140 S. Ct. 1731 (2020).

[160] Franklin, supra note TK.

[161] *Id.*

[162] *See, e.g.*, Am. Judiciatur Soc'y, Judicial Selection in the States: Appellate and General Jurisdiction Courts (2013), available at

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are subject to reappointment processes and retention elections; their work is supposed to be evaluated by—and evaluable by—politicians and voters.[163] Deploying a method of interpretation that obscures how they are actually reaching decisions significantly undercuts those structural systems of accountability.

Conclusion

The dangerousness and lawlessness of the independent state legislature theory are difficult to overstate. This piece has focused on just one aspect of it—how the ISLT, without adequate justification or sufficient basis, projects onto the states a method of interpretation that does not account for state institutional design choices, disregards state governance structures, and flouts basic precepts of federalism and the separation of powers.

But what, then, do the relevant provisions of Article I and Article II do? If the constitutional provisions mentioning state legislatures do not require state legislatures to control federal elections to the exclusion of other state entities or actors, what do the provisions do instead? Without purporting to offer a definitive or conclusive account of the two provisions, we briefly survey three possibilities, all of which underscore that the constitutional text does not mandate the ISLT, and that the ISLT is not the only way of giving effect to the language of the Elections and Presidential Electors Clauses.

One possibility would be to understand these clauses using an origination theory, under which state law regarding federal elections must *originate* in the state legislature, but may also involve other state actors, including state administrators who implement it, or state courts who interpret or even invalidate it.[164] Under this theory, the Elections and Presidential Electors Clauses would be satisfied so long as there is *some* legal text enacted by the state legislature at the beginning of the interpretive process. But so long as an administrator or governor was exercising some authority they believed was provided for by statute, or so long as a state executive official or judicial officer was purporting to interpret a statute or measure a statute against a constitutional provision, the Elections and Presidential Electors Clauses would have nothing more to say about the matter.

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www.judicialselection.com/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf (noting that two states use gubernatorial appointment, two use legislative appointment, 8 have partisan elections and 14 nonpartisan elections); Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1063 (2010) (noting historical development of judicial elections as a mechanism to strengthen judicial review, based on ideas about democracy).

[163] David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047 (2010).

[164] Cf. *Sissel v. U.S. Dep't of Health & Human Servs.*, 799 F.3d 1035, 1049, 1060-64 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (concluding the Affordable Care Act "originate[d] in the House, as required by" the Origination Clause because "[a]lthough the original House bill was amended and its language replaced in the Senate, such Senate amendments are permissible").

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A second possibility would be to graft the extremely rare, extremely limited, and extremely deferential review of state law questions that is reflected in the adequate and independent state ground doctrine onto the Elections and Presidential Electors Clauses. Under adequate and independent state ground doctrine, the Supreme Court (and federal habeas courts) do not review questions of state law de novo. Rather, they look for extreme instances of malfeasance or something gone obviously awry – a truly novel state interpretation without any fair or substantial support in the written text of a law or rule, or in state court decisions; or evidence of intentional manipulation of a state court rule to disadvantage a particular litigant or to disfavor certain federal protected rights.[165] In *Bush v. Gore*, Justice Ginsburg described the prototypical examples of the kinds of state law interpretations that would merit federal court review:

> Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee v. Hunter's Lessee*, *NAACP v. Alabama ex rel. Patterson*, and *Bouie v. City of Columbia*, cited by The Chief Justice, are three such rare instances. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee*, which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin v. Hunter's Lessee*. *Patterson*, a case decided three months after *Cooper v. Aaron*, in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support.' " *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws—criminalizing conduct not covered by the text of an otherwise clear statute—was "unforeseeable" and thus violated due process when applied retroactively to the petitioners.
>
> The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As Justice Breyer convincingly explains, this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern

[165] *See generally* Fallon et al, The Federal Courts and the Federal System 509-524, 529-46 (7th ed. 2015).

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> of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.[166]

Under an AISG-like interpretation of the Elections and Presidential Electors Clauses, the federal courts could not superintend state courts' interpretation of state election laws outside of truly extreme circumstances, such as where a state court looked at a magic 8-ball or rolled a dice to interpret what a statute meant. Put differently, federal courts could review state court decisions for something like "indefensibility."[167]

A third possibility is that the Elections and Presidential Electors Clauses present nonjusticiable political questions, at least with respect to state legislatures' authority over the rules regarding federal elections. This approach would recognize that, in part because interpretive questions are difficult and often produce reasonable disagreement, there is not a judicially manageable standard to determine when a state legislature has sufficiently directed the manner of appointing electors and the conduct of federal elections and when the legislature has not.

Our point here is not to defend or settle on one of these interpretations. It is merely to point out that the ISLT is not the only way of making sense of the relevant constitutional text, or even a particularly sensible way of making sense of the constitutional text given the extent to which it inverts core principles of judicial federalism and separation of powers without clear textual authorization. Indeed, in what seems like something of an irony, the ISLT, while purporting to project textualism onto the state courts, is itself an example of failed textualism. Among other things, the ISLT ignores the mandatory versus permissive nature of the Elections Clause relative to the Presidential Electors Clause: Article I's Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall* be prescribed in each State by the Legislature thereof,"[168] whereas Article II's Presidential Electors Clause, which provides that "*Each State* shall appoint, in such Manner as the Legislature thereof *may* direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[169] So the Presidential Electors clause does not require the Legislature to direct the appointment of Presidential Electors, even if the Elections Clause requires the legislature to prescribe the times, places and manner of congressional elections. The ISLT also rests on the worst form of decontextualization – isolating the word "legislature" from two clauses, and then taking the word out of its context and away from the rest of the constitutional text. There is no constitutional basis for requiring the state courts to engage in such interpretive fallacies, in particular at the expense of federalism and the separation of powers and potentially democracy itself.

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[166] *Bush v. Gore*, 531 U.S. 98, 139-41 (2000) (Ginsburg, J., dissenting) (internal cites omitted).
[167] Metrish v. Lancaster, 569 U.S. 351, 360 (2013).
[168] U.S. CONST. art. I § 4 cl. 1 (emphasis added). The clause goes on to provide that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."
[169] U.S. CONST. art II § 1 cl. 2 (emphasis added).

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THE DANGEROUS INDEPENDENT STATE LEGISLATURE THEORY

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THE DANGEROUS INDEPENDENT STATE LEGISLATURE THEORY

ABSTRACT

In 2020, conservative justices and the Trump Campaign championed a theory, known as the independent state legislature doctrine, that claims voting rights protections in state constitutions do not apply to the election rules that state legislatures set for the federal elections in their states. Under the theory, state courts cannot review and enjoin these state election laws for state constitutional violations. This Article exposes the flaws and dangers of the independent state legislature theory. It deconstructs the justifications for its utility, revealing them as undertheorized and based on flawed assumptions of legislative behavior and flawed understandings of constitutional and institutional design. As for the danger, while our constitutional system generally provides dual federal-state protections for civil rights, the independent state legislature theory would effectively remove state constitutions as a safeguard for voting rights. In this way, the theory would make voting rights the least protected civil right.

INTRODUCTION

One of the biggest open questions in election law is whether state constitutional provisions, such as those guaranteeing equal voting rights, apply to the rules that state legislatures set for the federal elections in their states.[1] The Elections and Electors Clauses of the U.S. Constitution give state legislatures the power to enact laws regulating federal elections.[2] Can state courts review these state election laws for violations of state constitutional law? Conservative scholars, justices, and the Trump Campaign have championed a theory, known as the independent state legislature doctrine, that posits the answer is no.[3] Because state legislatures derive their power over federal

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[1] *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 502-02 (2021) (explaining that one of the biggest unanswered questions from the 2020 election was the viability of the independent state legislature theory).

[2] U.S. Const. art. I, § 4, cl. 1; U.S. Const. art. II, § 1, cl. 2.

[3] *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1 (2020) (the leading scholarly article in support of the independent state legislature theory); *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28 (2020) (a memorandum order with separate concurrences and dissents explaining the current justices' views on the theory); *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (the theory was advanced by electors for Trump and endorsed by a divided panel of the Eighth Circuit).

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elections from the supreme federal constitution, the theory goes, state constitutions cannot restrain that power.

If the U.S. Supreme Court adopted this theory, it would effectively remove state constitutions as a safeguard for voting rights. Our constitutional system provides two sources of protection for civil rights – the federal constitution and state constitutions. The independent state legislature theory would eliminate the second level of protection and, in this way, make voting rights the least protected civil right.

This Article exposes the flaws and dangers of the independent state legislature theory. It begins with a brief background on the Elections and Electors Clauses and their precedents. This discussion sets up the question of whether state courts can enforce state constitutional guarantees on voting rights when reviewing generally applicable state election laws.

The Article then discusses the justifications for the independent state legislature theory. In the literature, there has been some back and forth about whether the theory has originalist or historical support[4] and its pros and cons.[5] This Article offers the fullest deconstruction of the

[4] *See* Morley, *supra* note 3; Hayward Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. (2022 Forthcoming); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997 (2021); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 Fla. St. U. L. Rev. 661, 672 (2001); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U. L. Rev. 731, 764–75 (2001); Akhil Reed Amar, Vikram David Amar & Neal Kumar Katyal, Opinion, *The Supreme Court Should Not Muck Around in State Election Laws*, N.Y. Times (Oct. 28, 2020).

[5] *See* Morley, *supra* note 3 at 32-37; Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1794-99 (2021); Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L.J. 689, 690 (2016); David A. Strauss, Bush v. Gore: *What Were They Thinking?*, 68 U. Chi. L. Rev. 737, 748 (2001); Richard Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 Hastings Const. L.Q. 599, 626 (2008).

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theory's utility. It draws on positive political theory and institutional design principles to reveal the flaws in the justifications that proponents have put forward for the theory.

Next, the Article places the theory in the context of the modern conservative movement for control of the federal courts. In the early twentieth century, when the Supreme Court was largely nonpartisan, it twice unanimously rejected aspects of the theory. Conservative justices did not start to embrace it until 2000. At that point, they had gained control of the Supreme Court. At that point, application of the theory would entrench conservative oversight of voting rights litigation, because of how the theory disempowers state courts and elevates federal judicial oversight of election law.

Finally, the Article discusses why the theory is so dangerous for voting rights: it would effectively eliminate state constitutions as a source of voting rights protections. As the U.S. Supreme Court has rolled back voting protections at the federal level, the theory would close off state courts as an alternative forum for voting rights protections.

One introductory note on terminology. While some refer to the "independent state legislature *doctrine*,"[6] I refer to the "independent state legislature *theory*." The word choice – doctrine v. theory – matters. The word doctrine suggests the view is embedded in established precedent. I reject that word choice because the U.S. Supreme Court has not adopted independent state legislature readings of the Elections and Electors Clause in binding holdings.[7] I use the word "theory" because it more accurately reflects that this proposed reading of the clauses advances one view, a highly contested one, on how best to interpret the U.S. Constitution. A main goal of this Article is to show that this contested theory is flawed and dangerous.

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[6] *See, e.g.,* Morley, *supra* notes 1 and 3 (emphasis added).

[7] *See infra* Part I.

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I. The Independent State Legislature Theory and Caselaw.

This part briefly summarizes the major aspects of the independent state legislature theory, with reference to the text of the Electors and Elections Clauses. It then discusses the relevant Supreme Court caselaw. It tees up where things stand on the issue of whether the clauses prevent state courts from reviewing state election rules for violations of state constitutional provisions. Finally, it unpacks the distinction the theory draws between federal court review and state court review of election laws. One point here is that the theory allows federal courts to police election law decisions from state courts, even when they are made entirely on state law grounds.

A. The Independent State Legislature Theory and the Elections and Electors Clauses.

When a state legislature enacts a generally applicable election law, it is acting under two different sources of power: sovereign police powers reserved to the states and the Elections and Electors Clauses of the U.S. Constitution.[8] The police powers let the legislature regulate elections for state offices, such as governor, attorney general, and state legislator. The Elections and Electors Clauses let the legislature regulate federal elections for Congress and the presidency.

The independent state legislature theory starts with the text of the Elections and Electors clauses and homes in on their references to state legislatures. The Elections Clause provides that the time, place, and manner of federal congressional elections is "prescribed in each State by the Legislature thereof."[9] The Electors Clause similarly provides that the method of selecting

[8] *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.").

[9] The Elections Clause states in full: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators." U.S. Const. art. I, § 4, cl. 1.

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presidential electors is determined in "Each State . . . in such Manner as the Legislature thereof may direct."[10] While their precise language differs, the two clauses are conceptually similar and are governed by the same precedent.[11] They both allow state legislatures to set rules for federal elections.

The independent state legislature theory points to the use of the word "Legislature" in the clauses and concludes that power to regulate federal elections belongs to the state legislatures specifically, not the states generally.[12] From this textual rendering, the theory, leads to several propositions.

First, state legislatures are the only state entities that can regulate federal elections.[13] A state, for example, cannot have an independent redistricting commission set federal congressional districts. The legislature must do that job.

Second, other state actors cannot review and reject the election rules produced by a state legislature for federal elections in the state. At its strongest, this would mean neither the governor through a veto, the public through a referendum, nor the state courts through judicial review could reject these laws.[14] Practically, if the legislature passed a generally applicable election law and one of these state actors rejected it, the rejection would only have effect as to state elections, under

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[10] The Electors Clause states in full: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2.

[11] *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting).

[12] *See id; see generally* Morley, *supra* notes 1 and 3.

[13] *See, e.g.,* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. 847 (2015); Morley, *supra* note 3 at 90-92.

[14] *See* Morley, *supra* note 3 at 90.

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the theory. The law passed by the legislature would still govern federal elections because, under the U.S. Constitution, rejection by something other than a legislative vote would have no effect.

Third, legislatures are not bound by state constitutional provisions, at least when it comes to how federal elections are conducted.[15] This means that legislatures can ignore state constitutional constraints when they pass rules for federal elections. It also means that state courts cannot enjoin these election laws for violations of state constitutional provisions, such as those that guarantee free and equal elections.

B. The Theory and U.S. Supreme Court Caselaw.

The U.S. Supreme Court has never accepted any of these three propositions. But it has come close, and it might be getting closer. This section traces the Court's caselaw, from 1892 through the 2020 election.

The first important precedent is the 1892 case of *McPherson v. Blacker*,[16] which contains dicta providing support to both proponents and opponents of the theory. In that case, the Court held that state legislatures have broad power, under the Electors Clause, to set the means for selecting presidential electors. A legislature can choose whether electors are selected by popular vote statewide, by votes within districts, or by some other means, without violating federal law.[17]

While the independent state legislature theory was not directly tested in the case, the opinion quoted from an 1874 Senate Report that appears to support the theory. The report stated that the authority granted to legislatures by the Electors Clause "cannot be taken from them or

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[15] *See* Morley, *supra* note 3 at 90-92; *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 34 n. 1 (2020) (mem.) (Kavanaugh, J., concurring).

[16] 146 U.S. 1 (1892).

[17] *Id.* at 36.

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modified by their State constitutions" and "can neither be taken away nor abdicated."[18] At the same time, though, the opinion contains dicta that cuts against the theory by suggesting the power granted by the clause belongs to the states themselves and is subject to state constitutional constraints. The Court concluded: "In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States."[19] The Court also observed that the state "legislative power is the supreme authority except as limited by the constitution of the State."[20]

On the issue of whether the Elections Clause prevents non-legislative actors from reviewing and rejecting state election laws, the Supreme Court issued two opinions in the early twentieth century. Both opinions were unanimous, and both reached results contrary to the independent state legislature theory.

The 1916 case of *Davis v. Hildebrant*[21] involved an amendment to the Ohio Constitution that let the people of the state approve or reject any state legislation by public referendum. After the public rejected legislation setting the districts for congressional elections, the question arose whether the Elections Clause, by assigning the state legislature the authority to regulate congressional elections, prevented the people of the state from reviewing the redistricting legislation. The Supreme Court held that the public referendum did not violate the Elections Clause because the referendum was "part of the legislative power" in Ohio.[22] The case recognized

[18] *Id.* at 34-35 (quoting S. Rep. No. 43-395 (1874)).

[19] *Id.* at 35.

[20] *Id.* at 25.

[21] 241 U.S. 565 (1916).

[22] *Id.* at 567-69.

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that the people of a state can veto legislation enacted pursuant to a legislature's Elections Clause powers.

The 1932 case of *Smiley v. Holm*[23] raised the question of whether a governor could veto a state law redistricting for congressional elections. The Supreme Court held that the governor's veto was part of the legislative process.[24] The case recognized that the governor of a state can review and veto legislation enacted pursuant to a legislature's Elections Clause powers.

If a state's voters and its governor can review and reject state legislation, what about a state's courts? Can a state high court, in a case involving how a federal election is conducted in the state, review the application of state election laws? For a long time, there was no substantial debate that state courts can exercise their normal judicial review powers in this context. That changed in 2000.[25]

That year, the outcome of the presidential election turned on the result in Florida, where a recount of an incredibly close election was underway. Florida law set a deadline of seven days after the election for county canvassing boards to count the votes and report the results.[26] The Florida Supreme Court ordered an extension to give counties time to complete their recounts.[27] The U.S. Supreme Court remanded for the court to clarify how it thought the Florida Constitution could circumscribe the state legislative power, consistent with the Electors Clause.[28] Proponents

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[23] 285 U.S. 355 (1932).

[24] *Id.* at 368-69.

[25] *See* Morley, *supra* note 1 at 504 (acknowledging the theory was largely forgotten after the 1930s until 2000).

[26] *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 74 (2000).

[27] *Id.* at 75-76.

[28] *Id.* at 78.

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of the independent state legislature theory often point to this remand for support.[29] The problem with putting weight on this opinion, though, is that the Court took no position on the ultimate issue, not even in dicta. It is also undermined by what happened days later in *Bush v. Gore*.

In *Bush v. Gore*,[30] *the Supreme Court ruled, per curiam, on equal protection grounds, but the justices addressed an Electors Clause question in separate, non-controlling opinions. The* Florida Supreme Court had ordered a manual recount of ballots that had been fed through tabulating machines but not produced a registered vote for president.[31] The U.S. Supreme Court held the court's recount procedures were too imprecise to comport with equal protection guarantees.[32]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, went beyond the equal protection issue and asserted there was an Electors Clause issue: whether the Florida Supreme Court's recount procedures were unconstitutional because they departed from the scheme set by the state legislature, which has plenary authority under the Electors Clause: "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[33] He concluded the recount procedures violated the Electors Clause because they "significantly departed from the statutory framework."[34]

Justice Breyer, Ginsburg, and Stevens disagreed that the Electors Clause stripped state courts of their normal judicial review functions: "The legislative power in Florida is subject to

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[29] *See, e.g.,* Morley, *supra* note 3 at 80-81.

[30] 531 U.S. 98 (2000) (per curiam)

[31] *Id.* at 100-103.

[32] *Id.* at 107-111.

[33] *Bush v. Gore*, 531 U.S. 98, 111, 113 (2000) (per curiam) (Rehnquist, C.J., concurring).

[34] *Id.* at 122.

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judicial review pursuant to Article V of the Florida Constitution, and nothing in [the Electors Clause] of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it."[35] In the end, neither side of the debate had enough for a majority.

The Supreme Court next discussed the independent state legislature theory in 2015, when it took up the question of whether a state can empower an entity other than the legislature to regulate aspects of federal elections.[36] Through a voter initiative, Arizona passed a constitutional amendment that removed redistricting authority from the state legislature and gave it to an independent commission. The Arizona legislature complained that the word "legislature" in the Elections Clause meant that only the state legislature could exercise this redistricting authority. In a 5-4 decision, the Supreme Court held that the lawmaking power includes the initiative process, and the creation of a redistricting commission through that process does not violate the clause.[37] The dissents leaned heavily on the word "legislature" in the clause and insisted it refers to the actual institution of the legislature, not the law-making process.[38]

In 2020, the Supreme Court faced the question of whether state courts can review and enjoin state election laws, as applied to federal elections, for violations of state constitutional law. While the Court did not produce any binding opinions, the justices issued a series of illuminating orders, with concurrences and dissents, showing a strongly divided Court.

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[35] *Bush v. Gore*, 531 U.S. 98, 123, 124 (per curiam) (Stevens, J., dissenting).

[36] *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).

[37] *Id.* at 824.

[38] *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) (Roberts, C.J., dissenting) (Scalia, J., dissenting) (Thomas, J., dissenting)

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The first order came out of litigation about the deadline for absentee ballots to arrive in Pennsylvania.[39] Pennsylvania has an election-day-receipt law, under which absentee ballots are timely only if they are received by election day.[40] The secretary of state asked the state high court to extend the deadline to allow the counting of ballots postmarked by election day and received within three days, because of mail delays due to the Covid-19 pandemic and cuts to the postal service.[41] The Pennsylvania Supreme Court agreed, holding that the election-day-receipt rule, as applied in the pandemic election, overly burdened voting rights protected under the "Free and Equal Elections Clause" of the Pennsylvania Constitution.[42] The Republican Party applied to the U.S. Supreme Court for an emergency stay of the Pennsylvania high court's decision.[43] It argued that the court violated the Elections Clause by departing from the ballot deadline set by the legislature. The Court issued a short order with no reasoning: the stay application was denied. Justices Thomas, Gorsuch, Alito, and Kavanaugh would have granted the application.[44] With a 4-4 split, the Pennsylvania Supreme Court's opinion remained intact. (At the time of the vote, Amy Coney Barrett had not yet replaced Ruth Bader Ginsburg.)

While the order contained no reasoning, some of the justices offered their thinking on the independent state legislature theory days later, in litigation over Wisconsin's ballot deadline. As in Pennsylvania, the question was whether Wisconsin should change from an election-day-receipt rule to a postmark rule for the election. A federal court had issued an injunction ordering the

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[39] *See, e.g.,* Richard Pildes, *The Possibility of a Blockbuster Supreme Court Decision in the PA Election Case*, Election Law Blog (Oct. 19, 2020).

[40] 25 P.S. §§ 3146.6(c), 3150.16(c).

[41] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 365–66 (Pa. 2020).

[42] *Id.* at 371.

[43] *Republican Party of Pennsylvania v. Boockvar*, 20A53 (Sup. Ct.).

[44] *Id.* at Order Denying Stay (Oct. 19, 2020).

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change, but the Seventh Circuit had stayed the injunction.[45] The Supreme Court rejected an application to reinstate the deadline extension.[46]

Chief Justice Roberts wrote separately to explain why he had voted to let the Pennsylvania Supreme Court decision stand but not the Wisconsin federal court injunction, when both involved the same question of absentee ballot deadlines. "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations . . . ."[47] This explanation suggests the Chief Justice does not subscribe to the proposition that the Elections Clause prevents state courts from reviewing state election laws for violations of state constitutional rights. But given the context, a very short statement on the Court's shadow docket in response to an emergency application, we do not have a full picture of his views.

We do know, though, that Justice Kavanaugh is a strong proponent of the independent state legislature theory. He explained why he believed the Pennsylvania court could not enjoin state election laws for violations of the state constitution: The "text of Article II means that the clearly expressed intent of the legislature must prevail and that a state court may not depart from the state election code enacted by the legislature."[48] Justice Kagan, joined by Justices Breyer and

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[45] *Democratic National Committee v. Bostelmann*, 488 F.Supp.3d 776 (W.D. Wis. 2020).

[46] *Democratic National Committee v.* Bostelmann, 977 F.3d 639 (7th Cir. 2020).

[47] *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring in the denial of application to vacate stay).

[48] *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 34 n. 1 (2020) (mem.) (Kavanaugh, J., concurring in the denial of application to vacate stay).

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Sotomayor, strongly disagreed. She criticized Kavanaugh's approach for lacking clear textual or precedential support.[49]

Ultimately, the 2020 election produced no definitive opinion on the question of whether the Elections and Electors Clauses prevent state courts from reviewing and enjoining state election laws for state constitutional violations. The Trump Campaign tried to get the Supreme Court to take up the issue, even after the 2020 election results were final, but, with no results at stake, the Court denied the petition for certiorari.[50] However, Justice Thomas and Justice Alito, joined by Justice Gorsuch, took the cert denial as an opportunity to write separately in support of the theory.[51]

To any litigant counting votes, it appears that, as of now, there are a solid four votes in favor of the theory, with Justice Barrett, who has not yet written on the theory, potentially in the position to cast the decisive vote.

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[49] *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 46 n.7 (2020) (mem.) (Kagan, J., dissenting).

[50] *Republican Party of Pennsylvania v. Degraffenreid*, No. 20-542 (Sup. Ct. Feb. 22, 2021) (order denying certiorari). On the Court's preference to leave divisive election cases for a later day, see Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 Sup. Ct. Rev. 89 (2009).

[51] *See Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732–33 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari) ("The Constitution gives to each state legislature authority to determine the 'Manner' of federal elections. Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead."); *id.* at 738 (Alito, J., dissenting from denial of certiorari). *See also Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite consideration of petition for certiorari) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.").

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C. Federal Courts under the Independent State Legislature Theory.

In unpacking the independent state legislature theory, it is important to distinguish the role envisioned for federal courts and state courts.

One question is whether federal courts can review and enjoin state legislation for violations of federal constitutional or statutory law. Michael Morley, a leading proponent of the independent state legislature theory suggests the answer is yes.[52] By granting election powers to state legislatures, the U.S. Constitution does not exempt legislatures from compliance with other federal constitutional provisions or statutory law, such as the Voting Rights Act. To hold otherwise would seriously destabilize election law. It would suggest that a host of U.S. Supreme Court cases were wrongly decided and should have been rejected on the grounds that state legislatures have unreviewable, plenary authority.[53] I have not seen any scholarly suggestion that the independent state legislature theory supports such an outcome. There does not appear to be any serious debate that federal courts can review and enjoin state election laws for federal violations.

A second question is what federal courts can do when state courts issue orders interpreting or enjoining aspects of state election laws. Here, proponents of the theory argue that federal courts have a key role: they police state courts to ensure they do not significantly depart from the exact text of what the legislature wrote. Justice Kavanaugh emphasized this role in the shadow docket in 2020, writing that federal courts should halt state court orders that enjoin or alter state election

[52] Morley, *supra* note 1 at 506-07 (stating that, when a state legislature regulates federal elections, it is bound by the federal constitution "and federal laws such as the Voting Rights Act").

[53] *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that state poll taxes violate the equal protection clause of the U.S. Constitution).

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laws because "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[54]

Kavanaugh's choice of the word "rewrite" here makes the federal courts' role seem innocuous. It portrays federal courts as faithful defenders of the law against wayward state courts seeking to rewrite the state code. However, one could just as easily, and perhaps more procedurally accurately, focus on how, under the theory, federal courts would prevent state courts from enjoining legislation that unconstitutionally burdens state voting rights. Viewed from this procedural posture, it is clear the theory is doing some serious and controversial work. It is not merely faithfully defending state laws. It is insulating them from state court review for violations of state constitutional voting rights.

Overall, the theory elevates federal courts and eliminates or severely diminishes the role of state courts.

II. The Independent State Legislature Theory Is Based on Flawed Assumptions and Design Principles.

This part unpacks the justifications that proponents of the independent state legislature theory have put forward for its utility. It shows that these justifications are undertheorized and based on flawed assumptions about legislative behavior and flawed understandings of constitutional and institutional design. The focus here is on how these justifications do little or nothing to support the proposition that state courts cannot review and enjoin aspects of state election laws for violations of state constitutional law.

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[54] *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 34 n. 1 (2020) (mem.) (Kavanaugh, J., concurring in the denial of application to vacate stay).

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A. Flexibility

One justification offered for the independent state legislature theory is that it provides flexibility by freeing state legislatures from the shackles of state constitutional constraints.[55] If legislatures are bound by rigid constitutional provisions, they will have less room to adapt to local needs or changing circumstances. The independent state legislature theory allegedly ensures that legislatures can meet "local needs and exigencies."[56] The problem with this justification is that it is based on severely flawed assumptions about legislative behavior, and it does not accurately reflect the kinds of cases where the theory comes into play.

First, legislatures are not known to be adaptive, flexible institutions. It is a basic principle of constitutional and institutional design that legislatures are prone to inertia and, even when there is movement, it can easily stall at any of the multiple veto points in the legislative process.[57] State court review of legislation can alleviate this problem.

To illustrate, consider this simple model of how flexibility is enhanced, not diminished, by allowing state court review. At Time 1, a state legislature enacts Election Rule A. At Time 2, societal circumstances change, and Election Rule A becomes more burdensome on the franchise than it was at Time 1. The chances of the legislature promptly updating the rule to adapt to the changed circumstances are low, due to legislative inertia and, perhaps, a self-interested preference for the existing rule under which they were elected to office in the first place. The chances of an

[55] Morley, *supra* note 3 at 32-33.

[56] *Id.* at 32 (citing Joseph Story, Commentaries on the Constitution of the United States § 820 (1833)).

[57] *See generally* Farber & Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873, 903-06 (1987) (discussing the structural and rule-based constraints on the legislative process); Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 Ga. L. Rev. 1193 (2021).

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updated rule increase, though, if injured actors can seek relief in state court. If the rule has become too burdensome, the court can issue an order enjoining its burdensome applications.

One comeback to this model might be that, under the theory, federal courts are still available to address changed circumstances. But, if flexibility is the goal, it is promoted by maintaining state courts as a venue along with federal courts. The more actors who have the power to update a rule, the more potential flexibility and adaptability there is in a system. Of course, there can be too much flexibility in a system. But it is not clear why elevating federal courts and diminishing state courts would produce something close to an optimal level of flexibility, and I have not seen proponents of the theory make such a claim.

The primary flaw with the flexibility justification is highlighted by looking to the cases where judges or litigants have actually invoked the independent state legislature theory in recent years. In these cases, state court review enhanced, not diminished, flexibility.

Consider *Bush v. Gore*.[58] The problem was not that the state constitution prohibited the legislature from crafting a reasonable recount process. The problem was that the process the legislature had designed might not have been up to the circumstances that arose in 2000. The Florida Supreme Court adopted a new recount process tailored to the circumstances. One can argue about whether the state high court was right doctrinally, morally, or practically. But it cannot be disputed that the state court brought flexibility to the situation.

Or consider the litigation out of Pennsylvania in 2020.[59] There was strong evidence that new delays in mail service, due to the Covid-19 pandemic and cuts to postal service, could disenfranchise voters. The U.S. Postal Service itself had written a letter alerting that there was a

[58] 531 U.S. 98 (2000) (per curiam).

[59] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

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"significant risk" that "Pennsylvania voters who submit timely ballot requests will not have sufficient time to complete and return their ballot to meet the Election Code's received-by deadline."[60] The Pennsylvania Supreme Court responded by enjoining the usual election-day-receipt rule for absentee ballots and allowing the counting of ballots postmarked by election day and received within three days. Again, one can argue about whether the state high court decision was right or wrong. But it is beyond dispute that, when faced with this new information and changed circumstances, it was the state court that showed flexibility.

Some may look at those cases and say they prove that the independent state legislature theory is needed to constrain activist state courts. That argument, though, depends on your normative priors about how active courts should be in protecting voting rights and expanding access to the ballot. It is not about flexibility. My point here is that flexibility, as a justification for the theory, does not work. Flexibility is promoted by state court judicial review, not diminished.

What about the problem of state constitutions establishing narrow, time, place, and manner mandates for elections? For example, if a state constitution banned all absentee voting, that could hamper advances in election administration through state legislation.[61] The independent state legislature theory would solve this problem by holding that the state constitution simply does not apply. However, empirically, it does not appear that this is a real problem that needs solving today. Some state constitutions contain provisions denying voting rights to certain classes of people (*e.g.*,

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[60] *Id.* at 364.

[61] *See, e.g.*, Com. ex rel. Dummit v. O'Connell, 181 S.W.2d 691 (Ky. 1944). During World War II, a Kentucky constitutional provision requiring in-person voting at a precinct seemed to disenfranchise soldiers serving overseas. The Kentucky Supreme Court upheld a statute allowing absentee voting for the soldiers, basing its analysis on the independent state legislature theory and the sanctity of the right to vote. *Id.*

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incarcerated people with felony convictions) or delegating authority over election administration to the state legislature.[62] But they generally do not get into the minutiae of election administration. By contrast, state constitutions, almost universally, have provisions expressly protecting voting rights.[63] Allowing state courts to enjoin aspects of election laws, when they would violate these provisions, promotes flexibility.

B. Political Accountability

Political accountability is, perhaps, the main justification given for the independent state legislature theory.[64] Legislators are elected and accountable to the people of a state. Allowing state courts to issue injunctions against legislated election rules undermines accountability because it empowers less accountable judicial actors, the argument goes. Justice Gorsuch made this point in 2020, writing that empowering state legislators, not judges, was a "feature to the framers" that improved accountability: "Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot."[65]

But this argument is based on a flawed understanding of comparative judicial accountability and of legislative biases. It also is undertheorized and ignores the multi-

[62] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 102 (2019) ("Some state constitutions also authorize legislatures to set out rules for registering voters or to provide for absentee balloting or early voting. Certain state constitutions deny voting rights to convicted felons or mentally incompetent persons. Finally, a few state constitutions allow the state's legislature to enact other 'necessary' voting procedures to root out fraud or protect the integrity of the election process. But at bottom, state constitutions include specific language granting voting rights to the state's citizen.").

[63] *Id.* at 104.

[64] *See* Morley, *supra* note 3 at 33.

[65] *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 29 (2020) (mem.) (Gorsuch, J., concurring).

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dimensional complexities of accountability when it comes to state election laws and judicial review.

First, the theory permits judicial review by federal courts for violations of the federal constitution, just not state court review for violations of the state constitution. If the goal is political accountability, this is exactly backwards because state judges are more politically accountable than federal judges. Federal judges have life tenure and are not subject to election. By contrast, most state judgeships are elected or subject to state retention elections.[66] There is no question that state judges are generally more accountable politically than federal judges, as measured by their exposure to public elections.[67] If the independent state legislature theory were meant to promote political accountability, it would not diminish the role of the more accountable state judges, while elevating the role of the less accountable federal judges.

Second, this political accountability logic could be used to justify no judicial review of any legislative action ever. Clearly, our constitutional system rejects that approach. We have a system where state courts are generally available to check legislative biases and ensure that state legislation meets state constitutional safeguards. Why should election rules be removed from this general feature of our system? Political accountability does not make sense as an answer here, because the biases that plague legislative processes are at least as strong, if not stronger, in the election context.

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[66] *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077, 1105 app. 2 (2007) (showing that eighty-nine percent of state appellate and general jurisdiction trial judges were selected or retained through popular election).

[67] *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L. Rev. 579, 594-95 (2005). On the costs and benefits of judicial elections, see David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265 (2008).

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Here's why. When it comes to election rules, self-interested legislators have a strong motivation to enact rules that maximize their chances of reelection. Once a rule is in place, change is unlikely and difficult, because any change requires cobbling together a majority of winning legislators willing to vote to change the rules that brought them into office in the first place. Daryl Levinson and Benjamin Sachs have examined how legislators routinely rig election rules to entrench themselves in office in anti-democratic ways.[68] One common strategy is to enact rules that make it hard for their opponents' supporters to cast ballots.[69]

Because of this anti-democratic bug in our system, many scholars have argued that courts must police election rules to prevent legislators from improperly entrenching themselves in office. Michael Klarman developed a framework for "anti-entrenchment review" of election rules. His approach is premised on the theory that judicial review of election rules should enhance democratic values of majority rule.[70] Samuel Issacharoff and Richard Pildes similarly emphasize the need for courts to guard against "political lockups," where legislators capture "the basic structures and ground rules of politics itself."[71] Under these theories, judicial review of election laws can advance accountability by scrutinizing rules that might undemocratically entrench legislators in office.

If we are willing to sacrifice some amount of political accountability by having state judges review legislation on topics as varied as property rights, free speech, and privacy, accountability

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[68] Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400 (2015).

[69] *Id.* at 414.

[70] Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997).

[71] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 648, 650 (1998).

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is not a good reason to remove election rules from the list of reviewable subjects. If anything, the risk of anti-democratic bias is higher in the election context than in other areas.

There is a third problem with the accountability justification. Political accountability dynamics in the context of elections and election law is complex. Applying the independent state legislature theory may actually end up undermining accountability by having unelected federal judges overturn decisions supported by multiple elected state officials, who might even be more accountable to the people than the state legislature.[72]

Consider the Pennsylvania case extending the absentee ballot deadline for 2020.[73] The Pennsylvania secretary of state, the chief elections officer who is elected statewide, asked the state high court to order the extension.[74] She was represented by the state attorney general, another statewide elected officeholder.[75] The Pennsylvania Supreme Court consists of seven justices, all subject to state elections.[76] If the people of Pennsylvania strongly disagreed with the extension, they could punish the two statewide officers and justices at the ballot box. But, if the U.S. Supreme Court had overturned the decision, there would have been no way for Pennsylvania voters who supported the extension to hold those justices accountable. On the whole, it is hard to see how a Supreme Court decision overturning the extension on Elections Clause grounds would have improved accountability.

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[72] *See* Seifter, *supra* note 5 at 1794-99 (describing how the prevalence of gerrymandered and minoritarian legislatures undermines the accountability justification for the independent state legislature theory).

[73] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

[74] *Id.* at 365.

[75] *Id.* at 349.

[76] Pa. Const. art. V, sec. 13.

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C. Symmetry

Symmetry has also been given as a justification for the theory.[77] Here, the argument is that Congress and state legislatures have primary power over election rules in federal elections. State courts cannot review and enjoin Congress's election rules. So, it brings symmetry to the system if state courts also cannot review and enjoin state legislatures' election rules.[78]

This is the most puzzling justification. Symmetry as a design feature has no intrinsic normative value. Symmetry itself is neither good nor bad. Our constitutional system is full of instances where there is symmetry and where there is not. For example, structurally, our three branches of government are asymmetrical – a legislature with two chambers, an executive branch with many levels of authority but with a single chief executive, and a judiciary with three levels of courts.

Even if symmetry itself were good, the independent state legislature theory creates a gross asymmetry between federal courts and state courts. Federal courts can review all manners of laws under the federal constitution, including election laws. State courts can review all manners of laws under the state constitution, but not election laws. There is no design principle on which this asymmetry is better than the asymmetry purportedly solved by the independent state legislature theory.

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[77] Morley, *supra* note 3 at 35-36.

[78] *Id.*

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D. Certainty

The final justification for the theory is certainty.[79] Certainty is an important value in the law generally, and in election law specifically.[80] However, the independent state legislature theory does not advance this value.

Morley argues that the main certainty provided by the theory is that it ensures election laws are not subject to the quirks and idiosyncrasies of state constitutional law.[81] The problem with this argument is that, while the theory eliminates any potential quirkiness from state constitutions, it helps entrench quirkiness from state legislation. If a state constitution is quirky, the theory decreases the chances of a quirky outcome by ignoring that constitution. But, if state legislation on election law is quirky, the theory increases the chances of a quirky outcome by making it harder to fix that quirk through judicial review.

The theory would improve outcomes along this dimension if state constitutions were the greater source of quirk. However, I am not aware of any evidence that quirks in state election laws are more likely to come from state constitutions than state legislation. There is at least a strong theoretical possibility that the legislature is the greater source of quirk. The legislative process, with self-interested legislators eager to craft rules that increase their reelection chances, can

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[79] Morley, *supra* note 3 at 36-37.

[80] *See, e.g.,* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 991-94 (2005) (discussing the benefits of having the election rules locked in place before voting and vote counting).

[81] Morley, *supra* note 3 at 37 ("its acts may be judged according to a uniform body of known federal constitutional standards, subject to ultimate review in the U.S. Supreme Court, rather than according to potentially esoteric, idiosyncratic, or otherwise unpredictable state constitutional restrictions").

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produce welfare-reducing abnormalities. A state constitutional process, whatever its flaws, might minimize or avoid the role of self-interested legislators.

Morley has also suggested that the theory advances certainty because actors in the federal government and other states are more likely to accept the results in a system where the theory applies: "It is far easier for the federal government—and other states—to accept legislatures' actions impacting the federal government at face value when they do not need to consider those acts' substantive validity under state constitutions."[82] Morley does not specify who these federal and out-of-state actors are. Perhaps he means the members of Congress who meet in joint session to accept the certified results of the presidential election. Regardless, this formulation of certainty rests on highly tenuous assumptions that have not borne out in real life.

This argument assumes that federal or out-of-state actors will embrace federal court review of state legislation under federal constitutional provisions, just not state court review. Looking at the real-world cases where the theory has arisen, this means these actors would have accepted the U.S. Supreme Court decision in *Bush v. Gore*, just not the Florida Supreme Court's decision. They would have accepted a decision by the U.S. Supreme Court invalidating Pennsylvania's ballot deadline order in 2020, but not the state high court's decision. On what basis would these actors make this distinction? Morley offers none.

It seems safe to assume that whether one prefers *Bush v. Gore* to the Florida high court's decision depends almost entirely on partisan identity and perhaps normative priors regarding a commitment to counting all votes. *Bush v. Gore* is one of the most contentious decisions the Court

[82] Morley, *supra* note 3 at 37.

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has issued.[83] It determined the presidential election for Bush on novel legal grounds,[84] and it was roundly decried as political hackery.[85] I have seen no evidence that relevant actors in the federal government disagreed with *Bush v. Gore* on substantive grounds but found it easier to accept because they preferred federal court intervention over state court intervention.

The same, I imagine, would have been true in 2020 for Pennsylvania. If the U.S. Supreme Court, with justices appointed by Trump, had overturned the state high court's ballot deadline at the request of the Trump Campaign, it seems safe to assume that Republicans and Trump supporters would have applauded the decision, but not Democrats. With partisanship doing most of the work there, the certainty value does not seem to be doing much of anything.

While certainty is an important value when it comes to timing in election law, the theory does not bring this kind of certainty either. When changes to election rules are made close to an election, it can cause voters confusion about when and how to cast their ballots, and it can cause administrative difficulties for the local election officials who must scramble to adopt those changes. Federal law deals with this through the *Purcell* principle, which establishes a presumption against issuing injunctions that bring last-minute changes to election laws.[86] State common law deals with this through the laches doctrine, which bars late and prejudicial challenges

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[83] *See, e.g.*, Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 Stan. L. Rev. 1 (2010); Schapiro, *supra* note 4; Strauss, *supra* note 4; Richard Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. Chi. L. Rev. 613, 620 (2001).

[84] *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 Fla. St. U. L. Rev. 377, 378, 386–88 (2001).

[85] *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 Yale L.J. 101, 102 (2001).

[86] *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

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to election laws.[87] The independent state legislature theory does not add to the work that these doctrines do on timing.

The independent state legislature theory also does not advance the related value of uniformity. Each state has its own set of election rules, and the independent state legislature theory does nothing to change that. Michael Morley suggests the theory brings certainty by creating uniformity at the judicial review level.[88] It ensures election laws are reviewed under one set of federal standards, rather than 50 different state standards. But this type of uniformity is superficial. It does not lead to a uniformity of election rules. There will always be at least 50 sets of those. It just leads to a smaller set of judges applying a smaller set of precedent to those 50 different sets of rules. The individual litigants in a particular case may or may not appreciate the narrower universe of caselaw. But the voting public will not see or experience that uniformity.

III. Situating the Independent State Legislature Theory in the Conservative Political Movement.

If the justifications for the independent state legislature theory are weak and underspecified, what explains the recent push for courts to adopt it? Political motivations explain a lot. This part situates the development of the theory within the modern conservative judicial movement. A key claim here is that justices in the early twentieth century, when the Court was less partisan, rejected aspects of the theory. Conservative justices and political actors did not start to embrace the theory until around 2000. At that point, politically conservative judges had greater control over the federal judiciary, and it was clear that adopting the theory, which empowers federal courts at the expense of state courts, would produce more conservative outcomes.

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[87] *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293 (Minn. 2008).

[88] Morley, *supra* note 3 at 37.

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In the early part of the twentieth century, until 1937, the Supreme Court was, by and large, not a partisan institution.[89] The justices typically issued short, unanimous opinions, without dissent.[90] When there was dissent, in did not fall along political party lines.[91] During this time, the justices appointed by Democratic presidents did not vote in separate blocks from the justices appointed by Republicans. While presidents may have appointed some justices to advance particular agendas, the strong and prevailing norm was nonpartisan, unanimous opinions.

This norm can be seen in the two Elections Clause cases decided in that period. In both cases, the Court unanimously rejected aspects of the independent state legislature theory. In the 1916 *Davis* case, the unanimous Court rejected the notion that, because the clause assigns power to state legislatures, it violates the Elections Clause to have the public review and reject a state law on redistricting through a public referendum.[92] In the 1932 *Smiley* case, a unanimous Court similarly rejected the notion that it violates the clause to have the governor review and reject a state law affecting federal elections.[93] After these cases, arguments based on the independent state legislature theory were largely abandoned and the theory forgotten.[94]

Fast forward several decades, past the relatively liberal Warren Court, to the Reagan administration. President Reagan made ideology the key criteria in selecting justices for the

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[89] Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 310-13 (2016).

[90] *Id.*; *see also* Cass. R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 Cornell L. Rev. 769, 773-84 (2015).

[91] *Id.*

[92] 241 U.S. 565 (1916).

[93] 285 U.S. 355 (1932).

[94] *See* Morley, *supra* note 1 at 504; Morley, *supra* note 3 at 80-81.

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Court.[95] His administration wanted to remake the Court by filling it with staunchly conservative candidates.[96] Ideology was key to Reagan's decision to nominate strong conservatives, like Antonin Scalia, and to elevate William Rehnquist to Chief Justice. For many years, Rehnquist, as justice and then chief justice, was a central player here. His disagreement with civil rights advances, and his goal of rolling back what he saw as the judicial excesses of that era and advancing conservative positions, has been well documented.[97]

Following Reagan, a conservative legal movement came to dominate judicial appointments under Republican presidents. A leading analysis found that there is a robust partisan split on the Supreme Court that has emerged in recent years and this "ideological gap between Democratic-appointed Justices and Republican-appointed Justices is largely attributable to the appointment of conservative Republican nominees."[98] Of course, the Court does not always rule in predictably conservative ways, and individual justices may depart from conservative ideology in idiosyncratic ways. However, it is clear the conservative movement has succeeded when it comes to placing nominees on the Supreme Court.

Democratic presidents have followed suit in considering ideological and political commitments among judicial nominees. But they have not been as successful in placing their nominees on the Court. Since 1980, Republican presidents have appointed ten new Justices, while Democratic presidents have named four. Since Justice Thomas's appointment in 1991, the

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[95] *See* Devins & Baum, *supra* note 89, at 338.

[96] *See* Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History 89 (Princeton 2009).

[97] *See, e.g.*, Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 Sup. Ct. Rev. 245 (1989); Bernard Schwartz, *Rehnquist, Runyon, and Jones--The Chief Justice, Civil Rights, and Stare Decisis*, 31 Tulsa L.J. 251 (1995).

[98] *See* Devins & Baum, *supra* note 89, at 306.

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Supreme Court has had a strong conservative majority, which has grown more conservative in the following decades.[99]

The success of the conservative movement in placing justices has two key effects relevant here: the Court is more likely to favor and adopt doctrines that will produce conservative outcomes, and it is more likely to embrace theories that entrench power in the conservative-controlled federal courts.[100]

The independent state legislature theory fits squarely into this development. In 2000, Chief Justice Rehnquist, in his *Bush v. Gore* concurrence, joined by two other movement conservatives, Scalia and Thomas, strongly endorsed the long-forgotten independent state legislature theory, claiming that a state court cannot review and enjoin a state election law that applies to a federal election.[101] The theory was not necessary to the outcome of that case, which was decided on equal protection grounds. So why stake out such a strong position on the theory? It seems Rehnquist understood the potential significance of the theory and was planting the seeds for its development in conservative directions.

The independent state legislature theory is not inherently conservative. It is only likely to produce conservative outcomes because of current background conditions – *i.e.*, conservative control of the federal courts. The key move here is that the theory allows conservative justices to police opinions by more liberal state high courts. When a state high court makes a voting rights decision, the conservative Supreme Court can review and reject it. The U.S. Supreme Court has

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[99] *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 Tex. L. Rev. 215 (2019).

[100] *See* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489 (2006).

[101] *Bush v. Gore*, 531 U.S. 98, 111, 113 (2000) (per curiam) (Rehnquist, C.J., concurring).

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always had the final say when state courts enforce federal rights. But the independent state legislature theory gives the Court the final say even when state courts enforce state constitutional rights. The Court can simply invoke the theory to reject the state opinions.

At its politically crudest, the theory lets conservative justices reverse any state decision on voting rights that might have the effect of favoring Democratic candidates on the ballot. One example here is again the Pennsylvania Supreme Court's 2020 decision to count ballots postmarked by election day and received within three days, instead of the usual election-day-receipt rule.[102] The court grounded its decision in the state constitution's guarantee for free and equal voting rights. The Republican Party figured the extension favored the Democrats, because they were more likely to vote by mail in 2020 and perhaps because the later ballots were especially likely to come from groups that tend to vote Democratic.[103] In a swing state like Pennsylvania, these ballots could have proven crucial. Having lost at the more liberal state court, the Republican Party asked the conservative U.S. Supreme Court to step in and stay the decision because it violated the independent state legislature theory. The Court denied the stay in a 4-4 vote, with the tie leaving the state decision intact.[104] Amy Coney Barrett was not yet on the Court to cast the deciding vote. Ultimately, the Supreme Court was one vote away from making sure that a state court could not issue a decision protecting state guarantees on voting rights in a way that might favor Democrats on the ballot.

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[102] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370-71 (Pa. 2020).

[103] *See* Adam Liptak, *Supreme Court ties gives Pennsylvania More Time to Tally Some Votes*, N.Y. Times (Oct. 19, 2020) (describing the rule as a major victory for Democrats because they had been pushing to expand access to the ballot and absentee voting).

[104] *Republican Party of Pennsylvania v. Boockvar*, 20A53, Order Denying Stay (Sup. Ct. Oct. 19, 2020).

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Despite pointing to conservative outcomes, the theory has not been fully embraced by all conservatives who have landed on the bench in the past few decades. It is possible that a conservative judge might dislike the theory because it is in tension with principles of federalism, which have often found conservative support.[105] The theory tells states that their normal constitutional processes for reviewing state laws do not apply. The early decisions on the Elections Clause – *Davis* and *Smiley* – avoided any federalism problems by finding that the state constitutional processes of public referendum and gubernatorial review do apply. Chief Justice Roberts may have been referring to this precedent, and the federalism tension, when he explained his decision to join the more liberal justices in voting to let the 2020 Pennsylvania decision stand.[106]

IV. The Independent State Legislature Theory and the Underenforcement of Voting Rights.

There is a large body of literature on the underenforcement of voting rights in federal courts. This literature has focused on the substance of election law doctrine, the political preferences of judges, and a judicial ignorance of or hostility to racial justice. The independent state legislature theory is troubling because it exacerbates the underenforcement problem. In our constitutional system, the general rule is that the federal constitution sets a floor when it comes to civil rights, and states can choose to provide greater protections through their constitutions. The independent state legislature theory effectively removes state-level protections. It leaves litigants and voters with the lower, underenforced floor set by the U.S. Supreme Court. In this way, the theory would make voting rights the least protected civil right.

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[105] *See* Earnest A. Young, *The Conservative Case for Federalism*, 74 Geo. Wash. L. Rev. 875 (2005).

[106] *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring in the denial of application to vacate stay).

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A. Theories on the Underenforcement of Voting Rights in Federal Court.

This section sketches the doctrinal, political, and racial reasons that scholars have advanced to describe and explain the underenforcement of voting rights in federal courts.

Doctrinally, scholars have given at least three reasons whey federal voting rights law has developed in ways that provide less than ideal protection.

First, the U.S. Constitution does not contain an express provision on voting rights.[107] In federal voting rights cases, the claims are typically grounded in the Equal Protection Clause or the Voting Rights Act. Under the Warren Court, the Supreme Court applied equal protection principles to eliminate some barriers to voting, such as barring poll taxes and establishing the principle of one person, one vote.[108] However, the lack of a straightforward federal right skews the legal analysis.[109] It can lead to an underenforcement of rights because the courts reason "backwards and upside-down . . . rather than forward and ground-up from the essential political rights of the citizen."[110]

Second, while voting is a fundamental right, the federal courts rarely apply strict scrutiny in voting rights cases. They typically apply a balancing test that balances the state interest in the

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[107] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982).

[108] *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

[109] *Cf.* Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. Rev. 1345, 1346 (2001) ("The Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted.").

[110] Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 Election L.J. 559 (2004). *See also see also* e Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. Pa. L. Rev. 503 (2004) (describing how voting cases involve structural harms and political process claims that the Court lacks a sound framework to adjudicate).

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election regulation against the burdens on the right to vote.[111] One problem with this standard is how courts require hard evidence from plaintiffs but accept ad hoc justifications from the state. States can point to justifications, such as voter fraud, without providing hard evidence that those problems are real, while plaintiffs can only make their case with hard evidence that the statute imposes a heavy burden on them.[112] This stacks the scales against the voting rights litigants.

Third, federal law can be read to favor as-applied election law challenges over facial challenges, which limits the scope of relief even when a plaintiff can come forward with enough evidence to make their case.[113] In *Crawford v. Marion*,[114] the Supreme Court acknowledged that requiring a voter to present photo identification at the polls could, in some context, violate equal protection principles. However, such a challenge would likely be "as applied." This means that voters would have to show the comparative burdens were too great in their specific cases, and any relief they obtained would be limited to them, without statewide effect.[115]

Politically, voting rights are underenforced because of some judges' partisan motivations. One theory of judicial decision-making in election law cases is that judges will make decisions that bolster the electoral prospects of their political party.[116] *Bush v. Gore* is an oft-cited example of justices casting votes along party lines to decide the outcome of an election. Empirical studies, though, go far beyond this anecdotal example to support this theory of judicial decision-making.

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[111] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

[112] *See* Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 101 (2009).

[113] *See* Joshua A. Douglas, The Significance of the Shift Toward As-Applied Challenges in Election Law, 37 Hofstra L. Rev. 635 (2009).

[114] 553 U.S. 181 (2008).

[115] *See* Hasen, *supra* note 112, at 101.

[116] *See, e.g.*, Michael S. Kang & Joanna Shepherd, *The Long Shadow of* Bush v. Gore: *Judicial Partisanship in Election Cases*, 68 Stan. L. Rev. 1411, 1413 (2016).

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Consider Adam Cox and Thomas Miles's study of federal appellate decisions on section 2 of the Voting Rights Act, under which federal judges decide whether a jurisdiction has engaged in discriminatory vote dilution based on race.[117] If a court finds liability, it typically requires changes to the dilutive voting standard or practice in ways that increase participation opportunities for racial minorities, which historically has benefited Democratic candidates. Cox and Miles found that the likelihood that a federal judge will vote for the plaintiff in a section 2 case is highly correlated with the partisanship of the president who nominated the judge.[118] Democratic appointees are significantly more likely than Republican appointees to vote for the plaintiff.

Michael Kang and Joanna Shepherd conducted a study designed to minimize the effects of ideology and focus as strongly as possible on partisan loyalty from judges.[119] They looked at state court judges deciding candidate-litigated election disputes. They found that Republican judges are more likely to favor their own party in election cases by a statistically significant margin, regardless of whether the judges are elected or appointed.[120] The effect was not as strong for Democratic judges. If Republican federal judges are similarly likely to make decisions that bolster Republican electoral chances, these judges will prove hostile to requests to expand access to the ballot or increase the voting power for non-white voters, because these decisions would likely have the effect of helping Democratic candidates.

Third, voting rights are underenforced from a racial justice perspective because conservative justices have discounted the racial bias that still plagues the system and elevated other concerns over anti-discrimination principles in voting rights cases.

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[117] Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008).

[118] *Id.*

[119] Kang and Shepherd, *supra* note 116.

[120] *Id.*

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The *Shelby County*[121] opinion, striking down section 5 of the Voting Rights Act, is a key example of this problem. Section 5 gave the Department of Justice authority to review and "preclear" all new rules created by jurisdictions with a history of voter suppression.[122] The Department could block the rules that would have discriminatory effects. For decades, section 5 eliminated voting laws that would have reduced voting opportunities for non-white citizens.[123] In 2013, though, the Court struck down section 5.[124] The Court based its decision on the need to preserve the "integrity, dignity, and residual sovereignty of the States."[125] Scholars have pointed out how the opinion weighed this vague and contested notion of state dignity over racial justice. As Darren Lenard Hutchinson put it: "The Court effectively extended solicitude to covered states to protect their dignity against the intrusion of a racial-justice statute."[126] The Court "elevate[d] this concept over the protections of persons of color from racial subordination."[127]

The 2021 *Brnovich* decision,[128] another Voting Rights Act case, is a second example. Section 2 allows plaintiffs to sue to challenge standards, practices, or procedures that minimize or cancel out the voting strength of minority groups.[129] The *Brnovich* Court laid out a series of

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[121] *Shelby County v. Holder*, 570 U.S. 529 (2013).

[122] *See* 52 U. S. C. §§10304(a)–(b).

[123] *See* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1 (2007).

[124] *Shelby County v. Holder*, 570 U.S. 529 (2013).

[125] *Id.*

[126] Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 Fla. L. Rev. 1, 37 (2017).

[127] *Id.*; *see also* Joseph Fishkin, *The Dignity of the South*, 123 Yale L.J.F. 175, 192 (2013).

[128] *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (2021).

[129] *See See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 471 (2015).

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principles that make it harder for a section 2 plaintiff to make their case.[130] Justice Kagan's dissent was powerful and explicitly called out the racial implications of another conservative majority gutting another section of the Voting Rights Act: "By declaring some racially discriminatory burdens inconsequential, and by refusing to subject asserted state interests to serious means-end scrutiny, the majority enables voting discrimination."[131]

B. The Independent State Legislature Theory Would Leave Voting Rights Without Dual Constitutional Protections.

Decades ago, Justice William Brennan observed that the "strength of our system is that it provides a double source of protection for the rights of our citizens."[132] While federal law sets a floor below which states cannot go, states are free to provide a level of civil rights protections that go beyond federal protections.[133] When federal courts underenforce a civil right, state courts can construe their constitutions to fill in the gap and provide the missing protections.

For voting rights, some have pointed to the dual protections of our federal system as a possible corrective to the underenforcement problem in federal courts. They have explicitly called on states to construe their constitutions as providing greater protections than federal law. Joshua Douglas has written a leading article on this point, arguing: "A renewed focus on the power of state constitutions provides the answer for how best to protect the fundamental right to vote."[134]

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[130] *Brnovich*, 141 S.Ct. at 2337-2343.

[131] *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2366 (2021) (Kagan, J., dissenting).

[132] William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 552 (1986).

[133] *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80-81 (1980); *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

[134] Douglas, *supra* note 134, at 105.

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Unlike the federal constitution, nearly all state constitutions have provisions guaranteeing voting rights. This gives state courts an express constitutional hook to depart from federal precedent and hold that state constitutional law provides greater voting rights protections. Some states have taken this approach or at least appeared open to it. The Missouri Supreme Court, for example, has concluded: "Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart."[135] Meanwhile, the Minnesota Supreme Court, has been careful to acknowledge that, under particular "facts and circumstances, a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution."[136]

All of this is normal, uncontroversial federalism 101 stuff. However, the independent state legislature theory would create a major crack in these bedrock principles. If the Supreme Court were to adopt the theory, state constitutional voting rights protections would crumble. A key tenet of the theory is that state constitutions cannot limit what state legislatures enact under the Elections and Electors Clause. The removal of state constitutional protections is baked into the theory. The Supreme Court could issue a series of decisions rolling back or underenforcing voting rights, while simultaneously ensuring that state constitutions could not provide backup protections.[137]

The independent state legislature theory would create a system where voting rights are the only civil rights that do not have the double protections of federal and state constitutional law.

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[135] *Weinschenk v. State*, 203 S.W.3d 201, 212 (2006).

[136] *Kahn v. Griffin*, 701 N.W.2d 815, 834 (2005).

[137] *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill of Rights J. (forthcoming) ("the independent state legislature doctrine also makes little sense, in part because it removes the vital and more robust protection that state constitutions give to the right to vote").

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Pause there for a moment. The fundamental right to vote would, in this way, be the least protected civil right. That is the extraordinary danger of the independent state legislature theory.

This is not just a theoretical danger. Voting rights groups, aware of the underenforcement problem in federal courts and the possibility that state constitutions can provide greater protections, often select state courts as their forum. For example, in Minnesota in 2020, the NAACP and ACLU brought a lawsuit to protect voting rights and expand access to the ballot in state court, claiming violations of the state constitution,[138] which the Minnesota Supreme Court has recognized can provide greater protections than the federal constitution on voting.[139] The independent state legislature theory, though, would force them to litigate under the less-protective federal constitution and subject to review by the more conservative federal judiciary.

Proponents of the theory might argue that, under the theory, state constitutional protections would still exist, but just for state elections. There are a couple reasons why this would not bring much solace. First, the theory would erode voting rights protections for the important elections of president, U.S. Senate, and Congress. In many elections, the most important races would be the ones with the least civil rights protections.

Second, as a practical matter, federal and state elections are held on the same day and the candidates typically appear on the same ballot.[140] State laws setting the rules for elections apply generally to both state and federal races. It would prove difficult, and sometimes impossible, to provide a meaningful remedy that applied to state races but not federal ones.

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[138] *NAACP v. Simon*, 62-CV-20-3625 (Minn. Dist. Ct., 2nd Jud. Dist. 2020).

[139] *Kahn v. Griffin*, 701 N.W.2d 815, 834 (2005).

[140] These ballots may also cover lower-level local elections. *See* Christopher R. Berry & Jacob Gersen, *The Timing of Elections*, 77 U. Chi. Law Rev. 37 (2010).

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Consider witness requirements for absentee voting. In a few of the eleven or so states that require a witness to certify an absentee voter's ballot, there has been litigation over the constitutionality of the witness requirement, given the burdens it places on older voters who live alone, or college students living out of state, and its limited effectiveness in preventing fraud.[141] If a state court held that the witness requirement violated the state constitution and enjoined its application for state races, how much good would that do if the voter still needed a witness to fill out the ballot bubbles for president and Congress? Or consider voter ID cases. If a state court enjoined application of a voter ID law for state races, how could election officials ensure that a voter without a required ID only voted for the state offices once they entered the precinct? Overall, the election administration costs of maintaining two sets of ballots and two sets of rules for casting and counting those ballots (one for state races and the other for federal) would be severe.

CONCLUSION

The removal of state-level constitutional protections for a civil right should not happen lightly. The justifications for this kind of drastic move should be fully formed, compelling, and well supported. The independent state legislature theory would effectively eliminate state-level constitutional protections for voting rights. However, the justifications for the theory are undertheorized, flawed, and unsupported. The theory cannot do the work that should be required before gutting a civil right as important and fundamental as voting. The key aim of this Article is to expose the independent state legislature theory as highly contested, severely flawed, and dangerous.

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[141] *See, e.g., Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020); *League of Women Voters v. Va. State Bd. of Elections*, 458 F.Supp.3d 442 & 454 n.13 (W.D. Va. 2020).

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Essay
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THE ELECTORS CLAUSE AND THE GOVERNOR'S VETO

This Essay examines whether the United States Constitution allows a governor to veto a state legislature's bill governing presidential elections. The Constitution does not support this seemingly intuitive proposition directly, and on its face appears to vest control over presidential elections solely in the hands of state legislatures: while Article II of the Constitution explicitly provides for the "Legislature" of each state to control the "manner" in which electors are chosen, it makes no mention of state governors. This vagary in the Constitution's text takes on particular import in light of political polarization over election administration in recent years. Moreover, the COVID-19 pandemic has prompted numerous states to make emergency modifications to their election systems, including delaying elections or attempting to cancel marginally competitive presidential primaries. Commentators have even expressed fear that a state legislature may eventually attempt to exercise its plenary authority to determine how presidential electors are appointed under Article II, Section 1 of the Constitution to choose electors without holding a popular vote. This Essay answers these concerns by arguing that a state governor can veto state legislatures' bills governing presidential elections on the same terms as any other legislation. Although the Constitution may not explicitly provide for a state governor's role, the Supreme Court's precedents and longstanding practice strongly suggest that a state governor has the same powers over bills governing presidential elections as over other state legislation. This conclusion has further implications for other potential conflicts between state legislatures and governors over presidential elections, including rules for absentee balloting, awarding electors by ***58** *congressional district, using ranked-choice voting, or entering the National Popular Vote Interstate Compact.*

INTRODUCTION

In an environment where election administration is politically polarized, it is increasingly likely that disputes will pit state legislatures against state governors. Indeed, given the changes and controversies over voting prompted by the coronavirus pandemic, many commentators have recently expressed concern that a state legislature might attempt to assign a state's presidential electors directly, even when such a step would certainly be vetoed by the governor. [1] These disputes could arise if a state's legislature passed and its governor vetoed a bill assigning the state's electors by congressional district (as in Nebraska and Maine), [2] choosing electors via ranked-choice voting, [3] or joining a compact assigning the state's electoral votes to the national popular vote winner. [4]

***59** Intense battles between state government branches are familiar in only slightly different contexts. In just the past two years, state high courts in North Carolina and Wisconsin have resolved partisan disputes between state executives and legislatures over powers including appointments and litigation authority. [5] And despite commentators' fear that legislators might try to assign electors for partisan reasons, [6] such a decision could be taken in plausibly good faith: the coronavirus pandemic has already prompted numerous states to change primary election dates, and led New York to try to cancel its marginally contested presidential primary. [7]

Although the gubernatorial veto is intuitive and familiar, the Constitution at first blush appears to favor state legislatures. Article II of the Constitution provides that a state's presidential electors are appointed "in such Manner as the Legislature thereof may direct." [8] It is settled that Article II does not require states to hold popular elections for president, [9] and the Constitution's plain text does not mention any role for a state governor's approval or veto in determining whether or how a state chooses its presidential electors via popular vote.

This Essay argues that despite the Constitution's committing the appointment of electors to "the Legislature," a state governor's veto can, constitutionally, stop a state legislature from acting alone to govern how a state assigns or chooses that state's electors. Part I offers an overview of Article II, Section 1's text, and the basis on which a legislature might claim the authority to direct the selection of a state's electors over a governor's veto. Part II contends that current Supreme Court precedent does not grant legislatures any power to override a governor's veto they would not otherwise have under state law--both because of how the Court defines "legislature," and because of how the Court understands a legislature to act. Part III argues that affording legislatures an unusually privileged role in assigning electors would be inconsistent with ***60** states' longstanding practice since the Founding, and would create substantial doubt about states' modern legal regimes for conducting presidential elections.

I

Both the Constitution's text and subsequent interpretation give state legislatures a significant role in choosing the President. American presidential elections' current structure rests on how legislatures have exercised this authority, as well as on certain federal statutes governing the transmittal and tabulation of electoral votes. [10]

Presidential elections depend on the Electoral College. [11] While the Constitution helps clarify the Electoral College's powers and organization, the document says little on how electors are chosen. Article II, Section I allows Congress to set when states choose electors, and at Clause 2 (the "Electors Clause"), provides that "Each State shall appoint" its electors "in such Manner as the Legislature thereof may direct." [12] Beyond some explicit caveats about who may serve as an elector, the Constitution's text provides no further guidance. [13]

The Supreme Court has repeatedly emphasized that this scheme gives state legislatures broad authority. The Court first recognized state legislatures' "plenary power" to determine the appointment of electors in the 1892 case *McPherson v. Blacker*, [14] and famously did so again in the *Bush v. Gore* litigation arising from the 2000 presidential election. [15] The Court very recently reaffirmed this understanding when it upheld "faithless elector" statutes in *Chiafalo v. Washington*, citing *McPherson* and noting that the Electors Clause grants states "far-reaching authority over presidential electors." [16]

***61** Of course, as the Supreme Court also recognized in *Bush v. Gore*, "[h]istory has now favored the voter." [17] States have, through their legislatures, universally provided for the popular election of presidential electors, enacting statutory schemes governing presidential elections. [18] And in every state, the ordinary legislative process subjects legislation to gubernatorial approval or veto before becoming law. [19] So while the Constitution has vested a great deal of authority in state legislatures, legislatures have in turn vested that authority with their states' publics.

But given politics, pandemic, or disaster, a legislature might try taking back or reallocating that authority. [20] Because extant statutes prescribe how to hold a presidential election, the legislature would need to pass a bill repealing those statutes and implementing its new preferences. And typically, such a bill would need the governor's approval to become law.

Here, however, legislators would have a straightforward argument from the text of the Constitution that the bill would become law immediately upon passage by the legislature. The Electors Clause prescribes that the state "Legislature" shall direct the appointment of presidential electors and does not mention a state's governor or any other body. The Supreme Court has reinforced this apparent autonomy by emphasizing a state legislature's plenary ability to direct the appointment of electors, and has gone so far as to suggest that state laws ***62** governing presidential elections are made under federal constitutional authority above state constitutional law. [21] Accordingly, the legislature could argue, all it needed to do to make new law was have each legislative chamber pass the bill, with no need for any other government actor to be involved. This is the argument that has prompted

concern that state legislatures could attempt to assign a state's electors without holding an election, even over a governor's veto. [22]

It is true that a state legislature might face certain other difficulties in enacting such a plan. Setting aside whether such a bill would be politically unpopular, Edward Foley points out a legislature may not legally be able to pass a bill purporting to choose electors *after* election day, when a state's voters have already done so. [23] Similarly, both Foley and Jason Harrow have argued that 3 U.S.C. § 15, which governs Congress's electoral vote tabulation, resolves disputes between otherwise valid elector slates in favor of the slate a state's governor certifies. [24] All the same, if a legislature can ensure that it acts before the election to attempt to assign electors, there is no guarantee that a dispute between a legislature and governor would ultimately result in competing electoral slates requiring 3 U.S.C. § 15's resolution, [25] and 3 U.S.C. § 15 is itself open to ***63** multiple interpretations. [26] Therefore, a dispute between a legislature and governor would likely still require determining the constitutional effect of the governor's veto. [27]

II

Fortunately, a governor's veto remains a constitutionally valid check on a legislature's ability to assign electors in light of Supreme Court case law defining the meaning of a "legislature," as well as precedents suggesting the necessary conditions for a state legislature to have made law.

i. Recent case law from the Supreme Court suggests that "Legislature" as defined in the Constitution extends beyond the institutional body of a state's legislative houses. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Arizona's House and Senate challenged as unconstitutional a ballot initiative placing the boundaries of Arizona's congressional districts in a nonpartisan commission's hands, leaving the Arizona House and Arizona Senate with no say in the congressional redistricting process. [28] The legislators argued that the initiative and commission violated Article I, Section 4 of the Constitution (the "Elections Clause"), which provides that the "Times, Places and Manner" of Congressional elections "shall be prescribed in each State by the Legislature thereof." [29]

The Court held that "Legislature" within the meaning of the Elections Clause referred to a state's legislative power, rather than the institutional chambers of a state legislature. [30] The Court distinguished the Elections Clause as referring to a legislature's lawmaking functions--"to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto"--rather than the ratifying role legislatures play with respect to ***64** constitutional amendments. [31]

Under this precedent, the same result is likely true for the meaning of "Legislature" within the Electors Clause. Chief Justice Roberts's dissenting opinion in *Arizona State Legislature* compares the two clauses directly. [32] Observers of the Supreme Court's election law jurisprudence have noted the parallels between each provision. [33] And although no extensive case law considers the definition of "Legislature" within the Electors Clause *per se*, the two provisions have close textual similarities, with the Elections Clause providing that legislatures shall "prescribe[]" the "Manner" of electing members of Congress, and the Electors Clause providing that legislatures may "direct" the "manner" in which electors are appointed. [34] As a result, just as the Court in *Arizona State Legislature* concluded that the Elections Clause governs a legislative function, so too does the Electors Clause.

ii. Admittedly, *Arizona State Legislature* may not be long for this world. But even if the Supreme Court were to revisit its decision, the remainder of the Supreme Court's Elections Clause jurisprudence makes it unlikely it would do so in a way that unsettles the role of a governor's veto.

It is true that the Supreme Court's composition has changed meaningfully since *Arizona State Legislature* was decided: Justice Ginsburg wrote for a five-Justice majority that included herself, Justice Kennedy, and Justices Breyer, Sotomayor, and Kagan. [35] Chief Justice Roberts led the ***65** dissenters. [36] Justices Kennedy and Ginsburg have since left the Court, and although Chief Justice Roberts's subsequent opinion in *Rucho v. Common Cause* suggested state redistricting commissions as a tool to curb partisan gerrymandering, the Chief Justice indicated that the majority "express [ed] no view on any of these pending proposals." [37] Accordingly, there may be five votes to revisit *Arizona State Legislature*'s conclusion. [38]

All the same, even without the Court's *Arizona State Legislature* holding, case law still suggests a governor's veto would still constrain a legislature's ability to "direct" the appointment of electors. [39] Most significant is the Supreme Court's 1932 decision in *Smiley v. Holm*, a case which addressed a governor's veto power over a state legislature's redistricting plan under the Elections Clause. [40] The *Smiley* Court held there to be "nothing in Article 1, [S]ection 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." [41]

Neither the *Arizona State Legislature* majority nor dissenters expressed interest in overturning *Smiley*. [42] Although the majority understood *Smiley* to support a functional view of what constitutes a legislature, the Chief Justice's dissent read the case differently--supporting *Smiley*'s ultimate conclusion as "true, so far as it goes," but understanding *Smiley* to "allow[] a State to *supplement* the legislature's role in the legislative process," rather than "permitting the State to *supplant* the legislature altogether." [43] Thus, so long as the parallels between the Elections and Electors Clauses hold, both opinions in *Arizona State* ***66** *Legislature* confirm what *Smiley* suggests: that a governor's veto is a permissible constraint on a state legislature, even when only the word "legislature" appears in the Constitution itself. [44]

Chief Justice Roberts's *Arizona State Legislature* dissent also offers an intratextual analysis that provides additional support for this result. The Chief Justice argues for an institutional view of state legislatures under the Elections Clause by discussing several constitutional provisions that reference a legislature on an institutional rather than functional basis. [45] Under that reasoning, just as significant is how the Constitution treats the relationship between the federal legislature and the federal executive veto power. The Constitution sets out the President's veto power entirely within Article I, Section 7, which prescribes how bills from Congress become law. [46] At the same time, the Constitution's text sets forth what "Congress may" do on seven different occasions, [47] and what "Congress shall" do on five. [48] None of these grants of congressional power--which include the creation of lower courts, [49] the power to dispose of federal property, [50] and all the powers contained in Article I, Section 8 [51] -- contain any proviso for the President's signature or veto. Rather, the President's veto power is part of how Congress makes any sort of law. [52] ***67** Hence, an intratextual reading of the Constitution--one that "urges a reader interpreting 'a contested word or phrase that appears in the Constitution' to consider its meaning as it appears in other passages"-- suggests that in omitting any mention of a state executive in the text of the Electors Clause, the Framers did not mean to proscribe a state executive role. [53] Accordingly, a governor's signature is simply a condition for the legislature to "prescribe" or "direct" in the same way as the President's signature is a condition for an act of Congress to take effect.

As such, both the Constitution's structure and the Supreme Court's precedents interpreting the document favor subjecting a state legislature's bill directing the appointment of electors to a governor's signature or veto. This is fortunate, because so too does states' longstanding practice.

III

Subjecting legislative directives on appointing electors to gubernatorial presentment is consistent with centuries of states' practice and could create significant legal confusion if abrogated.

Executive vetoes over state legislatures were rare at the Constitution's creation. Only two states--Massachusetts and New York--had implemented vetoes by the time of the 1788-89 presidential election. [54] How the 1789 election unfolded in those states is telling. In Massachusetts, the legislature ***68** provided for a procedure that saw voters in several districts nominate electors, with the legislature naming one of each of the top two vote-getters from each district as a member of Massachusetts's electoral college. [55] Once the legislature had devised this method, Governor Hancock approved the measure with his signature, and it became law. [56] Similarly, New York required that bills pass not only the houses of the state legislature, but also a Council of Revision that included the Governor, the Chancellor, and justices of the Supreme Court of Judicature. [57] New York did not participate in the first presidential election because its legislature could not agree on how to choose electors. [58] The New York Assembly and Senate did, however, agree on a bill under the Elections Clause governing the election of New York's Representatives. [59] That bill went before the Council of Revision, which approved the bill and allowed it to become law. [60] So

in light of the similarities between the Elections Clause and Electors Clause, both states' practices at the time of the Constitution and immediately afterwards suggests a similar understanding that a state legislature's setting procedures for federal elections remained subject to gubernatorial approval.

This practice has continued into the present. Governors vetoed legislation concerning presidential election administration in the early 20th Century, [61] and both Maine and Nebraska lawmakers treated explicit or implicit gubernatorial approval as necessary for the bills allocating their states' electoral votes on a district-by-district rather than winner-take-all basis. [62] More recently still, legislators in California and Hawaii voted multiple times to join the National ***69** Popular Vote Interstate Compact-- which would under certain conditions award their states' electoral votes to the national popular vote winner. [63] Each state's governor vetoed the legislature's initial bill, and rather than treat the veto as ineffective, Hawaiian legislators eventually overrode the governor's veto, while Californian legislators passed a bill that a new governor signed. [64]

The long history of gubernatorial approvals and vetoes over state legislatures' bills suggests that that governors' roles are legally sanctioned as, if nothing else, a matter of established practice rising to the level of constitutional interpretation. [65] But so too does what Justice Kavanaugh labeled during *Chiafalo*'s oral argument "the 'avoid chaos' principle of judging." [66]

If gubernatorial vetoes over laws that regulate presidential elections became legal nullities, significant confusion would ensue. In 2019, for example, the Nevada legislature passed a bill to join the National Popular Vote Interstate Compact which the governor vetoed. [67] Would nullifying governors' vetoes mean that Nevada had, in fact, joined the compact already? That same year, the Maine's governor allowed a bill to become law that implemented ranked-choice voting for the general presidential election, but held onto the bill long enough that it would not be effective for Maine's presidential primary. [68] If the ***70** bill had never needed the governor's approval, voters and candidates might be forced to litigate whether legislature's directives under the Electors Clause apply to primary as well as general elections, [69] let alone which procedure the secretary of state should use to tabulate votes. Nor does the potential confusion end there. Questions would arise over old and forgotten bills that governors had long ago vetoed, as well as whether vetoed bills purporting to govern all elections would, in fact, govern the conduct of presidential races.

This is not to say that states cannot modify how they choose presidential electors. Indeed, should a governor agree with his or her state legislature that a new wave of coronavirus infections--or any other crisis--was reason enough to cancel a popular vote for presidential electors, he or she would be fully able to sign into law a bill doing so. But there is no reason to think that a governor holds anything less than his or her ordinary powers of office when it comes to a legislature's attempts to choose electors.

CONCLUSION

In an environment where partisanship runs high, trust in institutions runs low, and election administration is politicized, the fear that institutions will attempt to exercise their full constitutional authority to work radical changes in democratic practices is understandable. At the same time, it is important to understand where that authority's limits lie. So, while the coronavirus may be the electoral challenge of the present and there will surely be future crises to pose challenges, we can nonetheless rest easy that state constitutional checks and balances remain in place.

Footnotes

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1 *See* Jerry H. Goldfeder, *2020 Election Sidebar: No Voters Need Apply*, N.Y.L.J. (May 22, 2020), https://www.law.com/newyorklawjournal/2020/05/22/2020-election-sidebar-no-voters-need-apply/ (reprinted at https://www.stroock.com/uploads/JerryGoldfederElectionSidebar2-0526.pdf) [https://perma.cc/V82A-MM9E] ("If these states decided to re-write their laws to allow the legislature to directly choose electors, they could

simply hand the election to Trump."); Jeffrey Davis, *How Donald Trump Could Steal the Election*, THE ATLANTIC (Mar. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-election/608989/?fbclid=IwAR2MHgWwEQm369pyqy4ZB8naYbDgzyqdg4CLC_xLQUPEDuUg0Bgf-qA-oFg [https://perma.cc/3R9E-U46T] ("If Trump were to ask states to appoint electors instead of having an election, they certainly might follow his request .... If only a few states allowed their legislators to appoint electors, or postponed electoral selection indefinitely, the November election could result in no candidate receiving a majority of electoral-college votes."); Mark Joseph Stern, *Trump Can't Cancel the Election. But States Could Do It for Him*, SLATE (Mar. 13, 2020), https://slate.com/news-and-politics/2020/03/trump-cancel-election-day-constitution-state-electors-coronavirus.html [https://perma.cc/LUM6-7P9U] ("Put simply, it is perfectly constitutional for a state legislature to scrap statewide elections for president and appoint electors itself."); Mark Joseph Stern (@mjs_DC), TWITTER (July 30, 2020, 9:23 AM), https://twitter.com/mjs_DC/status/1288827480313335809 [https://perma.cc/NDL3-QXWD] ("I expect the GOP-controlled legislatures in MI, PA, and WI to declare Trump the winner and assign their electoral votes to him.").

2 *See* J. Miles Coleman, *The Electoral College: Maine and Nebraska's Crucial Battleground Votes*, U. VA. CTR. FOR POL. (Jan. 9, 2020), https://centerforpolitics.org/crystalball/articles/the-electoral-college-maine-and-nebraskas-crucial-battleground-votes/ [https://perma.cc/PV97-YZ6Q].

3 *See* Scott Thistle, *Maine Secretary of State Rejects Petition to Repeal Ranked-Choice Voting*, PORTLAND PRESS HERALD (July 16, 2020), https://www.pressherald.com/2020/07/15/maine-secretary-of-state-rejects-ranked-choice-voting-repeal-effort/ [https://perma.cc/J4Z7-S42R].

4 *See infra* notes 67-69 and accompanying text.

5 *See* Cooper v. Berger, 822 S.E.2d 286, 290 (N.C. 2018) (upholding legislature's restrictions on governor's appointments); League of Women Voters of Wis. v. Evers, 929 N.W.2d 209, 213 (Wis. 2019) (upholding special legislative session limiting governor's powers).

6 *See* Goldfeder, *supra* note 1; Davis, *supra* note 1; Stern, *supra* note 1.

7 *See* Yang v. Kosinski, 960 F.3d 119, 124-25 (2d Cir. 2020) (describing legislation and executive authority attempting to cancel presidential primary vote); *2020 State Primary Election Dates*, NAT'L CONF. ST. LEGIS. (May 19, 2020), https://www.ncsl.org/research/elections-and-campaigns/2020-state-primary-election-dates.aspx [https://perma.cc/UFY6-E8JX].

8 U.S. CONST. art. II, §1, cl. 2 (emphasis added).

9 Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

10 *See generally, e.g.*, 3 U.S.C. §§ 1-18 (governing procedures for choosing electors and tabulating electoral votes).

11 U.S. CONST. amend. XII.

12 U.S. CONST. art. II, §1, cl. 2.

13 *Id.*

14 146 U.S. 1, 35 (1892).

15 531 U.S. 98, 104-05 (2000) (per curiam).

16 No. 19-465, slip op. at 1-2, 9 (U.S. July 6, 2020); *see also* Colo. Dep't of State v. Baca, No. 19-518, slip op. at 1 (U.S. July 6, 2020) (per curiam) (same). Interestingly, the Supreme Court's opinion avoids citing *Bush v. Gore*, despite *Bush v. Gore*'s holding being directly apposite. *See* Rick Hasen (@rickhasen), TWITTER (July 6, 2020, 10:27 AM), https://twitter.com/rickhasen/status/1280146453436829696 [https://perma.cc/M82C-YDTG] ("Setting a near perfect record at the Supreme Court ... the Court has managed to avoid citing *Bush v. Gore* on an issue where that case was EXACTLY on point"). The Court's opinion also consistently refers to "States" as the authority governing electors, rather than "legislatures." *See, e.g.*, *Chiafalo*, No. 19-465, slip. op. at 9-10. Whether this is an intentional maneuver to downplay the role of state legislatures relative to a state's broader constitutional structure is not immediately clear and beyond the scope of this Essay.

17 531 U.S. at 104.

18 *See, e.g.*, MICH. COMP. LAWS § 168.42 (2020) ("The candidates for electors of president and vice-president who shall be considered elected are those whose names have been certified to the secretary of state by that political party receiving the greatest number of votes for those offices at the next November election."); WIS. STAT. § 8.25 (2020) ("By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress.").

19 *Governors' Powers & Authority*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governors/powers-and-authority/ (last visited July 3, 2020) [https://perma.cc/HZ2Y-EKQJ]. Some governors' vetoes are more powerful than others. States typically follow the federal model and require a two-thirds vote of the state legislature to override a veto, but some states require only simple majorities or smaller supermajorities. *See* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2019 at 110 tbl. 4.4 (2019), http://knowledgecenter.csg.org/kc/system/files/4.4.2019.pdf [https://perma.cc/RJU7-JF47]. Alaska uniquely has a three-fourths override requirement. *Id.*

20 *See* Goldfeder, *supra* note 1; Davis, *supra* note 1; Stern, *supra* note 1.

21 *See* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76-77 (2000) (per curiam) (noting that "in the case of a law enacted by a state legislature applicable ... to the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2 of the Constitution," and remanding to consider whether "the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"). Justice Rehnquist's concurrence in Bush v. Gore would make this principle even more explicit: "[I]n ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them." 531 U.S. at 112 (citation omitted).

22 *See* Goldfeder, *supra* note 1; Davis, *supra* note 1; Stern, *supra* note 1.

23 *See* Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 319 (2019).

24 *See id.* at 330-31; Jason Harrow, *Red State Legislatures Cannot Cancel the Upcoming Presidential Election*, TAKE CARE (Mar. 17, 2020), https://takecareblog.com/blog/red-state-legislatures-cannot-cancel-the-upcoming-presidential-election [https://perma.cc/J8WP-D43C].

25 3 U.S.C. § 15's gubernatorial tiebreaker applies when the Senate and House of Representatives disagree over which of two slates of electors should be counted. There are many reasons why a dispute between a state legislature and a governor may not progress this far. For instance, both the legislature and governor may try to litigate their dispute to a resolution before any election. Alternatively, a governor may choose not to certify a competing slate of electors for fear of further contentiousness, or the House and Senate might reach an agreement over which slate's votes to count.

26 *See* Foley, *supra* note 23, at 331-32.

27 This Essay addresses the role of the gubernatorial veto as a constitutional legal question. The Constitution and U.S. Code, however, give political actors like the Senate and governors a role in tabulating electoral votes and certifying electoral slates. *See, e.g.*, U.S. CONST. amend. XII. Although these actors may be motivated by political considerations beyond the legal issues a court would consider, this Essay presumes that a legal assessment of the constitutionality of a gubernatorial veto would also be a relevant consideration for the political branches of government.

28 576 U.S. 787, 796-800 (2015).

29 *Id.* at 790-811; U.S. CONST. art. I, § 4, cl. 1.

30 576 U.S. at 813-15.

31 *Id.* at 808.

32 *Id.* at 839 (Roberts, C.J., dissenting) (explaining that Electors Clause has "considerable similarity" to Elections Clause).

33 *See* Richard L. Hasen, *Supreme Court Avoids* Bush v. Gore II *in Ducking Pennsylvania Redistricting Controversy*, HARV. L. REV. BLOG (Mar. 22, 2018), https://blog.harvardlawreview.org/supreme-court-avoids-bush-v-gore-ii-in-ducking-pennsylvania-redistricting-controversy/ [https://perma.cc/C4YYREDM] ("The Article II argument in the *Bush v. Gore* concurrence neatly parallels the Article 1 argument in [*Turzai v. League of Women Voters of Pennsylvania*, 138 S. Ct. 1323 (2018)] and in the *Arizona State Legislature* case."); Vikram David Amar, *What the Supreme Court's Arizona Redistricting Ruling Means for Presidential (Not Just Congressional) Election Reform*, JUSTIA VERDICT (July 8, 2015), https://verdict.justia.com/2015/07/08/what-the-supreme-courts-arizona-redistricting-ruling-means-for-presidential-not-just-congressional-election-reform [https://perma.cc/7J7K-AALG] ("Indeed the text of Article II and that of the Elections Clause are very close, and both provisions are concerned with empowering and obligating states making general rules to govern an election, rather than making a binary decision about ratification."); *see also* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 759-64 (2001) (considering Elections Clause and Electors Clause alongside each other in context of first federal elections).

34 U.S. CONST. art. I, § 4, cl. 1; *id.* at art. II, § 1, cl. 2.

35 Ariz. St. Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 790 (2015).

36 *Id.*

37 139 S. Ct. 2484, 2508 (2019).

38 *See* Hasen, *supra* note 33 ("[I]f there is a retirement of Justice Kennedy or one of the Court's liberals in the near future, it would not be a surprise to see [the *Arizona State Legislature*] issue come back."). All the same, it is also possible that any revisit of *Arizona State Legislature* would see at minimum the Chief Justice uphold the decision simply as a matter of *stare decisis*. *See* June Med. Servs. v. Russo, No. 18-1323, slip. op. at 47-49 (U.S. June 29, 2020) (Roberts, C.J., concurring in the judgment).

39 U.S. CONST. art. II, § 1, cl. 2.

40 285 U.S. 355 (1932).

41 *Id.* at 372-73 (capitalization altered).

42 576 U.S. at 806-09 (opinion of Ginsburg, J.); *id.* at 839-42 (Roberts, C.J., dissenting).

43 *Id.* at 841 (emphasis in original).

44 The Supreme Court's very recent stay orders in Republican Party of Pennsylvania v. Boockvar, No. 20A54 (Oct. 19, 2020), and Scarnati v. Boockvar, No. 20A53 (Oct. 19, 2020), also support this proposition. The applicants in both cases asked the Court to stay a Pennsylvania Supreme Court decision regarding the November 2020 general election on, *inter alia*, the ground that the lower court had usurped the legislature's authority to determine the "manner" of federal elections under the Elections and Electors Clauses. *See* Emergency App. for Stay at 10, 25-28, *Scarnati*, No. 20A53 (Sept. 28, 2020); Emergency App. for Stay at 1-3, 22-27, *Rep. Party of Pa.*, No. 20A54 (Sept. 28, 2020). The Court denied both applications, with Chief Justice Roberts voting with Justices Breyer, Sotomayor, and Kagan to do so. The Chief Justice's vote is consistent with the view that other state constitutional actors may constrain a legislature, and should not necessarily be read--as some scholars suggest--as purely motivated by institutional concerns. *See* Richard H. Pildes, *John Roberts Put the Country Before Politics*, CNN (Oct. 20, 2020, 12:21 PM), https://www.cnn.com/2020/10/20/opinions/john-roberts-country-before-politics-pildes/index.html [https://perma.cc/2UBA-KUJV].

45 576 U.S. at 830-32.

46 U.S. CONST. art. I, § 7, cls. 2-3.

47 *Id.* at art. I, § 4, cl. 1; art. II, § 1, cl. 4; art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV; art. II, § 2, cl. 2; art. III, § 1; art. III, § 2, cl. 3; art. IV, § 1.

48 *Id.* at art. I, § 4, cl. 2; art. I, § 8, cl. 1; art. III, § 2, cl. 2; art. III, § 3, cl. 2; art. IV, § 3, cl. 2.

49 *Id.* at art. III, § 1.

50 *Id.* at art. IV, § 3, cl. 2.

51 *Id.* at art. I, § 8, cl. 1.

52 INS v. Chadha, 462 U.S. 919, 951 (1983).

53 Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 847, 852 (2015). In recent weeks, several scholars have advanced a similar reading based on the Constitution's use of the word "direct" itself. *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illustrated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 271 & n.13 (suggesting that while *Arizona State Legislature* and *Smiley* counsel in favor of a broad reading of legislature, "direct" refers to legislating); David H. Gans, *The Trump Plan for Legislatures to Appoint Electors Would Be a Blatant Attack on Democracy*, SLATE (Oct. 29, 2020 3:07 PM), https://slate.com/news-and-politics/2020/10/trump-plan-legislature-appoint-electors-end-democracy.html [https://perma.cc/Y3ME-72AR] (arguing, *inter alia*, that the power to "direct" is the power to control the process of appointing electors, but not to choose electors themselves); Grace Brosofsky, Michael C. Dorf and Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors*, DORF ON LAW (Sept. 25, 2020), http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html [https://perma.cc/9FF5-FBH9] (arguing, *inter alia*, that the use of the term "direct" is associated specifically with legislative activity).

54 *See* John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 474-75 (1917). Gubernatorial vetoes became more common at the same time it became more common for states to hold popular elections for presidential electors. *See id.* at 475-77; *see also* McPherson v. Blacker, 146 U.S. 1, 29-33 (1892) (discussing early history of selecting electors).

55 *McPherson*, 146 U.S. at 29.

56 Smith, *supra* note 33, at 760.

57 *Id.*

58 *McPherson*, 146 U.S. at 30.

59 Smith, *supra* note 33, at 760.

60 *Id.* at 760-61.

61 *See, e.g.*, COMMONWEALTH OF PA., VETOES BY THE GOVERNOR OF BILLS AND RESOLUTIONS PASSED BY THE LEGISLATURE SESSION OF 1915 at 449-50 (1915) (vetoing bill that would rearrange order of presidential candidate names on general election ballot).

62 *See* Marlee Schwartz, *Nebraska's Vote Change*, WASH. POST (Aug. 7, 1991), https://www.washingtonpost.com/archive/politics/1991/04/07/nebraskas-vote-change/4ef16f69-1158-4e39-9556-4e65a666d735/ [https://perma.cc/H8NT-DS8L]; James Melcher, *Electing to Reform: Maine and the District Plan for Selection of Presidential Electors* (Conf. Paper: N. Engl. Pol. Sci. Ass'n Ann. Meeting 2004), https://www.researchgate.net/publication/274710557_Electing_to_Reform_Maine_and_the_District_Plan_for_Selection_of_Presidential_Electors [https://perma.cc/R6VA-YSAE].

63 *See 36 Legislative Chambers in 23 States Have Now Passed National Popular Vote Bill*, NAT'L POPULAR VOTE!, https://www.nationalpopularvote.com/36-legislative-chambers-23-states-have-now-passed-national-popular-vote-bill [https://perma.cc/Q3CP-Q29R]. *See also generally* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007) (describing generally the terms of the NPVIC).

64 *See Hawaii*, NAT'L POPULAR VOTE!, https://www.nationalpopularvote.com/state/hi [https://perma.cc/8UT6-SL6Z]; *National Popular Vote*, NAT'L CONF. OF ST. LEGIS., https://www.ncsl.org/research/elections-and-campaigns/national-popularvote.aspx [https://perma.cc/DJ3K-8YSF].

65 *See* Chiafalo v. Washington, No. 19-465, slip op. at 13 (U.S. July 6, 2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8-13 (2019) (discussing principles of constitutional liquidation generally); *see also* NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (similar).

66 Transcript of Oral Argument at 33, Chiafalo v. Washington, No. 19-465.

67 Benjamin Fearnow, *Nevada's Democratic Governor Vetoes Bill to Reject Electoral College in Favor of National Popular Vote Winner*, NEWSWEEK (May 30, 2019), https://www.newsweek.com/nevada-governor-electoral-college-popular-vote-1439796 [https://perma.cc/V23P-UQMC].

68 *See* Jacob Posik, *Governor Mills Lets RCV for Presidential Elections Become Law Without Her Signature*, ME. WIRE (Sept. 8, 2019), https://www.themainewire.com/2019/09/governor-mills-lets-rcv-for-presidential-elections-become-law-without-her-signature/ [https://perma.cc/4AUC-NUMG].

69 This question, while intriguing, is beyond the scope of this Essay.

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THE INDEPENDENT STATE LEGISLATURE THEORY, FEDERAL COURTS, AND STATE LAW

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Carolyn Shapiro[*]

Abstract

During the litigation surrounding the 2020 election, the independent state legislature theory ("ISLT"), emerged as a potentially crucial factor in the presidential election. The ISLT rests on the Electors and Elections Clauses of the Constitution, which assign decisions about federal elections to state legislatures. Proponents, including Supreme Court justices, of the ISLT assert that state constitutions' substantive provisions cannot apply to state election laws governing federal elections and sometimes argue that state courts' statutory interpretations of such laws must be rigidly textualist and are reviewable, apparently de novo, by federal courts and that delegations of decision-making authority to non-legislative bodies may be limited, albeit in unspecified ways. The ISLT is at issue in current litigation involving congressional redistricting that the Supreme Court will hear during its October 2022 Term.

This Article charts the emergence of this unprecedented reading of the Electors and Elections Clauses and examines both its justifications and its practical implications. Its central claim is that the ISLT, particularly in its maximalist form, is an unprecedented, unconstitutional, and potentially chaos-inducing intrusion into state election law. Those promoting the ISLT skip the crucial step of statutory interpretation—asking what the state legislature actually did. As a result, the ISLT undermines its own claims to

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promote political accountability and predictability by failing to engage in the question of whether a legislature has in fact rejected the state constitution and other aspects of state law. The Article concludes with suggestions for the Supreme Court, Congress, state actors, and litigants to protect the continued independence of state election law.

INTRODUCTION

In the run-up to the November 2020 election, the Pennsylvania Supreme Court unanimously agreed that voters who voted by mail, complying with all statutory requirements, faced a realistic danger that their mail-in ballots would not be received by election officials in time, given the particular circumstances of the election.[1] Those conditions included not only the COVID-19 pandemic but also the U.S. Postal Service's announcement that it might be unable to timely deliver mail-in ballot applications and completed ballots. All seven justices also concluded that, as a result, the statutory schedule for application and return of mail-in ballots could not operate consistent with the state constitution's guarantee of free and equal elections, that judicial relief was therefore necessary, and that appropriate relief required modifying one of the statute's deadlines for the 2020 general election only.[2] They disagreed, however, about which deadline should be modified. A four-justice majority exercised the court's equitable powers and extended the deadline for receipt of absentee ballots.[3] The three dissenting justices would have instead moved the deadline to apply for a ballot, making it earlier, but similarly extending the time period between the application deadline and the ballot-receipt deadline.[4]

The Republican Party and the Trump campaign (collectively, the GOP) asked the United States Supreme Court to stay that

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[1] Pennsylvania Democratic Party v. Boockvar (Boockvar I), 238 A.3d 345, 370–71 (Pa. 2020); Boockvar I at 392–93 (Donohue, J., concurring and dissenting); Boockvar I at 392 (Saylor, J., concurring and dissenting) (joining relevant section of Justice Christine Donohue's dissent).

[2] Id. at 370–72; id. at 392 (Saylor, J., concurring and dissenting); id. at 394–98 (Donohue, J., concurring and dissenting).

[3] Id. at 371–72.

[4] Id. at 392 (Saylor, J., concurring and dissenting); id. at 394–98 (Donohue, J., concurring and dissenting).

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judgment, arguing that it was a "judicial rewrite."[5] The Supreme Court denied the stay by a 4-4 vote and declined to expedite the petition for certiorari.[6] Justice Alito ordered Pennsylvania elections officials to segregate ballots that arrived after election day,[7] but ultimately, those ballots would not have made a difference in the results of either the presidential or the congressional elections, and the Supreme Court denied certiorari altogether several months after the election.[8] In different opinions along the way, however, several justices opined that the Pennsylvania high court overstepped its authority under the federal Constitution.[9]

Justice Samuel Alito, for example, proclaimed that "[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."[10]Justice Clarence Thomas likewise argued that the Pennsylvania court "violated the Constitution by overriding 'the clearly expressed intent of the legislature.'"[11]

These arguments arise from two clauses in the federal Constitution. In the Electors Clause, the Constitution provides

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[5] Application for Stay 23, Republican Party of Pennsylvania v. Boockvar (No. 20A54).

[6] Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 643 (2020) (denying stay by 4-4 vote); Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (same); Republican Party of Pennsylvania v. Boockvar (Boockvar II), 141 S. Ct. 1 (2020) (denying motion to expedite petition for certiorari). Justice Amy Coney Barrett, had not yet been confirmed when the stay application was rejected.

[7] Republican Party of Pennsylvania v. Degraffenreid, No. 20A84 (ordering elections officials to segregate late-arriving ballots and to count them separately) (available at https://perma.cc/2JH6-MXQ2).

[8] Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732 (2021) (denying certiorari).

[9] Boockvar II, 141 S. Ct. at 1 (Alito, J., statement respecting denial of certiorari); Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from denial of certiorari).

[10] Boockvar II, 141 S. Ct. at 2 (Alito, J., statement). Justices Neil Gorsuch and Clarence Thomas joined this statement. Id. at 1.

[11] Degraffenreid, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari), quoting Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring).

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that each state appoint presidential electors "in such Manner as the Legislature thereof may direct."[13] Similarly, the Elections Clause authorizes state legislatures to determine "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives," although Congress can enact federal regulations that override such state laws.[14] And these arguments are one form of what has become known as the independent state legislature theory ("ISLT").[16]

The ISLT can take several forms. Some ISLT proponents assert that state legislatures have plenary and exclusive power, at least among state entities, to regulate federal elections. The Supreme Court rejected one version of this argument in 2015, when it upheld an Arizona constitutional provision, enacted by popular initiative, that created an independent redistricting commission.[17] But that case, Arizona State Legislature v. Arizona Independent Redistricting Commission ("AIRC"), was decided by a 5-4 vote, with Justices Ginsburg and Kennedy, who have been replaced by more conservative justices, in the majority. Chief Justice Roberts himself wrote the principal dissent, which argued that the

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[13] U.S. Const. art. II, § 1, cl. 2.

[14] U.S. Const. art. I, § 4, cl. 1.

[16] This argument is also sometimes called the "independent state legislature doctrine." See, e.g., Michael T. Morley, The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, 55 GA. L. REV. 1, 9 (2020) (hereinafter Morley ISLD and Elections). Because the argument has never been endorsed by the full Supreme Court—and in fact the Court has rejected some forms of it—this Article calls it the "independent state legislature theory." As explained, there are a variety of different versions of the ISLT, and endorsing one does not necessarily imply acceptance of others. See Michael T. Morley, The Independent State Legislature Doctrine, 90 FORDHAM L. REV. 501, 505 (2021) (hereinafter Morley, ISLD); Carolyn Shapiro, Testimony Before the House of Representatives Committee on House Administration (July 28, 2022); Richard Pildes, Testimony Before the House of Representatives Committee on House Administration (July 28, 2022). This article focuses primarily on three major versions: the claim that state constitutions cannot constrain state legislatures when they regulate federal elections, the claim that the ISLT requires a particular textualist approach to statutory interpretation that can be implemented by federal courts, and the claim that the ISLT limits legislatures' ability to delegate decisions to elections officials or other executive officers.

[17] Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U.S. 787, 793 (2015).The logic of the ISLT could reach much further than gerrymandering, however. It would, for example, also nullify state constitutional provisions requiring presidential electors to be popularly elected. See, e.g., COLO. CONST. sched., § 20.

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provision violated the federal Elections Clause because it was not enacted by the legislature and divested the legislature of the authority to draw congressional districts.

Only four years later, however, the Court appeared to unanimously accept that some state constitutional provisions governing congressional redistricting, even when enacted by initiative, are valid. Even as the Court held in Rucho v. Common Cause, Inc., that federal courts cannot adjudicate claims of extreme partisan gerrymandering, the majority opinion, again written by Chief Justice Roberts, explained that state constitutions could themselves limit that practice.[18]

The breadth and durability of the Court's rejection of the ISLT are being tested during the current Supreme Court Term.[19] In Moore v. Harper, the North Carolina Supreme Court struck down that state's congressional redistricting as an unconstitutional partisan gerrymander under the state constitution.[21] (The map at issue drew ten Republican districts and three Democratic districts, even though North Carolina is about evenly split in terms of votes for Republicans and Democrats in general elections.) But unlike the provisions at issue in AIRC and cited in Rucho, the provisions at issue in Moore do not speak directly to redistricting or gerrymandering. Instead, the North Carolina Supreme Court relied on broader guarantees in the state constitution.[22] The petitioners in Moore are asking the Supreme Court either to overrule AIRC or to limit its holding to state constitutional guarantees, like the Arizona provision, that explicitly create redistricting commissions or prohibit gerrymandering.[23]

As this Article will demonstrate, a version of the ISLT that

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[18] See Rucho v Common Cause, 139 S. Ct. 2484, 2507–08 (2019). Rucho was also a 5-4 decision, but the dissenters also expressed support for such state constitutional limits on congressional districting. Id. at 2524 (Kagan, J., dissenting);

[19] See Moore v. Harper, Docket No. 21-1271.

[21] Harper v. Hall, 868 S.E.2d 499, 535–47 (N.C. 2022).

[22] The court held that the partisan gerrymander violated "the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirit[] and intent of our Declaration of Rights." Id. at 546.

[23] Petition for Certiorari, *Moore v. Harper*, No. 21-1271 (hereinafter *Moore* Petition), at i.

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precludes state constitutions from imposing limitations on regulation of federal elections, whether through general or specific language, is highly questionable in theory, problematic in practice, and without historical basis. But during the 2020 election litigation, some Supreme Court justices embraced even more sweeping versions of the ISLT. Some argued, for example, that the Clauses require the Supreme Court to undertake its own textualist interpretation of state election law, de novo, without deference to state courts' interpretations or interpretive methodology. Repeatedly, Justices Thomas, Alito, and Gorsuch accused state courts (and in one case, the state Board of Elections) of "rewriting" the laws, without considering whether those state officials had accurately applied precedent and practice or had appropriately taken into account legislative intent and the broader statutory scheme. In other words, these justices asserted that the Clauses require a particular type of textualism, regardless of pre-existing state law about appropriate statutory construction methodology. And some justices suggested that the Clauses might actually prohibit state legislatures from delegating discretionary authority to elections administrators. This Article expressly takes on these maximalist versions of the ISLT.

In part, the Article builds on important and new historical research demonstrating the invalidity of the ISLT as a matter of originalism, Madisonian liquidation, and longstanding practice.[24] But it goes beyond those analyses in several important ways. First, this Article demonstrates the significant disruption to state law, election administration, and principles of federalism that the ISLT would cause. Most states have election laws that apply to both

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[24] See, e.g, Michael Weingartner, Liquidating the Independent State Legislature Theory, 46 HARV. J.L. & PUB. POL'Y __ (forthcoming 2023), draft available at https://perma.cc/YN7C-CXS6.; Mark S. Krass, Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections, 108 VA. L. REV. 101 (forthcoming 2022), draft available at https://perma.cc/5L3A-WX83. ; Vikram David Amar & Akhil Reed Amar, Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish, 2021 S. CT. REV. 1, 19–26; Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 FLA. ST. U. L. REV. 731, 759–61 (2002) (hereinafter Smith, History); Hayward H. Smith, Revisiting the History of the Independent State Legislature Doctrine, 53 ST. MARY'S L.J. 445 (2022) (hereinafter Smith, Revisiting History). For a discussion of Madisonian liquidiation, see TAN 30.

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state and federal elections without distinction, and the ISLT would cause particular chaos in those states. If, for example, a state court strikes down a state law governing elections as violating the state constitution, under the ISLT, although that holding would apply to state elections, the law would still remain operational for federal elections, requiring two sets of election rules and causing confusion (at best) for election administrators and voters alike. And the maximalist ISLT, which allows—even requires—federal courts to review state court interpretations of election laws could likewise lead to inconsistent federal and state interpretations of the same law. Moreover, the threat of such inconsistent interpretations might itself constrain state courts and distort state law.

Second, the Article establishes that the policy justifications offered by ISLT proponents—including claims of political accountability and predictability—are in fact undermined by the ISLT. Despite the ISLT proponents' claim to respect and protect state legislative prerogatives, they in fact skip the most basic questions of statutory interpretation. That is, even assuming that some form of the ISLT is correct, ISLT proponents assume that legislatures chose not to incorporate state constitutional limitations, state law governing statutory interpretation, state court precedent, and other aspects of state law into statutes governing federal elections. But legislators—and their constituents—may well have understood the statute to operate like any other state law. By ignoring or rejecting those understandings, the ISLT in fact undermines both accountability and predictability.

Third, the ISLT, particularly the maximalist versions, also threatens to disrupt longstanding precedents, practices, and structures of election administration in the states. Suppose a state supreme court strikes down a comprehensive election law as violating the state constitution, but there is no appeal to the Supreme Court. The ISLT might allow a federal candidate to claim, years later, that the law is still valid for federal elections. In other words, the ISLT could provide fertile ground for lawyerly creativity, a distinct lack of finality, and unending divisive litigation.

Fourth, the ISLT is itself a significant change in law that undermines predictability by disrupting longstanding norms and understandings. If fully embraced, it would shift significant power away from state courts and towards the Supreme Court. It would

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turn the review and interpretation of any state statute governing federal elections into a federal constitutional case. The eagerness of some justices to seize that power was evident during the 2020 election.[25] Yet state legislatures and state courts have long understood that election law is their province, not subject to second-guessing by federal courts.

And all of these problems are worsened when election cases arrive at the Supreme Court by emergency filings, as they often do. Over the past few years, the Supreme Court has become increasingly willing to issue highly consequential rulings in response to such filings, in what has become known as the shadow docket.[26] The Article thus considers the role that the Supreme Court's shadow docket has and could play in the development and application of the ISLT. For example, the Justices who have already embraced the ISLT did so without the benefit of the significant historical research that they would have time to consider under normal briefing and argument. When the Court decides Moore v. Harper, we may learn whether they are willing to re-evaluate their positions in light of the significant amount of research, particularly historical research, that has emerged in the last two years.

The rushed nature of the shadow docket can also preclude appropriate investigation into state law, which can be complex and nuanced. There is a significant risk of gamesmanship and incomplete presentation of the issues on the shadow docket, especially in election cases where time is short and the cases inevitably have a highly partisan valence. Wholesale rejection of state court decision-making under those circumstances, as some justices have urged, may have serious unanticipated consequences, including for the Supreme Court's own legitimacy.

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[25] Cf. Mark A. Lemley, The Imperial Supreme Court, manuscript available at https://perma.cc/P7UU-GXR3. (arguing that the Supreme Court is systematically removing power from other government institutions and amassing it itself).

[26] See, e.g., Melissa Quinn, Supreme Court's abortion decision shines light on "shadow docket", CBS NEWS (Sept. 8, 2021), available at https://perma.cc/8CRH-FEDC; Stephen I. Vladeck, Testimony Before the Senate Committee on the Judiciary (Wednesday, September 29, 2021), available at https://perma.cc/9HCV-DNLV.

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Part I of this Article describes the historical development of interpretations of the Electors and Elections Clauses, including discussions of new research. It then details the emergence of the maximalist ISLT during both the 2000 and the 2020 presidential elections. Part II explains why even on its own terms, the ISLT skips crucial statutory interpretation questions and how making such decisions on the shadow docket means that the Supreme Court is particularly likely to miss key nuances of state law. Part III explores the ways that, in operation, the ISLT can wreak havoc on state election law and improperly federalizes state election law. Part IV proposes a range of actions for state courts, state legislatures, litigants, and Congress to help maintain existing expectations and division of authority.

I. THE HISTORY AND DEVELOPMENT OF THE ISLT

In the Electors Clause, the Constitution assigns to state legislatures the job of "direct[ing]" the "Manner" in which presidential electors are appointed.[27] Likewise, the Elections Clause authorizes the legislatures to determine "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives," although Congress can enact federal regulations that override such state laws.[28] Proponents of the ISLT point to the word "legislature" in each clause to argue that when state legislatures exercise their authority over federal elections, nothing their state constitutions require or prohibit matters.[29] And some also suggest that protecting this extraordinary grant of authority to legislatures also requires federal court supervision of state court statutory interpretation and possibly of elections officials' exercise of statutorily provided discretion.[30]

But the language of the Clauses does not compel a reading that excludes any constraints imposed by state constitutions or that diminishes state courts and restricts discretion by administrators. To the contrary, legislatures are creatures of their own

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[27] U.S. Const. art. II, § 1, cl. 2.

[28] U.S. Const. art. I, § 4, cl. 1.

[29] See, e.g, Michael W. McConnell, Two-and-a-Half Cheers for Bush v. Gore, 68 U. CHI. L. REV. 657, 661 (2001).

[30] See infra Part I.B.

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constitutions, and the at least equally natural reading is that the Clauses provide for them to act as they ordinarily do when they regulate federal elections, giving them no special powers.[31]

And as this Part will show, recent endorsements of the ISLT by some Supreme Court Justices are particularly extreme and unprecedented. Subpart A reviews the history of the clauses and then describes how state courts, federal courts, and Congress have historically interpreted them. Subpart B describes the emergence of the ISLT during the litigation surrounding the 2000 presidential election. Subpart C charts the ISLT's re-emergence, in an unprecedented and extreme form, before and shortly after the 2020 election.

A. The Historical Record

The ISLT is inconsistent with the historical record. If that fact was not entirely clear in 2000 or in 2020, it is now. Especially since the 2020 election, numerous scholars have delved deeply into that history, and the evidence against the ISLT is overwhelming.[32] For example, Hayward Smith, who wrote one of the first historical evaluations of the ISLT following the 2000 election,[33] has a new, even more detailed discussion of the history of the Elections and Electors Clauses, in which he concludes that the Framers did not grant any authority to state legislatures to act outside the scope of their state constitutional powers,[34] a conclusion echoed by others.[35]

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[31] Many have made this point. See, e.g., Amar & Amar, supra note 24, at 19 (arguing that the original "public meaning of 'state legislature' . . . was not just an entity created to represent the people; it was an entity created and constrained by the state constitution") (emphasis in original); Justin Levitt, Failed Elections and the Legislative Selection of Presidential Electors, 96 N.Y.U. L. Rev. 1052, 1057 (2021).

[32] After the ISLT's emergence during the 2000 election, there was an initial flurry of scholarship. At the time, however, even some of those who supported the ISLT did not argue that it had a solid historical basis. See, e.g, McConnell, supra note 29. Most of the scholarship I rely on in this subpart, however, is new since 2020.

[33] Smith, History, supra note 24.

[34] Smith, Revisiting History, supra note 24.

[35] See, e.g., Amar & Amar, supra note 24, at 19–26. See also Eliza Sweren-Becker & Michael Waldman, The Meaning, History, and Importance of the Elections Clause, 96 WASH. L. REV. 997, 1002–17 (2021) (presenting evidence that in enacting the Elections Clause, the Framers were extremely concerned

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Mark Krass details the states' extensive practice of delegation at the Founding to argue that the Clauses cannot be understood to restrict such delegation, as some justices have hinted.[36] And Michael Weingartner argues that any ambiguity within the clauses has long since been settled by what James Madison called "constitutional liquidation"—a longstanding and "regular course of practice."[37] That practice, Weingartner demonstrates, overwhelmingly establishes that, notwithstanding a few outlier events, state constitutions can impose substantive limits on the legislatures' regulation of federal elections.[38]

On the other side, the primary academic proponent of the ISLT, Michael Morley, argues, in an article written before the 2020 election, that the original public meaning of the Clauses allowed no such limitations on state legislatures and that the Constitution evidences "a consistent, pervasive, institutional choice" to give the responsibility to regulate federal elections to the political branches.[39] He admits, however, that there is no evidence that the Framers expressly considered the issue and that even at the Founding some such state constitutional limitations existed, and

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about state legislatures abusing their power); Leah M. Litman & Katherine Shaw, Textualism Judicial Supremacy, and the Independent State Legislature Theory, 2022 Wis. L. Rev. __ (forthcoming), manuscript at 29 (describing Madison's fear that state legislatures would be particularly susceptible to capture by factions as a "serious reason[ ] to doubt that the Framers would have empowered the state legislatures in particular vis-à-vis all other state offices."), available at https://perma.cc/58TZ-WDND.

[36] Krass, supra note 24.

[37] Weingartner, supra note 24 at 3 & n.12, quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern, et al., eds. 2009). See also William Baude, Constitutional Liquidation, 71 STAN. L. REV. 1, 4 (2019) (presenting a thorough analysis of liquidation and arguing that it "was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery.").

[38] Weingartner, supra note 17 at 14 (relying on Chiafalo v. Washington, 140 S. Ct. 2316 (2020) to demonstrate the Court's use of a liquidation model).

[39] Morley, ISLD and Elections, supra note 12, at 34. Morley also argues that state legislatures' authority over "federal elections was understood to be co-extensive with Congress' power to do so," id. at 35, and congressional power obviously was not limited by state constitutions. The ISLD, he argues, maintains "this symmetry." Id. at 36; See also id at 38–39; McConnell, supra note 29, at 661 (noting that the Electors Clause means that "the manner of selecting electors will be chosen by the most democratic branch of the state government".

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at least since the early twentieth century, a different understanding has held sway.[40] The extraordinarily widespread nature of that understanding is likewise established by Smith's and Weingartner's encyclopedic catalog of state constitutional provisions and amendments and the long history of state supreme courts evaluating the constitutionality of various state election laws and practices pursuant to their own constitutions.[41]

These scholars, and others, have produced detailed and careful discussions of the historical record, and in this Article, I do not attempt to summarize them fully or to definitively resolve their disagreements. Instead, I identify here some important historical facts about which there appears to be little disagreement, while also highlighting a few points of contention. This background is essential for understanding the current state of the law and for evaluating the claims made by ISLT proponents, including several Supreme Court justices.

First, there is no evidence that the Framers "expressly considered" the ISLT nor did they "address[ ] the potential significance of their use of the term 'legislature,'"[42] and the drafting history of the Clauses does not directly address it.[43] There is, however, some historical context. The Articles of Confederation used language very similar to the Clauses, providing that delegates to that early Congress "be annually appointed in such manner as the legislature of each state shall direct."[44] And "[m]ost of the state constitutions adopted between Independence and the adoption of the United States Constitution purported to regulate the selection of delegates to Congress."[45] The Elections and Electors Clauses were drafted in that context.

Second, all agree that beginning at the Founding, some state

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[40] Morley, ISLD and Elections, supra note 12, at 38–39 & n.168; id. at 10.

[41] Weingartner, supra note 24; see also Smith, Revisiting History, supra note 24, at 516–29. Smith's post-2020 article is in part a direct response to Morley, and analyzes his historical arguments in depth.

[42] Morley, ISLD, supra note 12, at 503.

[43] See McConnell, supra note 29, at 661 (noting that "[t]here is no relevant legislative history.").

[44] U.S. ARTICLES OF CONFEDERATION of 1781, art. V.

[45] See Smith, Revisiting History, supra note 24, at 479 & n.152. See also Amar & Amar, supra note 24, at 23 (discussing "state constitutions in the Confederation era [that] nonetheless directly and expressly regulated how state legislatures had to act in the appointment of Confederation Congressmen").

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constitutions included provisions that limited how state legislatures could regulate federal elections.[46] The original constitutions of at least five states required all elections to be conducted by ballot, instead of voice vote, which "was one of the most important, and most contested, issues of election administration in the post-Founding era . . ."[47] Other early state constitutional provisions explicitly applied to federal elections. Delaware, for example, adopted a new constitution only three years after the national Constitution was ratified, providing that congressional elections would occur in the same manner and in the same places as elections for the state legislature.[48] And in 1810, Maryland amended its 1776 constitution to provide that all free white men could vote in all elections, expressly including federal elections,[49] and that voting in such elections would be "by ballot."[50]

To be sure, as is often the case with history, there are arguable counterexamples. Morley points to the Massachusetts constitutional convention in 1820, where delegates considered a provision that would have required congressional representatives to be elected by district.[51] Justice Joseph Story, who was a delegate, argued against the provision on the ground that it would violate

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[46] See, e.g., Weingartner, supra note 24, at 41; Morley, ISLD and Elections, supra note 12, at 38–39 & n.168; Smith, Revisiting History, supra note 24, at 487–92; Amar & Amar, supra note 24, at 22–24.

[47] Weingartner, supra note 24, at 36.

[48] Weingartner, supra note 24, at 36; Smith, Revisiting History, supra note 24, at 484–85.

[49] See Smith, History, supra note 24, at 758, citing MD. CONST. of 1776, art. XIV (1810). This provision does not implicate the ISLT with respect to eligibility to vote for Members of the House of Representatives because Article I of the federal Constitution separately regulates voter qualifications for such elections, providing that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST., art I, § 2. See Morley, ISLD and Elections, supra note 12, at 38–39 n.168 (making this point). The Maryland amendment does, however, provide evidence against the ISLT because it requires voting by ballot for all elections and because the Electors Clause in Article II does not regulate voter qualifications for presidential elections.

[50] MD. CONST. of 1776, art. XIV (1810).

[51] See Morley, ISLD and Elections, supra note 12, at 39–40, citing JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 104 (Boston Daily Advertiser, Rev. ed. 1853) (hereinafter MASSACHUSETTS JOURNAL).

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the Elections Clause, and the convention rejected the provision.[52] But this episode is ambiguous, as there were a number of reasons that might have persuaded convention delegates to vote against the provision.[53] It is also an extreme outlier among all of the evidence from the Founding era and the early years of the republic.

Third, not only did state constitutions regulate federal elections beginning at the Founding, but they have consistently done so ever since,[54] and state courts have routinely adjudicated and enforced these provisions. Weingartner documents more than 80 such cases, extending from the nineteenth century until today.[55] ISLT proponents point to a small handful of cases in which a state court permitted state legislative action related to federal elections despite an arguably contradictory state constitutional provision.[56] But as a group, those cases do not meaningfully support the ISLT. In some, the state high courts concluded that the relevant state constitutional provisions did not apply to federal elections, either

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[52] Id. at 40, citing MASSACHUSETTS JOURNAL at 109–10. Daniel Webster also argued that the provision should be rejected but his comments are less explicit as to whether he thought that it would violate the Elections Clause or, rather, that he thought it was advisable for the state constitution to "have as little connection with the constitution of the United States as possible." Id. at 40 n. 184, quoting MASSACHUSETTS JOURNAL at 112 (statement of Webster).

[53] See Smith, Revisiting History, supra note 24, at 512–16 (discussing the 1820 Massachusetts convention).

[54] Weingartner, supra note 24, at 37–40; Smith, Revisiting History, supra note 24, at 505–09, 525–28; Nathaniel Persily, Samuel Byker, Williams Evans, and Alon Sachar, When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative, 77 Ohio St. L. J. 689, 708 (2016) (documenting state constitutional provisions enacted by popular initiatives that regulate federal elections).

[55] Weingartner, supra note 24, at 40–43. In a recent podcast, Professor Michael McConnell points out that until the 1960s, federal courts generally considered issues of election regulation to be nonjusticiable political questions, so the lack of federal court cases reviewing these questions should be seen as an absence of evidence, not evidence of absence. Available at https://perma.cc/R777-QLX6.

[56] Scholars seem to have identified at most seven such cases, but as discussed infra some of those cases do not clearly address the ISLT. See infra notes 49–50.

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without mentioning the ISLT at all[57] or discussing it in dicta.[58]

Moreover, in none of these cases was there any ambiguity about what the legislature was trying to do. In several early cases, for example, state legislatures sought advisory opinions from their state supreme courts about whether they had more or different authority with respect to federal as opposed to state elections.[59] In other cases, the challenged laws applied expressly and only to federal elections.[60] In other words, these legislatures' decisions to

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[57] In Connecticut, for example, the state legislature asked the state supreme court for an advisory opinion as to the constitutionality of a law allowing Union soldiers to vote for federal offices where they were stationed. Opinion of the Justices, 45 N.H. 595, 595 (1864) (advisory opinion). The question arose because the Connecticut constitution provided that individuals qualified to vote for state legislators do so in the places where they lived. Id. at 601. The Connecticut supreme court concluded that this provision said nothing about whether the legislature could authorize out-of-state voting for federal offices. Id. at 602–05.

The court's analysis turned on whether this provision set forth the "qualifications" for voting, in which case the federal Constitution required it to apply to voting for congressional representatives, see U.S. Const., art I, § 2, or whether it was a "time, place, manner" regulation, which the Elections Clause leaves to the state legislature in the absence of congressional action. The court concluded that the state constitution's location-of-voting requirement was a regulation, not a qualification, and so held that it did not apply to federal elections at all. Id. Likewise, because Article II also does not have any provisions related to place of voting for presidential electors, the state law was valid as to presidential electors. Id. at 600–01. For a detailed discussion of the case, including a rebuttal of Morley's claim that it is "one of the nineteenth century's clearest, most emphatic endorsements of the" ISLT, Morley, ISLD and Elections, supra note 12, at 42, see Smith, Revisiting History, supra note 24, at 519–21.

[58] See State v. Williams, 49 Miss. 640, 666 (Miss. 1873) (in a challenge related to an election for state office, construing state constitutional requirement of biannual elections to apply to specific offices, thereby allowing the state legislature to set congressional elections in years opposite elections for state offices); id. at 681 (Simrall, J., concurring) (same); id. at 666 (comparing state legislative authority to congressional authority); In re Plurality Elections, 15 R.I. 617, 620 (R.I. 1887) (advisory opinion) (construing state constitution's majority-vote requirement to apply only to state offices, thereby allowing plurality votes to decide both federal and local elections and if it applied to congressional elections, it would be unconstitutional); Opinion of the Judges, 37 Vt. 665, 676 (1864) (advisory opinion) (holding that Vermont constitution required in person voting in state elections but "is entirely silent" as to federal elections); id. at 677 (describing federal Constitution as leaving regulation of federal elections to the legislature).

[59] See, e.g., Plurality Elections, 15 R.I. at 618; Opinion of the Judges, 37 Vt. at 666; Opinion of the Justices, 45 N.H. at 597.

[60] See Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) (upholding state laws

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to treat federal elections differently from state elections were deliberate, public, and explicit. They thus provide no support for a maximalist ISLT that would, for example, allow federal courts to second-guess state courts' review or interpretations of statutes that govern federal and state elections without distinction. Nor were the arguments in those cases the product of post hoc litigation positioning.[61]

Fourth, all agree that when a state legislature regulates federal elections, it does so through its ordinary lawmaking processes, and so is subject to its state constitution's procedural lawmaking requirements.[62] More specifically, during the first half of the twentieth century, the Supreme Court upheld the use of both the gubernatorial veto and a statewide referendum disapproving otherwise valid legislation with respect to congressional redistricting.[63] Likewise, in 2015, the Court upheld (albeit by a 5-4 vote) a state constitutional provision establishing an independent redistricting commission enacted by popular initiative because initiatives were a constitutionally permitted exercise of that state's legislative authority.[64] Congress too, acting as the judge of its own elections,[65] has "typically enforced state constitutions' procedural requirements concerning the legislative process" when judging the results of elections.[66] I am aware of no historical or scholarly support for a version of the ISLT that bypasses state constitutional lawmaking procedures.[67]

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specific to choosing presidential electors); Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (upholding statute allowing absent soldiers to vote in federal elections only); Beeson v. March, 34 N.W.2d 279, 285–87 (Neb. 1948) (upholding state law specific to presidential electors).

[61] See infra Part III.C

[62] See, e.g., Morley, ISLD, supra note 12, at 541–42.

[63] Smiley v. Holm, 285 U.S. 355, 399 (1932); State of Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 570 (1916).

[64] Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U.S. 787, 793 (2015).

[65] U.S. CONST., art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .")

[66] Morley, ISLD and Elections, supra note 12, at 46.

[67] Cf. Levitt, supra note 31, at 1067–68 (noting that even under Art. II, under which the legislatures might be able to appoint presidential electors themselves, doing so would require the passage of a law); Morley, ISLD, supra note 12, at 546 (same). In this way, the Clauses are different from the federal constitutional provisions involving the appointment of Senators and the ratification of constitutional amendments. See Hawke v. Smith, 253 U.S. 221, 231 (1920)

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Fifth, although some ISLT proponents suggest that there is a difference between procedural rules for lawmaking and substantive constitutional limitations, the Supreme Court has never held that when a state legislature regulates federal elections, it is free of such substantive constitutional constraints. Proponents of the ISLT often point to language in the 1892 case McPherson v. Blacker, but in that case the Court considered only whether the Electors Clause itself imposed any restrictions on the legislature, which had determined that presidential electors be chosen by districts instead of statewide.[68] The language of the Electors Clause, the Court said in that context, was "conveying the broadest possible power of determination" and "leaves it to the legislature exclusively to define the method" for appointing presidential electors.[69] The Clause, the Court said, thus "operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power."[70]

But despite this broad language, McPherson has no holding exempting the legislature from the constraints of the state constitution. To the contrary, in that opinion, the Court noted that Article II specifically directed "[e]ach state" to appoint electors,[71] and said that "[w]hat is forbidden or required to be done by a state is forbidden or required of the legislative power under the state constitutions as they exist," and that "[t]he [state's] legislative power is the supreme authority except, as limited by the constitution of the state..."[72] McPherson, at most, contains ambiguous or contradictory dicta about the scope of state legislative authority to regulate federal elections, and the more explicit language actually militates against the ISLT.[73]

(holding that a state constitution cannot require a referendum to ratify a federal constitutional amendment); id. at 228 (explaining that the same is true for selection of Senators before the 17th Amendment); id. at 229 (distinguishing between those acts and regular legislation); Leser v. Garnett, 258 U.S. 130, 137 (1922) (rejecting state constitutional challenges to ratification of the 19th Amendment where state constitutions prohibited such ratification).

[68] 146 U.S. 1 (1892). For examples of reliance on McPherson, see Morley, ISLD and Elections, supra note 12, at 84; Degraffenreid, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari).

[69] McPherson, 146 U.S. at 27.

[70] Id. at 25.

[71] Id. at 24.

[72] Id. at 25.

[73] In my view, the best reading of McPherson is that it holds that the Electors

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Sixth, Congress has long assumed the legitimacy of state constitutional regulation of federal elections. As Weingartner points out, for example, when admitting (and readmitting) states, Congress has approved numerous state constitutions that regulate federal elections.[74] And when each house of Congress resolves election disputes as "the Judge of the Elections . . . of its own Members . . .,"[75] they frequently rely on state constitutions and state court decisions.[76] In 1861, for example, despite arguments expressly invoking the ISLT, the House seated an Oregon candidate whose election was held on the date set by the Oregon constitution instead of the candidate elected on a different date chosen by the legislature.[77]

The primary counterexample on which ISLT proponents rely is a Civil War–era election contest from Michigan.[78] The case, known as Baldwin v. Trowbridge,[79] arose from a potential conflict between Michigan's constitutional requirement of in-person voting and a statute allowing Union soldiers to vote absentee.[80] In one congressional race, those absentee votes were decisive.[81] The House Committee on Elections issued a majority report relying on the ISLT and arguing in favor of rejecting the soldiers' votes.[83] There was also a minority report opposing the ISLT.[84] Similar arguments were repeated on the House floor, and the House ultimately voted to seat Trowbridge, the candidate who won when the absentee ballots were not counted.[85]

Clause itself does not limit the method a state uses to appoint its presidential electors, requiring only that the legislature chooses that method, and that it states in dicta, although does not hold, that the legislature is subject to state constitutional limitations. Contra. Morley, ISLD and Elections, supra note 12, at 84 (arguing that McPherson means that state constitutions cannot constrain state legislatures at all with respect to appointing presidential electors).

[74] Weingartner, supra note 24, at 51–55 (noting different states' regulations).

[75] U.S. CONST., art. I § 5.

[76] Weingartner, supra note 24, at 56–62 (documenting numerous instances).

[77] See Smith, Revisiting History, supra note 24, at 509–11 (describing dispute between candidates Shiel and Thayer); Weingartner, supra note 24, at 59 (same).

[78] See Morley, ISLD and Elections, supra note 12, at 48–52.

[79] H.R. REP. NO. 39-13 (1866).

[80] Id. at 1–2.

[81] Id. at 1–2.

[83] Id. at 2.

[84] Id. at 2.

[85] Id. at 3.

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Baldwin is a fascinating episode, but it carries less weight than some argue. For one thing, like the 1820 Massachusetts constitutional convention story, it is an extreme outlier. Both before and after Baldwin, Congress has relied on state constitutional provisions and state court decisions in deciding election contests. Moreover, even on its own terms, its lesson is ambiguous. As Smith documents, a number of Members who voted to seat Trowbridge nonetheless expressly rejected the ISLT, arguing instead that the absentee votes were valid because the statute did not in fact violate the Michigan Constitution.[86] All we can conclude from Baldwin is that in a highly-charged partisan environment, some Members of Congress in 1861 argued in favor of the ISLT to seat a candidate of their own party and some did not.[87]

Seventh, all agree that, under the Clauses, state legislatures are free to delegate substantial discretionary decision-making to executive branch and local elections officials, and such statutes rarely distinguish between federal and state elections.[88] As Mark Krass has established, such delegation was widespread and remarkably broad at the Founding, with elections officials making decisions about where, when, and how voting would take place.[89] And although there is some academic debate about what the outer limits of delegation might be,[90] the Supreme Court has never struck down a delegation under the Clauses. Indeed, because elections administration is complicated and technical, it is hard to

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[86] Smith, Revisiting History, supra note 24, at 523–24.

[87] In this way, Baldwin is good precedent for how the ISLT is manipulable. After decades of Congress assuming state constitutions validly regulated federal elections, some Members seized on the ISLT at a moment when it provided some partisan advantage.

[88] Cf. Derek T. Muller, Legislative Delegations and the Elections Clause, 43 Fla. St. L. Rev. 717, 719 (2016), citing Transcript of Oral Argument at 11, Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U.S. 787 (2015) (No. 13-1314) (describing nondelegation argument specific to congressional redistricting).

[89] Krass, supra note 24, at 122–38.

[90] Morley, for example, argues for evaluating delegations in this context using the same standard as the federal nondelegation doctrine, which is extremely capacious. Morley, ISLD, supra note 12, at 554–55. He does not discuss, however, what should happen if the Supreme Court adopts a new, more restrictive version of the doctrine, which may well happen. See Krass, supra note 24, at 104 n.12. See also Muller, supra note 88, at 736–39.

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imagine how elections function if the legislature itself had to make every single decision.[91]

Finally, there is absolutely no historical support for arguments that the Clauses give the federal courts the power to reject state court interpretations of state laws governing federal elections.[92] The Supreme Court has never relied on the Clauses to reject a state court's interpretation of state election law governing federal elections. In fact, before 2000, no Supreme Court Justice—nor any other judge, so far as I can tell—ever suggested such a possibility. Likewise, there is no support for the suggestion, hinted at by Justice Gorsuch, that federal courts can second-guess elections administrators' discretion about how to implement state law. As already noted, recent historical research establishes that at the Founding, legislatures delegated significant discretion to local officials in running elections.[93] But as explained below, the claims that federal courts—or more significantly, the Supreme Court—can insist on their own interpretation of state statutory language and can use those interpretations to limit the discretion of elections officials are emerging as important and potentially highly disruptive issues in the federal Constitution's law of elections.

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In sum, the pre-2000 history demonstrates that from the Founding, drafters of state constitutions, state legislatures, state courts, and Congress have all repeatedly either rejected the ISLT outright or proceeded on the understanding that it did not exist. The few arguable counterexamples are, in many instances, ambiguous as to the basis of the decisions reached. And there is no historical support at all for the maximalist ISLT that allows federal courts to second-guess state courts' statutory construction and election administrators' discretionary decisions.

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[91] See Krass, supra note 24, at 107 (noting that elections officials "depend heavily on delegation to keep their agencies moving.").

[92] As Smith explains, the historical record does contain some examples of "state courts and Congress consider[ing whether to] decline[ ] to observe state constitutional requirements." Smith, Revisiting History, supra note 24, at 503. In contrast, in the version of the ISLT pressed today, "federal courts, in the name of protecting state 'legislatures,' are considering whether to assume the role of overseeing state court interpretations of state law . . .." Id.

[93] See generally Krass, supra note 24.

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B. The Modern Emergence of the ISLT: The Election of 2000

The presidential election of 2000 is remembered for hanging chads, weeks of uncertainty, and the Supreme Court's decision in Bush v. Gore.[94] But it also is the modern source of the maximalist ISLT.

As is well known, the vote in Florida that year was extraordinarily close, and Florida's electoral votes would determine the overall winner of the presidential election. In the aftermath of the election, there were several parallel proceedings in the Florida courts and in the U.S. Supreme Court, culminating in Bush v. Gore. There, in a 5-4 opinion, the Court overruled the Florida Supreme Court, ended the recount in Florida, and effectively declared George W. Bush the winner of the election.[95]

The majority in Bush v. Gore relied on the Equal Protection Clause for its holding, but the ISLT also arose during the litigation over the election. In Bush v. Palm Beach County Canvassing Board,[96] the first case to come to the Supreme Court, the Court raised the possibility, though did not hold, that the ISLT might limit the application of the state constitution to state legislatures' choices related to presidential elections. Later, in Bush v. Gore itself, Chief Justice William Rehnquist embraced the argument that there might be special approaches to statutory interpretation for laws governing federal elections. But the Supreme Court issued no holding about the ISLT, and even Chief Justice Rehnquist did not go as far as some current justices were prepared to during the 2020 election litigation.

1. Bush v. Palm Beach County Canvassing Board

Shortly after election day, when Florida was still considered too close to call and President George W. Bush appeared narrowly ahead in the official count, Al Gore requested a manual recount in four counties. Controversy and litigation ensued about whether the Secretary of State would be required to accept the results of those recounts if they were submitted after the initial statutory timeframe. Exercising its equitable authority and noting the

[94] 531 U.S. 98 (2000).

[95] See generally id.

[96] 531 U.S. 70 (2001) (per curiam).

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Florida Constitution's express right to vote, the Florida Supreme Court set a new deadline and ordered the Secretary of State to accept recount results submitted by that date.[97]

Bush appealed to the Supreme Court, arguing, among other things, that the Florida Supreme Court had improperly intruded on the authority that the Electors Clause gives the legislature. More specifically, he argued that because "the Constitution 'leaves it to the legislature exclusively to define the method of effecting the object" of appointing electors,'" and because the Florida "legislature manifestly did not grant the authority to adjust deadlines for election returns to organs of the Florida judiciary, ...[t]he Florida Supreme Court's extensive and unauthorized revision of that scheme was unconstitutional."[98]

But the Supreme Court did not decide whether the Florida Supreme Court had exceeded its authority. Nor did it decide whether a state court could, as the Florida Supreme Court arguably had, use the constitutional avoidance canon in construing a state election statute that governed federal elections. Instead, the Court explained that it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under" the Electors Clause, and it "decline[d] at this time to review the federal questions asserted to be present."[99] In other words, the Supreme Court engaged in its own form of constitutional avoidance by remanding the case to the Florida court to clarify the basis for its ruling.[100]

The Supreme Court also specifically instructed the state supreme court to take into account section 5 of the Electoral Count Act ("ECA") when it construed the state law.[101] The ECA provides that when a state has put in place procedures for resolving disputes over the outcome of a presidential election before election day, and where those procedures lead to resolution of any dispute at least

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[97] Palm Beach County Canvassing Bd. v. Harris (Palm Beach I), 772 So.2d 1220, 1240 (Fla. 2000) (per curiam).

[98] Petitioner's Brief, Bush v. Palm Beach County Canvassing Bd., 2000 WL 1761134, *37 (2000) (emphasis in original), quoting McPherson v. Blacker, 146 U.S. 1, 27 (1892).

[99] Bush, 531 U.S. at 78.

[100] See id.

[101] Id. at 77–78, citing 3 U.S.C. § 5.

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six days before the electors vote, that resolution is "conclusive."[102] That provision, sometimes called the "safe harbor" provision, is a promise that Congress will defer to the state's own resolution of election disputes so long as the state uses the procedures that were in place before the election. The Court instructed the Florida Supreme Court to consider whether the legislature wished to take advantage of the safe harbor, and if so, whether that "legislative wish ... would counsel against any construction of the Election Code that Congress might deem to be a change in the law."[103]

On remand, the Florida Supreme Court analyzed the state election code, which had been enacted in 1999 and for which there was therefore no well-developed precedent. The court did not reference the state constitution. It explained that its "polestar" in statutory interpretation was "legislative intent."[104] Turning to the statutory text, it identified several ambiguities in the statutory scheme, which it resolved by reference to legislative intent and by relying on well-settled principles of statutory interpretation, such as "the specific statute controls the general statute."[105] The court noted that the legislature had "chosen to have a single election code control all elections,"[106] and that by doing so it had made "no provision for applying its rules one way for presidential elector

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[102] 3 U.S.C. § 5.

[103] Bush, 531 U.S. at 78. Morley reads Palm Beach County as an affirmative "endorsement" of the maximalist ISLT. Morley, ISLD and Elections, supra note 12, at 81. Noting that the Court relied on some of the language from McPherson, he argues that the Court would have had no reason to remand with these instructions if the justices were not in unanimous agreement that reliance on the state constitution was improper. Id. at 80–81. See also McConnell, supra note 29, at 659 (describing the case as "decid[ing] nothing of practical consequence" but "reminding the Florida Supreme Court that its decisions were subject to review on federal grounds"); Morley, ISLD, supra note 12, at 517 (noting that "the primary reason for remand was to give the Florida Supreme Court the opportunity to clarify whether the state constitution was influencing its interpretation of the election code."). Morley's reading is, in my view, a drastic overreach. Much more likely, the Court hoped to avoid deciding that question. And in fact, in Bush v. Gore, only three justices embraced this version of the theory. See Amar & Amar, supra note 24, at 42 (noting that this version of the theory was accepted by three justices and rejected by four). See infra section B2 for a discussion of Justice Souter's dissent.

[104] Palm Beach County Canvassing Bd. v. Harris (Palm Beach II), 772 So. 2d 1273, 1282 (Fla. 2000) (per curiam).

[105] Id. at 1287.

[106] Id. at 1291.

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elections and another way for all other elections."[107]

The Florida Supreme Court also took into account the ECA. It reinstated its deadline for the county canvassing boards to submit the results of the manual recounts to the Department of State,[108] but held that the statute gave the Department discretion to "ignore" the returns.[109] It rejected the idea that this discretion was unbridled, however, and said that in most elections it could "foresee no reason why the Department would refuse to accept amended returns if a county was proceeding in good faith with a manual recount."[110] In the unique context of presidential elections, however, it held that the Department could exercise discretion to ignore those results if "it can clearly be determined that the late filing would prevent . . . the consideration of Florida's vote in a presidential election."[111] In other words, the Florida court read the statute to have a single meaning for both state and federal elections, but acknowledged that the discretion the statute granted election officials might have a different scope for presidential elections in light of the ECA's safe harbor provision.

While there may have been different ways to resolve the statutory ambiguities, nothing about the court's approach to statutory interpretation was unprecedented or unusual. Indeed, the decision was 6-1, with the lone dissenter arguing solely that the court should hold off on ruling while the U.S. Supreme Court was considering Bush v. Gore,[112] in which it had already granted certiorari.[113]

2. Bush v. Gore

Bush v. Gore grew out of a different state court lawsuit filed by Al Gore, in which he relied on Florida law to contest the statewide election results. Although in that case, known as Gore v. Harris in the state courts, the Florida Supreme Court did not grant all the relief that Gore sought, it did order a manual recount of those ballots for which the ballot-tallying machines had registered no

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[107] Id. at 1291.

[108] Id. at 1289.

[109] Palm Beach County Canvassing Bd., 772 So.2d at 1288–89.

[110] Id. at 1289.

[111] Id. at 1291.

[112] Id. at 1292 (Wells, J., dissenting).

[113] See 531 U.S. 1046 (2000). Bush did not seek Supreme Court review of the Florida Supreme Court's opinion in Palm Beach II.

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vote for president.[114]

The Florida Supreme Court's opinion in Harris was issued on December 8, 2000, four days after the U.S. Supreme Court remanded the Palm Beach County case. Unsurprisingly, therefore, the Florida Supreme Court began its analysis by pointing to both the Electors Clause and the Electoral Count Act, noted that the legislature had delegated the resolution of election contests to the courts, and explained why it concluded that the text of the statute required that the intent of each voter be discerned and counted if at all possible.[115] In other words, the Florida court expressly grounded its holding in its analysis of the statute as it governed a presidential election. It did not rely on the state constitution.

Ultimately, of course, the U.S. Supreme Court shut down the recount. Five justices concluded that the lack of a statewide standard for identifying voter intent violated the Equal Protection Clause and that the recount had to stop.[116] But in a concurring opinion, Chief Justice William Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, relied on the Electors Clause to revisit the Florida Supreme Court's statutory interpretation. Rehnquist argued—with no corroborating citations—that under Article II, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[117] This claim was, quite literally, unprecedented. Rehnquist cited no authority for it, and none appears to have existed at the time.

The crux of the statutory issue that Rehnquist focused on was what authority the legislature had delegated to the Secretary of State and what it had delegated to the courts.[118] He disagreed with the Florida court's interpretation of the statute allowing it to order manual recounts and extend the deadlines the Secretary of State was enforcing. Rehnquist acknowledged that "[i]n any election but a Presidential election, the Florida Supreme Court can give as little

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[114] Gore v. Harris, 772 So.2d 1243, 1247 (Fla. 2000) (per curiam).

[115] Id. at 1248–49, 1254–55.

[116] 531 U.S. at 104–11. Justices Breyer and Souter agreed that the recount as originally conducted violated the Equal Protection Clause, but they would have remanded for the Florida courts to "establish uniform standards for evaluating the several types of ballots that have prompted differing treatments." Bush v. Gore, 531 U.S. at 135 (Souter, J., dissenting).

[117] Id. at 113.

[118] Id. at 113–14.

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or as much deference to Florida's executives [here, the Secretary of State] as it chooses, . . . and this Court will have no cause to question the court's actions."[119] But presidential elections are different, he said, and "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[120]

Rehnquist did not discuss the Florida court's reliance on longstanding principles of Florida's law of statutory interpretation in its effort to make sense of a statute with provisions that were, if not absolutely contradictory, at least in tension with each other. Nor did he discuss the fact that the statute did not distinguish between state and federal elections. And he provided no clear standard of review, sometimes using deferential language but undertaking apparent de novo review of the state court interpretation of the state law.

Moreover, despite Rehnquist's claim about the special significance of the statutory text, his argument was not purely textual. The Chief Justice pointed to the ECA's safe harbor provision providing that Congress would defer to pre-election dispute procedures established by state law. He imputed a specific intent to the Florida legislature: a "desire to attain the 'safe harbor.'"[121] As a result, he concluded, if the Florida Supreme Court's post-election holding functioned to change the law from its pre-election state—or even if "Congress might deem [it] to be" such a change[122]—that would infringe the federal constitutional power granted to the Florida legislature.[123] And he concluded that such (potential) disruption was precisely what had happened.[124]

The safe harbor provision informed his analysis in another way as well. One of the key statutory provisions in the Florida law gave courts overseeing election contests the "authority to provide relief that is 'appropriate under such circumstances.'"[125] And the Florida Supreme Court relied on these statutorily delegated "equitable powers" in ordering the manual recounts.[126] Rehnquist argued that

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[119] Id. at 114.
[120] Id. at 113.
[121] 531 U.S. at 113, citing Palm Beach Cty., 531 U.S. at 77.
[122] Id. at 113, quoting Palm Beach Cty., 531 U.S. at 78.
[123] Id. at 114.
[124] Id.
[125] Id. at 121, quoting Fla. Stat. Ann. § 102.168(8) (Supp. 2001).
[126] Palm Beach Cty., 531 U.S. at 76.

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these equitable powers were limited by an unstated legislative intent. Much as the Florida Supreme Court concluded that the scope of the Secretary's discretion to ignore late-arriving recounts might be different in presidential elections rather than others, Rehnquist here explained: "Surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cut-off date of" the ECA.[127] In other words, the scope of "appropriate relief" for presidential elections had to be informed by the operation of the ECA.

Only Justices Scalia and Thomas joined Rehnquist's opinion. Justices Anthony Kennedy and Sandra Day O'Connor, who were in the five-Justice majority, did not join or adopt his reasoning. All of the dissenters disagreed.[128] There was nothing close to a majority

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[127] Bush v. Gore, 531 U.S. at 121. Ironically, the Florida Supreme Court agreed with this conclusion. The disagreement between that court and Rehnquist was based on a prediction about whether the recount could in fact be final by that deadline. And that uncertainty was created by the stay that the Supreme Court itself had issued. See id. at 135 (Souter, J., dissenting) (noting that "before this Court stayed the effort to [recount the ballots manually], the courts of Florida were ready to do their best to get that job done").

[128] Justice Stevens, for example, dissenting and joined by Justices Ginsburg and Breyer argued that "nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it." 531 U.S. at 124 (Stevens, J., dissenting); see also id. at 130–33 (Souter, J. dissenting). Stevens also took issue with Rehnquist's statutory interpretation, concluding that "the Florida legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes." Id. at 124 (Stevens, J., dissenting). Stevens rejected the notion that the Electors Clause "grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law." Id. And finally, all four dissenters disagreed that the Florida court had essentially rewritten state law. Id. at 127–28 (Stevens, J., dissenting)

Some proponents of the ISLT have suggested that Justice Souter "was somewhat more sympathetic to" it. See, e.g., Morley, ISLD and Elections, supra, note 12, at 85. Indeed, Justice Souter did cite the Electors Clause and indicated that a constitutional issue might be presented if the Florida Supreme Court's reasoning "was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing a new law untethered to the legislative Act in question." Id. at 131 (Souter, J., dissenting). But he was quite explicit that disagreement about how to interpret a statute did not come close to meeting this standard of lawlessness, id. at 131–33 (Souter, J., dissenting), and he expressly reaffirmed the "customary respect for state interpretations of state law," id. at 133 (Souter, J., dissenting). Nothing in

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for the ISLT proposition that Rehnquist espoused.

C. The 2020 Election

The 2020 presidential election was, we can only hope, unique in numerous ways. One way, of course, is that it took place in the midst of a global pandemic. In addition, as the election approached, the Postal Service appeared to be struggling with significant mail delays. As a result, state legislatures, executive officers, local election officials, and courts alike, faced new and challenging questions about how to administer a free and fair election safely, while also complying with state and federal constitutional and statutory law.

Although the ISLT did not turn out to be decisive in any of the litigation surrounding the 2020 election, and although the Supreme Court issued no holdings regarding it, the ISLT nonetheless re-emerged as salient, and potentially potent in a variety of separate opinions. This subsection explores the ways the ISLT developed through that litigation, specifically focusing on cases that arose from Wisconsin, Pennsylvania, and North Carolina.

The subsection first gives an overview of how different Supreme Court justices offered maximalist visions of the ISLT that were more extreme and have much more disruptive implications even than Chief Justice Rehnquist's opinion in Bush v. Gore. Next, the subsection describes the litigation from each state in some detail, highlighting the different versions of the ISLT that different justices discussed. Finally, the subsection describes the limited authority and justification that these justices offered in their opinions.

1. Overview.

The versions of the ISLT that various emerged described was even more extreme than Chief Justice Rehnquist's version in at least four important ways.

Justice Souter's opinion provides support for Chief Justice Rehnquist's approach—evidenced by the fact that all of the other dissenters joined that portion of his opinion—much less for the even more extreme versions of the ISLT endorsed by some justices during the 2020 election litigation.

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First, in Rehnquist's Bush v. Gore opinion, he identified a "legislative wish" to take advantage of the ECA's safe harbor,[142] and, as just discussed, part of his argument rested on an understanding of whether the relief ordered was "appropriate," within the meaning of the state law.[143] In other words, Rehnquist thought that for a presidential election, the scope of the court's discretionary equitable powers, expressly granted by the legislature, was implicitly limited by the ECA's time constraints. In 2020, the justices who embraced the maximalist ISLT did not discuss whether the state legislatures might have any particular intent with respect to federal elections.

Second, at no time did Rehnquist so much as hint that there was a question whether the state legislature's delegations to the executive and to the courts were improper. To the contrary, he acknowledged that "the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State . . . and to state circuit courts . . ."[144] Rather, the only issue with respect to those delegations was whether the Florida Supreme Court had properly construed them. In 2020, Justice Gorsuch twice—in litigation from Wisconsin and from North Carolina—hinted at limitations on such delegations.

Third, the controversy at issue in Bush v. Gore applied only to post-election counting of vote, and only for votes in the presidential election itself. As a result, there was no possibility that Rehnquist's Article II argument could lead to different rules for the operation of federal versus state elections that year. In contrast, all of the statutes at issue in 2020, and all of the legal disputes about them, applied to both state and federal elections without distinction, and the disputes arose before election day. None of the opinions discussing the ISLT acknowledged those facts or the disruption and confusion for elections officials and voters alike that the ISLT might cause in that context.

Fourth, again because of the post-election posture of Bush v. Gore and the nature of the question before the courts, there were no meaningful reliance interests at stake, whether by voters, elections officials, or candidates. There was no reason to think that any voters would have behaved differently if they knew how the

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[142] 531 U.S. at 120–21, quoting Palm Beach Cty., 531 U.S. at 78.

[143] Id. at 121.

[144] Id. at 113–14.

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votes would be counted after the fact.

None of this was true in the 2020 cases. No longer was there an effort to identify a reason why the legislature might have intended to limit its delegation to state courts, or for that matter, to other officials, with respect to federal elections. To the contrary, there were even hints that some delegations might themselves violate the ISLT. There was no meaningful discussion of what the state legislatures actually did or of what impact the rulings would have on election administration and on the significant reliance interests at stake. Instead, some of the justices simply claimed that the Supreme Court could review, apparently de novo, any and all state court holdings with respect to federal elections for some kind of enhanced textualist statutory interpretation and for improper reliance on state constitutions.

All of the Justices who made these claims relied on Rehnquist's opinion, citing it as if it carried the weight of a holding, and some also cited the non-holding of Palm Beach County. Many of them cited the McPherson dicta favorable to their position. But they all failed to consider whether or why a state legislature that passed a single law governing elections would expect it to be reviewed and construed differently for state versus federal contests.

2. The Cases

Wisconsin

During the 2020 election, the first time the justices issued opinions discussing the ISLT was in litigation about absentee ballots in Wisconsin. Strictly speaking, the ISLT was not relevant to the issues presented, as the case arose in federal court and involved federal constitutional claims. Nonetheless, both Justice Gorsuch and Justice Brett Kavanaugh opined about it, hinting at an expansion of the theory and issuing a warning shot on the issue.[145]

The case involved a district court injunction that extended the deadline for receipt of absentee ballots. Justice Gorsuch criticized the federal district court for "substitut[ing] its own election deadline for the State's" due to the pandemic, even though the

[145] The Wisconsin case was pending in the Supreme Court at the same time as the Pennsylvania case. See No. 20A66 (Wisconsin) available at https://perma.cc/7YTG-UB6E; No. 20-542 (Pennsylvania) available at https://perma.cc/3EFD-LNYA.

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Wisconsin Elections Commission had made numerous efforts to make voting accessible, including sending absentee ballot applications to every voter over the summer.[146]

Although that initial point was unrelated to the ISLT, Justice Gorsuch then invoked the theory. Despite praising the Wisconsin Election Commission's actions in responding to the pandemic, Gorsuch hinted at a potential delegation problem arising from his reading of the Elections Clause. "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."[147] But even while hinting that the Commission may have exceeded its authority under the federal constitution, Gorsuch did not acknowledge that the election at issue included state offices, to which even the most maximalist versions of the ISLT cannot apply and he thus likewise failed to acknowledge the chaos and confusion that might ensue were the ISLT to apply to such unified election.

Gorsuch also provided a political accountability justification for the distinction between the legislatures and courts, though he did not expressly discuss other branches of state government, and this justification recurred in later opinions involving the 2020 election. "Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot," he wrote.[148] "Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful."[149]

Gorsuch argued further that "[l]egislatures enjoy far greater resources for research and factfinding on questions of science and safety than" courts generally do.[150] And finally, "[i]n reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws . . ."[151] Justice Gorsuch cited no authority to suggest that these reasons in fact motivated the

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[146] Democratic National Committee v. Wisconsin State Legislature, 141 S. Ct. 28, 28–29 (2020) (DNC) (Gorsuch, J., concurring in denial of vacatur of stay). See also id. at 29 (arguing that "it's indisputable that Wisconsin has made considerable efforts to accommodate early voting and respond to COVID").

[147] Id. at 29 (emphasis added).

[148] Id.

[149] Id.

[150] Id.

[151] Id.

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Framers and no cases connecting these arguments to the ISLT.[152]

Justice Kavanaugh joined Justice Gorsuch's concurrence, but he also wrote his own separate opinion, most of which focused on the relationship between the federal courts and state legislatures. He included a long footnote about the ISLT, however, quoting from and endorsing Chief Justice Rehnquist's concurrence in Bush v. Gore.[153] He summed up: "[T]he text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws."[154]

In sum, emerging from the Wisconsin litigation was not only a full-throated endorsement of Rehnquist's claim that statutory interpretation itself can run afoul of the ISLT, but several new ideas. Justice Gorsuch in particular raised the possibility that some delegations to or exercises of discretion by elections administrators might also be unconstitutional and he articulated a new political accountability justification for the ISLT. And although Kavanaugh noted that the ISLT would be relevant only to federal elections,[155] Gorsuch did not, and even Kavanaugh did not explore the implications of the ISLT when the same laws and regulations apply to both state and federal elections.

North Carolina

Unlike Wisconsin, the litigation in North Carolina initially presented only state constitutional claims brought in state court, although—like Wisconsin—the claims involved statutes that applied, without distinction, to federal and state elections. The state court litigation culminated in a settlement that was approved

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[152] Justice Gorsuch was not the first to make some of these arguments, however. See, e.g., Morley, ISLD and Elections, supra note 12, at 33 (arguing that "the Framers deliberately structured the Constitution to place ultimate responsibility for elections in the political branches of government"); id. at 34 (describing ISLD as "not an anomaly stemming from an ill-considered word in an isolated constitution provision or two, but rather a component of a consistent, pervasive, institutional choice concerning the entities to be entrusted with ultimate authority over federal elections"); McConnell, supra note 29, at 661 (noting that Art. II § 1 cl. 2 "puts the federal court in the awkward and unusual posture of having to determine for itself whether a state court's 'interpretation' of state law is an authentic reading of the legislative will.").

[153] DNC, 141 S. Ct. at 34 n.1 (2020) (Kavanaugh, J., concurring in denial of vacatur of stay).

[154] Id.

[155] Id.

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by a state trial court and that the state supreme court refused to disrupt. Nonetheless, legislators who were unhappy with the settlement invoked the ISLT in an attempt to persuade the federal courts—including the Supreme Court—to declare the settlement unconstitutional. The North Carolina litigation illustrates some of the complications that can arise if federal courts second-guess state court statutory construction and review not only of substantive election law but also of the assignment of authority to different state officials.

In June 2020, North Carolina Governor Roy Cooper signed the Bipartisan Elections Act, which was intended, in part, to address the challenges of holding an election during the COVID pandemic.[156] The legislation, for example, changed the witness requirement for an absentee ballot application from two witnesses to one.[157] It did not, however, change either the deadline for requesting an absentee ballot or the 3-day-after-election-day deadline for receipt of completed ballots.[158]

On July 30, 2020, more than a month and a half after the governor signed the revised election law, the Postal Service formally announced that it might be unable to timely deliver completed absentee ballots of voters who complied with all North Carolina requirements.[159] For this and other reasons, the North Carolina Alliance for Retired Americans, along with some individual plaintiffs, sued the Board of Elections in state court, alleging violations of the North Carolina constitution.

The plaintiffs sought a variety of types of relief, including an injunction extending the receipt deadline for absentee ballots.[160] They also asked for full elimination of the witness requirement for absentee voters in single-adult households, expansion of early voting opportunities, elimination of the existing signature-matching procedures, and elimination of the prohibition on assistance in applying for and returning absentee ballots.[161] After the lawsuit was filed, House of Representatives and the President

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[156] 2020 N.C. Sess. Laws § 2020-17.

[157] Id.

[158] Id.

[159] North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections, 2020 WL 10758664, *1 (N.C. Super. Ct. 2020) (N.C. Alliance I).

[160] Complaint, N.C. Alliance I at 38–41.

[161] Id.

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Pro Tempore of the state Senate intervened as of right,[162] as authorized by statute.[163]

In September 2020, the plaintiffs and the Board of Elections asked the state court to approve a consent order. One of the agreement's provisions required that absentee ballots postmarked by election day be accepted if they were received within nine days of the election, matching the federally mandated received-by deadline for overseas and military voters.[164] The settlement also provided for drop boxes and for a "revised cure process" for absentee ballots.[165] As a condition of the settlement, the plaintiffs agreed to drop their remaining claims, which included their claims for significant additional injunctive relief.[166]

The legislator-intervenors objected to the settlement and claimed that it could not be entered without their consent.[167] The state trial court disagreed and entered the settlement as a consent judgment.[168] The court noted that the plaintiffs had "agreed to forgo many of their demands,"[169] and concluded both "that the plaintiffs are likely to succeed on the merits of their [state] constitutional claims" and that the settlement was "a compromise" and "not a product of collusion."[170] The trial court also held that entering the consent order was "in the public interest" because of the "strong public interest in having certainty in our elections procedures and rules" and that the order would "provide public confidence in the safety and security in [sic] this election."[171]

The trial court also considered the authority of the Board of Elections to agree to the consent order and of the legislator-intervenors to prevent its entry. North Carolina statutes gave the Board, "upon recommendation of the Attorney General, to enter

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[162] Wise v. Circosta, 978 F.3d 93, 106 (4th Cir. 2020) (Wilkinson and Agee, J.J., dissenting).

[163] N.C. G.S. § 1-72.2(b) (noting that Speaker of the House and the President Pro Tempore of the Senate "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute" and can intervene as of right).

[164] See 52 U.S.C. § 20301, et seq.

[165] N.C. Alliance I, 2020 WL 10758664, *2.

[166] Id.

[167] Id.

[168] Id.

[169] Id.

[170] N.C. Alliance I, 2020 WL 10758664 *3.

[171] Id.

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into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes."[172] The trial court compared that authority to the statutory authority to intervene given to the legislators, concluded that the legislators were not "necessary parties," and held that their consent was not necessary for the settlement.[173]

Finally, the trial court analyzed the Board's substantive statutory authority to agree to the settlement's modifications of election procedures. It cited the statutes that gave the Board discretion to "'exercise emergency powers to conduct an election . . . where the normal schedule for the election is disrupted by a natural disaster'" and held that the COVID pandemic constituted such a disaster.[174] The court held that the settlement did not "enjoin any statutes" and "retain[ed] fidelity to the purpose behind these statutes."[175]

The legislator-intervenors asked the state supreme court to stay the judgment pending appeal, but that court denied their petitions.[176] The U.S. Supreme Court also denied an application for a stay, although Justices Alito, Gorsuch and Thomas indicated, without opinion, that they would have granted it as to the ballot receipt deadline.[177]

After the Board of Elections and the plaintiffs moved for entry of the consent judgment but before the trial court ruled, however, the same legislators who intervened in that case, along with a number of private plaintiffs, initiated a federal court action. Relying on both an ISLT argument and an equal protection claim, they asked the federal district court to enjoin the Board of Elections from issuing the memoranda required by the settlement.[178] The

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[172] N.C. G.S. § 163-22.2.

[173] N.C. Alliance I, 2020 WL 10758664, *4.

[174] Id., quoting N.C. G.S. § 163-27.1.

[175] Id, at *2. The court described the purposes as counting all ballots marked in accordance with state law where later delivery was not the fault of the voter, ensuring a record of who returns absentee ballot so fraud investigations could be undertaken when necessary, and ensuring that absentee ballots are completed by the correct voters. Id.

[176] North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections, 848 S.E.2d 496 (N.C. 2020); North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections, 848 S.E.2d 497 (N.C. 2020).

[177] Berger v. North Carolina State Bd. of Elections, 141 S. Ct. 658 (2020).

[178] See generally Complaint, Wise v. North Carolina Bd. of Elections, No. 1:20-CV-00912 (M.D.N.C. 2020).

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federal district court declined to do so, as did the en banc Fourth Circuit (with three judges dissenting) and the Supreme Court.[179]

In the Supreme Court, Justice Gorsuch, joined by Justice Alito, dissented and wrote an opinion endorsing the maximalist ISLT. Justice Gorsuch accused the Board of Elections and the state court of "egregious" and collusive action, asserting that they had "worked together to override a carefully tailored legislative response to COVID."[180] And he cited the intervention of the legislators as proof of this egregiousness, suggesting that they would not have intervened if the Board and the court had not overstepped.[181] He did not discuss the trial court's explicit conclusion that the settlement was not the product of collusion.

Beyond questioning the state trial court and Board of Elections' integrity and authority, Justice Gorsuch disagreed with the state court's analysis of the statutory scheme and the authority it gave the Board. He argued that the legislature had already concluded that the deadline change the Board agreed to was "unnecessary,"[183] when it declined to change it when making other changes to election law due to the pandemic, but he did not mention that those changes occurred before the Postal Service's announcement. He also raised the issue of whether the legislature "could delegate its Election Clause authority to" the Board, although he concluded

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[179] Moore v. Circosta, 494 F.Supp.3d 289, 331 (M.D.N.C. 2020) (Moore I); Wise, 978 F.3d at 98; Moore v. Circosta, 141 S. Ct. 46, 46 (2020) (Moore II). The district court held that none of the plaintiffs had standing to challenge the Board of Elections' actions, although it nonetheless analyzed the question and concluded that the Board had exceeded its statutory authority. 494 F. Supp.3d at 323–24 (standing analysis); id. at 325–31 (Board's authority). The district court, however, rejected the plaintiffs' argument that a delegation to the Board allowing it to act in contradiction to other, more specific statutes in an emergency would necessarily violate the Clauses, noting that it was appropriate for the legislature to delegate the ability to respond quickly in an emergency. Id. at 324–25. And the district court found that the individual plaintiffs established a likelihood of success on their equal protection claims but did not issue an injunction because it believe it to be too close to the election under Purcell. Id. at 315–22. The Fourth Circuit agreed in an en banc ruling, with three dissenters. Wise, 978 F.3d 93.

[180] Moore II, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief). Gorsuch said that their actions might be even worse than the federal court intervention that the Supreme Court had previously stayed. Id. He did not mention standing at all in his opinion. Id.

[181] Id.

[183] Id.

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that such delegation did not occur here.[184]

At no point did Justice Gorsuch mention the state trial court's analysis of the statutory scheme giving the Board of Elections settlement authority. Although he argued that the statutory criteria for modifying election law—a natural disaster that disrupted the election schedule—were not met, he did not acknowledge that the state trial court had considered that issue and concluded otherwise. Nor did he note that the state supreme court itself had declined to intervene. And he did not mention that the statutes at issue, and therefore the settlement, applied to both state and federal elections, and so did not consider the implications of his arguments for the state elections held simultaneously with the federal ones.

In other words, Justice Gorsuch construed the statutes de novo, announcing his view of what the phrases "natural disaster" and "normal schedule for the election is disrupted" mean, without reference to other state statutes, to longstanding practice, or to the fact that the statute and settlement applied to both state and federal elections, much less to the holding of the state trial court, which he accused of colluding with the Board of Elections. On every point, however, there were significant counterarguments. As the Fourth Circuit pointed out, the Board of Elections regularly changes the deadline for receipt of absentee ballots in response to potential disruptions caused by hurricanes.[185] While the COVID-19 pandemic may not have been a hurricane, there was ample support to consider it a natural disaster within the meaning of state law.[186]

In his dissent, Justice Gorsuch again pointed to political accountability as a justification for the ISLT, and he also suggested that the state court's actions undermined the predictability that is

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[184] Id.

[185] Wise, 978 F.3d at 97 n.2.

[186] See N.C.G.S.A. § 166A-41 (implementing the Emergency Management Assistance Compact ("EMAC"), which authorizes participating states to assist each other in responding to "any emergency or disaster that is duly declared by the governor of the affected state or states, whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.") (emphasis added); N.C. Exec. Order No. 130 (invoking EMAC as part of the state's response to COVID). It is true that the Postal Service problems were not themselves a natural disaster, but they were caused, at least in part, by the pressures of the pandemic.

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particularly important for election law. He complained that the "constitutional overreach and . . . last-minute election-law-writing-by-lawsuit" exemplified in this case "do damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures."[188] But Justice Gorsuch did not consider whether the ISLT, in the form he appeared to embrace, was consistent with those values. To the contrary, he did not acknowledge that the Board of Elections decision to extend the deadline itself was a unanimous decision of a bipartisan board appointed by a popularly elected governor.[189] Nor did he consider whether the people of North Carolina would have expected their election statute to be construed by a federal Supreme Court that insisted on reading it in a vacuum, devoid of any context and without regard to the views and actions of state elections officials and judges. The "last-minute election-law-writing-by-lawsuit" was his.

Pennsylvania

Pennsylvania revamped its election laws shortly before the pandemic. In October 2019, the legislature enacted a statute, known as Act 77, that "created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day."[190] As November 2020 approached, concerns emerged about how this new opportunity would be implemented in light of the pandemic and the problems with the post office. Litigation ensued over how to construe and apply the statute, in particular provisions relating to expanded opportunities for absentee voting.

As already explained, the Pennsylvania Supreme Court concluded that the state constitution required it to extend the

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[188] Moore II, 141 S. Ct. at 48.

[189] Wise, 978 F.3d at 97. See Miriam Seifter, Countermajoritarian Legislatures, at *60 (discussing the 2020 litigation in North Carolina and arguing that "[i]t is hard to see how honoring the wishes of the two leaders of the unconstitutionally gerrymandered legislature [who filed suit in federal court] would have been a better approximation of the will of the people than adhering to the decision of the [bipartisan] officials appointed by the popularly elected governor").

[190] Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 352 (Pa. 2020) (Boockvar I), citing 25 P.S. §§ 3150.11–3150.17.

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deadline for receipt of absentee ballots. The Supreme Court, splitting 4-4 during the period between Justice Ginsburg's death and Justice Barrett's confirmation, denied a stay.[191] In a subsequent opinion, Justice Alito, joined by Justices Thomas and Gorsuch, accused the state court of significant overreach: "The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."[192] In other words, Justice Alito accused the Pennsylvania Supreme Court of completely substituting its own policy judgment for the legislature's under the guise of judicial review, although he did not note that the Pennsylvania Supreme Court did not interpret the statute as the plaintiffs requested across the board.[193]

Once the election was over, the Supreme Court denied certiorari in the Pennsylvania case. The same three justices dissented from the decision. Justice Alito, joined by Justice Gorsuch, reiterated his complaint about the Pennsylvania Supreme Court usurping the role of the legislature. Noting what he called "the breadth" of the state court's decision, Alito described it as "claim[ing] that a state constitutional provision guaranteeing 'free and equal' elections gives the Pennsylvania courts the authority to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections."[194] Again, Justice Alito did not discuss Pennsylvania precedent construing its "free and equal" elections clause, did not consider the implications of the same statute applying to both state and federal elections, and did not consider

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[191] See note 6, infra.

[192] Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 2 (2020) (Boockvar II) (Alito, J., statement).

[193] The Pennsylvania Supreme Court rejected the plaintiffs' requests to order county election boards to provide voters with notice and an opportunity to cure technical defects, like using the wrong ink color or failing to use both the required inner and outer envelopes, or to provide the inner envelopes themselves. Boockvar I, 238 A.3d at 374–80, citing 25 P.S. §§ 3146.6(a), 3150.16(a).

[194] Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732, 739 (2021) (Alito, J., dissenting from denial of certiorari).

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whether the legislature had disavowed the state constitutional limitation, for federal elections only, when it passed Act 77.

Justice Thomas echoed Justice Alito's argument about the Pennsylvania court, as well as, by implication, other bodies: "[B]oth before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules."[195] He complained that the Pennsylvania Supreme Court was "[d]issatisfied" with the "unambiguous" election day deadline so decided "to rewrite the rules."[196] He criticized the Pennsylvania court's reliance on what he called a "vague clause" in the state constitution.[197] And he highlighted the problems caused by a lack of predictability and clear rules established ahead of time. "Unclear rules . . . sow confusion and ultimately dampen confidence in the integrity and fairness of elections," he said, which is why the Supreme Court has "repeatedly . . . blocked rule changes made by courts close to an election."[198] When it is unclear who has the authority to set the rules, "voters may not know which rules to follow" and "[e]ven worse . . . competing candidates might each declare victory under different sets of rules."[199] But Justice Thomas did not consider whether the maximalist ISLT itself might lead to such problematic results.[200]

3. Limited Support and Extreme Positions

The justices—Thomas, Alito, Gorsuch, and (to a lesser extent) Kavanaugh—who appeared to endorse the maximalist ISLT during 2020 relied on limited authority, expressed no hesitation about their positions, and failed to acknowledge any counterarguments or potential disruption were their views to

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[195] Id. (Thomas, J., dissenting from denial of certiorari).

[196] Id. at 732–33.

[197] Id. at 733.

[198] Id. at 734.

[199] Degraffenreid, 141 S. Ct. at 734.

[200] To be fair, Justice Thomas's arguments about uncertainty in part addressed why he thought the Court should have granted certiorari and clarified the relative authority of state legislatures and relied on and promoted one justification for the maximalist ISLT—elimination of state courts' authority over the construction and review of laws governing federal elections. And like Justice Alito, Justice Thomas did not acknowledge the many ways in which the Pennsylvania Supreme Court denied relief to the plaintiffs.

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become law. They did, of course, cite and quote the Elections and Electors Clauses' assignment of authority and responsibility to states through their legislatures.[201] Justice Thomas quoted dicta from McPherson, though he overstated its weight and did not acknowledge the case's contradictory language.[202] Some of them cited Palm Beach County with no meaningful discussion of its precedential weight, or lack thereof[203] None of them discussed any other historical evidence or acknowledged the longstanding practices described above, nor did they suggest that any additional information could affect their views.[204]

And of course, all of the ISLT-endorsing justices in these cases relied in part on Chief Justice Rehnquist's concurrence in Bush v. Gore, even as they also went beyond it. Unlike Rehnquist, they did not consider legislative intent, so they did not address whether the legislatures intended to allow for different interpretations of the same statute with respect to federal and state elections or for different conclusions about their constitutionality—or whether, in contrast, the legislatures incorporated by reference state constitutional law and statutory interpretation practices and precedents. Unlike Rehnquist, who accepted that the legislature could delegate authority, some of the justices in the 2020 litigation hinted at limitations on such delegations. And these justices engaged in apparent de novo textualist interpretation of state statutes, in some cases without even acknowledging that state courts had reached different conclusions about the meaning of the same laws. The following Part explores the far-reaching and

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[201] DNC, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of vacatur of stay) ("Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions."); Moore II, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief); Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 1 (2020) (Alito, J., statement).

[202] Degraffenreid, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari), quoting McPherson, 146 U.S. at 25 (noting that the federal "Constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' to regulate federal elections") (brackets in original). See also DNC, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) (citing McPherson).

[203] Degraffenreid, 141 S. Ct. at 738–39 (Alito, J., dissenting from denial of certiorari); DNC, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay); Boockvar II, 141 S. Ct. at 1 (Alito, J., statement).

[204] Shadow docket

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disruptive implications of this approach. The following part explores those implications in more detail.

II. Construing Election Law

A. Skipping Statutory Interpretation

In all of the 2020 cases, the ISLT-embracing justices skipped the crucial question of statutory interpretation. They entirely failed to address what the state legislatures actually did when they passed election laws. Instead, they assumed that the legislatures eschewed state constitutional limitations, state law precedent, and longstanding state law methodology about statutory interpretation.

Even if the Elections and Electors Clauses give legislatures the power, under the federal Constitution, to reject state constitutional limitations, and other aspects of state law when regulating federal elections, that does not mean they have in fact done so.[205] To the contrary, if they have the power to reject those aspects of state law, they surely also have the power to incorporate them into the election law statutes they enact. The justices' failure to consider that possibility is particularly remarkable given the political accountability justification for the ISLT. If, as Justice Gorsuch argued, "[l]egislators can be held accountable by the people for the rules they write or fail to write...",[206] then it is crucial that the people know what those rules actually are.[207] But by failing to take the first statutory interpretation step, the justices are endorsing an ISLT that presumes that state legislatures are imposing election laws on federal elections that would be unconstitutional under their state constitutions—and that the legislatures are doing so absolutely silently.

This problem is even more acute when it comes to laws that pply to federal and state elections without distinction. State legislatures

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[205] Cf. Amar & Amar, supra note 24, at 38 (arguing that state legislatures incorporate state constitutional law, especially when they mandate unified elections for state and federal offices).

[206] DNC, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of vacatur of stay).

[207] Cf. Levitt, supra note 31, at 1058 (describing failure to ask this question as "the use of a decoding system different from the encoding engine the legislature used in the first place").

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unquestionably cannot reject state constitutional constraints with respect to the laws governing state elections. But the maximalist ISLT appears to presume that even where a law violates the state constitution and so must be struck down as to state elections, it must remain in effect for federal contests. In other words, when the same laws govern both federal and state elections, the ISLT presumes that the legislatures have—again silently—decided to allow for the possibility that different rules will govern the two types of elections. Likewise, the maximalist ISLT presumes that the legislatures passed statutes that they understood might be construed differently as to federal and state elections. These presumptions, implicit in the maximalist versions of the ISLT will inevitably undermine political accountability and create confusion for election officials and voters.[208]

The historical record is bare of support for such presumptions. I am not aware of a single example of a state or federal court interpreting or reviewing the same state law differently as to state versus federal elections. As already noted, in the tiny number of cases in which state supreme courts have allowed state legislatures to regulate federal elections differently from state elections under state constitutions, the laws in question applied expressly and exclusively to federal elections, not state elections.[209] And as also discussed earlier, since the Founding, state constitutions have constrained legislative choices with respect to federal elections.[210]

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[208] There are other reasons to doubt the claim that the ISLT is justified by democratic accountability. See Miriam Seifter, Countermajoritarian Legislatures, available at https://perma.cc/6AGL-QESN (arguing that in 2020, the states in which the ISLT arose were states with highly gerrymandered countermajoritarian legislatures); id. at *60 (discussing the 2020 litigation in North Carolina); Jason Marisam The Dangerous Independent State Legislature Theory, 2022 Mich. St. L. Rev. __ (forthcoming), manuscript at 20 (arguing that the self-interest and "biases that plague legislative processes are at least as strong, if not stronger, in the election context), available at https://perma.cc/YX2J-Q8PU id. at 21 (noting scholarship establishing ways that legislators use election rules to entrench themselves in power). And the emergence of remarkably effective and durable partisan gerrymandering enabled by mapping software and extensive data about voters likewise weakens Professor's McConnell's pro-ISLT argument that legislatures act under a veil of ignorance while courts often do not, at least in the context of redistricting. McConnell, supra note 29, at 662.

[209] See supra nn. 57–58.

[210] See supra note 46.

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The Supreme Court itself embraced the validity of state constitutional restraints on congressional redistricting as recently as 2019.[211] That state constitutions apply to all state election law is, to put it mildly, a widespread baseline assumption.

The same is true of other issues related to state law, including the types of equitable powers state courts have, the appropriate delegation of discretion and election law interpretation to both election officials and courts, and states' established doctrines of statutory interpretation. Even if the state legislature could constitutionally reject all of that, the question remains whether it in fact did so.[212] The ISLT, particularly in its most extreme forms, ignores that question entirely.

B. Demanding Textualism

Much of the discussion of the ISLT focuses on whether state constitutions can constrain state legislatures' regulation of federal elections, but some of the issues in the 2020 election litigation turned on more ordinary questions of statutory interpretation. In the North Carolina case, for example, Justice Gorsuch reviewed statutory language authorizing the state Board of Elections to issue certain types of regulations and concluded that the Board had

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[211] Rucho v Common Cause, 139 S. Ct. 2484, 2507–08 (2019); id. at 2524 (Kagan, J., dissenting). See also Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U.S. 787, 793 (2015).

[212] This question is front and center in Moore v. Harper. Although that case involves congressional redistricting, and so does not raise the problems present with statutes that apply to both federal and state elections, there are still questions of statutory interpretation. Not only are there questions about whether the legislature incorporated the state constitution by reference when enacting the maps, but as the respondents argued in their opposition to the application for a stay, state law expressly authorizes state courts to hear constitutional challenges to congressional districting. See, e.g., Moore v. Harper, Respondents North Carolina League of Conservation Voters et al., Response in Opposition to Emergency Application for Stay Pending Petition for Certiorari 2, 3–6 (No. 21A455), citing N.C. Gen. St. §§ 1-267.1(a), 1-81.1(a), 120-2.4(a), (b), (a1), 120-2.3(a). Petitioners argue in response that the statutes in question are civil procedure statutes that do not affirmatively authorize state courts to hear state constitutional challenges to congressional districts but instead contemplate, in part, the procedures for federal constitutional challenges. Moore v. Harper, Reply in Support of Emergency Application for Stay Pending Petition for Certiorari 18-20 (No. 21A455). Normally, such questions of interpretation of state laws are definitely up to state courts.

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exceeded that authority.[213] And he did so despite the fact that the state trial court came to the opposite conclusion and the state supreme court declined to intervene. Justice Gorsuch, and other proponents of a maximalist ISLT, have thus "prescribed the unusual role for the Supreme Court of deciding whether a state court properly interpreted state law,"[214] and doing so apparently with de novo review.

Chief Justice Rehnquist took such a position, but in the 2020 election opinions, the ISLT justices went even further than Rehnquist in staking out the federal courts' role. Recall that Rehnquist, although noting that the Electors Clause gave the "text of the election law itself . . . independent significance,"[215] imputed a specific intent to the legislature to take advantage of the ECA's safe harbor. The more recent statements of the justices, however, suggest that they are claiming that the Clauses empower—indeed require—federal courts to engage in de novo textualist construction of state election law, without regard to legislative intent, as they complain about "nonlegislative officials ... rewrit[ing]" statutes.[216]

But the choice between textualism and purposivism is a contested jurisprudential choice.[217] Many states have law—sometimes embodied in statutes—requiring courts to engage in purposivist statutory construction in at least some circumstances.[218] The maximalist ISLT appears to reject this approach as a matter of federal constitutional law.

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[213] Moore II, 141 S. Ct. at 47–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief).

[214] Robert A. Schapiro, Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie, 34 LOY. U. CHI. L. J. 89, 93 (2002).

[215] Bush, 531 U.S. at 113.

[216] Degraffenreid, 141 S. Ct. at 732–33 (2021) (Thomas, J., dissenting from denial of certiorari).

[217] See Schapiro, supra note 214, at 108–09; Richard H. Pildes, Judging "New Law" in Election Disputes, 29 FLA. ST. U. L. REV. 691, 720–21 (2001); Amar & Amar, supra note 24, at 29 n.71, 44, 48–49. As Litman and Shaw note, this rejection ignores the fact that textualists have long pointed to the lawmaking process laid out in the federal constitution as justification for their approach, but state are not bound by those provisions. Litman and Shaw, supra note 35, at 13–16. Moreover, textualism itself does not provide anything close to the predictability that its proponents claim. See Litman and Shaw, supra note 35, at 12–13 (documenting examples of inconsistency); id. at 12 n.59 (listing scholarship documenting textualism's problems).

[218] See, e.g., 1 Pa.C.S. § 1921(a).

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Justice Gorsuch's opinion in the North Carolina case provides one example of how the Court might entirely override a state court interpretation of its own statute while failing to engage with the state's own legal framework or the state court's analysis. But there are other potential examples. Take, for example, an issue in the Pennsylvania litigation that the parties did not bring to the Supreme Court, but that, under a maximalist ISLT, would be ripe for such an appeal. The 2019 statute, which applied equally to federal and state elections, provided that an absentee voter must either return a ballot by mail or "deliver it in person to [the] county board of election."[219] The plaintiffs sought a declaration that this provision allowed county boards to set up "as many secure and easily accessible locations to deliver personally their mail-in ballots as each board deems appropriate."[220] Other parties (and intervenors) argued that the language meant that the only place a voter could deliver a ballot was to a board's official office.

The Pennsylvania Supreme Court concluded first that the statutory language was ambiguous.[221] "Accordingly," the court explained, "we turn to interpretive principles that govern ambiguous statutes generally and election matters specifically."[222] The court pointed to the Pennsylvania Statutory Construction Act in which the legislature itself directed the courts that "the object of all interpretation and construction of statues is to ascertain and effectuate the intention of the General Assembly."[223] The Act also contains "a comprehensive list of specific factors" that the courts should turn to if the statutory text is unclear.[224] And the court expressly mentioned some of those factors, including "the occasion and necessity for, the mischief to be remedied by, and the object to be obtained by the statute."[225]

The court also noted both "the 'longstanding and overriding policy in this Commonwealth to protect the elective franchise,'"[226] and its conclusion, dating back to at least 1965, that "'the Election

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[219] 25 P.S. § 3150.16(a).

[220] Boockvar I, 238 A.3d at 357.

[221] Id. at 360.

[222] Id.

[223] Id. at 356, quoting 1 Pa.C.S. § 1921(a).

[224] Id.

[225] Boockvar I, 238 A.3d at 361, citing 1 Pa.C.S. § 1921(c)(1), (3), and (4).

[226] Id. at 360–61, quoting Shambach v. Bickhart, 845 A.2d 793, 798 (Pa. 2004).

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Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice.'"[227] Relying on those principles, the court held that the statute "should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes."[228] It explained: "This conclusion is largely the result of the clear legislative intent . . . to provide electors with options to vote outside of traditional polling places."[229]

When the GOP petitioned for certiorari in this litigation, it did not challenge this holding. But as the maximalist ISLT has re-emerged, it is not hard to imagine what such a challenge would look like. It could argue that the statute was not ambiguous.[230] And even if there were ambiguity, the challenge would argue that the state court's purposivist approach to resolving the ambiguity and its reliance on legislative intent—despite the Pennsylvania statute that the legislature itself passed instructing courts to use that approach—were improper because under the maximalist ISLT, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[231] And the challenge might suggest that state law precedent construing the Election Code is irrelevant for purposes of construing the statute's application to federal elections. Under the maximalist ISLT, then, federal courts will be encouraged (perhaps even required) to ignore states' statutory construction statutes, legal precedent, practices, and conventions, all of which legislatures, as well as courts, rely on, and which may render a purely textualist reading of a statute inappropriate even given unusual deference to the legislature.

Ignoring all of these sources of legal meaning also could have astonishing and chaotic results. Boockvar again provides an example. In the Supreme Court, the crux of the GOP's claims was that the Pennsylvania Supreme Court rewrote Act 77 by extending the received-by deadline. As part of that argument, the GOP

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[227] Id. at 356, quoting Perles v. Hoffman, 213 A.2d 781, 783 (Pa. 1965).

[228] Id. at 361.

[229] Id. On this issue, the court split 5-2. See id. at 392 (Saylor, J., concurring and dissenting) (joined by Justice Mundy).

[230] Cf. Teigen v. Wisconsin Elections Comm'n, 976 N.W.2d 519, 540–41 (Wis. 2022) (construing comparable Wisconsin statute to unambiguously prohibit dropboxes). See infra note 267 for a discussion of textualism's lack of certainty.

[231] Bush v. Gore, 531 U.S. at 113 (Rehnquist, C.J., concurring).

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pointed to the Act's "non-severability clause."[232] That clause identified a number of specific provisions as "non-severable" and stated: "If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void."[233] Because the Pennsylvania court concluded that the received-by deadline could not function constitutionally under the circumstances of the 2020 election, the GOP argued, it should have struck down the entire mail-in voting regime.[234]

A purely textualist reading of this provision might come to the same conclusion.[235] But a deeper knowledge of state law demonstrates that the story is not so simple. First, the Pennsylvania courts do not automatically apply nonseverability clauses as written. In fact, in 2006, the Pennsylvania Supreme Court refused to give force to a nonseverability clause with identical language to Act 77.[236] There, the court concluded that the clause exceeded the legislature's authority largely because of the "separation of powers concerns" that arise when the legislature attempts to influence the outcome of a judicial proceeding.[237] The court reasoned that where a nonseverability clause is designed to deter the judiciary from finding statutory provisions unconstitutional—that is from doing its job—by making the consequences of doing so terrible, the clause should not necessarily be enforced.[238]

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[232] Republican Party of Pennsylvania v. Boockvar, No. 20-542, Petition for Certiorari, 22 (U.S. 2020).

[233] PA Act 77, Section 11.

[234] Republican Party of Pennsylvania v. Boockvar, No. 20-542, Petition for Certiorari, 6–7, 22. See also Honest Elections Amicus Brief at 15.

[235] One cert-stage amicus brief, from the state of Missouri and nine other states, described the statutory provision as "an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of preventing Pennsylvania courts from making such post-hoc changes to Pennsylvania's mail-in voting system." Republican Party of Pennsylvania v. Boockvar, No. 20-542, Amicus Brief of Missouri et al. at 5 (emphasis in original). But that description of the statute begs the question of what the legislature actually did and, more specifically, whether it in fact enacted the clause expecting that the courts would apply it without reference to prior precedent.

[236] Stilp v. Commonwealth, 905 A.2d 918, 973 (Pa. 2006), citing Act 44, § 6.

[237] Id. at 980.

[238] In other words, the Missouri amicus brief described precisely the kind of legislative attempt to stop the judiciary from honestly and thoroughly assessing a law's constitutionality that the Pennsylvania Supreme Court had previously

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Thus, under precedent dating back more than a decade, the Pennsylvania legislature knew that Act 77's nonseverability clause would not automatically be enforced. Nor did the legislature claim to be invoking the ISLT to override the 2006 holding. To the contrary, because Act 77 applied equally to state and federal elections—elections that occur simultaneously—the strongest inference is that the legislature expected the statute, nonseverability clause and all, to apply and be interpreted identically to both.

Second, in Boockvar, the court appeared to distinguish its well-established equitable powers to make adjustments to election procedures in the face of a natural disaster[239]—which under Pennsylvania law included the pandemic—from a holding that the statute was unconstitutional as applied.[240] As a result, the court concluded the nonseverability clause was not implicated.

Third, at least three Pennsylvania Supreme Court justices believed that strict application of the non-severability clause to strike down the entire law "would itself be unconstitutional [under the state constitution], as it would disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election."[241].

And finally, application of the nonseverability clause would have had much further-reaching effects than the petition for certiorari acknowledged. In the Supreme Court, the petitioners described the election-day deadline as part of a bipartisan compromise that the clause was designed to preserve.[242] But the deal that was struck in the legislature had little to do with the receipt date. Instead, the legislation embodied a three-way agreement with an entirely different focus. It provided a funding

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concluded violated the state's separation of powers principles. See supra note 235.

[239] Boockvar I, 238 A.3d at 370, citing Friends of Devito v. Wolf, 227 A.3d 872, 888 (Pa. 2020).

[240] Id. at 366. See also id. at 397 n.4 (Donohue, J., concurring and dissenting) (disagreeing with particular remedy but concluding that "the election specific remedies at issue here" are not an "as-applied constitutional violation [ ] triggering the draconian consequence" of the nonseverability clause).

[241] Id. at 397 n.4 (Donohue, J., concurring and dissenting, joined by Saylor and Mundy, J.J.)

[242] Republican Party of Pennsylvania v. Boockvar, No. 20-542, Petition for Certiorari, 6–7.

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mechanism for new voting machines that had a paper trail, which the Department of State had mandated; it provided for no-excuse mail-in voting, which was sought by Democrats; and it eliminated straight-ticket voting, which Republicans badly wanted.[243] So if the the nonseverability clause were applied literally, all of those provisions would have been eliminated,[244] less than seven weeks before the election.[245]

The chaos and confusion that would ensue under such circumstances make the argument that the nonseverability clause was designed to deter meaningful judicial review or equitable relief was particularly strong, thus making the Pennsylvania court's refusal to give effect to it entirely consistent with longstanding state law. And indeed, although the Pennsylvania justices did not agree on all points, they were unanimous on two important points: (1) the absentee ballot application and return deadlines could not operate constitutionally under the circumstances, and (2) whatever remedy the court imposed (about which they did disagree), the nonseverability clause would not apply.

None of this is to say that the Pennsylvania Supreme Court's decision and reasoning were unassailable. Instead, the point is that the law of any particular state may be complicated and nuanced in ways that legislators and courts are well aware of but that may not be apparent on the face of a statute. When U.S. Supreme Court justices accuse state courts of "rewriting" election laws, then, relying on their own narrow textualist methodology, they have it exactly backwards. And both political accountability and predictability are undermined when federal judges ignore the likelihood that state legislators—and their constituents—understood election laws to incorporate established state law.[246]

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[243] See Jonathan Lai, Pa.'s election system is on the verge of the largest changes in decades — in time for the 2020 election, PHIL. INQUIRER (Oct. 23, 2019), available at https://perma.cc/5QRF-ZLJV.

[244] The funding mechanism for new voting machines appears in a section of the statute not expressly listed as nonseverable. See Act 77, Sections 3.1, 11. But the second sentence of the nonseverability clause—the language at issue in 2006—ostensibly applied to the entire statute. Id., Section 11.

[245] Under some versions of the ISLT, having struck down the statute, the state court would be powerless to impose any other remedy as to federal elections. See Derek Muller, Rucho v. Common Cause and a weak version of the claims in the North Carolina partisan gerrymandering dispute, ELECTION LAW BLOG (March 8, 2022), available at https://perma.cc/SLQ5-QBTY.

[246] Cf. Marisam, supra note 208, at 20 (noting that the ISLT has the ironic

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This danger is exacerbated when the Supreme Court rules on the shadow docket and in the absence of full briefing. Indeed, it is exacerbated even when individual justices issue separate opinions without full briefing, as they may stake out positions that they are later reluctant or embarrassed, consciously or not, to back off of. In the heat of election litigation, issues may go undeveloped. As described in the next Part, the Court runs the risk of irreparable damage to state law, and to itself, if it embraces the maximalist ISLT, especially under such circumstances.

III. CONSEQUENCES

Not only have the proponents of the ISLT skipped the first and essential statutory interpretation question before proceeding to claim significant new federal judicial authority, but they also ignore numerous serious disruptions to state law and the predictable operation of elections that might ensue from unrestrained federal intrusion on state election law. This Part explores some of these consequences. Subpart A addresses practical consequences for elections officials, candidates, and voters. Subpart B takes on the consequences for federalism of a maximalist ISLT, and subpart C does the same for issues of democracy and institutional legitimacy.

A. Practical Disruptions

This article has already noted many of the practical disruptions that might ensue from a maximalist ISLT, but this subpart engages those questions in more depth. It focuses first on just how disruptive the ISLT would be when it inevitably leads to different rules for state elections as oppose to federal ones, turning then to the lack of finality and certainty the ISLT might bring, and, finally, addressing the disruption to election administration if delegations to non-legislative officials are construed narrowly or even prohibited.

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effect of "diminish[ing] the role of the more accountable state judges, while elevating the role of the less accountable federal judges"); id. at 22 (discussing Pennsylvania case).

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1. Dual Systems

As discussed in the prior Part, when a state legislature enacts a law that applies to state and federal elections without distinction, federal courts should presume that the legislatures incorporated state constitutional law and state law precedent and conventions. The alternative is deeply problematic as a practical matter. Under the ISLT, if a state court finds some or all of a statute unconstitutional under the state constitution, the statute would still apply to federal elections. Likewise, a federal court might disagree with the state court's construction of a statute that applies to both state and federal elections, leading to two different sets of rules.

In some situations, these inconsistent holdings could be confusing and might disrupt voters' expectations, but they would not be impossible to administer. Elections officials could segregate absentee ballots arriving after election day, for example, and could count votes on those ballots for state offices but not for federal ones. In fact, Pennsylvania was prepared to do just that in 2020.[247]

But other situations would be substantially more complicated. If, for example, a state court struck down voter identification requirements as violating the state constitution, election officials would be prohibited from enforcing them with respect to state elections. The ISLT would nonetheless require the state to keep the requirements in force for federal elections. That legal inconsistency would, at a minimum, require costly administrative duplication and create confusion for election officials and voters alike.[248]

The ISLT might also prevent state courts from appropriately managing election-related litigation or would place those courts in an impossible Catch-22, even where the litigation does not expressly involve federal elections. For example, ISLT could even cause disruption in cases involving state constitutional challenges to state legislative redistricting, even though the ISLT does not

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[247] Letter on behalf of respondent Kathy Boockvar, available at https://perma.cc/7F5Q-LHQF.

[248] See supra at 49–52 (discussing challenge of applying severability clause only to federal elections). Justin Levitt provides another example. Tennessee had a statute imposing a five-minute voting limit, which a state court construed as hortatory, requiring elections officials to count ballots where voters went over the limit. Stuart v. Anderson Cty. Election Comm'n, 300 S.W.3d 683, 688–92 (Tenn. Ct. App. 2009). Applying the text strictly to federal elections but not to state elections would be problematic at best. Levitt, supra note 31, at 1059.

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apply directly in those contexts. The disruption would come at the remedy stage. Once a court concluded that state legislative maps were unconstitutional, new maps would to be drawn. And because the creation of new maps takes time, the primary election for those state legislative offices might not be able to occur on the date originally set by statute—a statute that might well also provide that the primary be for all state and federal offices. In other words, the state court would have to consider whether to either move the date of the primary or sever the state and federal elections.[249] And under the ISLT, both of those outcomes would be improper.

2. No Finality

The ISLT invites claims, even years after the fact, that a state court decision construing or striking down an election law violated the Elections and Electors Clauses, a possibility made all the more likely by the recent emergence of the ISLT as a viable legal argument.[250] To be concrete, consider recent litigation in New Hampshire.

In 2017, the New Hampshire legislature enacted a law, known as SB 3, that amended the state's voter registration process.[251] The new law applied to all elections and made no distinction between federal and state offices. The state Democratic Party and the League of Women Voters, along with six individual plaintiffs, sued, alleging that the new registration requirements were confusing and unduly onerous, particularly when combined with significantly increased civil and criminal penalties. They brought only state law claims, alleging that SB 3 violated Part I, Article 11, of the state constitution, which states in relevant part: "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election."[252]

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[249] See Toth v. Chapman, Emergency Application at 24–26, No. 21A457 (U.S., February 28, 2022) (arguing that Pennsylvania Supreme Court could not change primary schedule due to the ISLT).

[250] See Krass, supra note 24 at 115–20 (discussing changed landscape regarding Elections Clause challenges to state legislative delegations of election law and comparing Baldwin v Cortes, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting delegation challenge) with more recent cases).

[251] See generally New Hampshire Democratic Party v. Secretary of State, 262 A.3d 366 (N.H. 2021) (N.H. Dem. Party).

[252] Id. at 374, quoting N.H. CONST. pt. I, art. 11 The plaintiffs also alleged a violation of the state constitution's equal protection guarantees. Id. at 369.

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The trial court denied the state's motion for summary judgment, which claimed that the plaintiffs could not show that SB 3 was facially unconstitutional.[253] More specifically, the trial court relied on New Hampshire Supreme Court precedent to hold that plaintiffs did not have to show that the law "placed a substantial burden on the vast majority of voters."[254] Following the same precedent, the court "required the State to 'meet its burden under intermediate scrutiny to demonstrate that the law is substantially related to an important government objective.'"[255]

The case proceeded to trial, where, relying on "unrebutted expert testimony, supported by testimony from a multitude of witnesses and the State's own data," the trial court held that the state failed to meet that burden and that SB 3 therefore violated the New Hampshire constitution.[256] The trial court thus imposed a permanent injunction.[257] The state defendants did not seek a stay of the injunction, and neither the Republican Party, any Republican candidates or campaigns, nor any state legislators attempted to intervene to do so. SB 3 was not in effect during the 2020 general election.

In July 2021, the New Hampshire Supreme Court affirmed.[258] It accepted the trial court's findings of fact and interpretations of the evidence, and it agreed that SB 3 unconstitutionally burdened the right to vote in New Hampshire. Under New Hampshire law, because SB 3 was struck down, the pre-existing law remains. No party filed for certiorari.

But the ISLT might disrupt this equilibrium. Of course, at some point the New Hampshire legislature may enact a new version of SB 3 that attempts to resolve the constitutional defects the court identified or might try to amend the state's election laws in other ways. But in the absence of such legislative action, any candidate

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Although the trial court granted an injunction on both bases, the state supreme court did not reach the equal protection issue. Id.

[253] Id. at 372.

[254] Id., citing Guare v. State of New Hampshire, 117 A.3d 731 (N.H. 2015).

[255] Id.

[256] N.H. Dem. Party, 262 A.3d at 373 (internal quotation marks omitted).

[257] See generally League of Women Voters of New Hampshire v. Gardner, 2020 WL 4343486 (N.H.Super. 2020).

[258] N.H. Dem. Party, 262 A.3d 366. In New Hampshire, most civil cases are tried in Superior Court, and appeals are taken directly from Superior Court to the Supreme Court. See https://perma.cc/Q4GF-L7VN .

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for federal office at any time in the future might be able to bring a federal lawsuit challenging the New Hampshire Supreme Court's decision as violating the ISLT and seek an injunction to reinstate SB 3's requirements for federal elections—but only for federal elections.[259] The ISLT would hang, like the sword of Damocles, over settled state election law.[260]

The same problem with respect to state court decisions arises—and indeed is likely multiplied—with respect to actions taken by members of a state's executive branch or by other elections officials. Campaign and party lawyers would go through administrative rules, guidance, adjudications, and other decisions by elections officials with a fine-tooth comb, looking for any conceivable daylight between executive interpretations and applications and the kind of hypertextualist readings of state statutes that the ISLT maximalists promote. Challenges would be limited only by the creativity of armies of lawyers. The ISLT might be better named the Perpetual Election Litigation Machine.

3. Disrupting Delegation

Similar arguments apply to other important issues of state law, including, for example, state-law delegation doctrines as applied to state election laws.[261] Under the maximalist ISLT, challenges to executive action as related to federal elections could render irrelevant any state law governing delegation in general and delegation of election law-related matters in particular.[262]

Indeed, Justice Gorsuch hinted at an argument that the Electors and Elections Clauses might actually restrict legislatures'

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[259] Some ISLT proponents suggest that highly specific constitutional provisions, such as those mandating nonpartisan redistricting commissions, might not violate the Clauses, but that vague or broad ones, like the "free elections" provisions in many state constitutions, do. See, e.g., Muller, supra note 245 [Election Law Blog post]. That version of the ISLT is sometimes described as narrow, but as the New Hampshire case demonstrates, its implications are extraordinarily broad. Those state constitutional provisions have long applied to a host of different types of election law, not just to redistricting.

[260] Justin Levitt coined the phrase "zombie requirements" to refer to statutory provisions that were struck down by state courts but are revived for federal elections. Levitt, supra note 31, at 1058.

[261] See Krass, supra note 24.

[262] See, e.g., Texas League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 150–54 (5th Cir. 2020) (Ho, J., concurring).

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ability to delegate various aspects of election administration. He questioned whether "the North Carolina General Assembly could delegate its Elections Clause authority to other officials," although he ultimately concluded no improper delegation had occurred.[263]

But delegation is ubiquitous and crucial in our election system. The ISLT, whether by subjecting discretionary decisions to de novo textualist review or by limiting the range of permissible discretion, could thus destabilize longstanding, productive, and professional election administration, including administrators' responses to unexpected and disruptive events.[264] In 2020, for example, several states' elections officials mailed absentee ballot applications to every registered voter.[265] Some of these mailings were not expressly authorized by state statutes. A maximalist ISLT might prohibit voters who used such applications from voting in federal elections, or might prohibit the state from counting votes for federal offices from such voters, on the grounds that the legislature authorized some methods of encouraging voters to apply for absentee ballots, or making those applications available, but not others.

Elections officials would likely find themselves defensively limiting their own discretionary decisions. Under a robust ISLT, a

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[263] Moore II, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief). See also DNC, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of vacatur of stay) (noting that the Clauses provide that "state legislatures . . . not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." The petitioners in Moore v. Harper echo that claim, hinting that the legislature might not even have the power to authorize, or delegate the power to, state courts to review the constitutionality of congressional maps. See Moore v. Harper, Reply in Support of Emergency Application for Stay Pending Petition for Certiorari 18–19 (No. 21A455) (describing this issue as "a momentous constitutional question that this Court should avoid if possible").

[264] See Krass, supra note 24, at 107 (explaining that "elections officials depend heavily on delegation to keep their agencies moving"); id. at 107 n.21, citing Daniel P. Tokaji, The Future of Elections Reform: From Rules to Institutions, 28 Yale L. & Pol'y Rev. 125, 130–31 (2009), for the proposition that discretion is "baked into current election administration systems").

[265] Todd Spangler, Secretary of State: All Michigan voters will get absentee ballot applications at home, Det. Free Press (May 19, 2020), available at https://perma.cc/JLR9-UWPL; David Eggert, Michigan mails absentee ballot applications to all voters, A.P. (May 19, 2020), available at https://perma.cc/7FZ3-3YPS; Wisconsin Elections Commission, WEC Prepares for Fall Elections by Approving Block Grants to Municipalities and Mailing to Voters - COVID-19 (May 29, 2020), available at https://perma.cc/FC5Y-R9JF.

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discretionary decision to, for example, set up dropboxes or send out absentee ballot applications is likely to provoke costly and time-consuming litigation—and could result in confusion or worse if a federal court determined that the decision was improper under the ISLT. Faced with such possibilities, officials are likely to exercise their discretion very conservatively, affecting their administration of state elections as well as federal. Similarly, if a state court held, as the Pennsylvania court did, that dropboxes were permissible under the statute but a federal court disagreed, elections officials would likely not use dropboxes at all, rather than trying to explain to voters that they could use them but their votes for federal offices would not count.

B. Consequences for Federalism

The maximalist ISLT could create significant practical problems for courts, election officials, and voters alike, as the last subpart explains. But it also could undermine state courts and state law in more far-reaching ways. If, as Justices Gorsuch, Alito, and Thomas seem to suggest, the proper construction of state election law governing federal election requires a different approach from the way state courts ordinarily interpret state statutes, one implication of the ISLT is that federal courts might be superior to state courts at the task.[266] State courts' understanding of and immersion in their states' legal culture, precedent, and constitutions would, if anything, detract from their ability to interpret these particular state laws in the peculiarly textualist manner the maximalist ISLT requires.[267]

For these reasons, a maximalist ISLT essentially federalizes the interpretation and application of state election law as it applies

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[266] Morley suggests (although does not clearly embrace) a version of this argument in the context of determining the scope of elections officials' statutorily delegated authority. For one thing, he hints that, where judges are elected, they may have an interest in the outcome or in pleasing the official. Morley, ISLD, supra note 12, at 513. In addition, he argues, "[a] federal judge also may be further removed from the state's political scene and therefore better able to objectively adjudicate a case that is likely to have partisan consequences." Id.

[267] Pildes, supra note 217, at 720–21; Schapiro, supra note 214, at 107–09. Cf. Litman and Shaw, supra note 35, at 3 (describing the insistence on textualism as "an assertion of interpretive primacy on the part of federal courts").

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to federal elections.[268] The normal deference to state court interpretation and expertise is lacking and their usual role as the authoritative interpreter of state law is irrelevant at best, obstructionist at worst.[269] Parties might, therefore, prefer to go directly to federal court to seek rulings about the meaning and application of these state laws. Or they could seek injunctions from federal courts to preclude state actors from applying state court rulings to federal elections.[270]

Such litigation could be significantly destabilizing to state law. For one thing, if a federal court interpreted a state election law before the state courts did so, that might create significant pressure on state courts to accept that interpretation with respect to state elections because failure to do so could lead to a two-tier election system, which could be confusing to voters and difficult or even impossible to implement. For another, to the extent that the provision interpreted by the federal court relates to or interacts with other parts of the election code, it could affect state court interpretations of state statutes beyond the specific disputes in question.

And the ISLT is insulting to state courts and could well undermine public confidence in the state judiciary.[271] State courts might begin to alter their own approaches to statutory interpretation and judicial review with respect to election law if they fear federal court reversal or contradiction, both out of a desire to preserve their own legitimacy and to avoid the problems that might arise from a dual system of elections.[272] The ISLT's contempt for state judges could in the end distort state law.

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[268] See Morley, ISLD, supra note 12, at 526 & nn. 188–94 (discussing this concern and citing other scholars who have argued the point).

[269] Cf. Amar & Amar, supra note 24, at 18; Litman and Shaw, supra note 35, at 20.

[270] See Wise v. Circosta, 973 F.3d 93 (4th Cir. 2020), for one example of plaintiffs attempting to use federal courts to circumvent state court rulings in pending elections cases.

[271] See Harold J. Krent, Judging Judging: The Problem of Second-guessing State Judges' Interpretation of State Law in Bush v. Gore, 29 Fla. St. U. L. Rev. 493, 529–30 (2001) (arguing that the Rehnquist concurrence "all but heaps scorn on state jurists" and "compromises state judicial authority").

[272] As Litman and Shaw put it, the ISLT may "effectively require[ ] states to allocate decisionmaking authority within the state in a particular way, which flies in the face of the idea that states have considerable latitude in structuring their governmental system." Litman and Shaw, supra note 35, at 20.

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And most counter-intuitively, given the "independent state legislature" label, the ISLT, especially in its most maximalist forms, does not empower state legislatures. Maximalist forms of the ISLT might disregard legislative intent, undermine legislative decisions to have unified elections for federal and state offices, ignore pre-existing precedent against which legislatures act, and prohibit delegation to professional election administrators. None of that empowers state legislatures. To the contrary, it empowers federal courts—especially the Supreme Court—which can second-guess everything legislatures do that affects federal elections.

C. Undermining Institutional and Democratic Legitimacy

A core insight about election law—and one that was much discussed after the 2000 election—is that it is crucial to know ahead of time, from behind the veil of ignorance, what the rules are and who the deciders are. That is even more true today with our intense partisanship.

But federal courts too can engage in "adventurous or unanticipated judicial changes in the law."[273] The ISLT itself is just such a change. State and federal courts, state legislatures, Congress, and the people of various states in amending their own constitutions have presumed for most of this country's history that state constitutions—and thus state courts—control state law governing federal elections.[274] As recently as 2019, although the Supreme Court was sharply divided on the federal justiciability of partisan gerrymandering, all nine justices agreed that state constitutions can prohibit it, including in congressional districting.[275]

Indeed, until 2020, the Supreme Court showed no interest in reviewing state court holdings applying such state constitutional limitations. In 2018, for example, the Pennsylvania Supreme Court struck down the state legislature's congressional redistricting map as violating the state constitution and imposed its own map when the legislature failed to provide one.[276] When legislative leaders

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[273] Krent, supra note 271, at 529.

[274] See Part I.A.

[275] Rucho v Common Cause, 139 S. Ct. 2484, 2507–08 (2019); id. at 2524 (Kagan, J., dissenting).

[276] See generally League of Women Voters of Pennsylvania v.

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sought a stay and then petitioned for certiorari, expressly raising the ISLT,[277] the Supreme Court denied both without comment.[278]

And the Supreme Court has insisted that federal courts defer to state courts in matters involving federal elections. In Growe v. Emison, for example, both the state and federal courts were hearing challenges to Minnesota's congressional maps.[280] Although the legislature passed new redistricting plans, they were vetoed by the governor, and shortly thereafter, the federal district court enjoined the state court from imposing its own maps, including a congressional map.[281] The Supreme Court unanimously held that the federal court should have deferred to the state court process. More specifically, the Court emphasized that "'reapportionment is primarily the duty and responsibility of the State through its legislature or other body . . .,'"[282] and it expressly demanded deference to the state court in congressional redistricting.[283]

Under these circumstances, and along with the long history of state constitutional regulation of election law described in Part I, the Pennsylvania Supreme Court in 2020 (nor any other state supreme court) was not exactly on notice that any of the U.S. Supreme Court justices were about to embrace the ISLT. Nor, for that matter, were state legislators. The ISLT is itself a significant change in the rules[284]—and in part because of its novelty, it is a

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Commonwealth of Pennsylvania, 178 A.3d 737 (Pa. 2018).

[277] Pet'n for Certiorari, Turzai v. Brandt, No. 17-1700, 2018 WL 3122294.

[278] Id. Of course, certiorari denials are not precedential and the Court has often warned against reading anything into them. See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 note 1 (1973) ("For the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits, see Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (Frankfurter, J.)."). But in the broader context of the Supreme Court's treatment of federal judicial involvement in state election law, this denial is a telling piece of evidence.

[280] 507 U.S. 25, 27 (1992).

[281] Id. at 30–31.

[282] Id. at 34 (emphasis added), quoting Chapman v. Meier, 420 U.S. 1, 27 (1975).

[283] Id. at 36–37.

[284] That the ISLT itself would upset longstanding expectations is a partial response to Professor Morley's claim that it is important for law governing federal elections to "be judged according to a uniform body of known federal constitutional standards, subject to ultimate review in the U.S. Supreme Court, rather than according to potentially esoteric, idiosyncratic, or otherwise unpredictable state constitutional restrictions. It is far easier for the federal

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change that, as already explained, functionally shifts power to the Supreme Court, not to state legislatures.

Moreover, the ISLT, especially as it interacts with other aspects of the Supreme Court's docket, invites litigation gamesmanship and could damage that Court's own legitimacy. Return to the 2020 litigation in Pennsylvania. The GOP argued that the statute's nonseverability clause required striking down the entire mail-in ballot regime. But as already explained, if applied literally, that clause would have required striking down most or all of the entire statute, including the elimination of straight-ticket voting. The GOP did not argue for that result presumably because getting rid of straight-ticket voting was something that the party had sought for a long time. The defendants and the Democratic party did not make that argument because they opposed any application of the nonseverability clause. Particularly when a case arises under the time pressure and absence of briefing, including amicus briefing, that characterize the shadow docket, the Court may not have adequate information to assess the meaning of a particular statute.

Parties may also be strategic in the specific issues they present to the Supreme Court in ways that push the Court into taking sides in hotly partisan matters without full information. In 2020, for example, Republican litigants repeatedly asked the Court to intervene when other courts concluded that election-day deadlines for receipt of absentee ballots had to be extended. But they did not ask the Court to reverse numerous other state court holdings, even in the same cases.

Litigation in Pennsylvania today also illustrates the possibility for such gamesmanship. A state appeals court recently held that Act 77's expansion of mail-in voting to all voters violates the state

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government—and other states—to accept legislatures' actions impacting the federal government at face value when they do not need to consider those acts' substantive validity under state constitutions." Morley, ISLD and Elections, supra note 12 at 37. It is, quite simply, too late in the day for this justification to work. See AIRC, 576 U.S. at 804–09 (upholding constitutional amendment creating redistricting commission over ISLT-type challenge); Persily, et al., supra note 54 (documenting numerous state laws and constitutional provisions adopted by initiative that might be called into question by the ISLT). Morley himself tacitly acknowledges this problem by suggesting that if the Supreme Court adopts the version of the ISLT that precludes state constitutional constraints, it could "make its ruling prospectively applicable only in the case before it and as to future state statutes." Morley, ISLD, supra note 12, at 552.

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constitution.[285] This holding was reversed by the Pennsylvania Supreme Court.[286] But suppose the state supreme court had agreed with the lower court. Under the ISLT, promoted by the GOP and opposed by the Democratic Party in 2020, that holding would not apply to federal elections. But to make that argument, Republicans and Democrats in Pennsylvania would have to switch sides from their positions as to the ISLT in 2020. So either the ISLT will be only selectively enforced or the parties will have to take deeply unprincipled positions.

IV. FENDING OFF THE ISLT

As described in Part I, there is powerful evidence against the argument that state legislatures are not bound by state constitutions when they regulate federal elections. But even if some version of that claim is ultimately endorsed by the Supreme Court, the rest of this Article demonstrates the illogic, danger, and disruption of the most aggressive forms of the ISLT. This Part discusses how to fend off some of those consequences. There are roles here for numerous players—state courts, state legislatures, elections administrators, Congress, litigants, and the Supreme Court itself—and some strategies could be embraced by several of them. This Part therefore describes the strategies in relatively broad strokes, as the details may vary by situation and by actor.

State courts and state legislatures alike should embrace the importance of political accountability and predictability in election law. Legislatures can include express statements in election-related laws indicating that they are incorporating the full body of state law into their election-related enactments. Even better, they can pass stand-along laws declaring that all election laws incorporate all state law, and that unless otherwise expressly stated, federal and state election laws are reviewed and interpreted identically, with all state precedent applying equally to both. Congress too could establish that legislatures cannot disavow state law and state constitutional limitations when they regulate federal elections, or at least that they must expressly say so.[287]

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[285] McLinko v. Dept. of State, 270 A.3d 1243 (Pa. Cmwth Ct. 2022).

[286] McLinko v. Dept. of State, 2022 WL 3039295 (Pa. 2022).

[287] Under the Elections Clause, Congress unquestionably has the authority to pass such a law with respect to congressional elections. See Congress could

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State courts should expressly determine whether the state legislature intended not to incorporate state law when reviewing and construing laws governing federal elections.[288] Moreover, state courts should write defensively. That is, they should assume that their readers know nothing about their state's law and they should explain how their analysis is grounded in longstanding state law precedent and norms. The Pennsylvania Supreme Court, for example, could have explained its nonseverability precedent in more detail, including noting that the clause at issue in 2020 was identical to the clause it refused to enforce in 2006 and that the legislature therefore knew that the clause might well be ineffective.

Claims about the state constitutionality or meaning of election laws should be decided by state courts in the first instance. There are numerous mechanisms, including exhaustion, waiver, abstention, and certification requirements, that either Congress or the federal courts could use to ensure that happens. Indeed, Congress has imposed a comparable requirement on habeas petitioners, who must exhaust their state remedies before filing for federal court review of their convictions.[289] Before seeking federal court review of state election law, litigants could be required to present their issues to the state courts, up to and including the state court of last resort. If there is no definitive state court ruling, the federal courts could be required to certify questions to state high courts. And especially where there are parallel proceedings, abstention doctrines, like Pullman abstention, could apply.[290]

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also pass a bill that "ratifies non-legislative state regulations of congressional elections." *See* https://twitter.com/ProfNickStephan/status/1542720570906771456. https://twitter.com/ProfNickStephan/status/1542720570906771456 (arguing that Congress could pass a law that "ratifies non-legislative state regulations of congressional elections"). As for presidential elections, the Supreme Court has long held Congress's power to regulate presidential elections is comparable its power to regulate congressional elections. See, e.g., Burroughs v. United States, 290 U.S. 534, 544–48 (1934).

[288] Cf. Amar & Amar, supra note 24, at 29 (arguing that federal courts should defer to state court interpretations on this point).

[289] 28 U.S.C. § 2254(b).

[290] See Wise, 978 F.3d at 101–01 (abstaining under Pullman). See also Morley, ISLD, supra note 12, at 514 (discussing Pullman abstention). Other preemption doctrines might also be relevant. See generally Wright and Miller, 17A Federal Practice and Procedure (3d ed., April 2022 Supp.) § 4241. The specific application of those doctrines is well beyond the scope of this article.

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Litigants should also have to make the same ISLT claims in state court that they later present to the Supreme Court and other federal courts. In other words, it should not be enough for litigants to ask state courts to construe or review statutes. Where the statutes apply to both federal and state elections, litigants should have to expressly ask state courts to evaluate whether the statutes mean something different for federal as opposed to state elections and whether the legislature made clear an intention to abrogate ordinary state constitutional and other constraints, or such arguments are waived or forfeited.[291] And as already suggested, state courts should address the question, even if not expressly asked to.

Courts should impose strong norms of legislative acquiescence to address the threat of litigation disrupting settled expectations and settled law. If the legislature does not enact a new law after state court litigation, or after established administrative practice, federal courts should consider those interpretations of the law definitive as to both federal and state elections.[292] And Congress could legislate such a requirement.[293]

Nor should individual legislators be able to call such acquiescence into question, whether by litigation, public statements, or speeches on the floor of the legislature. Regardless of how one reads the scope of authority over federal elections that the Constitution grants to state legislatures, it is a grant of authority only to the legislature as a whole. Indeed, Supreme Court precedent establishes that it is a grant of authority to the legislature as a lawmaking body,[294] and additional precedent

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[291] Again habeas law provides an analogy. When habeas petitioners fail to raise their claims in state court first, those claims are generally considered to be procedurally defaulted. See Shinn v. Ramirez, 142 S. Ct. 1718, 1732 (2022).

[292] See Pildes, supra note 217 at 695 (discussing Chief Justice Rehnquist's claim in Bush v. Gore that the Florida Supreme Court had essentially created new state law after the votes had been cast in the 2000 election); Michael L. Wells & Jeffry M. Netter, Article II and the Florida Election Case: A Public Choice Perspective, 61 Md. L. Rev. 711, 715 (2002) (pointing out that federal judicial involvement in "the business of state government" is often unnecessary because "the main tool for seeing that courts do not exceed their authority is the power of the legislature to override nonconstitutional court rulings by enacting new legislation"); id. at 712 (arguing that Article II is "a guarantee that election rules are put in place before the election").

[293] See infra note [citing Nick Stephanopoulous's tweet].

[294] Smiley, 285 U.S. at 399.

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establishes that individual legislators have no standing to assert the interests of the full body.[295] That individual legislators might be unhappy with court decisions should be irrelevant to the status of the law. Put another way, while state law might give them standing to litigate, the fact that they decide to do so should have no bearing on an assessment of whether a state court's holding was correct.

Finally, even a maximalist ISLT does not require the Supreme Court to leap into action every time it disagrees with a state court. The Supreme Court itself has instructed the lower federal courts to be cautious about issuing election-related injunctions that change the status quo too close to an election.[296] Because elections are primarily governed by state law, the Supreme Court has repeatedly emphasized, federal court involvement at the last minute can be extraordinarily disruptive.

This principle is called the Purcell principle, after the 2006 case Purcell v. Gonzalez. During and after the 2020 election, the Court has enforced it increasingly vigorously. In a February 2022 case, for example, the Court stayed a three-judge district court order that the state of Alabama redraw its congressional districts because it found that the original map violates the Voting Rights Act.[297] Justice Kavanaugh, joined by Justice Alito, argued in a concurrence that Purcell compelled the Court to grant the stay—even though the first primary elections were still months away.[298]As Justice Kavanaugh explained, "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election."[299]

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[295] Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953 (2019).

[296] Purcell v. Gonzalez, 549 U.S. 1 (2006). See Wise v. Circosta, 978 F.3d 93, 99 (4th Cir. 2020) (explaining that the Supreme Court's own actions during the 2020 election litigation clarified that Purcell deference extended to state court actions); but see Moore II, 141 S. Ct. at 46–48 (Gorsuch, J., dissenting) (asserting, in an application for an emergency stay in the same case, that the Supreme Court should have intervened).

[297] Merrill v. Milligan, 142 S. Ct. 879, 881 (2022).

[298] Id. at 880–83 (Kavanaugh, J., concurring in grant of applications for stays); id. at 888 (Kagan, J., dissenting from grant of application for stays) (explaining why Purcell should not apply).

[299] Id. at 881 (Kavanaugh, J., concurring in grant of application for stay). Justice Kavanaugh's opinion was joined by Justice Alito. Id. at 879.

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But the scope of Purcell is deeply unclear, and the justices invoking it do not appear to be applying it evenhandedly. In the North Carolina case about absentee ballot deadlines, for example, only six days before the election, Justice Gorsuch, joined by Justice Alito, was eager to "swoop in" when he disagreed with a state court's interpretation of state election law.[300] In other words, these justices not only embraced a maximalist ISLT that gives them the unique authority to construe state election law, but they were willing to do so under circumstances in which they themselves instructed all other federal courts to stay their hands.[301] And that, in turn, will invite unending last-minute challenges to state court holdings regarding all aspects of state election law.

The full Supreme Court, or Congress, should reject this double standard. A full discussion of Purcell, the inconsistent ways the Court has applied it during and since 2020, and the full range possible congressional interventions is beyond the scope of this article.[302] But either actor could, for example, provide expressly that state court rulings, even if relatively close to an election, receive more deference than federal court rulings.

Such a statute or doctrine would be consistent with Chief Justice John Roberts' concurring opinion in the 2020 Wisconsin case. The case involved a challenge to a federal district court injunction, which the Seventh Circuit stayed.[303] The Supreme Court refused to vacate the stay, and Roberts explained that the situation was very different from the Pennsylvania case, in which the Court allowed the state court ruling that modified election rules to stand. "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state

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[300] Moore II, 141 S. Ct. at 46–48 (Gorsuch, J., dissenting). Justice Thomas also would have granted the requested injunctive relief, although he neither joined Justice Gorsuch's opinion nor wrote his own.

[301] See Lemley, supra note 25.

[302] For more about the inconsistency with which the Supreme Court applies Purcell, see, e.g., Carolyn Shapiro, The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court, __ Ohio St. L. J. Online __, 8–11 (forthcoming 2022) available at https://perma.cc/ZLS2-FD5P; Stephen I. Vladeck, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 129–43 (forthcoming 2022).

[303] DNC, 141 S. Ct. 28.

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lawmaking processes," he said.[304] "Different bodies of law and different precedents govern these two situations . . ."[305]

*** ***

There is, of course, a legitimate federal interest in orderly and lawful federal elections, and therefore there may be a federal judicial role in ensuring, for example, that state courts do not issue rulings that are so unpredictable or ungrounded that they "change the law," especially after voters, candidates, parties, and election administrators have relied on previous understandings.[306] But it is not so clear that these interests arise from the Electors and Elections Clauses' assignment of responsibilities to state legislatures rather than from the fact that the elections are federal elections and the federal government thus has an interest in preserving its own integrity.[307] So the issue confronting federal courts is not whether state courts encroached on the authority of state legislatures, but it is whether state courts have improperly disrupted federal elections.

There may be other interests at stake as well. As Richard Pildes has explained, late changes in election law might implicate reliance interests, in some contexts strongly enough to violate the Due Process Clause.[308] But these kinds of inquiries too require a much more deferential standard than the maximalist ISLT's de novo textualism and nihilistic approach to state constitutional law.[309]

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[304] Id. at 28.

[305] Id.

[306] See, e.g., Krent, supra note 271, at 508–09 (explaining that it is crucial for rules to be in place before an election and if they change, "faith in the integrity of the election process itself may be compromised." Also explaining why the Constitution insisted that change come from the legislature); McConnell, supra note 29, at 662 (noting importance of laws being created ahead of time under the "veil of ignorance"). Wells and Netter even suggest that Article II might apply differently depending on whether it is before or after an election. Wells & Netter, supra note 292, at 722.

[307] Cf. Burroughs, 290 U.S. at 544–48 (explaining that Congress must have the power to preserve the Republic).

[308] Pildes, supra note 217, at 704, citing Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995).

[309] See Amar & Amar, supra note 24, at 49 (suggesting that "the proper questions are 'In the federal-election case at hand, was the state supreme court

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CONCLUSION

In his opinion in Bush v. Gore, Chief Justice Rehnquist claimed that the version of the ISLT he was promoting did "not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures."[310] But the ISLT, especially the maximalist version, evinces no such respect for state legislatures. It fails to engage in basic questions of statutory interpretation. Some justices even appear to suggest that even where the legislature itself expects legislative intent to play a role in statutory construction, doing so would violate the Electors and Elections Clauses. Justice Gorsuch, joined by Justice Alito, has also hinted that state legislatures are limited in their ability to delegate election-related decision-making to courts and to election administrators.

Instead of evincing respect for state legislatures, the ISLT is a significant shift of authority over election law away from state legislatures and state courts in favor of the Supreme Court. And if the Court demonstrates a willingness to overrule state court actions even at the last minute, it is inviting a deluge of emergency applications over even minor state court decisions, such as whether candidates have complied with ballot-access requirements or whether particular polling places can be kept open late due to problems earlier in the day. And state laws that govern both federal and state elections could be subject to different, even contradictory interpretations, with all the chaos that would bring.

Any reading of the Elections and Electors Clauses that deprives state courts and state constitutions of their ordinary authority over state law is questionable at best. But the maximalist version of the ISLT—the version that some justices seemed to espouse in 2020—goes beyond any reasonable understanding of those Clauses. It must be rejected.

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doing the kinds of things it has generally done in other cases (especially cases involving the same types of statutes and state constitutional provisions at issue) in years past?' and 'Was the state court and/or the state constitution treating federal elections similarly to state elections?'"); Litman and Shaw, supra note 35, at 32 (proposing the use of "the extremely rare, extremely limited, and extremely deferential review of state law questions that is reflected in the adequate and independent state ground doctrine").

[310] Bush, 531 U.S. at 115 (emphasis in original).

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THE MEANING, HISTORY, AND IMPORTANCE OF THE ELECTIONS CLAUSE

Abstract: Historically, the Supreme Court has offered scant attention to or analysis of the Elections Clause, resulting in similarly limited scholarship on the Clause's original meaning and public understanding over time. The Clause directs states to make regulations for the time, place, and manner of congressional elections, and grants Congress superseding authority to make or alter those rules.

But the 2020 elections forced the Elections Clause into the spotlight, with Republican litigants relying on the Clause to ask the Supreme Court to limit which state actors can regulate federal elections. This new focus comes on the heels of the Clause serving as the primary constitutional basis for democracy reform legislation that passed the U.S. House of Representatives in 2019 and was reintroduced in 2021. Increased interest heightens the need for a deeper understanding of the intent and meaning of the Elections Clause. This Article fills a gap in the literature by providing a first-of-its-kind comprehensive analysis of the purpose, meaning, and interpretation of the Elections Clause by the Framers, early Congresses, and federal courts.

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***998 INTRODUCTION**

The Elections Clause--Article I, Section 4 of the U.S. Constitution--has been rarely studied and infrequently adjudicated. That is changing.

The Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." [1] In other words, the Elections Clause affirmatively directs states to regulate federal congressional elections, but reserves to Congress the superseding power to make its own regulations or to modify state election law.

It is a provision of extraordinary, if often latent power. Nowhere else in the original Constitution is Congress given explicit authority to "alter" state laws even absent a conflicting federal statute. It is also one of the few places in the Constitution where states are given an explicit instruction to act--in this case, to ensure the continuation of the federal legislature. Beyond the significance of this exertion of federal power, ***999** what is noteworthy about the Clause is the motive that drove its inclusion: a clear-eyed sense of the risk of political abuse by state lawmakers and the unambiguous decision *not* to leave federal elections in their hands alone.

Unexpectedly, the Elections Clause has emerged as the latest voting rights battleground. In 2020, litigants filed more than forty cases raising Elections Clause and Electors Clause [2] claims, largely seeking to limit voting access before the election or to overturn results after election day. [3] Unlike bizarre claims about Dominion voting machines and a deceased Venezuelan president, [4] these cases had the patina of constitutional seriousness. Today, in partisan voting rights battles, litigants focus on the meaning of the word "legislature," assuming it to restrict election regulation only to elected representatives in each state capitol. They claim, variously, that election officials, governors, or even state courts interpreting state constitutions cannot act. From the founding era to the present, one would have to look far and wide for evidence that the framers sought to limit these actions only to legislators (as opposed to understanding that language to refer to states generally). Indeed, suspicion of those very legislators suffuses the purpose and history of the Clause. After four justices--considering voting cases on the U.S. Supreme Court's 2020 "shadow docket" [5] --suggested that they would limit which state entities can regulate federal elections under the Elections and ***1000** Electors Clauses, [6] several petitioners sought certiorari to ask the Court to limit which state entities can regulate federal elections. [7]

At the same time, the Elections Clause serves as the primary constitutional rationale for federal democracy reform legislation to expand and protect voting access, including the For the People Act, which passed the U.S. House of Representatives in 2019 and again in 2021, and the Freedom to Vote Act (introduced in the Senate in September 2021). [8] And the Elections Clause took center stage in the Supreme Court's 2019 political gerrymandering decision, *Rucho v. Common Cause*. [9] The Clause was the subject of a 2015 ruling that allowed voters to enact election reforms through ballot initiatives. [10] In 2013, the Clause was the basis of a case on the scope of the National Voter Registration Act. [11] Understanding the Elections Clause's purpose, history, and application over more than 200 years is now essential.

Though the Elections Clause generated substantial friction during the state constitutional ratification debates from 1787 to 1790, it is not widely ***1001** known, at least as far as constitutional provisions go. Congress did not legislate pursuant to its power under the Elections Clause until 1842,[12] and the Supreme Court did not elaborate on its meaning until 1879.[13] In a nearly unbroken string of cases since then, the Court has deemed uncontroversial a wide range of elections regulations. But the Court did not engage in a robust analysis of the provision's history until 2013.[14] Given the Court's scant attention, scholarship on the Clause--especially its original meaning and public understanding over time--has been limited and is typically directed to the relationship between the Elections Clause and a specific issue.[15] This Article builds on this literature by providing a comprehensive examination of the purpose, meaning, and understanding of the Elections Clause over time.

The full sweep of the history of the Clause--from its drafting to the current day--tells a clear story. It was understood from the start to give ***1002** Congress extraordinary power over federal elections. Some derided it for this reason; others welcomed that federal oversight; all took it for granted. It was an important, if narrow, aspect of the Constitution's federalist clockwork machinery. From the start, the Elections Clause was motivated by great and still-relevant constitutional goals: to guarantee and amplify basic democratic rights by ensuring fair and accurate representation, and by precluding tactics that could be used by incumbent factions and parties to blunt representation and exclude voters.

Part I analyzes the drafting of the Elections Clause along with the state constitutional ratification and public debates on the provision. Part II considers the early congressional record and Congress's understanding of its authority under the Elections Clause. Part III explores the Supreme Court's interpretation of the Clause. And Part VI explains the importance of the Elections Clause for today's legal and political fights about our democracy.

I. THE ELECTIONS CLAUSE AT THE FOUNDING

A. The Constitutional Convention

1. The Framers' Goals

The Framers' inclusion of the Elections Clause was driven by two overlapping concerns of current relevance: a focus on representation and a distrust of state lawmakers.

First, the Framers cared passionately about representation.[16] As every American schoolchild knows, a fighting slogan was "No taxation without representation."[17] Americans understood the risks of electoral manipulation to minimize effective representation--manipulation they saw in England, and to a degree in their own pre-revolutionary past.

During the fight over British repressive acts that led up to the revolution, Americans bristled at the notion that they need not be represented directly in parliament. Britain insisted that virtual representation was enough. In the colonies, where many more people owned land and the electorate was a larger share of the population than in Britain, especially in the north, actual representation was deemed a necessary aspect of legitimate government.

***1003** British parliamentary seats were notoriously malapportioned. The booming industrial cities of Birmingham and Manchester had no representation.[18] On the other hand, a verdant hilltop known as Old Sarum had a seat in parliament.[19] Britain had ample reason to avoid the topic. As one historian writes, "Heeding American arguments about representation of the colonists in Parliament would open up a Pandora's box of defective representation in Britain."[20]

In American colonies, on the other hand, new towns were awarded legislative seats. Larger communities, such as Philadelphia and Boston, were awarded extra seats. As tensions rose, the Crown attempted to manipulate this practice. In Pennsylvania, it refused to add legislative representation when new towns were incorporated.

John Adams articulated the colonists' focus on ensuring the representative nature of legislatures in his *Thoughts on Government,* written in the spring of 1776 as the Continental Congress was preparing to formally declare independence.

> The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and

> act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. [21]

Others echoed Adams's words. [22]

As the revolutionaries established new governments, they kept an eye on the need to ensure accurate representation. One pamphlet, possibly written by Thomas Paine, [23] proposed that "A Constitution should lay down some permanent ratio, by which the representation should ***1004** afterwards encrease or decrease with the number of inhabitants; for the right of representation, which is a natural one, ought not to depend upon the will and pleasure of future legislatures." [24]

The second impetus for the inclusion of the Elections Clause came from a strong distrust of state lawmakers. During the "Critical Period" between the victory in the war and the 1787 gathering in Philadelphia, the newly independent states offered ample evidence of the self-dealing and political corruption of local-minded officials. [25] Indeed, as one Framer put it, the Constitutional Convention was appointed specifically because of the "corruption & mutability of the Legislative Councils of the States." [26] The Constitution was intended to rectify the weak Articles of Confederation, under which the national government had little leverage over States. The Confederation Congress could not impose taxes, enact statutes, regulate international or interstate commerce, or enforce treaty obligations. States operated largely out of self-interest. For example, New York enacted its own import duties in 1784, generating substantial revenue and keeping its property taxes low, leading to the state's reluctance to approve an amendment to the Articles that would have permitted federal taxing. [27] Madison's diligent preparation for the convention included thorough study of all the ways state governments had frustrated the national interest. [28] That distrust permeated the final Constitution.

2. Drafting the Elections Clause and Debate at the Constitutional Convention

The Elections Clause came together over the course of fifteen days in the summer of 1787. Between July 26 and August 6, a five-member ***1005** Committee of Detail [29] pulled together a first draft of the Constitution based on the resolutions approved to date. [30] Over successive versions, the Clause's broad purpose to protect the integrity of elections came into view.

An early version produced by the Committee of Detail focused only on the timing of congressional elections. [31] Over the next four drafts, the Committee of Detail coalesced around broader language that grew to include authority over the manner of elections. [32] The sixth draft, significantly, introduced the notion that the Clause protects not just the frequency of elections, but the qualification of voters. [33] But by later drafts, the language had been boiled down to a more concise wording. [34] When John Rutledge (S.C.) delivered the Committee's report on August 6, the Elections Clause read: "The times and places and [the] manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States." [35]

As the Clause evolved, the Committee toyed with various roles for Congress (the August 6 version did not yet include its power to "make" elections regulations, an authority added by amendment on August 9). But the drafters consistently preserved Congress's veto power over state regulations of federal elections.

On August 9, 1787, when the full federal convention considered the ***1006** proto-Elections Clause, delegates proposed several amendments. [36] Among the suggested changes was an addition to Congress's power--the authority to *make* (not just "alter") regulations for congressional elections. In his notes, James Madison explained that the delegates added this authority "in case the States should fail or refuse altogether." [37] This fear, that states might not set up rules for congressional elections *at all*, permeated state ratification debates and congressional debates all the way through Reconstruction. One reason for the provision was the concern that state legislators would try to strangle the new government by refusing to hold federal elections at all. [38] That fear was not far-fetched. Local potentates such as Patrick Henry, who dominated the Virginia legislature, and George

Clinton, who held sway in Albany as New York's governor, would prove the new Constitution's most dogged foes. [39] There was a risk the whole experiment could collapse.

One of the amendments proposed that day generated meaningful debate. John Rutledge and Charles Pinckney represented South Carolina, a state with a notoriously malapportioned legislature, with large coastal plantations far better represented than newly populated inland areas. [40] They moved to strike from the Elections Clause the phrase, "but their provisions concerning them may at any time be altered by the Legislature of the United States." [41] According to Madison's notes, Rutledge and Pinckney argued that the "States ... could & must be relied on in such cases." [42] The delegates from the nascent union's most gerrymandered state (before that word was invented) aimed to strike Congress's power to do anything about it.

Several delegates rose to defend the congressional veto. Nathaniel Ghorum remarked that the absence of congressional authority over elections would be just as improper as county control over British parliamentary elections. [43] Rufus King warned that the absence of a congressional override would repeat the mistakes of the Articles of ***1007** Confederation. [44] Following King's rejection of the "dangerous" and "fatal" idea that the federal government should depend on state lawmakers, Gouverneur Morris warned that, without congressional authority, states might make "false returns" and then fail to hold new elections. [45] Roger Sherman expressed "sufficient confidence in the State Legislatures," but still approved of congressional authority. [46]

Madison offered the most extensive defense (at least according to his own notes), along with an explanation of the purpose and scope of the Elections Clause. [47] He described the Clause as containing "words of great latitude," stressing the many ways that states could misuse their authority. [48] And recognizing that state lawmakers would abuse their power in ways that were impossible to predict at the time, he warned that the Elections Clause was needed to prevent self-interested partisans from twisting election rules to benefit their faction. Given its singular importance, we quote Madison's defense of the provision in full:

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the ***1008** candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature? Of whom was it to consist? 1. of a Senate to be chosen by the State Legislatures. If the latter therefore could be trusted, their representatives could not be dangerous. 2. of Representatives elected by the same people who elect the State Legislatures; surely then if confidence is due to the latter, it must be due to the former. It seemed as improper in principle--though it might be less inconvenient in practice, to give to the State Legislatures this great authority over the election of the Representatives of the people in the Genl. Legislature, as it would be to give to the latter a like power over the election of their Representatives in the State Legislatures. [49]

Particularly focused on fair representation, Madison echoed these concerns during the Virginia ratification debates a year later, "Elections are regulated now unequally in some States; particularly South-Carolina, with respect to *Charleston,* which is represented by 30 Members." [50]

Madison's denunciation of the likely machinations of self-interested state politicians seemed to have stilled the debate in Philadelphia. He recorded no subsequent interjections. Before moving on to consider other provisions of the new Constitution, the delegates agreed to the Elections Clause. The vote was unanimous. [51]

B. Ratification of the Constitution

Publication of the Constitution in September 1787 led to a roaring national debate. Antifederalists cautioned that the Constitution would concentrate too much power in the new central government. The Elections Clause was one target for their fire. Antifederalists warned the provision would let Congress manipulate elections. In his pathbreaking 1961 study of the debate over ratification, historian Jackson Turner Main observed that this seemingly frivolous objection to the Elections Clause was "of ***1009** great importance, judging from the number of times it was introduced." [52]

1. State Ratification Debates

Records indicate the Elections Clause was discussed at the ratification conventions in nine of thirteen states [53] and was the subject of proposed amendments from at least six states. Every state that proposed specific amendments included one to trim or eliminate the clause. [54]

Defenders of the Elections Clause repeatedly expressed an unvarnished distrust of state legislatures. For example, in Massachusetts, George Cabot argued that if state lawmakers exclusively regulated congressional elections "they may at first diminish, and finally annihilate that controul [sic] of the general government, which the people ought always to have through their immediate representatives--as one of the *people*, ... the 4th section is to be as highly prized as any in the constitution." [55] Others warned against relying, even "for a moment, on the will of state legislatures," and expressed concern about state lawmakers trying to exercise "undue influence in elections" and making "improper regulations" arising from "sinister views." [56]

***1010** Backers worried that balky states would simply refuse to participate in federal elections. [57] Rhode Island's refusal to send delegates to Congress and the Constitutional Convention was top-of-mind. [58] Indeed, in New York, supporters of George Clinton would manage to stall the first House election in two districts in 1788. [59] At times, supporters assured antifederalists that the purpose of the Clause was simply to ensure that states held elections. At the first ratification convention the prominent lawyer James Wilson claimed the Clause was needed for "the very existence of the federal government." [60] The authority would not be abused because Congress would act only "to correct the improper regulations of a particular state." [61] James Iredell attempted to soothe critics by explaining that the provision would only be used when states failed to hold elections, such as in case of a military invasion (and even proposed an amendment along those lines). [62]

But many federalists, as well as antifederalists, saw the power given to Congress to be far more sweeping than just one to be used if a state refused to hold elections. Just as at the Constitutional Convention, proponents warned that powerful factions within states would use unchecked control over elections to gerrymander districts and entrench their power. ***1011** Theophilus Parsons, who later became Massachusetts's chief justice, spoke at the commonwealth's ratifying convention in January 1788. During the ratification debate, he warned of abuse in prescient and eerily modern language:

> But a state legislature, under the influence of their senators, who would have their fullest confidence, or under the influence of ambitious or popular characters, or in times of popular commotion, and when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the State into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy[. [63]

The Elections Clause, Parsons explained, "provides a remedy--A controuling power in a legislature, composed of senators and representatives of twelve States, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." [64] According to Parsons, the Elections Clause vested superseding power in Congress to "secur[e] to the people their equal rights of election." [65]

Indeed, federalists warned that voter suppression tactics by state lawmakers would make it harder for voters to be heard. For example, James Wilson, arguing for the Constitution, noted with a shiver that Pennsylvania's elections could be moved to far-west Pittsburgh. [66] Thomas McKean (Pennsylvania's chief justice) asked, if States directed that votes be cast by voice, Congress must be authorized to change that mode to secret ballot "to preserve the suffrages of the citizens from bias and influence[.]" [67] He later explained that it is Congress's duty to ensure that its members were "fairly chosen" and, to do so, "it is proper they should have it in their power to provide that the times, places, and manner of election should be such as to insure free and fair elections." [68] One Massachusetts commentator explained, a state "might abuse the inhabitants, by appointing a place for holding the elections, which would prevent some from attending, and burthen [sic] others with very great inconveniences. These are cases in which the supreme power must ***1012** interpose, and abuses which none but it can rectify." [69]

In particular, Elections Clause proponents sought to avoid the malapportionment that had plagued England and reemerged in South Carolina. One essayist explained that, in England,

> the people have by no means an equal representation, even in the house of commons, the only popular branch of their legislature. The old, decayed, and almost forgotten borough of Sarum, sends two members to parliament, when Bristol, the second town in the kingdom, sends only two. London, which contains at least the seventh part of the inhabitants of England, does not furnish the hundredth part of the representation in parliament. [70]

Early in 1788, at the Massachusetts ratification, Rufus King described that under South Carolina's constitution, Charleston held a disproportionate number of seats in the state's General Assembly and refused to "alter[] of this unequal mode of representation" even though the population had grown in "[t]he back parts of Carolina." [71] If South Carolina's legislature had unchecked power to draw congressional districts, congressional "representatives, therefore, from that State, will not be chosen by the people, but will be the representatives of a faction of that State." [72] King then asked, "[i]f the general government cannot control in this case, how are the people secure?" [73]

In addition, federalists urged national uniformity. [74] According to one Maryland commenter, the "great object" of the Framers at the convention "appears to have been, to institute a government as *uniform* and equal in all its parts, as could be accomplished. It was foreseen that the states, by different regulations with regard to the above recited instances, might obstruct that *uniformity*, and occasion great inconveniences." [75] ***1013** Uniformity as to the time of elections, in particular, would ensure there would always be a quorum in the House, including during periods of emergency. [76]

Madison made his own arguments at the pivotal, contentious Virginia ratifying convention, consistent with his statement at the Constitutional Convention and the reasoning of his federalist colleagues in other states. For days, Madison defended the Constitution against assault from Patrick Henry, George Mason, and other prominent foes. Henry warned that the Elections Clause could "totally destroy the end of suffrage" if Congress sets the election at a place "the most inconvenient in the state" or far from where voters live. [77] James Monroe (who would soon face Madison in the first congressional election) challenged the Clause. He asked why regulation of congressional elections was under the "ultimate controul" of the national legislature. [78] At Charlottesville, Madison set out his view of the broad purposes behind the Clause, beyond whether states held elections at all. State regulation of congressional elections, he declared, "should be uniform throughout the Continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust." [79] Critiquing South Carolina's malapportionment, [80] he added, "[s]hould the people of any State, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government." [81]

Antifederalists waged repeated attacks. The Elections Clause, they argued, granted Congress too much power. One Massachusetts delegate remarked that the Clause would "make Congress omnipotent." [82] A North Carolina delegate called the provision "reprehensible" and predicted that it could cause "state legislatures [to] entirely decay away." [83] In Virginia, Patrick

Henry claimed that the control "given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage." [84] And the dissenting minority in Pennsylvania warned that ***1014** when the spirit of the people shall be gradually broken; when the general government shall be firmly established, and when a numerous standing army shall render opposition vain, the Congress may complete the system of despotism, in renouncing all dependence on the people, by continuing themselves, and [their] children in the government. [85]

Opponents warned that members of Congress could entrench themselves by situating polling places at inconvenient locations, [86] and they advanced similar arguments in published essays and private letters. [87] One opponent, John Steele in North Carolina, addressed these concerns by highlighting the newly powerful federal judiciary; if Congress enacted Elections Clause legislation that was "inconsistent with the Constitution, independent judges will not uphold them[.]" [88] Many proposed that ***1015** Congress's power to regulate should only be triggered by a state's complete failure to enact federal election regulations. [89] Generally, they assumed that would require a rewrite of the Clause. The Pennsylvania antifederalist Samuel Bryan (or his father, George) suggested that the language of the Clause *already* limited Congress's authority to apply only in cases of state default, [90] and John Jay of New York seemed to have understood the Clause in the same manner. [91] But that interpretation was belied by the fact that, upon ratifying the Constitution, nearly half of all states proposed amendments to limit Congress's power to occasions of state default or, in Massachusetts and New Hampshire, if states acted in a way that was "subversive of the rights of the people to a free and equal representation in Congress." [92] Ultimately, however, those amendment efforts failed.

2. Federalist Papers

During the state debates, Madison, along with Alexander Hamilton and John Jay, made the case for ratifying the new Constitution in the Federalist Papers. In Federalist Papers Nos. 59, 60, and 61, published in late February 1788, Hamilton addressed "the Power of Congress to Regulate ***1016** the Election of Members" [93] and rebutted objections to that power. [94] These articles are illuminating, though they are somewhat misleading in their narrow focus on what to do if states fail to hold elections.

In Federalist No. 59, Hamilton was charged with defending the congressional veto found in the Elections Clause. Hamilton affirmed that Congress must have the authority to regulate the election of its own members because "EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION." [95] Hamilton made no attempt to disguise his distrust of state lawmakers:

> Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. [96]

Hamilton also offered a rationale for why the Elections Clause uses "words of great latitude." [97] No specific regulation "would have been always applicable to every probable change in the situation of the country." [98] Therefore, "a discretionary power over elections" was preferable to a more specific provision that would later require a constitutional amendment to change. [99]

In Federalist No. 60, Hamilton addressed fears that the Elections Clause conferred on Congress the power to "promote the election of some favorite class of men in exclusion of others." [100] Concerns that Congress could effectively select its members by setting polling places at inconvenient locations were "chimerical." [101] A "victorious and overbearing majority" might, "in certain turbulent and factious seasons," violate the right to vote for "a particular class of citizens." [102] But Hamilton was confident that such a manipulation by Congress--if it affected "the ***1017** great mass of the people"--would occasion a "popular revolution" led by State governments. [103] He dismissed the worry that Congress would favor, say, landowners over merchants, because the House of Representatives would be made up of diverse members with varying interests. [104] Nor could Congress regulate elections to accommodate the rich because "the wealthy and the well-born" were not concentrated in particular locations, but were instead "scattered over the face of the country as avarice or chance may have happened to cast

their own lot or that of their predecessors." [105] The Constitution had avoided giving Congress the power to restrict voting to property owners because the power granted by the Elections Clause is "expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections." [106]

In Federalist No. 61, Hamilton noted that states were more likely than Congress to abuse their elections authority to favor a particular class of electors. [107] Congress could establish uniformity, particularly as to the time of electing House members. [108] And although uniformity would be most easily achieved by a constitutional provision setting a date for federal elections, Hamilton explained that "if a time had been appointed, it might, upon experiment, have been found less convenient than some other time." [109] Nevertheless, Hamilton argued that Congress's flexible time power would facilitate uniformity as to the time of elections, enabling the House to assemble at a particular period each year and allowing citizens to vote out the entirety of the House at one time, if an "improper spirit" prevailed on all its members. [110]

II. EARLY CONGRESSIONAL UNDERSTANDING OF THE ELECTIONS CLAUSE

A. The First Fifty Years

In the first five decades after the ratification of the Constitution, Congress enacted no legislation pursuant to its authority under the Elections Clause. However, Congress was far from silent. In debates about proposed constitutional amendments and contested House ***1018** elections, lawmakers consistently embraced broad conclusions about the Clause's meaning, recognizing that it empowered Congress to supersede state provisions for congressional elections, even if states had not defaulted on their duty to hold such elections.

1. The First Congress (1789)

The original public meaning of the Clause--that it gave Congress sweeping power and aimed to curb abuse by state lawmakers--was evident in congressional debates held just a few months after ratification.

In 1789, the First Congress rejected a constitutional amendment that would have let Congress "alter, modify, or interfere in the times, places, or manner" of congressional elections *only* "when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." [111] Introduced by antifederalist Aedanus Burke of South Carolina as the House considered what became the Bill of Rights, the proposal instigated debate that mirrored the ratification debates. As Fisher Ames, Chair of the House Committee on Elections, stressed, "such an amendment as was now proposed would alter the Constitution: it would vest the supreme authority in places where it was never contemplated." [112] "[T]he constitution," Madison maintained, "stands very well as it is." [113]

By denouncing the constitutional status quo, the amendment's antifederalist proponents confirmed that the Elections Clause conferred unilateral, plenary power upon Congress - going beyond whether states held elections at all. Elbridge Gerry (Mass.) condemned the provision as granting Congress unchecked authority over its own elections--the power of "controlling the elections of the people." [114] The Elections Clause, he warned, enabled Congress to "abolish the mode of balloting," require that "every person must publicly announce his vote," or move the polls to "remote places." [115] Notably, none of the critics contested that Congress could revise state laws for congressional elections as it saw fit or that "manner" conveyed comprehensive control, including over balloting and ***1019** districting. [116]

Madison, Sherman, and others did not dispute critics' claim of sweeping congressional power. Rather, they argued those powers were integral to the Constitution's design. "The Convention were very unanimous in passing this clause," Sherman insisted, noting that "it was an important provision, and if it was resigned it would tend to subvert the Government." [117] Madison warned that limiting congressional power over elections would "destroy the principles and the efficacy of the Constitution." [118] The purpose was broad: "as much injury might result to the Union from improper regulations, as from a neglect or refusal to many any" and "inadequate regulations were equally injurious as having none." [119] In this spirit, Theodore Sedgwick (later Speaker of the House) proposed a compromise amendment that would have let Congress "alter the times, manner, and places of holding

elections, provided the States made improper ones." [120] Ames argued that the elections power was "one of the most justifiable of all the powers of Congress" because "it was essential to a body representing the whole community, that they should have power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." [121]

2. Rejected Constitutional Amendments (1801 and 1823)

In the coming decades, Congress would twice more reject proposed amendments that sought to change the Elections Clause. Its decision confirmed the founding-era view that the clause confers upon Congress discretionary, plenary, and superseding authority over congressional elections.

In 1801, Congress set aside a proposal to amend the Constitution to require that House members be elected from single-member districts in each state "in the manner which the Legislature thereof shall prescribe." [122] The House Committee on Elections concluded that the amendment would be "superfluous and inconvenient" because requiring single-member districts was "already within the limits of the legislative authority of the Government of the United States ..., to which recurrence may be had at ***1020** all times ... as the public good or convenience may require." [123] Further, the Committee worried that adopting the amendment would "indirectly tend to withdraw from the Government of the United States its existing control" over House elections by reassigning control of their "manner" to the States. [124]

In 1823, Congress rejected a proposed constitutional amendment that similarly would have required uniform House elections by single-member districts. [125] A special committee urged the House to reduce both congressional and state legislative power over federal elections because that power was so vast that factions at either level could wield it to entrench themselves or their partisans. [126] The Elections Clause, the committee recognized, granted Congress "controlling and superseding power" over its own elections. [127] With that power, Congress could decide whether to hold elections by districts or by "general-ticket" (i.e., at-large, statewide winner-take-all voting) and how to draw the district lines. [128] Congress could even treat some states differently from others. [129] The special committee found these powers to be "exceedingly dangerous" because Congress could create "an artificial arrangement of districts" such that a "small minority of the people would elect a majority of the national representatives." [130]

Yet the committee equally feared the power the Elections Clause granted the states. The Clause, it was argued, permitted "the very foundations of the two most important branches of this Government ... to fluctuate with the mutable counsels of twenty-four separate Legislatures." [131] This "Constitutional laxity" undermined the "stability of the law," which should have been an "indispensable safeguard." [132] "[T]emporary factions" might seize state legislatures and use their Elections Clause power to entrench themselves or their allies. [133] The "existing system" was actually "without system" and should be remedied to prevent majorities from adopting measures that would "deprive the ***1021** minority of their just rights," which was "one of the primary objects of a written Constitution." [134]

Notwithstanding these concerns, Congress rejected the proposed amendments and left the body's vast powers as it found them.

3. Contested Elections (1789-1841)

Though Congress did not legislate pursuant to the Elections Clause during its first fifty years, contested House elections gave lawmakers occasion to reflect on the scope of their election powers.

For example, in 1804, after Representative William Hoge vacated his congressional seat, his brother John Hoge was sent to Congress in a special election held at the direction of Pennsylvania's governor. [135] Pennsylvania lacked legislation pertaining to special elections in the event of a vacancy. The scenario presented Congress with occasion to consider how the Elections Clause interacts with Article I, Section 2, Clause 4, which directs the state executive to issue a writ of elections to fill a congressional vacancy. [136] Representative William Findley (Pa.), who chaired the Committee of Elections, acknowledged that Congress could

regulate the times, place, and manner of holding an election for congressional vacancy, even if that election was ultimately called by the governor. [137] John Lucas, also of Pennsylvania, noted that state lawmakers were vested with the power to regulate elections, but added that this is "a subject of such importance that Congress is empowered to control the State Legislatures in that very case." [138] Three years later, when the House seated a member even though his election defied a state statute requiring that he reside in one subsection of his district, the House reasserted this power. "The Federal Constitution indeed *provisionally* delegates to the State Legislature the authority of directing the time, place, and manner of holding elections *at the discretion of Congress*," Findley explained. [139] Although Findley thought that Congress should not exercise its Elections Clause power except to check "abuses or usurpations of power by the States," he readily conceded that the national legislature "may do [so] at discretion." [140] Similar endorsements of Congress's supreme, ***1022** discretionary power permeate the record of contested House elections throughout these decades. [141]

Congressional debates in this era reflected not only the supremacy of Congress's elections power, but also the variety of legitimate interests that the Elections Clause countenanced. At a minimum, Congress could legislate in order to preserve its existence. [142] Others recognized additional interests, particularly uniformity and the protection of the right of qualified electors to vote in congressional elections. [143] Congress's power to regulate the "manner" of elections included regulation of balloting, counting, election administration, and districting. For example, one representative noted without dispute that the term encompassed whether "the election may be *viva voce*, by ballot, by districts for the convenience of the voters, or by the States in a general ticket." [144] In 1834, Aaron Vanderpoel, a New York Representative and member of the House Committee on Elections, explained that the "manner" of holding elections included "the means, the judges, the instruments, by which the election is to be carried into effect," along with "the sheriff of the county, and a clerk and two judges, appointed by the county court at their term next preceding the election." [145] These collectively formed "[t]he conduits through which the will of the voter is to flow ...." [146] Nevertheless, some legislators pointed to the limits of the "manner" authority, noting that the qualifications of voters and representatives went beyond such power. [147]

1023** ***B. The Apportionment Act of 1842 and its Aftermath

In its first exercise of its power under the Elections Clause, Congress enacted an Apportionment Act in 1842, [148] requiring that House members be elected from contiguous single-member districts. [149] The Act also reduced the size of the House of Representatives by increasing the ratio of persons per representative. [150] The fact that Congress had never before enacted any Elections Clause legislation loomed over the debate. [151] With a slight Whig majority in the Twenty-Seventh Congress, it passed the House by just two votes, along mostly partisan lines. [152]

Coming a half-century after the ratification of the Constitution, it was also a chance for the young nation to reflect on the original intent of the document. Madison's *Notes on the Debates in the Federal Convention* were first published in 1840, and Elliot's Debates--a compilation from the state ratifying conventions--came out between 1827 to 1830. [153] Members had a novel opportunity to ground their arguments in the Framers' original intent. As one scholar has noted, "perhaps the most striking feature of the debate was the backward-looking tone and structure of the argument." [154]

At the time, ten states used at large voting for House elections. Since the first Congress, in fact, nearly one-third of members had been elected that way. [155] This magnified the power of small states, which for decades successfully resisted a requirement for districts. [156] Whigs believed the districting legislation would help preserve their new majority and were angered by Alabama's switch to an at-large ticket in 1840, which deprived the state of Whig representation. [157] But partisanship was not the only ***1024** factor at play. The politics of slavery also led Southerners (including Southern Democrats) to support the Bill, because elections held by district decreased the likelihood that northern districts would elect critics of slavery. [158] One South Carolina Democrat warned, "On all the questions peculiar to Southern interests, the Northern States, owing to the district system, were now divided," but if "the general [system] prevail[ed], [the Northern states] would overwhelm the South." [159] Reducing the size of the House by increasing the ratio of persons to representatives also favored the less populous Southern states. [160]

The Bill's enactment (despite sharply polarized debate), the next Congress's decision not to repudiate it as unconstitutional, and successive districting legislation confirmed that Congress understood it had the power to regulate congressional elections and the drawing of districts.

1. Elections Clause Issues Raised by the Apportionment Act

Controversy centered on the Apportionment Act's second section, which required single-member congressional districts: "[I]n every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative." [161] States would be barred from holding at-large elections, or from electing multiple members from the same district.

a. Federalism

Some Apportionment Act opponents tried to resurrect a familiar objection: Congress must defer to states unless they refuse or fail to act themselves. "[I]t would be unconstitutional to exercise this power now," Representative John G. Floyd (D-NY) told the House, "because the debates in the National Convention prove that it was only intended to be an *ultimate* power, for self-preservation, in case the States neglected to ***1025** exercise it." [162] The Senate heard similar arguments. "[I]t was only intended that Congress should exercise it in case the States should make insufficient regulations, or fail to make them altogether," one opponent insisted. [163]

The Act's supporters countered that the text expressly empowered Congress to "alter" state laws for congressional elections at any time. "[W]hat plain, unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the whole subject, whenever, in its discretion, it shall see fit to do so? Could language be more direct, full, and explicit?" asked Representative Sampson H. Butler (D-S.C.). [164] "Nor is it only in case of a neglect or failure, for any cause, to perform this duty, that it then devolves upon Congress," Representative Daniel Barnard (W-N.Y.) argued. "To Congress, moreover, the power is ultimate and appellate. If the States fail altogether, or if any one of them fail, Congress must act. If the States act, Congress has a right to review, and revise, and, if need be, correct and 'alter' the regulations which they may adopt." [165] Others echoed this interpretation, [166] and contested rival claims about the Framers' intent. [167]

Each side acknowledged that Congress could not order the states to enact particular laws. "Congress *may* itself make the *alterations*," one lawmaker complained, "but may not, cannot, direct the Legislatures of the States to make them." [168] Similar statements recurred throughout the debates. [169] Even the Bill's advocates, such as Senator Nathanial P. Tallmadge (W-N.Y.), conceded: "no one on this side of the question has said anything about a mandamus or a mandate to the States. No one pretends that Congress or this Government has any power to issue such a ***1026** mandate ... Congress has no such power, and will not attempt to compel the States." [170]

The Act's opponents saw partial election laws as a violation of what would later be called the anti-commandeering principle. [171] One senator insisted: "If they are required to elect by districts, Congress must go on and prescribe the boundaries of the districts." [172] Senator Silas Wright (DN.Y.), one of the bill's most dedicated opponents, added that "The great principle ... was, that whatever regulations Congress should attempt to make in this matter, should be so made that the people might be able to act under them, without the intervention and aid of laws to be passed by the State Legislatures." [173]

The Act's defenders insisted that Congress could exercise as much or as little of its Elections Clause power as it saw fit. Any command to the states came from the Constitution, not from Congress. "[T]he power of Congress and the duty of the States, in relation to this subject, are correlative," Tallmadge explained. [174] "Whenever Congress exercises its power, the States must perform their duty ... The extent to which Congress will go in making or altering these regulations, whether in whole or in part, is entirely within its own discretion." [175] Partial legislation left the states free "to fill up the measure of legislation which the case requires." [176] Senator Isaac C. Bates (W-Mass.) explained, "[t]here is not only no command in [this bill], which seems so offensive to some Senators; but there is nothing in the form of a command, nor in effect a command." [177]

With the enactment of the Apportionment Act, the understanding that the Elections Clause allowed Congress to control *some* of the "manner" of elections without having to control *all* of it prevailed.

b. The Meaning of "Manner"

Although the precise scope of "manner" remained contested, the Apportionment Act's passage confirmed that Congress understood the term to include a broad array of topics, including districting. Senator ***1027** Wright acknowledged that "manner" included "the manner of voting, the manner of receiving, keeping, counting, and returning the votes, and the *districts of territory* within which the freemen should meet and vote at the same poll." [178] Representative William W. Payne (D-Ala.) argued that "manner" meant

> [n]othing more than that Congress might, by law, provide that the electors should vote *viva voce*, or by ticket; that the United States marshal, the sheriff of a county, commissioners of roads and revenue, the county judge, or other officer appointed by Congress, should open the polls, receive and count the votes, declare the result, and issue the certificate of election,

before paradoxically adding, "&c. [*et cetera*], and nothing more." [179] Representative Walter Colquitt, a newly minted Democrat from Georgia, construed districting as a de facto regulation of the qualifications of representatives and voters, and argued this went beyond Congress's "manner" authority. [180]

Supporters offered similar lists, but often added districting. Tallmadge explained that "[t]he manner includes the districts; the voting by ballot or *viva voce*; the officers to conduct the election; the form of the ballot, whether written or printed; the ballot boxes; the poll lists; the returns, and all the incidents from the commencement to the close of an election." [181]

In a sign of how hard it was to deny that "manner" included districting, the Act's opponents were divided about how (or even whether) to contest that claim. Buchanan, who criticized the bill for commandeering state legislatures, "freely admit[ted] the power of Congress to divide the States into single congressional districts" as one "expressly given to them by the terms of the Constitution itself." [182] Though he and opponents of the Apportionment Act "might complain of such an act as an abuse of power, we could never contend that it was a violation of the Constitution." [183] One Representative told his colleagues that he could not justify his claim that "manner" excluded districting. [184] A smaller number of the Act's critics ***1028** offered more confident (if not more convincing) objections. [185] But none of these members won many colleagues to these positions.

The clear (and ultimately successful) majority of the Twenty-Seventh Congress interpreted the "manner of holding elections" to include districting. [186] Like other supporters of the Act, Tallmadge emphasized the original public meaning of the Elections Clause and the intent of the Framers more generally. Congress's power to direct that representatives be elected by district was "fully and beyond all question," Tallmadge argued, because of

> the contemporaneous exposition given by [the Framers] and those associated with them, in the journal of the convention which formed the Constitution--in the publications that enforced its adoption--in the debates of the conventions of the States which ratified it--and in the proceedings of the first Congress which assembled under it. [187]

Representative Nathaniel G. Pendleton (W-Ohio) reasoned that if the Elections Clause gave the *states* the power to elect their representatives by single-member districts, so too must the Elections Clause give *Congress* the same power. [188]

Supporters of the Apportionment Act also advanced the understanding of the Elections Clause that would prevail by Reconstruction: that the Clause conferred plenary power over congressional elections except as to the matters the Constitution

seemed to expressly preclude (*e.g.*, the site of elections to the Senate and the qualifications of voters and candidates).[189] Affirmations that the phrase "times, places, and manner of holding elections" confers plenary power appear throughout these debates.[190] ***1029** Representatives read the constitutional and ratification conventions, together with the history of rejected constitutional amendments, to confirm their claims. For example, Senator Jabez Huntington explained:

> The foregoing views are sustained by the opinions expressed in the National and State conventions, by all who spoke on the subject, and by the resolutions of several of the State conventions, which admitted that full power was given, but expressed an ardent desire that the Constitution might be so amended as that this power should not be exercised except in cases of necessity. All the debates and proceedings connected with this subject show the entire concurrence of all the friends and all the opponents of the Constitution in the opinion that the power of Congress was entire and supreme.[191]

Pendleton explained that "General Hamilton ... had no such doubts" about whether "the words 'manner of holding' ... can be made to extend to the question whether the elections shall be by districts or by general ticket." Indeed, Hamilton "treated the authority of the Legislature, whether National or State, as covering the whole ground, embracing all the regulations necessary to the consummation of an election, except such as are established by the Constitution."[192]

c. Legitimate Congressional Interests

Debate on the 1842 Apportionment Act also addressed the ends to which Congress could legitimately exercise its Elections Clause power.

i. Self-Preservation

The least controversial interest that Congress could advance under the Elections Clause was one familiar from the Framing: ensuring that congressional elections would take place. As "a legal and moral person," Congress necessarily had the power "of continuing and perpetuating its own existence, by the due election and perpetuation of these officers," one representative explained.[193] Opponents of the Act went further, arguing that self-preservation was the *only* permissible basis for the exercise of this federal power. "The power to prescribe the 'times, places, and manner' of electing Senators and Representatives, was conferred on this ***1030** Government for the sole purpose of enabling it to preserve its own existence, provided the States should fail or refuse to elect Representatives, and for no other," Representative Payne asserted in typical remarks.[194] Over the course of the debate, most of the Act's critics raised some version of this point.[195]

Some of the Act's advocates replied that even if the Framers had adopted the Elections Clause to enable Congress to protect itself, the Framers had nevertheless written a sweeping grant of general power over congressional elections that should be interpreted broadly. For example, in response to a critic arguing Congress could not exercise its Elections Clause power "until it is indispensable to prevent a dissolution of the Government," Pendleton took a "much larger and more liberal, and [he] believe[d] more accurate, view of what the Convention intended by the *preservation of the Government*."[196] Pendleton argued that the Elections Clause must be understood broadly to ensure "the purity of popular representation in this House, according to the true principles of the Constitution[.]"[197] He urged the embrace of substance over form. Preservation of the federal government would be meaningless if "the show, the appearance, the form of our Government" was maintained "but the spirit and life are gone" because "the Government is almost as much dissolved by a vicious representation as by no representation."[198] Senator Bates likewise encouraged his chamber to take a broad view of the permissible purposes of the Elections Clause power, arguing that "a particular inducement to a grant is not a limitation upon the grant."[199]

ii. Uniformity and Equality

Representatives also acknowledged that Congress could exercise its Elections Clause power to ensure uniformity and equality among districts. According to Representative Barnard, "[t]he power conferred on Congress by the Constitution, on the subject

of the elections, was designed to be exercised in either of two events": if the states did not provide for congressional elections or "if these regulations in the different States should be such as to produce a want of uniformity and an inequality in the ***1031** representation on this floor." [200] Many others agreed. [201] As Senator Huntington explained, Congress could require that its members be elected by district because it would ensure "the right of the people to a free, equal, and just representation in the Legislature" and it would "establish a system uniform, practicable, just, [and] equal--giving to every portion of the people its fair and legitimate political influence." [202] Huntington added that such a system would ensure the representativeness of the body by "send[ing] up to the House of Representatives men identified in feeling and interest with those whom they represent." [203] Even some opponents embraced the principle of equal representation. Buchanan, for example, called it "the *beau ideal* of a system of representation." [204] Buchanan acknowledged that "[a]s the people of the respective congressional districts enjoy equal rights, their Representatives ought to meet and deliberate on terms of perfect equality; and they ought individually to be subjected to an equal responsibility to those by whom they were elected." [205] And chief foe Senator Wright conceded that Congress had the power to "alter" state election regulations:

> [b]ecause the Legislature of a State, from disaffected feeling, or other cause, might make regulations subversive of the principle, of fair and equal representation, impracticable as to time, unreasonable as to place, odious as to manner, or otherwise subversive of those popular rights intended to be secured by the Constitution--and by this provision, as a most essential part of it. [206]

iii. Protecting Political Minorities

Protecting political (*i.e.*, partisan) minorities emerged as an important congressional interest during these debates. One refrain of advocates for single-member districting was that at-large elections denied political minorities proportional (or, sometimes, any) representation. This denial ***1032** of due representation, they contended, amounted to the disenfranchisement of political minorities and the entrenchment of majorities. The Elections Clause gave Congress the power to right that wrong.

Many in Congress were confident that political minorities had rights that Congress had the duty and power to secure. "It needs no argument to prove the importance of minorities to the preservation of public liberty, and the equitable administration of Government," Huntington said. "They have rights too, which ought to be protected." [207] Chief among these was the right to vote and be represented. "If the general-ticket system be adopted, that political party which is in a minority, however near it may approximate to an equality in numbers, will virtually be disfranchised," Senator Huntington elaborated, "and a free and equal representation of the people be prevented." [208] Senator Bates echoed that concern. "The generalticket system disfranchises the minority in a State," he declared, and "may be used by the majority to perpetuate their power." [209] "[M]inorities, as well as majorities, shall be represented in the Legislature," another explained. "Majorities certainly must govern, but minorities must be heard." [210] For many members, single-member districting seemed likely to mitigate, if not eliminate, the threat of the tyranny of the majority. [211]

In response, the Act's opponents waved off concerns about such a threat and defended a narrower conception of the right to vote as the right (of qualified voters) to cast a ballot and have it counted. Senator Leonard Wilcox (D-N.H.), for example, predicted that House of "nearly or mainly of the same party character" was not "an event to be apprehended or expected" because "[i]f it should ever exist, it would break down the party by its own cumbrous weight." [212] Senator Bagby argued that denying political minorities representation did not deny the right to vote at all: "While the right to vote according to the dictates of conscience and judgment remains unfettered and uncontrolled, no man is disfranchised. It is said, however, that it is destructive of the rights of minorities. Beyond the ballot-box minorities have no rights." [213] In enacting the Apportionment Act, Congress repudiated this claim that merely casting a ballot is all that the right to vote guarantees.

1033** ***iv. Preventing Partisan Manipulation

Finally, and intertwined with the protection of political minorities, the Apportionment Act debate reflected that Congress understood the Elections Clause to enable it to combat partisan manipulation of election law--especially gerrymandering. State

power to regulate federal elections, one member observed, led to "a violent struggle for the ascendancy in the State Legislatures, growing out of the knowledge that this power may, and the apprehension that it will, be abused." [214] Partisan conflict, in turn, would lead to the reality (or at least the appearance) that the minority "had in some way been defrauded of their electoral rights." [215] "The mode of forming districts, which has received the name of *gerrymandering* ... which is alike subversive of popular rights and of the spirit of the Constitution," was one particularly threatening means by which partisan interests could suppress minority representation. [216] Through the Elections Clause, Congress could decide for itself how its elections would proceed, reducing the stakes of state political strife and ensuring that "[a]ll attempts to arrange districts for political, party, or selfish purposes, would be in vain, and the people would be secure in their right to be represented in Congress." [217]

2. Enactment and Aftermath

The first complete draft of the Apportionment Act passed the House with the single-member districting requirement by a vote of 113-87. [218] The House passed the final version of the Bill, embracing two Senate amendments to the apportionment ratio, by votes of 113-103 and 111-102. [219] The Senate passed the final Bill by a vote of 25-19. [220]

In the years after the enactment of the Apportionment Act of 1842, debate about whether the Elections Clause permitted Congress to control congressional districting slowly abated. By the close of Reconstruction, Congress had enacted two similar districting laws with almost no debate.

In the first congressional elections under the Apportionment Act of 1842, four states defied the statute and elected their representatives at- ***1034** large. [221] The outgoing House Committee on Elections recommended a bill suspending single-member districting for the upcoming Congress, but it was not adopted. [222]

When the Twenty-Eighth Congress convened, Democrats had ousted the Whig majority. The majority report of the new Congress's committee on the dispute recommended declaring the single-member districting provision unconstitutional on anti-commandeering grounds. Because the Act could not "execute itself without the intervention of the State legislatures" (i.e., unless states drew maps), Congress had commandeered the states. [223] The report did make a significant concession, however, acknowledging that Congress could intervene to protect political rights against state laws that threatened them. "If the legislatures of the States fail or refuse to act in the premises or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution," the report concluded, "then this conservative power interposes, and, upon the principle of self-preservation, authorizes Congress to do that which the State legislatures ought to have done." [224] The minority report repeated the constitutional claims that the Act's original supporters had advanced, and concluded that the state laws providing for at-large elections were void because Congress had acted lawfully in passing the Apportionment Act. [225]

After relitigating the constitutional questions discussed in 1842, [226] Congress voted to seat the disputed representatives-elect, [227] but also voted down a resolution declaring the 1842 law unconstitutional. [228] This seemingly contradictory position likely reflected politics more than a particular view on the Elections Clause. As Franita Tolson, authoritative scholar on the Elections Clause and federalism, notes:

> Arguably, the Democrats wanted to impose principled limitations on the exercise of federal power to protect the slaveholding states, which had been concerned about *any* broad interpretation of federal power, while simultaneously taking advantage of their ***1035** majority status by reaffirming the more expansive interpretation of federal authority embraced by the Whigs through the 1842 Act. [229]

Subsequent congresses embraced the interpretation of the Elections Clause that the Twenty-Seventh Congress had put forward (and rejected the narrower view of the Twenty-Eighth Congress). In 1862, Congress enacted an Apportionment Act substantially similar to the 1842 statute, again requiring that House members be elected from contiguous singlemember districts. [230] Debate was desultory. [231] In the Apportionment Act of 1872, Congress again required contiguous single-member districts, and further required that each district "contain[] as nearly as practicable an equal number of inhabitants." [232]

C. Reconstruction, 1865-1877

During Reconstruction, congressional activity under the Elections Clause centered on two issues. Between 1865 and the ratification of the Fifteenth Amendment in 1870, Congress debated whether the Elections Clause granted it the power to extend the right to vote to more people--namely, Black men. Then, having enacted the Fifteenth Amendment, Congress enacted three bills to protect the right to vote--constructing the first comprehensive system of federal election administration and enforcement. The three Enforcement Acts drew on the constitutional authority of the Fourteenth and Fifteenth Amendments, but they also relied on the Elections Clause. By the close of this period, Congress cemented the understanding that--with the exceptions of voter qualifications and the place of choosing Senators--the national legislature could exercise plenary power over its own elections.

1. Congressional Power to Expand the Franchise, 1865-69

Between 1865 and 1869, Congress debated drafts of what became the Fourteenth and Fifteenth Amendments. That debate is as revealing for what Congress assumed as for what it rejected. Most notably, although a ***1036** few prominent members of each house contended that the Elections Clause granted Congress the power to specify the qualifications of federal voters, i.e., who was eligible to vote, Congress largely declined to act on that theory.

Congress began to consider this question even before the Civil War had ended. In 1865, New York's legislature formally requested that the Senate adopt

> a law making uniform regulation throughout the United States of the times, places, and manner of holding elections for Senators and Representatives, except as to the place of choosing Senators, defining the qualifications requisite for electors, and abrogating such regulations prescribed by the Legislatures in each State or otherwise as may be inconsistent therewith .... [233]

The Senate referred the request to the Committee on the Judiciary, [234] which later decided not to act. [235]

Debate on federal legislation to expand the franchise--primarily to prohibit denial of the right to vote on the basis of race, color, or previous condition of servitude--unfolded in earnest after the war concluded. In an 1866 debate about a bill to prohibit denial of the right to vote "on account of color," Representative William D. Kelley (R-Penn.) advanced what appears to be the first postwar congressional argument that the Elections Clause (read in conjunction with the Guarantee Clause) granted Congress the power to decide who could vote:

> [The Framers] made it the duty of the United States Government to *guaranty to each State a republican form of Government,* and having done that they did not fail to provide the means by which the Government on which they had laid that duty should be able to perform it. And they gave Congress the amplest power to execute that section ... in section four, article one .... Now, sir, what did they mean by that provision? ... Mr. Madison said ... "*Should the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government.*" [236]

Remarking on the injustice of denying the right to vote to the "educated, industrious, taxpaying, school-sustaining, church-building people of this District[,]" Kelly exclaimed: "How bitterly would Madison, unimpassioned as he was, have denounced such treachery to the essential ***1037** principle of republicanism--universal suffrage." [237] As Kelley understood the ratification debates, the word "manner" was universally acknowledged to include who could vote. "[T]he whole country, so early as the 9th of August, 1787, two years before the final adoption of the Constitution, were informed that that word ['manner'] in the clause in question embraced not merely the method of voting, the place of voting, and the order of voting," he contended, "but the grand fundamental question of who should vote, and by what power they might be invested with the right of suffrage." [238]

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Few shared Kelley's view. "Mr. Speaker, it is utterly impossible, by any rules of construction that have ever properly been applied to language, to place any such construction as that upon the simple clause in the Constitution which has been read," one representative replied. [239] Another denounced Kelley's argument as "one of the most dangerous and startling that has yet been suggested in connection with our national policy." [240] Kelley acknowledged the opposition, but argued that the Elections Clause was fundamentally intended to provide for universal suffrage. "Gentlemen tell me that this is a new construction of the Constitution," he acknowledged, but "I reply that it is the true one, which is enough for me, and that the old and false one was the fruitful source of discord and war and misery." [241]

The following year, 1867, Congress did enact one statute expanding the franchise, but the body did not clearly identify the constitutional source of its power to do so. [242] The First Reconstruction Act required the former Confederate States to convene constitutional conventions of delegates "elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election," and specified that the resulting constitutions "shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates." [243] The Act directly set the qualifications for *state* voters, and some members sporadically invoked the Guarantee Clause. [244]

***1038** Support for the claim that Congress could decide who could vote in federal elections grew in the remaining years before the passage and ratification of the Fifteenth Amendment, but no more than a small minority of each house understood the Elections Clause that way. [245] In the Senate, Radical Republican Charles Sumner (Mass.) was the leading supporter of congressional power over voter qualifications.

> [T]here are two hostile pretensions which must be exposed; the *first,* founded on a false interpretation of "qualifications," being nothing less than the impossible assumption that because the States may determine the "qualifications" of electors, therefore they can make color a criterion of the electoral franchise; and the *second,* founded on a false interpretation of the asserted power of the States "to regulate suffrage," being nothing less than the impossible assumption that, under the power to regulate suffrage, the rights of a whole race may be annihilated. These two pretensions are, of course, derived from slavery. They are hatched from the eggs that the cuckoo bird has left behind. Strange that Senators will hatch them .... Admitting that the States may determine the "qualifications" of electors; what then? Obviously it must be according to the legitimate meaning of this word .... The Constitution, where we find this word, follows the Declaration of Independence and refuses to recognize any distinction of color .... The "qualifications" of different officers, as President, Vice President, Senators and Representatives are named; but "color" is not among these .... The dictionaries of our language are in harmony with the Constitution. Look at "qualifications" in Webster or Worcester, the two best authorities of our time, and you will find that the word means "fitness"-- "ability"--"accomplishment"--"the state of being qualified;" but it does not mean "color!" It embraces age, residence, character, education and the payment of taxes--in short, all those conditions which when honestly administered are in the nature of *regulation,* not of *disfranchisement .... An insurmountable condition is not a qualification but a disfranchisement.* [246]

Because race was not a "qualification," he argued, then the Elections Clause empowered Congress to protect the federal right to vote from this unconstitutional restriction. Sumner pointed to Madison's argument that "[s]hould the people of any State by any means be deprived of the right ***1039** of suffrage, it was judged proper that it should be remedied by the General Government." [247] "Thus was it expressly understood, at the adoption of the Constitution," Sumner concluded, "that Congress should have the power to prevent any State, under the pretense of regulating the suffrage, from depriving the people of this right or from interfering with the principle of *Equality.*" [248]

In the House, George Boutwell (R-Mass.) led the charge for the view that the Elections Clause was the source of both federal and state power over congressional elections. For that reason, any state power over federal voter qualifications was subject to Congress's controlling power to "make or alter" state regulations of federal elections. He argued that the Voter Qualifications Clause gives neither to the States nor to Congress the power to determine the qualification of voters. [249] Rather,

> [i]t merely declares the fact that the voters for Representatives in Congress shall possess the qualifications of voters for members of the most numerous branch of the State Legislature .... But there is no declaration in this section that either [the States or the national Government] has the power, and certainly not that either has the power to the exclusion of the other. [250]

The Elections Clause explained who "has the power," and on what terms:

> The word "manner," in this connection of course becomes important .... It includes, as I maintain, everything relating to an election, from the qualification of the elector to the deposit of his ballot in the box .... Either one or the other of two things is true: either these words as herein employed in their scope and meaning cover the entire subject of elections, from the qualifications of the voter to the deposit of his ballot in the box, or else, by necessary legal inference, the States have not the power which they have been in the habit of exercising .... But the history of the facts from the first, and the recognition by Congress of the powers of the States, go to the extent of conceding to them entire scope and original control of the whole matter of voting, including the qualifications of the voter, his registration, and the deposit of his ballot in the box .... [T]herefore, when a State-rights man proves that by the Constitution of the United States a State has a right to decide who shall exercise the elective franchise, he has proved also that Congress may do the same thing under this provision of ***1040** the Constitution which says that Congress may make any regulations it chooses relating to this subject or may alter such regulations as have been made by the States. [251]

Like Sumner, Boutwell closed by pointing to the purpose of the Clause at the founding--to ensure that Congress could provide a remedy when a state deprived people of the right to vote. [252] With this authority, Boutwell urged, federal law should prohibit denial of the right to vote on the basis of race. Gauging support for Sumner's and Boutwell's position is difficult, but their arguments were not widely taken up by their colleagues. Congress chose to amend the Constitution instead.

2. The Enforcement Acts

In 1870 and 1871, in the wake of the Civil War, Congress invoked its powers under the Elections Clause and the new Fourteenth and Fifteenth Amendments to enact three Enforcement Acts to protect the right to vote, particularly for newly enfranchised Black men. [253] The Enforcement Acts and the associated debates underscore that Congress understood the Elections Clause to confer expansive power over congressional elections (the scope of the franchise aside), permitting the federal government to establish a comprehensive code for election administration, integrity, and security. The debates reveal a Congress focused on securing free, fair, and racially inclusive elections by any means deemed necessary and proper, and less concerned than its 1842 predecessor with defining the precise scope of "manner" or identifying particularized legitimate legislative interests.

a. The First Enforcement Act

On May 31, 1870, Congress enacted "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union"--the First Enforcement Act. [254] As the title suggests, the Act reached beyond the confines of the recently ratified Fifteenth Amendment (which applies to voting restrictions on account of race, color, or previous condition of servitude) to establish a federal regime for protecting the right to vote. For that reason, the Act's constitutionality rests in large part on the Elections ***1041** Clause.

The First Enforcement Act deployed sweeping federal power over congressional elections. [255] Congress created new crimes, penalties, and civil causes of action against private individuals for interference with the right to vote, prohibiting the use of "force, bribery, threats, intimidation, or other unlawful means" to "hinder, delay, prevent, or obstruct ... any citizen from doing any act required to be done to qualify him to vote or from voting at any [congressional] election," [256] or "to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United

States, or because of his having exercised the same." [257] The Act gave federal district courts exclusive jurisdiction over all crimes and offenses committed against the provisions of the Act, and it granted to federal district and appellate courts concurrent jurisdiction over all other actions arising under the law. [258]

The First Enforcement Act also marked an unprecedented exercise of federal power over the states and their agents. For example, the statute attempted to preempt malfeasance by state actors by deeming that any eligible voter who offered or attempted to fulfill a state's "prerequisite[s]" for voting would be entitled to vote if a state officer wrongfully failed to receive or permit the performance of the prerequisite. [259] In any election involving a congressional race, the Act declared it a federal crime for any federal or state election officer to "neglect or refuse to perform" the duties imposed by any federal or state election law. [260] Congress established federal protection of, and regulation over, all state voter registration systems that served "any State or other election at which such representative or delegate in Congress shall be chosen," even if "the same shall also be made for the purposes of any State, territorial, or municipal election." [261] To escape federal reach, a state would have to operate a completely independent election system for its own elections. Congress authorized the military to augment the courts. The Act declared, "it shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process issued under this ***1042** act." [262]

Relatively little debate about the Elections Clause preceded the First Enforcement Act--seemingly less than the Apportionment Act of 1842. Still, some House Democrats raised the familiar objection that the statute exceeded congressional authority under the Elections Clause. "Whence came the authority of Congress to make penal bribery, intimidation, or influence in respect of elections in the States ...?" Representative Clarkson Potter (D-N.Y.) asked. [263] Finding no basis in the Elections Clause or the Fifteenth Amendment, Potter argued that many of the Act's provisions "relate neither to the time, place, nor manner of holding elections ... nor to the denial or abridgment of suffrage on account of race, color, or previous condition of servitude ... and in all such respects, therefore, this bill is necessarily and flagrantly without authority." [264] Representative Michael Kerr (D-Ind.) fulminated, "every single section of this bill--twenty-three in number--save only the first, involves a palpable violation of the spirit and letter of the Constitution." [265] Kerr argued that "[i]t was never contemplated by the people that Congress would attempt to usurp control of the elections in the States, to dictate in what manner they should be conducted, to put them under the supervision of Federal officers, and give all judicial power over them to Federal courts"--but he made no attempt to reckon with the "manner" authority provided by the Elections Clause. [266] Another member objected that the bill was "placing in the hands of Congress all matters growing out of State elections." [267]

Republicans dismissed these objections. The law's provisions "are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress," Representative John Bingham (R-Ohio), principal author of the Fourteenth Amendment and a legal architect of Congressional Reconstruction, told his colleagues. [268] Bingham explained,

> the sum total of the outcry against this bill is that by it the equal rights of the people of this country are to be enforced, for the first time in the history of the Republic, by a national statute and by the whole power of the Union and of the people of all the States. [269]

Representative Noah Davis (R-N.Y.) thundered, "it is true ... that ***1043** heretofore in the history of this country it has not been necessary for Congress to interfere for the purpose of preserving the purity of the election of members of this House. But has not that time now arrived?" [270] Amid the white violence and subterfuge prevailing in the former Confederate States, "members of this body cannot be elected fairly and according to the will of those entitled to exercise the right of suffrage unless Congress intervenes and exercises that dormant power that has so long existed, but which has never yet been exercised." [271]

Indeed, the debates were studded with lurid claims about how the Enforcement Act subjugated white people, particularly when a draft of the bill also included measures ending racial discrimination in the taxation and treatment of immigrants. [272] Opponents chastised the Bill as unfair favoritism towards freed slaves. "The bill now before us seeks to give the negro rights, safeguards, and remedies which are withheld from the white man," one representative complained with reference to section 5, which provided additional protection for the right to vote of anyone "to whom the right of suffrage is secured or guaranteed

by the fifteenth amendment." [273] "[Y]ou cannot with impunity trample upon this great white race," he added, arguing that if Congress "humiliate[d] and degrade[d] the white man" by enacting the Enforcement Act, states would simply adopt literacy tests (as Massachusetts had) and enfranchise immigrants to "increase[]" "the white majority at the polls." [274] In response to statements of unabashed white supremacy, Representative Davis tersely affirmed that the bill "simply prohibits crime." [275]

The final version of the First Enforcement Act passed the House with 133 yeas, 58 nays, and 39 members not voting, [276] and passed the Senate with 48 yeas and 11 nays. [277]

1044** ***b. The Second Enforcement Act

The following year, Congress enacted the Second Enforcement Act, [278] framed as a set of amendments to its predecessor. The law established a new system of federal election administration and supervision. At the request of two citizens in any town of at least twenty thousand people, each United States circuit judge was required to commission two local "supervisors of election" to "guard[] and scrutinize[]" voter registration and balloting. [279] These federal election supervisors were authorized to "personally inspect and scrutinize such registry ... in such manner as will, in their or his judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names." [280] They were also authorized to supervise and challenge the counting of the votes, [281] to maintain clear lines of sight over all election processes, [282] and to investigate and challenge the seating of any representative-elect whose election defied the new regime. [283] Congress criminalized the obstruction of these supervisors or any other federal election administration officials--including the federal marshals and deputies tasked with enforcing much of the new election system--and undermining the integrity of the voter registration system. [284] The Act also required the states to conduct congressional elections with paper ballots, expressly displacing all state laws that said otherwise: "[A]ll votes for representatives in Congress shall hereafter be by written or printed ballot, any law of any State to the contrary notwithstanding; and all votes received or recorded contrary to the provisions of this section shall be of none effect." [285] Finally, the Second Enforcement Act doubled down on enforcement. Among other things, Congress empowered the federal marshals to enlist the local bystanders to combat violent resistance [286] and gave the federal courts complete jurisdiction over all matters arising under the Enforcement Acts. [287]

These additions to the growing federal election system prompted vigorous, if far from novel, congressional debate about the meaning of the ***1045** Elections Clause.

Some opponents raised the tired objection that Congress could only exercise its Elections Clause power if states defaulted on their duty to provide for congressional elections or otherwise threatened the existence of Congress. [288] Although Kerr argued that Congress could only act under very limited circumstances, he conceded that once Congress could act, it could set up the very sort of federal election administration system the two Enforcement Acts had created. [289] In those emergencies,

> Congress may declare that elections shall be held at certain times and at certain places and in a certain manner; for example, that ballot-boxes shall be opened at each voting precinct ..., and that an election board shall be organized there under Federal laws, and in the persons of one inspector and two judges. [290]

When another opponent of the Second Enforcement Act, Senator George Vickers (D-Md.), rose to make a similar argument that Congress could act only for "reasons of absolute, unqualified necessity," he included among those "paramount reasons of State" not only "to perpetuate the existence of the Government," but also "to preserve representation" and "to protect minorities by the district system." [291]

Other opponents resurrected the anti-commandeering objection. Representative Charles Eldridge, for example, asked indignantly whether anyone would argue that under the Elections Clause, or any other constitutional provision, "the Governors of the States and all other State officers can, under penalties, be required by the Federal Government to serve as its officers and do its bidding [.]" [292]

Some lawmakers questioned whether the "manner of holding elections" included the wide range of regulation imposed by the Second Enforcement Act.[293] In response, the statute's supporters, as in previous ***1046** decades, answered that the Clause granted Congress comprehensive power to regulate congressional elections. Calling attention to the Elections Clause, the Necessary and Proper Clause, and the Fourteenth Amendment, Representative William Lawrence (R-Ohio) contended, "Congress could provide officers to conduct the elections of Representatives in Congress. Under these provisions Congress may define and punish crimes against the exercise of the elective franchise in the election of Representatives in Congress."[294] Just as the constitutional power to tax permits Congress to criminalize violations of the revenue laws, and the constitutional power to establish post offices permits congress to define offenses against the postal service, so too "the power to make regulations as to the 'times, places, and manner' of holding elections for Representatives in Congress carries with it the right to define penal offenses against the exercise of the elective franchise."[295]

Representative Burton Cook (R-Ill.) likewise argued that the power to correct violations of election law was inherent in Congress's "manner" authority:

> if these frauds in the elections grow to any extent out of the manner of conducting the elections, then clearly to that extent the remedy is within our power, and we are called upon to apply that remedy by every consideration that would induce us to preserve our free Government and preserve the liberties of our people.[296]

Cook emphasized that

> there can be no valid reason urged against the passage of this bill, unless it can be shown that under a fair and reasonable administration of this act, if it should become a law, men who are justly entitled to vote would be deprived of their right to do so.[297]

And he pointed out that "[n]o evidence" had been produced to that effect.[298]

The bill's proponents argued that the enforcement legislation was authorized on even the narrowest traditional grounds: Congress's need to protect itself from subversion by states. In this emergency, nothing less than a federal election code could secure Congress's fundamental interest in its own existence and integrity. Bingham stated the case clearly. "Your ***1047** Constitution would have been only a glittering bauble if it had not conferred, as it did confer, upon the national Legislature the power of selfpreservation," he began.[299] "Who does not know that if the State Legislature should choose to incumber the exercise of this power with inconvenient or impossible conditions, and if the national Congress had not the power to overrule or alter such conditions, the nation would perish?"[300] Others concurred. "The idea that Congress cannot protect the national Government in the election of the very officers who are to make its laws is supremely ridiculous and absurd," Lawrence argued.[301] "This power to preserve the purity of the ballot is simply the exercise of that inherent power, which this, like every other Government has--a power higher, if possible, than the Constitution--the power of preserving its own existence when that existence is threatened by force or fraud ...."[302] Lawrence reasoned that no member could deny that such force and fraud had already occurred:

> Sir, we all know that Kuklux outrages have been committed, not only in North Carolina, where it was recently necessary to call out a military force to protect the people at the elections, but in other States of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot-box.[303]

Even if the legislation was unprecedented, the crisis was unprecedented too. "It is said that the last clause of this section [of the Elections Clause] giving the power to Congress has fallen into abeyance, never having been used, and should now be considered but as a dead letter," Representative Cook said.[304] "Sir, the men who framed this Constitution foresaw that the exigency might arise, *as it has arisen*, requiring the exercise of this power by Congress, and they provided for its exercise when that exigency should arise."[305]

The bill passed the House by a vote of 144 yeas, 64 nays, and 32 members not voting, [306] and the Senate by a vote of 39 yeas to 10 nays. [307]

1048** ***c. The Third Enforcement Act

Less than two months later, Congress enacted a third Enforcement Act, also known as the Ku Klux Klan Act. [308] The third Enforcement Act, known as "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," pursued some of its other purposes through the Elections Clause. [309] Most of the Act's provisions increased federal military and judicial authority over regional violence, but section 2 of the Act also created a new civil cause of action against voter intimidation and related interference with the right to vote, which remains in the U.S. Code as 42 U.S.C. § 1985(3), and a criminal equivalent, which does not. [310] The House passed its first version by 118-91, [311] and the Senate passed its own by a vote of 45-19. [312] The House approved the final bill by a vote of 93 yeas, 74 nays, and 63 not voting, [313] and the Senate approved it with 36 yeas and 13 nays. [314]

Because this second section of the Act resembled the sixth section of the First Enforcement Act, which created a cause of action against conspiracies to violate the rights of federal citizenship, Congress engaged in little original constitutional debate. As Representative Samuel Shellabarger (R-Ohio) said while making the case for the bill, "it rests upon exactly the same legal ground, and is in its constitutional aspects identical with [the First Enforcement Act], the only difference being that the section of this bill defines the offense with greater exactness." [315] Only James Garfield felt the need to mention the Elections Clause as the source of constitutional authority for this federal protection of the right to vote, and his remarks on this point appear to have been relatively uncontroversial. Garfield acknowledged that it had been repeatedly argued "that the clause in the main text which gives to Congress the power to regulate the time, place, and manner of holding elections carried with it the whole question of suffrage. I was never able to believe that this clause went so far." [316] But, he continued, "I did believe, and I do now believe, that it goes so far that, with the fifteenth amendment superadded, ***1049** Congress is armed with more than a mere negative power, and had the right to pass the enforcement act of May last *[i.e.*, the First Enforcement Act]." [317]

III. THE ELECTIONS CLAUSE IN FEDERAL COURTS

A. Reconstruction

The three Enforcement Acts marked Congress's first foray into creating a federal scheme of election regulations that went beyond districting. At the same time, the Acts granted federal courts jurisdiction over matters arising under the new laws. It's no surprise then, that the Enforcement Acts offered federal courts, including the U.S. Supreme Court, the first occasions to opine meaningfully on the Elections Clause and its scope.

Before Reconstruction, courts typically referred to the Elections Clause as a way to understand some other issue or unrelated aspect of law. [318] For example, in establishing the foundational principle that federal courts retain the power to review state court decisions interpreting federal law or the Constitution, in *Martin v. Hunter's Lessee*, [319] Justice Story pointed to the Elections Clause as an instance in which the Constitution makes federal law supreme. [320] In interpreting the word "manner" as used in a statute providing pensions to widows of the Revolutionary War, the Court of Claims explained that the word was so broad as used in the Elections Clause to permit Congress to enact the Apportionment Act of 1842 and compel elections by district. [321]

The Circuit Court for the Southern District of New York appears to have been the first federal court to elaborate on the purpose of the Elections Clause when the court considered the constitutionality of the ***1050** First Enforcement Act less than six months after the law's passage. [322] Noah Davis was the attorney who argued that the Act (and a criminal prosecution thereunder) was constitutional under the Elections Clause. [323] Davis had been a congressman from New York and had vocally defended the

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Act just months earlier.[324] President Grant appointed Davis to be the U.S. District Attorney (now known as "U.S. Attorney") for the Southern District of New York in July of 1870.[325] As the first court to examine the underpinnings of the Elections Clause in nearly a century of the provision's existence, *United States v. Quinn*[326] should be foundational to understanding the meaning and purpose of the Clause--but it has never been cited by the Supreme Court or any other federal court in analyzing the scope of the Clause.

The *Quinn* Court looked to the intent in drafting and adopting the Elections Clause, examining "the explanations which were given by the great and good men who expounded it."[327] The court repeatedly recognized the singular importance of an accurate and fair vote:

> those framers of the constitution did not, for one moment, lose sight of the indispensable condition--on which alone a government of the people could be safe to the people themselves or could secure the beneficent ends for which it was instituted--that her popular vote should be the true expression of the opinions and choice of the electors.[328]

And the court articulated the Framers' underlying fears that "the states might become indifferent to the general good," and as a result fail to hold congressional elections or put obstacles in the way of "the full and fair expression of the popular voice."[329]

Each of Congress's powers under the Elections Clause was, according to the *Quinn* Court, intended to ensure the people could express their voice through a fair vote. For example, Congress needed the authority to set the time of elections because "[t]ime might some where be so arranged, and for some end other than the well-being of the whole nation, that the ***1051** popular voice might be denied a full expression."[330] Congress likewise required superseding power to establish the place of elections because "[p]lace might be so fixed as in that mode to defeat the general and the indispensable purpose."[331] Lastly, Congress retained authority over the manner of conducting elections because "[t]he manner of holding an election might be such as to operate to prevent an open, fair expression of the popular voice."[332] The Elections Clause was designed to avoid a scenario in which "either through an indifference of the states or otherwise, that the general government might find itself unsupported by the very people in whose will the foundations of the government rested."[333] The *Quinn* Court plainly stated that the "principle on which it was declared that this clause might be useful" was that "all legal voters should have full and fair opportunity to deposit their votes."[334]

Similarly, where defendants challenged the constitutionality of the law under which they were prosecuted for conspiracy to intimidate voters, a federal court in Louisiana concluded that the law was "clearly within the constitutional power of congress" as granted by the Elections Clause.[335] That provision was "framed to secure the existence of the government itself, and was made in the interest of all the people of all the states."[336] The Elections Clause, along with the Voter Qualifications Clause, was "intended to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives, first by preventing obstructive legislation by the states, and, second, securing to the voter the protection of the general government."[337]

The Supreme Court first addressed the constitutionality of the Enforcement Acts in 1875, in two decisions issued on the same day--*United States v. Reese*[338] and *United States v. Cruikshank*.[339] Neither relied on the Elections Clause,[340] and both cases reflect the Court's well- ***1052** covered narrowing of the Reconstruction Amendments.[341]

Five years later, the Court was confronted with a challenge to other provisions of the First and Second Enforcement Acts in the context of a federal election. In *Ex parte Siebold*,[342] defendants (some of whom were election judges) were charged with stuffing ballot boxes and engaging in other acts of interference in and manipulation of a congressional election in Maryland.[343] The Court upheld several provisions of the First and Second Enforcement Acts as expressly authorized by the Elections Clause. In so doing, the Court embraced Congress's broad authority to legislate under the Clause and rejected the argument that Congress could not enact partial federal regulations:

> After first authorizing the States to prescribe the regulations, it is added, 'The Congress may *at any time*, by law, *make or alter* such regulations.' '*Make or alter:*' What is the plain meaning of these words? ... There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. [344]

In fact, the *Siebold* Court expressly blessed the 1842 Apportionment Act. "No one will pretend," it stated, "at least at the present day, that these laws were unconstitutional because they only partially covered the subject." [345] The Court rejected concerns about Congress and states legislating on the same issue concurrently, because federal regulations are always "paramount" to state laws where the two conflict. [346] The Court upheld the federal punishment of state officers for violating state laws, the violation of which was made punishable by the Enforcement Acts, because the state officers also owed duties to the United States and because Congress could effectively adopt state laws and "demand[] their fulfilment." [347]

***1053** For the first time, the Supreme Court in *Siebold* declared "that Congress has plenary and paramount jurisdiction over the whole subject" of federal elections. [348] Like the lower court in *Quinn*, the Supreme Court rejected any suggestion that the absence of significant federal elections legislation prior to 1870 diminished Congress's broad authority on the subject:

> If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power. [349]

The Court acknowledged that the "exigency" had arrived: "In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government." [350] In other words, voter intimidation and violence, fraud, and interference with election integrity had become issues of self-preservation for the federal government.

The Supreme Court decided a companion case, *Ex parte Clarke*, [351] on the same day as *Siebold*. An election officer had been convicted under the Enforcement Act for neglecting to convey a poll-book to the county clerk of court and for permitting the poll-book to be broken open. [352] The Court upheld the conviction and denied the motion for habeas corpus, relying on its reasoning in *Siebold*. [353] Justice Field, joined by Justice Clifford, dissented from the majority opinions in *Siebold* and *Clarke*, arguing, in part, that the Elections Clause's "make or alter" power did not permit Congress to penalize violations of state law. [354] Justice Field relied on the debates during the constitutional and state ratification conventions, pointing to language from the Framers that identified self-preservation as the primary purpose for the Clause. [355] Justice Field also echoed the anti- ***1054** commandeering arguments of the Framers and members of Congress who had urged limitations on, or at least a narrower interpretation of, the Elections Clause. [356] Once again, however, this restrained view of Congress's power under the Elections Clause was a minority opinion that did not carry the day.

The Court reaffirmed its broad view of the Elections Clause in *Ex parte Yarbrough*, [357] a unanimous opinion that upheld the Third Enforcement Act's criminal provisions against conspiracy to intimidate federal voters and conspiracy to deny the "free exercise or enjoyment" of federal privileges or immunities. [358] Eight men sought habeas relief after being convicted of conspiring to prevent Berry Saunders, a Black man, from voting in Georgia's congressional election, and carrying out that conspiracy by violently assaulting Mr. Saunders on account of his race. [359] In response, the Court announced Congress's unmitigated power to protect voters and the integrity of federal elections:

> If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its

> existence depends from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. [360]

Again rejecting the argument that Congress's delay in deploying its Elections Clause authority diminished his power, [361] the Court explained that Congress's powers must include the authority to: "provide laws for the proper conduct of those elections[;]" "provide, if necessary, the officers who shall conduct them and make return of the result[;]" "to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function[;]" and "protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation and the election itself from corruption or fraud[.]" [362]

Looking beyond "specific sources of the power to pass these laws[,]" the Court relied on fundamental principles of American democracy in a ***1055** lofty conclusion:

> It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. ... In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources. [363]

Recognizing the profound terror and unrest inflicted throughout the South, the Court also predicted other election manipulations--namely, the distorting effect of money in politics--that were still to come. [364] The Constitution *must* include the power to prevent against such "evils," because if not "the country [is] in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other." [365]

After *Yarbrough*, the Supreme Court continued to uphold the constitutionality of federal criminal penalties for voter intimidation and federal supervision of congressional elections. [366] Lower federal courts likewise followed *Siebold* and *Yarbrough*, repeatedly recognizing the breadth of Congress's constitutional authority to enact laws to ensure election integrity and protect the right of citizens to vote freely and ***1056** without interference. [367]

B. The Wide Range of Elections Clause Powers

As Congress and states began exercising their Elections Clause powers more regularly in the Twentieth Century, the Supreme Court repeatedly reasserted the extraordinary breadth of the "[t]imes, [p]laces, and [m]anner" [368] authority under the provision and largely approved of legislation regulating a wide range of aspects of elections.

In an oft-quoted passage, the Court affirmed in *Smiley v. Holm* [369] that "[i]t cannot be doubted that" the "comprehensive words" of Article 1, Section 4

> embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns. [370]

Explicitly recognizing that this list was not exhaustive, the Court explained that the Elections Clause authorizes States "in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce

the fundamental right involved." [371] The Court went on to acknowledge that this broad power extended to Congress, which may issue "regulations of the same general character" as States and "may supplement these state regulations or may substitute its own" because Congress "has a general supervisory power over the whole subject." [372] The Court has also recognized that breadth of Congress's power under the Elections Clause is further bolstered by the Necessary and Proper Clause. [373]

Although it was never disputed that the Elections Clause included the power to draw and redraw districts, in *Smiley,* the Court held that nothing in the Elections Clause prohibited State redistricting legislation from ***1057** being subject to the governor's veto power. [374] In so holding, the Court implicitly accepted that the power to redistrict is part of the Elections Clause authority. Since *Smiley,* the Court has confirmed this conclusion explicitly. For example, in *Wesberry v. Sanders,* [375] an apportionment challenge, the Court delved into the constitutional ratification debates and explained that the Framers intended the Elections Clause to give Congress the power to rectify the malapportionment that had developed in certain state legislatures and to "lay the state off into districts." [376] Even as it acknowledged that the breadth of Congress's power under the Elections Clause was controversial during the constitutional debates, the Supreme Court has treated as undisputed that Article 1, Section 4 left "in state legislatures the initial power to draw districts for federal elections," and "permitted Congress to 'make or alter' those districts if it wished." [377] The Court went on to list the many instances in which Congress had exercised such power, "in particular to restrain the practice of political gerrymandering." [378]

In addition to redistricting, the Court has recognized Congress's power to issue regulations pertaining to voter registration, [379] campaign finance ***1058** and corruption, [380] primary elections, [381] recounts, [382] party affiliation rules, [383] and balloting [384] (so long as the balloting rule did not impermissibly attempt to regulate electoral outcomes). In each of these cases, the Court remarked on the comprehensive and wide-ranging scope of the Elections Clause power.

The Court's jurisprudence is muddier with respect to whether Congress can expand the electorate using its Elections Clause powers. In *Oregon v. Mitchell,* [385] Justice Black, announcing the judgments for the Court, concluded that Congress can require states to permit 18-year-olds to vote in federal elections, but could not do so for state elections. [386] Relying on the Elections Clause, as "augmented by the Necessary and Proper Clause," [387] Justice Black explained that

> [t]he breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. [388]

Four justices agreed with Justice Black that Congress could lawfully require states to extend the franchise to eighteen-year-olds for federal ***1059** elections, but did so on different grounds. [389] Writing separately, Justice Stewart, with Chief Justice Burger and Justice Blackmun, agreed that Congress *could* regulate some voter qualifications through the Equal Protection Clause, but could not do so with respect to age because the state laws that set the voting age at twenty-one did not "invidiously discriminate against any discrete and insular minority." [390]

In *Tashjian v. Republican Party of Connecticut,* [391] the Supreme Court later confirmed that the Constitution does "not require a perfect symmetry of voter qualifications in state and federal legislative elections." [392] The Court unequivocally rejected the argument that the Voter Qualifications Clause requires identical voter qualifications in state and federal legislative elections as "plainly inconsistent" with *Mitchell.* [393] However, Justice Stevens, with Justice Scalia, dissented and argued that the opinions of eight justices in *Mitchell* were consistent with the proposition that the Constitution "requires the same qualifications for state and federal elections." [394] More recently, justices have weighed in on this question, though in dicta or in minority opinions. For example, in a 2013 decision striking down Arizona's law requiring would-be voters to provide proof of U.S. citizenship, Justice Scalia waded into the debate, writing that "Prescribing voting qualifications ... forms no part of the power to be conferred upon

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the national government by the Elections Clause, which is expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." [395] Notwithstanding nonbinding statements to the contrary, *Mitchell* and *Tashijian* represent the state of the law: Congress can expand the federal electorate beyond state law voter qualifications. Perfect symmetry is not required so long as all electors for the most ***1060** numerous state legislative body also qualify as electors for federal office.

C. Exceptions to the Rule?

Three cases run counter to the great weight of jurisprudence recognizing the Elections Clause as a broad grant of power to Congress; one of these cases has since been overturned and another has been called into question--by Justice Scalia in his majority opinion in *Arizona v. Inter Tribal Council of Arizona, Inc.* [396] and by the sweep of history.

In *Newberry v. United States*, [397] the court struck down portions of the Federal Corrupt Practices Act that placed spending limits on spending in primaries or other nomination processes for federal office, in part because the term "elections" in Article I, Section 4 did not include primary elections because that procedure was "unknown" to the Framers. [398] But the Court later rejected this rule in *United States v. Classic*, [399] explaining that when the Elections Clause is "read in the sense which is plainly permissible and in the light of the constitutional purpose," the Court was required "to hold that a primary election ... is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it." [400] The *Classic* Court explained that the Necessary and Proper Clause--when operating in conjunction with the Elections Clause--grants Congress the power to legislate to "safeguard the right of choice by the people of representatives in Congress." [401]

In *United States v. Gradwell*, [402] the Court held that criminal prohibition of fraud against the United States did not extend to election fraud (specifically, bribery of electors). [403] To reach this conclusion, the Court looked at Congress's history of exercising its Elections Clause power to date, and noted that Congress had rarely interfered with state regulations of elections, except for a period of twenty-four years. [404] The Court wrote off as an aberration the period from 1870 (when Congress issued muscular elections regulations though the Enforcement Acts) to 1894 (when Congress repealed a substantial portion of these laws as Reconstruction ***1061** gave way to Redemption). The Court could not expressly state that Congress lacked the authority to regulate on congressional elections; instead, the Court explained that it was merely a matter of "policy" that had prevented Congress from doing so. [405] Because Congress had previously exercised its election authority "by positive and clear statutes," the *Gradwell* Court declined to read an election regulation into "a law for the protection of the revenue." [406]

In practice, *Gradwell* has not narrowed the Court's interpretation of the Elections Clause. Indeed, in explaining why the presumption against preemption does *not* apply in Elections Clause cases, Justice Scalia limited *Gradwell* to its facts, explaining that the "provision at issue was adopted in a tax-enforcement bill, and that Congress had enacted but then repealed *other* criminal statutes specifically covering election fraud." [407] Thus, "*Gradwell* says nothing at all about pre-emption, or about how to construe statutes (like the NVRA) in which Congress has *indisputably* undertaken 'to regulate such elections.'" [408] Indeed, Congress's adoption of sweeping regulation of federal elections throughout the twentieth and twenty-first centuries all but nullifies *Gradwell*.

Finally, in *U.S. Term Limits, Inc. v. Thornton*, [409] the Court held that a state could not impose term limits on U.S. representatives or senators because the "Times, Places and Manner" authority granted to states did not contain the power to determine the qualifications for federal office. [410] Such power would contravene the intent of the Framers, who were motivated by "evident concern that States would try to undermine the National Government." [411] Justice Stevens several times noted that the Elections Clause was intended to grant Congress control over the "procedural" aspects of elections (i.e., how elections are run), rather than the "substantive" qualifications of candidates for office. [412] But it would be a mistake to read Justice Stevens's focus on election procedure too narrowly, given the Framers' emphasis on the breadth of the Elections Clause (e.g., "words of great latitude"), the intent to protect against voter ***1062** suppression and intimidation, and early Elections Clause legislation (approved by the Supreme Court) aimed at ensuring free and fair elections. [413]

D. Who Is a "Legislature"?

The most voluble recent Supreme Court jurisprudence on the Clause has addressed what once seemed like a quirky, ancillary issue. The Republican legislature challenged Arizona's nonpartisan redistricting commission, which had been established by ballot measure under the state's constitution.[414] The commission violated the Elections Clause, the lawsuit insisted, because only the "legislature" could set the "times, places, and manner" of balloting and districts--and the voters were not the legislature.[415] This argument, if successful, would have put at risk numerous other ballot measures in states across the country, especially in western states that joined the Union in the late nineteenth and early twentieth Centuries, with direct democracy as part of their constitutions.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[416] by 5-4, the Court ruled that the Constitution did not bar the people of Arizona from direct democracy when it came to the method for drawing district lines. "The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government."[417] Ominously for future jurisprudence, Justice Anthony Kennedy joined the majority. Chief Justice John Roberts wrote a stinging dissent, arguing that "legislature" must mean only the representative body.[418] Kennedy's retirement augured a future Supreme Court ruling striking down dozens of state election procedures and provisions enacted by voters over the decades.

However, in *Rucho*, even as Roberts wrote that the courts could not police partisan gerrymandering, he acknowledged that Congress and state voters could. At length he cited with approval how

> numerous ... States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, ***1063** voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position-- state demographer--to draw state legislative district lines.[419]

These measures are constitutionally indistinguishable from the ones put at risk in Arizona.

Litigation on this question took center stage in the months leading up to, and following, the 2020 general elections. Faced with the difficulties of holding elections in the midst of the coronavirus pandemic, governors, secretaries of state, state election boards, county election administrators, and courts issued executive orders, rules, and interpretations to ensure that voters could safely cast ballots that would count. As a result, there were at least forty-three cases, in both federal and state court, in which parties challenged an election rule or procedure on the grounds that the entity issuing the regulation or interpretation was not entitled to make rules as to the times, places, or manner of federal elections under the Elections and/or Electors Clauses.[420] Opining on voting cases that bubbled up to the Supreme Court's 2020 "shadow docket," four justices indicated their support for the independent state legislature theory, under which only the formal legislative body of a state would be permitted to regulate federal elections under the Elections and Electors Clauses.[421] These views contradict the Court's majority opinions in *Arizona Independent Redistricting Commission* and *Rucho*, the practice of election administration nationally, and the unmistakable original intent of the Elections Clause to *limit* the power of state lawmakers, whom the Framers fundamentally distrusted. Ultimately, the Court denied the petitions for certiorari arising from these cases.[422]

CONCLUSION: THE ELECTIONS CLAUSE TODAY

One remarkable feature of the Founding-era debates on the Elections Clause is their resonance today. Madison's well-known warning that partisan factions in the States would write laws to entrench themselves ***1064** still echoes profoundly: "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould [sic] their regulations as to favor the candidates they wished to succeed."[423]

For example, rules to limit ballot-access--including stricter voter identification requirements for in-person voting, stricter voter-registration requirements, and curtailment of early-voting opportunities--are advanced predominantly by one political party, often crafted to exclude some voters, and based on a premise about the relationship between turnout and electoral outcomes. [424] At the same time, partisan gerrymandering designed to entrench political parties has plagued Maryland, Michigan, North Carolina, Pennsylvania, and Wisconsin amidst the heightened partisanship of recent years, [425] consistent with Theophilus Parsons' prediction that "in times of popular commotion, and when faction and party spirit run high," States "would introduce such regulations as would render the rights of the people insecure and of little value" including making "unequal and partial division of the State into districts for the election of representatives." [426] Indeed, even as the Supreme Court in *Rucho* ruled that claims of partisan gerrymandering are nonjusticiable, the Court acknowledged that electoral districting problems in part animated the Framers' desire for the Elections Clause. And the Court squarely stated that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause." [427] The Court pointed specifically to the For the People Act of 2019 as an example of proposed legislation that would create such districting regulations and noted that the avenue for reform "remains open" in Congress. [428]

Along with redistricting reform, the For the People Act and the Freedom to Vote Act include provisions related to methods of voter registration, early voting, restoration of eligibility to people with past ***1065** convictions, and election security. [429] Arguments that the Elections Clause is not broad enough to authorize these reforms would give the Framers and early members of Congress déjà vu. For example, the president of the Public Interest Legal Foundation testified that the Elections Clause "was only added" to the Constitution "when concerns were raised that the states would suffocate the power of the new government by refusing to establish procedures to elect federal officials"--a circumstance that "simply does not exist, and therefore should not justify a federal takeover of election procedures." [430] Not only does this argument reflect a very narrow slice of the historical record, but it has been advanced and defeated--repeatedly. The Framers of the Constitution declined to adopt Rutledge and Pinckney's proposed amendment to excise federal authority to alter state elections regulations. Then, during state ratification, six states tried and failed to amend the constitution to limit Congress's power to apply only when States entirely failed to enact elections regulations. The first Congress likewise tried and failed to amend the Constitution to grant elections authority only in instances of state default. Rather than adopt such a limited construction, Madison, the Framers, and early Congresses understood (sometimes to their chagrin) that the Elections Clause contained "words of great latitude" and that Congress's authority was *not* limited to circumstances in which states entirely refused to enact rules for congressional elections. The national self-preservation that the Elections Clause was intended to provide has *always* meant more than merely holding congressional elections. [431]

Partisan manipulation of district boundaries is just one tactic used to dilute the power of voters and suppress votes. Voters face myriad burdens and inconveniences, from strict voter identification laws and registration ***1066** requirements, to aggressive voter roll purges and limited voting hours and locations. Framers who worried that States, if unrestricted, would situate polling places at inconvenient locations would be unsurprised by the rash of polling place closures since 2013, when the Supreme Court gutted the federal government's most potent tool for fighting race-based voter suppression--the preclearance requirement of the Voting Rights Act. [432] Indeed, one essayist during the state ratification debates expressly warned that, without federal mediation, a State would "appoint[] a place for holding the elections, which would prevent some from attending, and burthen [sic] others with very great inconveniences." [433]

It is disheartening that abuse of state power over elections, partisan manipulation of district lines, and myriad forms of voter intimidation and suppression (precisely the harms the Framers hoped to avoid by drafting the Elections Clause into the Constitution) persist. But there is reason for optimism. The historical record of the Elections Clause--at the nation's founding, in early Congresses, and in the courts--demonstrates that Congress and states have the power to deliver on the promise of free and fair elections that the Framers intended.

Footnotes

a1 Eliza Sweren-Becker is Voting Rights and Elections counsel at the Brennan Center for Justice at NYU School of Law. Michael Waldman is President of the Brennan Center and author of *The Fight to Vote*. Thank you to Michael Mitchell for his exceptional research assistance. Thanks also to the editors of *Washington Law Review* for their careful efforts.

1 U.S. CONST, art. I, § 4, cl. 1.

2 The Electors Clause, U.S. CONST, art. II, § 1, directs how *presidential* electors are appointed by the states. "[C]ourts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races." Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power,* 36 CONST. COMMENT. 1, 54 (2021); *see also* Burroughs v. United States, 290 U.S. 534, 545 (1934); Voting Rts. Coal. v. Wilson, 60 F.3d 1411, 1414 (9th Cir. 1995) ("The broad power given to Congress over congressional elections has been extended to presidential elections...."); Ass'n of Cmty. Orgs, for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995) ("[Article II section 1] has been interpreted to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections."); Eugene Gressman, *Uniform Timing of Presidential Primaries,* 65 N.C. L. REV. 351, 355 (1987) ("[T]he Court employs the same constitutional analysis--the same broad treatment of vested congressional power--in dealing with article II, section 1.").

3 *Voting Rights Litigation Tracker 2020,* BRENNAN CTR. FOR JUST. (July 8, 2021), https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020 [https://perma.cc/4MDM-628K].

4 Glenn Kessler, *Fact-Checking the Craziest News Conference of the Trump Presidency,* WASH. POST (Nov. 19, 2020, 2:18 PM), https://www.washingtonpost.com/politics/2020/11/19/fact-checking-craziest-news-conference-trump-presidency/ [https://perma.cc/A6WR-8HFS].

5 The term "shadow docket," coined by William Baude, refers to Supreme Court decisions decided outside of its regular docket, without oral argument. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket,* 9 N.Y.U. J.L. & LIBERTY 1 (2015).

6 *See, e.g.,* Wise v. Circosta, ___ U.S. ___, 141 S. Ct. 658 (2020) (mem.) (Justices Thomas, Alito, and Gorsuch would have granted an application to enjoin the North Carolina State Board of Elections' extension of the state's absentee ballot receipt deadline. The deadline extension was challenged based on the claim that the Board is not the "legislature" under the Elections and Electors Clauses.); Democratic Nat'l Comm. v. Wis. State Legislature, ___ U.S. ___, 141 S. Ct. 28, 29-30 (2020) (Gorsuch, J., concurring) (in denying an application to stay a Seventh Circuit decision-- which stayed the district court's order to extend the ballot receipt deadline-- Justice Gorsuch, concurring, wrote that state legislatures, not judges or other state officials, bear primary responsibility for setting election rules); *id.* at 32 (Kavanaugh, J., concurring) (Justice Kavanaugh agreed that designing electoral procedures is a "legislative task"); Republican Party of Pa. v. Boockvar, ___ U.S. ___, 141 S. Ct. 643 (2020) (mem.) (Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted an application to stay the Pennsylvania Supreme Court's ruling to extend the mail ballot receipt deadline, which was challenged based on the claim that the state court is not the "legislature" under the Elections and Electors Clauses).

7 *See generally* Petition for Writ of Certiorari, Corman v. Pa. Democratic Party, 592 U.S. ___,141 S. Ct. 732 (2021) (mem.) (No. 20-574); Petition for Writ of Certiorari, Republican Party of Pa. v. Degraffenreid, 592 U.S. ___, 141 S. Ct. 732 (2021) (mem.) (No. 20-542); Petition for a Writ of Certiorari, Bognet v. Degraffenreid, ___ U.S. ___, 209 L. Ed. 2d 544 (2021) (mem.) (No. 20-740), 2021 WL 1520777. The Court declined to grant certiorari in *Corman* and *Republican Party of Pennsylvania v. Degraffenreid.* The Court granted certiorari in *Bognet* before vacating the ruling and instructing the lower court to dismiss the case as moot.

8 For the People Act of 2019, H.R. 1, 116th Cong. (2019); For the People Act of 2021, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021). The Brennan Center for Justice has advocated in support of the For the People Act, including offering testimony before Congress in support of the legislation.

9 ___ U.S. ___, 139 S. Ct. 2484 (2019). The Brennan Center for Justice submitted an amicus brief to the Court in support of appellees.

10 Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015). The Brennan Center for Justice submitted an amicus brief to the Court in support of appellees.

11 Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013). The Brennan Center for Justice submitted an amicus brief to the Court in support of respondents.

12 Act of June 25, 1842, ch. 47, 5 Stat. 491.

13 *Ex parte* Siebold, 100 U.S. 371 (1879).

14 *Inter Tribal Council of Ariz., Inc.,* 570 U.S. at 7-9.

15 *See, e.g.,* Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause,* 114 YALE L.J. 1021 (2005) (justiciability of partisan gerrymandering); Troy McCurry, *Leeway for Judicial Usurpation: Ignoring the Default of the Elections Clause in the Texas Redistricting Cases,* 25 QUINNIPIAC L. REV. 631 (2007) (same); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections,* 13 U. PA. J. CONST. L. 1 (2010) (campaign finance); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act,* 65 VAND. L. REV. 1195 (2012) (Elections Clause, when combined with Congress's ability to enforce the Fourteenth and Fifteenth Amendments, provides constitutional justification for the VRA); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 340-48 (2016) (discussing Antifederalist views of and arguments against the Elections Clause); Franita Tolson, *The Spectrum of Congressional Authority over Elections,* 99 B.U. L. REV. 317, 317 (2019) [hereinafter Tolson, *Congressional Authority]* (exploring the breadth of congressional power over elections, which derives from multiple sources of congressional authority and should overcome federalism concerns); Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law,* 129 YALE L.J. F. 171 (2019) (addressing Congress's Elections Clause authority to enact the For the People Act of 2019 (H.R. 1)); *Recent Legislation,* 133 HARV. L. REV. 1806 (2020) (addressing anti-commandeering under the Elections Clause in the contest of H.R. 1). *But see* Stephanopoulos, *supra* note 2 (writing more broadly on congressional authority over elections). A separate line of scholarship addresses the "independent state legislature" theory. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions,* 55 GA. L. REV 1 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530136 [https://perma.cc/P5GC-PXHU]; Vikram David Amar, *Federal Court Review of State Court Interpretations of State Laws that Regulate Federal Elections: Debunking the "Independent State Legislature" Notion Once and for All, and Keeping Federal Judges to Their Important but Limited Lanes* (Nov. 23, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755 [https://perma.cc/NFM4-ZPEC]; Derek T. Muller, *Legislative Delegations and the Elections Clause,* 43 FLA. ST. U. L. REV. 717, 726-28, 734 (2016); Michael T. Morley, *The New Elections Clause,* 91 NOTRE DAME L. REV. ONLINE 79 (2016); Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599 (2008); Hayward H. Smith, Comment, *History of the Article II Independent State Legislature Doctrine,* 29 FLA. ST. U. L. REV. 731 (2001).

16 *See generally* J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND & THE ORIGINS OF THE AMERICAN REPUBLIC (1966).

17 Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus* Taxation No Tyranny, 44 HOUS. L. REV. 1377, 1378 (2008) ("That 'no taxation without representation' was the rallying cry of colonists seeking their independence in 1776 is the 'mother's milk' of American history education. Generations of schoolchildren have been weaned on it.").

18 CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES 349, 490-91 (1915).

19 Stephen Fairell, *Old Sarum*, THE HISTORY OF PARLIAMENT, http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/old-sarum [https://perma.cc/5FR8-Y7DD].

20 R.B. BERNSTEIN, THE EDUCATION OF JOHN ADAMS 52 (2020).

21 John Adams, *Thoughts on Government, April 1776*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/06-04-02-0026-0004 [https://perma.cc/FB3E-YNSE]; JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161-75 (1967).

22 *See, e.g.*, THEOPHILUS PARSONS, THE ESSEX RESULT, 1778, *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY 341 (Oscar Handlin & Mary Flug Handlin eds., 1966) ("They should think, feel, and act like them, and in fine, should be an exact miniature of their constituents.").

23 *See* Gary Berton, Smiljana Petrovic, Lubomir Ivanov, & Robert Schiaffino, *Examining the Thomas Paine Corpus: Automated Computer Authorship Attribution Methodology Applied to Thomas Paine's Writings, in* NEW DIRECTIONS IN THOMAS PAINE STUDIES 40-41 (Scott Cleary & Ivy Linton Stabell, eds., 2016).

24 FOUR LETTERS ON INTERESTING SUBJECTS 18-24 (1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 639 (Philip B. Kurland & Ralph Lerner eds., 1987).

25 *See* JOHN FISKE, CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789 (Forgotten Books 2012) (1888).

26 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 288 (Max Farrand ed., 1911) [hereinafter 2 Farrand] (notes of James Madison, recording arguments of John Francis Mercer); *see also* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009) ("Corruption was discussed more often in the Constitutional Convention than factions, violence, or instability.").

27 KLARMAN, *supra* note 15, at 31.

28 James Madison, *Vices of the Political System of the United States, April 1787*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-09-02-0187 [https://perma.cc/N99G-Z4XQ]; 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 119-20 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 5 ELLIOT'S DEBATES] (noting in the debates of July 25, 1788 that the States repeatedly failed to heed the Confederation Congress, failed to fulfill their national obligations, and even tried to keep secret their defiance of Congress).

29 The Committee of Detail was comprised of Edmund Randolph, James Wilson, Oliver Ellsworth, John Rutledge, and Nathaniel Gorham. *See* KLARMAN, *supra* note 15, at 173.

30 *See id.* at 147; 2 Farrand, *supra* note 26, at 129-74.

31 2 Farrand, *supra* note 26, at 135 ("The Time of the Election of the Members of the H. D. and of the Meeting of U. S. in C. assembled.").

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32 *Id.* at 139 ("The elections shall be *biennially* held on the same day through the *same* state(s): except in case of accidents, and where an adjournment to the succeeding day may be necessary .... The place shall be fixed by the (national) legislatures from time to time, or on their default by the national legislature .... So shall the presiding officer ... (Votes shall be given by ballot, unless 2/3 of the national legislature shall choose to vary the mode.)") (emphasis in original).

33 *Id.* at 153 (Committee of Detail, VI, Article 4: "The Members of the House of Representatives shall be chosen every second Year (in the Manner following) by the People of the several States comprehended within this Union (the Time and Place and the Manner and the of holding the Elections and the Rules) *The Qualifications of the Electors* shall be (appointed) *prescribed* by the Legislatures of the several States; but th*eir* provisions (which they shall make concerning them shall be subject to the Control of) *concerning them may at any Time be altered and superseded by* the Legislature of the United States.") (emphasis in original).

34 *Id.* at 165 (Committee of Detail, IX, Article 6: "The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States.").

35 *Id.* at 179.

36 *Id.* at 229.

37 *Id.* at 242.

38 *See infra* notes 57-62 and accompanying text.

39 *See infra* notes 59, 77, 84.

40 The western "back country" contained as much as seventy-five percent of the colony's white population and was settled by yeoman farmers who enslaved relatively few people. James Haw, *Political Representation in South Carolina, 1669-1794: Evolution of a Lowcountry Tradition*, 103 S.C. HIST. MAG. 106, 112 (2002). As described in greater detail *infra* section I.B.I, South Carolina's malapportionment was repeatedly offered as an example during state ratification debates to demonstrate the need for superseding congressional authority under the Elections Cause.

41 2 Farrand, *supra* note 26, at 240.

42 *Id.*

43 *Id.*

44 *Id.* at 241.

45 *Id.*

46 *Id.*

47 Madison requested that his notes be published posthumously, a full half century later in 1840. *See* THE PAPERS OF JAMES MADISON (Henry D. Gilpin ed., 1840); James H. Hutson, *The Creation of the Constitution: The Integrity*

of the Documentary Record, 65 TEX. L. REV. 1, 24 (1986). Madison was known to have edited and "improved" the transcripts, including his own contributions. Hutson, *supra,* at 25-35; KLARMAN, *supra* note 15, at 135-36.

48 2 Farrand, *supra* note 26, at 240-41.

49 *Id.* at 240-41.

50 THE VIRGINIA CONVENTION: DEBATES (June 14, 1788), *reprinted in* 10 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA [3], at 1259-60 (John P. Kaminski et al. eds., 1993) [hereinafter VOL. 10 VIRGINIA 3] (emphasis in original).

51 2 Farrand, *supra* note 26, at 242.

52 JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 149-51 (2d ed. 2017).

53 No such debate was found in records of the Connecticut, Delaware, Georgia, and New Jersey ratification debates (in Elliot's Debates or the Documentary History of the Ratification of the Constitution). These four states ratified the Constitution most quickly. The vote was unanimous in Delaware, Georgia, and New Jersey; in Connecticut, the margin in favor of ratification was more than three to one. KLARMAN, *supra* note 15, at 422-23.

54 MAIN, *supra* note 52, at 151.

55 THE MASSACHUSETTS CONVENTION: CONVENTION DEBATES (Jan. 16, 1788), *reprinted in* 6 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS [3], at 1217 (John P. Kaminski et al. eds., 2000) [hereinafter VOL. 6: MASSACHUSETTS 3] (emphasis in original).

56 THE NEW YORK CONVENTION: DEBATES (June 25, 1788), *in* 22 RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK [4], at 1906 (John P. Kaminski et al. eds., 2008) [hereinafter VOL. 22: NEW YORK 4] ("Richard Morris suggested that so far as the people, distinct from their legislatures, were concerned in the operation of the constitution, it was absolutely necessary that the existence of the general government should not depend, for a moment, on the will of the state legislatures. The power of perpetuating the government ought to belong to their federal representatives; otherwise, the rights of the people would be essentially abridged."); *Plain Truth: Reply to an Officer of the Late Continental Army,* INDEPENDENT GAZETTEER, Nov. 10, 1788, *reprinted in 2* RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 222 (Merrill Jensen ed., 1976) [hereinafter VOL. 2: PENNSYLVANIA] ("Congress indeed are to have control to prevent undue influence in elections, which we all know but too often happens through party zeal."); *Text of a Federalist Speech Not Delivered in the Maryland Convention,* MD. J. (July 21, 1788), *reprinted in* 12 RATIFICATION OF THE CONSTITUTION BY THE STATES: MARYLAND [2], at 884 (John P. Kaminski et al. eds., 2015) ("It has been said, that congress will be more likely to make improper regulations, than the general assembly. But that is an assertion without foundation, because although we may easily suppose improper regulations to take place in a state assembly, from the prevalence and sinister views of a party ....").

57 *See* Roger Sherman, *A Citizen of New Haven,* CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 RATIFICATION OF THE CONSTITUTION BY THE STATES: DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT 526 (Merrill Jensen ed., 1978) [hereinafter VOL. 3 DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT] ("The regulating the time, place, and manner of elections seems to be as well secured as possible. The legislature of each state may do it, and if they neglect to do it in the best manner, it may be done by Congress; and what motive can either have to injure the people in the exercise of that right?"); Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), *reprinted in* VOL. 3 DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT, *supra,* at 569; THE PENNSYLVANIA CONVENTION: PROCEEDINGS AND DEBATES OF THE CONVENTION, *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note

56, at 402-03, 406 (statements of James Wilson); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 60 (Jonathan Elliot ed., 2d ed., 1836) [hereinafter 4 ELLIOT'S DEBATES] ("It would have been a solecism, to have a government without *any means* of self-preservation. The Confederation is the only instance of a government without such means, and is a nerveless system, as inadequate to every purpose of government as it is to the security of the liberties of the people of America. When the councils of America have this power over elections, they can, in spite of any faction in any particular state, give the people a representation.") (replicating a statement of William R. Davie) (emphasis in original).

58 *See* THEOPHILUS PARSONS: NOTES OF CONVENTION DEBATES (Jan. 16, 1788), *reprinted in* VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1210-11 (noting Theodore Sedgwick's statement: "But this controlling power is necessary to preserve the general government ... Attend to the conduct of Rhode Island last winter; without any reason, they recalled their delegate and refused to send any. The same may happen under the general government"); 4 ELLIOT'S DEBATES, *supra* note 57 (noting the statement of William R. Davie addressing "the little state of Rhode Island").

59 FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 7 (1974).

60 Proceedings and Debates of the Convention, *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 56, at 565 (Dec. 11, 1787).

61 *Id.* at 565-66.

62 4 ELLIOT'S DEBATES, *supra* note 57, at 53-54.

63 VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1218.

64 *Id.*

65 *Id.* at 1217.

66 VOL. 2: PENNSYLVANIA, *supra* note 56, at 403.

67 *Id.* at 413.

68 *Id.* at 537.

69 Remarker ad Corrigendum, INDEP. CHRON., Jan. 17, 1788, *reprinted in* 5 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS [2], at 738 (John P. Kaminski et al. eds., 1998) [hereinafter VOL. 5: MASSACHUSETTS 2]; *see also* 4 ELLIOT'S DEBATES, *supra* note 57, at 54 (explaining that the Elections Clause "might also be useful ... lest a few powerful states should combine, and make regulations concerning elections which might deprive many of the fair exercise of their rights, and thus injure the community, and occasion great dissatisfaction.").

70 Caroliniensis, CHARLESTON CITY GAZETTE, 1, Apr. 2, 1788, *reprinted in* 27 RATIFICATION OF THE CONSTITUTION BY THE STATES: SOUTH CAROLINA 240 (John P. Kaminski et al eds., 2016) [hereinafter VOL. 27: SOUTH CAROLINA].

71 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 267-68 (Max Farrand ed., 1911) (Jan. 21, 1788, Massachusetts Convention).

72 *Id.* at 268.

73 *Id.*

74 4 ELLIOT'S DEBATES, *supra* note 57, at 60 (statement of William R. Davie); VOL. 10: VIRGINIA 3, *supra* note 50, at 1259 (statement of James Madison).

75 ARATUS: TO THE PEOPLE OF MARYLAND, *reprinted in* 11 RATIFICATION OF THE CONSTITUTION BY THE STATES: MARYLAND [1], at 38 (John P. Kaminski et al. eds., 2015) (emphasis in original) (thought to be authored by George Lux).

76 THE VIRGINIA CONVENTION: DEBATES (June 4, 1788), *reprinted in* 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA [2], at 920-21 (John P. Kaminski et al. eds., 1990) [hereinafter VOL. 9: VIRGINIA 2] (statement of George Nicholas).

77 *Id.* at 964.

78 VOL. 10: VIRGINIA 3, *supra* note 50, at 1259.

79 *Id.* at 1260.

80 2 Farrand, *supra* note 26, at 242.

81 *Id.*

82 VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1398-99.

83 4 ELLIOT'S DEBATES, *supra* note 57, at 50-51.

84 VOL. 9: VIRGINIA 2, *supra* note 76, at 964-65.

85 THE DISSENT OF THE MINORITY OF THE CONVENTION (Dec. 18, 1787), *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 56, at 629-30.

86 *See, e.g.*, THE SOUTH CAROLINA GENERAL ASSEMBLY CALLS A STATE CONVENTION (Jan. 19, 1788), *reprinted in* VOL. 27: SOUTH CAROLINA, *supra* note 70, at 167 (statement of Charles Pinckney); VOL. 10: VIRGINIA 3, *supra* note 50, at 1290-91 (June 14, 1788) (denoting George Mason's concerns that Congress could establish polling place at inconvenient locations); VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1409 (Feb. 2, 1788) (undelivered speech by Timothy Winn); *see also* VOL. 2: PENNSYLVANIA, *supra* note 56, at 510 (Dec. 6, 1787); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 30-32 (Jonathan Elliot ed., 2d ed., 1836) [hereinafter 2 ELLIOT'S DEBATES]; 4 ELLIOT'S DEBATES, *supra* note 57, at 70.

87 *See* An Officer of the Late Continental Army, PHILA. INDEP. GAZETTEER, Nov. 6, 1787, *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 56, at 210; Consider Arms, Malachi Maynard & Samuel Field, *Dissent to the Massachusetts Convention*, HAMPSHIRE GAZETTE, Apr. 16, 1788, at 9, *reprinted in* 7 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS [4], at 1734-35 (John P. Kaminski et al. eds., 2001); *Samuel*, INDEP. CHRON., Jan. 10, 1788, *reprinted in* VOL. 5: MASSACHUSETTS 2, *supra* note 69, at 680 (John P. Kaminski et al. eds., 1998); BRUTUS, VA. INDEP. CHRON., May 14, 1788, *reprinted in* VOL. 9: VIRGINIA 2, *supra* note 76, at 802; A Farmer and Planter, MD. J., Apr. 1, 1788, *reprinted in* 12 RATIFICATION OF THE CONSTITUTION BY THE STATES: MARYLAND [2], at 467 (John P. Kaminski et al. eds., 2015); Letter from John Brown Cutting to William Short (Dec. 13, 1787), *in* 14 COMMENTARIES ON THE CONSTITUTION [2], at 479 (John P. Kaminski et al. eds., 2009).

88 4 ELLIOT'S DEBATES, *supra* note 57, at 71; *see also* Wesberry v. Sanders, 376 U.S. 1, 16 (1964). Judicial review was not foreign to the Framers, even if finding legislation unconstitutional was atypical. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 891, 927-82 (2003) (noting that "there is a wealth of evidence that the Founders believed that the courts could exercise some form of judicial review over federal statutes" and presenting such evidence, including review of state statutes); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 798 (1999) ("[F]or many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action ...."). In the years before *Marbury v. Madison*, judicial review particularly reflected distrust of state lawmakers, as "exercises of judicial review served to keep state legislatures, rather than Congress, in check." William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 459 (2005). Notably, in a case shortly after ratification in which a circuit court struck down a state statute (unrelated to elections), the court made the case for judicial review by arguing that state lawmakers "surely" could not make election laws that contravened a state's constitution. VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 309 (C.C.D. Pa. 1795) ("Could the Legislature have annulled these articles, respecting ... elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves .... The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times ..."). *But see* Rucho v. Common Cause, ___ U.S. ___, 139 S. Ct. 2484, 2496 (2019) ("The Framers were aware of electoral districting problems and considered what to do about them .... At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.").

89 *See* VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1213-22; 26 RATIFICATION OF THE CONSTITUTION BY THE STATES: RHODE ISLAND [3], at 920-21 [hereinafter VOL. 26: RHODE ISLAND] (debates of Mar. 3, 1790); 23 RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK [5], at 2206 (John P. Kaminski et al. eds., 2009) (debates of July 17, 1788); Letter from David Ramsay to Benjamin Rush (Nov. 10, 1787), *reprinted in* VOL. 27: SOUTH CAROLINA, at 38 (John P. Kaminski et al. eds., 2009).

90 *See, e.g.*, Centinel I, PHILA. INDEP. GAZETTEER, Oct. 5, 1787, *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 60, at 163-64 ("The plain construction of [Art. I, Sec. 4] is, that when the state legislatures drop out of sight, from the necessary operation of this government, then Congress are to provide for the election and appointment of Representatives and Senators.") (quoting who is thought to be Samuel Bryan)

91 VOL. 22: NEW YORK 4, *supra* note 56, at 1905 (June 25, 1788).

92 *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 322, 325-26, 329-30 (Jonathan Elliot ed., 2d ed., 1836); *see also* 4 ELLIOT'S DEBATES, *supra* note 57, at 246; VOL. 26: RHODE ISLAND, *supra* note 89, at 999-1000 (Rhode Island Form of Ratification and Amendments); 2 ELLIOT'S DEBATES, *supra* note 86, at 545 (meeting at Harrisburg, after Pennsylvania had ratified the Constitution).

93 THE FEDERALIST No. 59 (Alexander Hamilton).

94 *Id.* Nos. 59-61 (Alexander Hamilton).

95 *Id.* No. 59 (Alexander Hamilton) (emphasis in original).

96 *Id.* ("With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men ... might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited), to discontinue the choice of members for the federal House of Representatives.").

97 2 Farrand, *supra* note 26, at 240-41; THE FEDERALIST No. 59 (Alexander Hamilton).

98 THE FEDERALIST No. 59 (Alexander Hamilton).

99 *Id.*

100 *Id.* No. 60 (Alexander Hamilton).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* (emphasis in original).

107 *Id.* No. 61 (Alexander Hamilton).

108 *Id.*

109 *Id.*

110 *Id.*

111 1 ANNALS OF CONG. 797-802 (1789) (Joseph Gales ed., 1834).

112 *Id.* at 800.

113 *Id.* at 798.

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114 *Id.*

115 *Id.* at 797-98. Michael Stone of Maryland endorsed the amendment on the ground that the federal government should not have "the power of determining on the mode of their own election." *Id.* at 798. Thomas Tucker of South Carolina lamented that the Elections Clause granted Congress the power to decide for itself whether and how states should district for House elections. "It had been supposed by some States, that electing by districts was the most convenient mode of choosing members to this House; others have thought that the whole State ought to vote for the whole number of members to be elected for that State," Tucker observed. "Congress might, under like impressions, set their regulations aside." *Id.* at 801.

116 *Id.* at 797-802.

117 *Id.* at 800.

118 *Id.*

119 *Id.* (statements of Reps. Theodore Sedgwick (Mass.) and Fisher Ames (Mass.)).

120 *Id.*

121 *Id.* at 797.

122 6 ANNALS OF CONG. 785 (1801).

123 1 AMERICAN STATE PAPERS: MISCELLANEOUS 218 (Walter Lowrie & Walter S. Franklin eds., 1834).

124 *Id.* at 218-19.

125 41 ANNALS OF CONG. 850-66 (1823).

126 *Id.* at 850-53.

127 *Id.* at 852.

128 *Id.* at 853.

129 *Id.*

130 *Id.* at 852-53

131 *Id.* at 852.

132 *Id.*

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133 *Id.*

134 *Id.*

135 14 ANNALS OF CONG. 838 (1804).

136 Article I, Section 2, Clause 4 provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST, art. 1, § 2, cl. 4.

137 14 ANNALS OF CONG. 842-44 (1804).

138 *Id.* at 852.

139 17 ANNALS OF CONG. 874 (1807) (emphasis added).

140 *Id.*

141 *See, e.g.,* 10 CONG. DEB. 4303 (1834) (statement of Rep. Patrick H. Pope, Ky.) ("[T]he right to vote for members of this House is derived, not from the constitution of Kentucky, but from the constitution of the United States .... [T]hat instrument gives to the Legislature, and not to the constitution, or those who framed it, the right to prescribe the time, place, and manner of voting ... *so long as the Congress shall permit it*.") (emphasis added); 14 CONG. DEB. 1186-87 (1837) (statement of Rep. Hugh S. Legaré, S.C.) (Congress "controlled absolutely the whole subject of congressional elections, with the single exception of the place of electing Senators").

142 *See* CONG. GLOBE, 25th Cong., 2d Sess. app. at 68 (1838) (statement of Rep. Charles Eaton Haynes, Ga.); CONG. GLOBE, 26th Cong., 1st Sess. app. at 12-13 (1840) (statement of Rep. Robert Rhett, S.C).

143 *See* CONG. GLOBE, 25th Cong., 1st Sess. app. at 91-92 (1837) (statement of Rep. George W. Towns, Ga.).

144 17 ANNALS OF CONG. 912-13 (1807) (statement of Rep. Philip B. Key, Md.); *see also* 14 CONG. DEB. 1187 (1837) (statement of Rep. Hugh S. Legaré, S.C.) (noting that when discussing an 1837 election dispute, another representative offered a nonexhaustive list of Congress's "manner" authority, which included the power to "pass uniform laws requiring all elections to be by ballot or *viva voce*--all to be by general ticket or by district--all to be at the same season of the year, &c").

145 10 CONG. DEB. 4286-87 (1834).

146 *Id.* at 4287.

147 *See, e.g.,* 17 ANNALS OF CONG. 908 (1807) (statement of Rep. Josiah Quincy, Mass.) (explaining that Congress had exclusive power to establish the qualifications of its members through the Qualifications Clause, Article I, Section 5, Clause 1, and that states were not granted such power by the Elections Clause); 10 CONG. DEB. 4303 (1834) (statement of Rep. Patrick H. Pope, Ky.).

148 Apportionment Act of 1842, ch. 47, 5 Stat. 491.

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149 *Id.*

150 *Id.*

151 *See, e.g.*, CONG. GLOBE, 27th Cong., 2d Sess. app. at 316 (1842) (statement of Rep. Andrew Kennedy, D-Ind.) ("[H]ere is a proposition to commence the exercise of a power by this Government, which, if it possess the power at all, it is admitted has never been exercised, but has lain dormant for the entire period of our national existence."); *id.* at 342 (statement of Rep. George S. Houston, DAla.).

152 Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 637 (2008).

153 *Id.* at 639-40.

154 Johanna Nicol Shields, *Whigs Reform the "Bear Garden": Representation and the Apportionment Act of 1842*, 5 J. EARLY REPUBLIC 355, 372-73 (1985).

155 ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 129 (1987).

156 *Id.*

157 Shields, *supra* note 154, at 371; James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 375 (2002).

158 James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 913 n.114 (2006); ZAGARRI, *supra* note 155, at 140; *see, e.g.*, CONG. GLOBE, 27th Cong., 2d Sess. 448 (1842) (statement of Rep. Garret Davis, W-Ky) ("The peculiar principles of the South, and every interest it cherished, were to be protected by the district system.").

159 CONG. GLOBE, 27th Cong., 2d Sess. 445 (1842) (statement of Rep. John Campbell, D-S.C).

160 Shields, *supra* note 154, at 371.

161 Apportionment Act of 1842, ch. 47, 5 Stat. 491.

162 CONG. GLOBE, 27th Cong., 2d Sess. app. 322 (1842) (emphasis in original).

163 *Id.* at 786; *see also id.* at 584; *id.* at 524 (statement of Sen. Samuel McRoberts, D-Ill.) ("[T]his power was not to be exercised by Congress," another asserted, "*except when the Legislatures of any State shall neglect, refuse, or be disabled by invasion, or rebellion, to prescribe the same.*") (emphasis in original).

164 *Id.* at 319.

165 *Id.* at 380.

166 *See, e.g., id.* at 490 (statement of Sen. Jabez W. Huntington, W-Conn.); *id.* at 512 (statement of Sen. Nathaniel P. Tallmadge, W-N.Y.); *id.* at 793 (statement of Sen. Isaac C. Bates, W-Mass.); *id.* at 789 (statement of Sen. Jacob W. Miller, W-Mass.).

167 *Id.* at 380 (statement of Rep. Daniel D. Barnard, W-N.Y.); *see also id.* at 408 (statement of Rep. Nathaniel G. Pendleton, W-Ohio); *id.* at 789 (statement of Sen. Jacob W. Miller, W-Mass.).

168 *Id.* at 467 (statement of Sen. Silas Wright, D-N.Y.) (emphasis in original).

169 *See also id.* at 360 (statement of Rep. William W. Payne, D-Ala.) ("I do deny that Congress has power to command a State Legislature to district a State."); *id.* at 449 (statement of Sen. James Buchanan, D-Pa.) ("That no such command can be constitutionally issued, I consider to be a clear, nay, an almost self-evident proposition."); *id.* at 397 (statement of Rep. Charles G. Atherton, D-N.H.); *id.* at 422 (statement of Sen. Leonard Wilcox, D-N.H.).

170 *Id.* at 512.

171 Under the "anti-commandeering" doctrine, Congress cannot directly compel states or state officials to enforce federal law. *See* Printz v. United States, 521 U.S. 898, 924 (1997).

172 CONG. GLOBE, 27th Cong., 2d Sess. app. 524 (1842) (statement of Sen. McRoberts).

173 *Id.* at 469.

174 *Id.* at 512.

175 *Id.; see also id.* at 513; *id.* at 793 (statement of Sen. Bates).

176 *Id.* at 380 (statement of Rep. Barnard).

177 *Id.* at 793.

178 *Id.* at 469.

179 *Id.* at 361.

180 *Id.* at 447.

181 *Id.* at 513; *see also id.* at 492 (statement of Sen. Huntington) ("The 'manner' of holding elections embraces several things: such, among others, as an election by districts or general ticket; *viva voce* or by ballot; by a plurality or by a majority").

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182 *Id.* at 449.

183 *Id.* at 451.

184 *Id.* at 360 ("The weight of authority is against me," he confessed, "but I am not lawyer enough to have my thoughts trammeled by precedent, or my mind swayed by authority.").

185 Senator Arthur P. Bagby (D-Ala.) claimed that the Constitution *required* at-large congressional elections, arguing that single-member districts denied each voter the right to vote for all of his state's House members. *Id.* at 786. Representative Andrew Kennedy (D-Ind.) suggested that the "manner of holding the elections" meant "prescribing the mode in which the voter shall exercise the right of suffrage," a definition he thought denied Congress the power to "break into our territorial limits, and there 'gerrymander' our States." *Id.* at 317.

186 *See, e.g., id.* at 512 (statement of Sen. Tallmadge) ("Congress has the power to direct that Representatives to the other House be elected by single districts.").

187 *Id.*

188 *Id.* at 408.

189 *Id.* at 512 (statement of Sen. Tallmadge) (arguing the Elections Clause "includes every thing necessary to ascertain, under our system of Republican Government, the popular will in regard to those who shall represent them.").

190 *See, e.g., id.* at 789 (statement of Sen. Miller) ("The exercise of the power by Congress ... is a primary overruling power, embracing the whole subject."); *id.* at 490 (statement of Sen. Huntington) (Congress's power "[i]s ample, full, and plenary; and, so far as it is exercised, it is supreme, overriding State legislation, and is the paramount law, to be obeyed and enforced."); *id.* at 319 (statement of Rep. Butler) ("Now, sir, what plain, unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the whole subject ...? Could language be more direct, full, and explicit?").

191 *Id.* at 491.

192 *Id.* at 407-08.

193 *Id.* at 379 (statement of Rep. Barnard).

194 *Id.* at 361.

195 *See id.* at 397 (statement of Rep. Atherton); *id.* at 465 (statement of Sen. Wright); *id.* at 786 (statement of Sen. Bagby); *id.* at 450-51 (statement of Sen. Buchanan); *id.* at 322 (statement of Rep. Floyd).

196 *Id.* at 407.

197 *Id.*

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198 *Id.*

199 *Id.* at 793.

200 *Id.* at 381.

201 *See id.* at 491 (Sen. Huntington, arguing that one aim of the Elections Clause was "to produce uniformity in the manner of holding elections, so far as Congress should deem it proper to have the manner uniform"); *id.* at 788 (statement of Sen. Miller); *id.* at 792 (statement of Sen. Bates). Only in the years after this debate would Congress enact legislation to enable uniform administration of federal elections. *See, e.g.,* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (1845) (uniform presidential election day); Act of Feb. 19, 1851, ch. 11, 9 Stat. 568 (1851) (uniform process for resolving contested House elections).

202 CONG. GLOBE, 27th Cong., 2d Sess. app. 493 (1842).

203 *Id.*

204 *Id.* at 439.

205 *Id.*

206 *Id.* at 465.

207 *Id.* at 493.

208 *Id.*

209 *Id.* at 793-94.

210 *Id.* at 409 (statement of Rep. Pendleton).

211 *See id.* at 493 (statement of Sen. Huntington); *id.* at 391 (statement of Sen. John J. Crittenden, Ky.); *id.* at 320 (statement of Rep. Butler).

212 *Id.* at 424.

213 *Id.* at 584.

214 *Id.* at 407 (statement of Rep. Pendleton).

215 *Id.*

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216 *Id.* at 493 (statement of Sen. Huntington); *cf.* CONG. GLOBE, 27th Cong., 2d Sess. 556 (1842) (statement of Sen. Wright) (denouncing the "vice" of gerrymandering, which he predicted would be the result of districting under the Apportionment Act).

217 CONG. GLOBE, 27th Cong., 2d Sess. app. 493 (1842) (statement of Sen. Huntington).

218 CONG. GLOBE, 27th Cong., 2d Sess. 471 (1842).

219 *Id.* at 649.

220 *Id.* at 614.

221 *See* CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901, at 117-20 (1901).

222 *See id.* at 117 n.1; H.R. 649, 27th Cong. (3d Sess. 1843).

223 *See* ROWELL, *supra* note 221, at 119.

224 *See id.* at 118; *see also* Tolson, *Congressional Authority, supra* note 15, at 352.

225 *See* ROWELL, *supra* note 221, at 120.

226 *See* CONG. GLOBE, 28th Cong., 1st Sess. 248-77 (1844).

227 *Id.* at 278.

228 *Id.* (voting 127 to 57 to substitute a resolution seating the disputed representatives in lieu of one that would have declared the Act unconstitutional).

229 Tolson, *Congressional Authority, supra* note 15, at 349.

230 Apportionment Act, ch. 170, 12 Stat. 572 (1862).

231 *See* CONG. GLOBE, 37th Cong., 2d Sess. 3117-18 (1862) (statement of Sen. Lyman Trumbull, R-Ill.) ("This bill reenacts [the 1842 Act], and makes it a permanent law."); *id.* (statement of Sen. Daniel Clark, R-N.H.) ("After the passage of the old law requiring members to be elected by single districts, the State of New Hampshire refused to comply with the law, and elected all her members by general ticket, and they were all admitted by the House of Representatives. I thought the precedent wrong at the time.").

232 Apportionment Act, ch. 11, 17 Stat. 28 (1872).

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233 CONG. GLOBE, 38th Cong., 2d Sess. 849 (1865).

234 *Id.* at 849.

235 *Id.* at 977.

236 CONG. GLOBE, 39th Cong., 1st Sess. 182-83 (1866) (emphasis in original).

237 *Id.* at 183.

238 *Id.* at 409.

239 *Id.* at 412 (statement of Rep. Samuel S. Marshall, D-Ill.).

240 *Id.* at 454 (statement of Rep. Michael C. Kerr, D-Ind.).

241 *Id.* at 409.

242 CONG. GLOBE, 39th Cong., 2d Sess. 1315-40, 1458-69 (1867) (debating the First Reconstruction Act without invoking the Elections Clause).

243 First Reconstruction Act, ch. 153, 14 Stat. 429 (1867).

244 CONG. GLOBE, 39th Cong., 2d Sess. 1318-19 (1867).

245 CONG. GLOBE, 39th Cong., 1st Sess. 173-83, 403-12, 447-60, 1054-62 (1866); CONG. GLOBE, 40th Cong., 2d Sess. 2053-57, 3023-27 (1868); CONG. GLOBE, 40th Cong., 3d Sess. 555-61, 642-45 (1869).

246 CONG. GLOBE, 40th Cong., 2d Sess. 3026 (1868) (emphasis in original).

247 *Id.* at 3027 (emphasis omitted).

248 *Id.* (emphasis in original).

249 CONG. GLOBE, 40th Cong., 3d Sess. 556 (1869).

250 *Id.*

251 *Id.*

252 *Id.* at 557.

253 First Enforcement Act, ch. 114, 16 Stat. 140 (1870); Second Enforcement Act, ch. 99, 16 Stat. 433 (1871); Third Enforcement Act, ch. 22, 17 Stat. 13 (1871); CONG. GLOBE, 41st Cong., 2d Sess. 3871-84 (1870); CONG. GLOBE, 41st Cong., 3d Sess. app. 207-14 (1871); CONG. GLOBE, 41st Cong., 3d Sess. 1271-85, 1633-49 (1871).

254 16 Stat, at 140.

255 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 454-59 (1988).

256 First Enforcement Act §§ 4, 5.

257 *Id.* § 6.

258 *Id.* § 8.

259 *Id.* § 3.

260 *Id.* § 22.

261 *Id.* § 20.

262 *Id.* § 13.

263 CONG. GLOBE, 41st Cong., 2d Sess. 3876 (1870).

264 *Id.*

265 *Id.* at 3872.

266 *Id.* at 3872-73.

267 *Id.* at 3875 (statement of Rep. James B. Beck, D-Ky.).

268 *Id.* at 3872.

269 *Id.* at 3883.

270 *Id.* at 3881.

271 *Id.*

272 *See, e.g., id.* (statement of Rep. John D. Stiles, D-Pa.) ("I protest against this outrage in the name of every white voter in this country .... I protest against it because I am in favor of a white man's Government upon this continent, and utterly opposed to forcing upon an unwilling people negro suffrage, negro equality, and negro supremacy ...."); *id.* at 3877

(statement of Rep. James A. Johnson, D-Cal.) ("Mr. Speaker, this bill ought to be entitled an act to foster paganism ... to foster child murder, to strike down Christianity, and to deprive the people of their liberties. Of course nearly all of this long conglomeration of vicious verbiage is directed against the white man and in favor of the Chinaman.").

273 *Id.* at 3874 (statement of Rep. Beck, D-Ky.).

274 *Id.* at 3874-75.

275 *Id.* at 3881.

276 *Id.* at 3884.

277 *Id.* at 3809.

278 Second Enforcement Act, ch. 99, 16 Stat. 433 (1871).

279 *Id.* § 2.

280 *Id.* § 4.

281 *Id.* § 5.

282 *Id.* § 6.

283 *Id.* § 7.

284 *Id.* § 10.

285 *Id.* § 19.

286 *Id.* § 12.

287 *Id.* § 15.

288 CONG. GLOBE, 41st Cong., 3d Sess. 1277 (1871).

289 *Id.*

290 *Id.*

291 *Id.* at 1633. Immediately after it passed, Vickers moved (unsuccessfully) to rename it "An act to prevent the free and intelligent voters of the United States from exercising the right of suffrage." *Id.* at 1655.

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292 *Id.* at 1272.

293 *See, e.g., id.* at app. 208 ("[W]hat is meant by the word 'manner,' and with what power does this simple word invest Congress? for it is upon this word, and this word only, that this measure is at all pretended to be justified .... Congress may, under this power, prescribe how the votes shall be received for Representatives, whether by ballot or *viva voce*; how they shall be counted or canvassed, how they shall be returned, and how certified; authorize the kind of ballot-boxes to be used, and such like things connected with the 'holding' of the election. Nothing more could have been intended ...."); *id.* at 1637 ("But what right has Congress to interfere with the registration of voters? What clause of the Constitution gives them the right? The States have the exclusive power to judge of and fix the qualifications of voters; not denying or abridging the right by reason of race, color, or previous condition of servitude. The States are to fix the age and residence. The 'manner' of conducting an election refers to a different subject.").

294 *Id.* at 1276.

295 *Id.*

296 *Id.* at 1280.

297 *Id.*

298 *Id.*

299 *Id.* at 1283.

300 *Id.*

301 *Id.* at 1276.

302 *Id.*

303 *Id.* at 1275.

304 *Id.* at 1280.

305 *Id.* at 1280 (emphasis added).

306 *Id.* at 1285.

307 *Id.* at 1655.

308 Third Enforcement Act, ch. 22, 17 Stat. 13 (1871).

309 *Id.*

310 *Id.* § 2.

311 CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871).

312 *Id.* at 709.

313 *Id.* at 808.

314 *Id.* at 831.

315 CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871).

316 *Id.* at 154.

317 *Id.*

318 *See* Tolson, *Congressional Authority, supra* note 15, at 361 ("Prior to Reconstruction, there was not much mention of the Elections Clause in the Supreme Court's jurisprudence, much less any thorough analysis of the meaning of its terms.").

319 14 U.S. 304 (1816).

320 *Id.* at 343; *see also* Smith v. Turner (Passenger Cases), 48 U.S. 283, 497-98 (1849) (Daniel, J., dissenting) (arguing states exercise powers "until they shall be superseded by a paramount authority vested in the Federal government," including those in the Elections Clause).

321 Smith v. United States, 1857 WL 4176, at *3 (Ct. Cl. Feb. 16, 1857) ("[In 1842 it] was considered by Congress that in the word 'manner' was included the power to prescribe that congressional districts should each be composed of contiguous territory, although in some of the States the elections for members of Congress had already been had by general ticket. Whether the authority of Congress in this particular has ever been contested or not, this act shows the construction given by Congress to the word manner. Now, if the manner of holding an election means that Congress may provide that the election of its members shall be by districts composed of contiguous territory, the word is surely comprehensive enough in the present case to mean that the pension shall commence on the 4th of March, 1848.").

322 *See* United States v. Quinn, 27 F. Cas. 673 (C.C.S.D.N.Y. 1870) (No. 16,110).

323 *Id.* at 676.

324 *See supra* notes 270, 271, 275.

325 *Davis, Noah, (1818-1902),* BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000126 [https://perma.cc/WWM5-QAFY]. Davis was a personal friend of President Grant's, according to Davis's obituary. *See Ex-Justice Davis Dead,* N.Y. TIMES (Mar. 21, 1902), https://timesmachine.nytimes.com/timesmachine/1902/03/21/101942952.pdf [https://perma.cc/WPZ9-6VJU].

326 27 F. Cas. 673 (C.C.S.D.N.Y. 1870) (No. 16,110).

327 *Id.* at 678.

328 *Id.*

329 *Id.*

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 United States v. Goldman, 25 F. Cas. 1350, 1354 (C.C.D. La. 1878) (No 15,225).

336 *Id.* at 1353.

337 *Id.* at 1354.

338 92 U.S. 214 (1875).

339 92 U.S. 542 (1875).

340 *Reese* expressly disclaimed application of the Clause because the case involved an election for state representatives only. *See Reese*, 92 U.S. at 218.

341 *See, e.g.*, Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2350-51 (2003) (cataloguing the substantial scholarship on the Court's hollowing of the Fourteenth and Fifteenth Amendments).

342 100 U.S. 371 (1879).

343 *Id.* at 377-79.

344 *Id.* at 383-84 (emphasis in original).

345 *Id.* at 384.

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346 *Id.; see also id.* at 386.

347 *Id.* at 387-88.

348 *Id.* at 388.

349 *Id.*

350 *Id.; id.* at 382.

351 100 U.S. 399 (1879).

352 *Id.* at 400-01.

353 *Id.* at 403-04 ("The principal question is, whether Congress had constitutional power to enact a law for punishing a State officer of election for the violation of his duty under a State statute in reference to an election of a representative to Congress. As this question has been fully considered in the previous case, it is unnecessary to add any thing further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient.").

354 *Id.* at 415-16 (Field, J., dissenting).

355 *Id.* at 416-19.

356 *Id.*

357 110 U.S. 651 (1884).

358 *Id.* at 654-55 (quoting 70 Rev. Stat. § 5508).

359 *Yarbrough*, 110 U.S. at 655-57.

360 *Id.* at 657-58.

361 *Id.* at 660-61.

362 *Id.* at 661; *see also id.* at 662 ("[I]t is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.").

363 *Id.* at 666-67.

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364 *Id.* at 667 ("If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.").

365 *Id.*

366 *See, e.g.*, *Ex parte* Coy, 127 U.S. 731, 752 (1888) ("[T]he power, under the constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned. The right of Congress to do this, by adopting the statutes of the States, and enforcing them by its own sanctions, is conceded by counsel to be established." (citing *Ex parte* Clarke, 100 U.S. 399 (1879))); Logan v. United States, 144 U.S. 263, 293-94 (1892), *abrogated on other grounds by* Witherspoon v. Illinois, 391 U.S. 510 (1968); United States v. Mosley, 238 U.S. 383, 386 (1915) (holding that criminal penalties for voter intimidation are constitutional because it is "unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box" (citing *Yarbrough*, 110 U.S. 651; *Logan*, 144 U.S. at 293)).

367 *See, e.g.*, *Ex parte* Geissler, 4 F. 188, 191 (C.C.N.D. Ill. 1880); United States v. Munford, 16 F. 223, 228 (C.C.E.D. Va. 1883); *Ex parte* Morrill, 35 F. 261, 265-66 (C.C.D. Or. 1888).

368 U.S. CONST. art. I, § 4, cl. 1.

369 285 U.S. 355 (1932).

370 *Id.* at 366.

371 *Id.*

372 *Id.* at 366-67 (citation omitted).

373 United States v. Classic, 313 U.S. 299, 320 (1941) (finding that the Necessary and Proper Clause "leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution" in order to "safeguard the right of choice by the people of representatives in Congress").

374 *Smiley*, 285 U.S. at 372-73.

375 376 U.S. 1 (1964).

376 *Id.* at 16 (quoting 4 ELLIOT'S DEBATES, *supra* note 57, at 71).

377 Vieth v. Jubelirer, 541 U.S. 267, 275 (2004).

378 *Id.* at 276-77; *see also* Rucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484, 2495 (2019) ("Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering."); Oregon v. Mitchell, 400 U.S. 112, 122 (1970) ("The Framers expected Congress to use this power [in Article I, Section 4] to eradicate 'rotten boroughs,' and Congress has in fact used its power to prevent States from electing all Congressmen at large.") (citations omitted); *cf.* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (holding that the Elections

Clause permitted Arizona voters to amend the state constitution by proposition to vest congressional redistricting power in the newly created Independent Redistricting Commission).

379 Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8-9 (2013) ("The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as petitioners do not contest, regulations relating to 'registration.' ... The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'") (internal citations and quotation marks omitted) (quoting *Smiley,* 285 U.S., at 366; *Ex parte* Siebold, 100 U.S. 371, 392 (1879)).

380 Burroughs v. United States, 290 U.S. 534, 545-47 (1934) (relying heavily on *Ex parte* Yarbrough, 110 U.S. 651 (1884), to uphold as constitutional the financial disclosure and reporting requirements of the Federal Corrupt Practices Act); Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("This Court has also held that it has very broad authority to prevent corruption in national Presidential elections." (citing *Burroughs,* 290 U.S. 534)); *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case."); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 187 (2003), *overruled on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen.").

381 United States v. Classic, 313 U.S. 299, 319-20 (1941) (overturning Newberry v. United States, 256 U.S. 232 (1921)); *see Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned *Newberry*); Foster v. Love, 522 U.S. 67, 69-73, 71 n.2 (1997) (invalidating Louisiana's "open primary" law because the law conflicted with time of elections set by federal statute pursuant to the Elections Clause).

382 Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972).

383 Storer v. Brown, 415 U.S. 724, 736 (1974) (holding that a state can require that an independent candidate be unaffiliated with a political party for one year prior to a primary election).

384 Cook v. Gralike, 531 U.S. 510, 523 (2001).

385 400 U.S. 112 (1970).

386 *Id.* at 134-35.

387 *Id.* at 120.

388 *Id.* at 121.

389 *See id.* at 135-44 (Douglas, J., concurring) (finding Congress can compel states to permit eighteen-year-olds to vote in federal *and state* elections pursuant to the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment); *id.* at 239-81 (Brennan, J., concurring in part and dissenting in part) (writing with Justices White and Marshall, Justice Brennan dissented from the judgment insofar as it declared the age requirement unconstitutional as applied to state and local elections and concluded that Congress could compel states to extend the franchise to eighteen- to twenty-one-year-olds pursuant to the Equal Protection Clause).

390 *Id.* at 293-96 (Stewart, J., concurring in part and dissenting in part).

391 479 U.S. 208 (1986).

392 *Id.* at 229.

393 *Id.* The Voter Qualifications Clause provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST, art. 1, § 2, cl. 1.

394 *Tashjian*, 479 U.S. at 233 (Stevens, J., dissenting).

395 Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) (citations omitted) (emphases in original); *see also id.* at 29-33 (Thomas, J., dissenting); Husted v. A. Philip Randolph Inst., 584 U.S. ___, 138 S. Ct. 1833, 1849-50 (2018) (Thomas, J., concurring).

396 570 U.S. 1 (2013).

397 256 U.S. 232 (1921).

398 *Id.* at 250.

399 313 U.S. 299 (1941)

400 *Id.* at 320.

401 *Id.*

402 243 U.S. 476 (1917).

403 *Id.*

404 *Id.* at 482-84.

405 *Id.* at 482 ("Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are.").

406 *Id.* at 485.

407 Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 13 n.5 (2013) (emphasis in original).

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408 *Id.* (emphasis in original).

409 514 U.S. 779 (1995).

410 *Id.* at 828.

411 *Id.* at 810.

412 *Id.* at 810, 832-35.

413 *See supra* Parts I-II.

414 Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).

415 *Id.* at 792-93.

416 576 U.S. 787 (2015).

417 *Id.* at 813.

418 *Id.* at 825-50 (Roberts, C.J., dissenting).

419 Rucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484, 2507 (2019) (citation omitted).

420 *Voting Rights Litigation Tracker 2020,* BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020 [https://perma.cc/TE5M-3QX5] (last updated July 28, 2021).

421 *See supra* note 5 and accompanying text.

422 *See supra* note 6 and accompanying text.

423 *See supra* note 47 and accompanying text.

424 Samuel Issacharoff, *Ballot Bedlam,* 64 DUKE L.J. 1363, 1370 (2015) ("[T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life.").

425 PEW RSCH. CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 7 (2017), https://www.people-press.org/wp-content/uploads/sites/4/2017/10/10-05-2017-Politicallandscape-release-updt.pdf [https://perma.cc/J9BV-KC9Z] ("The gap between the political values of Democrats and Republicans is now larger than at any point in Pew Research Center surveys dating back to 1994, a continuation of a steep increase in the ideological divisions between the two parties over more than a decade.").

426 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *reprinted in* VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1218.

427 Rucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484, 2508 (2019).

428 *Id.; see* H.R. 1, 116th Cong. §§ 2401, 2411 (2019).

429 For the People Act, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021).

430 *For the People Act: Hearing on H.R. 1 Before the H. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of J. Christian Adams, President and General Counsel, Public Interest Legal Foundation), https://docs.house.gov/meetings/JU/JU00/20190129/108824/HHRG-116-JU00Wstate-AdamsJ-20190129-U1.pdf [https://perma.cc/N7KX-N2BN].

431 *See, e.g.*, 1 ANNALS OF CONG. 800 (1789) (Joseph Gales ed., 1834) ("[A]s much injury might result to the Union from improper regulations, as from a neglect or refusal to many any."); *see also* CONG. GLOBE, 27th Cong., 2d Sess. 407 (1842) ("[T]he Government is almost as much dissolved by a vicious representation as by no representation. In the latter case, to be sure, the whole fabric is destroyed; in the former, you preserve the show, the appearance, the form of our Government, but the spirit and lite are gone."); CONG. GLOBE, 41st Cong., 3d Sess. 1283 (1871) ("Who does not know that if the State Legislature should choose to incumber the exercise of this power with inconvenient or impossible conditions, and if the national Congress had not the power to overrule or alter such conditions, the nation would perish?"); *Ex parte* Siebold, 100 U.S. 371, 382 (1879) ("In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.").

432 *See* THE LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12 (2019), http://civilrightsdocs.info/pdf/reports/DemocracyDiverted.pdf [https://perma.cc/XVL3-A8XT] (finding 1,688 polling place closures between 2012 and 2018 in jurisdictions formerly covered by the preclearance formula of the Voting Rights Act); Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (invalidating the formula that determined which states and jurisdictions were covered by section 5 of the Voting Rights Act and thus are required to undergo preclearance, effectively ending the preclearance requirement).

433 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *reprinted in* VOL. 5: MASSACHUSETTS 2, *supra* note 87, at 738.

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The "Independent" State Legislature in Republican Theory

Franita Tolson*

Introduction

The independent state legislature theory provides that state legislatures are not constrained by their respective state constitutions in exercising the authority that the U.S. Constitution delegates to states over federal elections. Effectively, in overseeing the mechanics of federal elections—from regulating the times, places, and manner of federal elections under the Elections Clause of Article I, Section 4 to appointing electors under the Presidential Electors Clause of Article II, Section 1—state legislatures can disregard state court interpretations of these governing documents. Scholars have offered a number of criticisms of this doctrine, noting that it runs counter to the founding generation's concerns about the lawlessness of state legislatures;[1] is contrary to historical practice at the founding and that developed soon after ratification;[2] and undermines the constitutional structure in which the more democratically accountable Congress, rather than the states, is vested with final say over federal elections.[3] Even its defenders have noted that, historically, the theory has varied in scope, suggesting that the concept of a truly independent legislature is not constitutionally mandated.[4] But few scholars have queried how the constitutional text ratified an understanding of republican government, indeed of the "state" itself, that requires state legislatures to act in accordance with majoritarian preferences.

Specifically, the Electors Clause of Article II, Section 1 provides that, "Each **state** shall appoint, in such manner as the **legislature** thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress…"[5] This text explicitly raises the question of who is the "state" on behalf of which the legislature deploys power. Using this language as its jumping off point, this article argues that the "state" referenced in this provision is its citizens, whose preferences are conveyed through the voting public to the state legislature.[6] As this article will show, within a decade of the founding, the selection of elected officials by the state's electorate became central to the theory of republicanism underlying

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[1] *See* Hayward H. Smith, *History of the Article II Independent State Legislature Theory*, 29 FLA. ST. U. L. REV. 731, 737 (2001). *See also* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021) (noting that state legislatures are almost always controlled by the minority party).

[2] Michael Weingartner, *Liquidating the Independent State Legislature Theory*, HARV. J. L. & PUB. POL'Y at 33 (forthcoming 2023); Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, U. Chi. L. Rev. (forthcoming 2022); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Chiafalo: Constitutionalizing Historical Gloss in Law & Democratic Politics*, 15 Harv. L. & Pol'y Rev. 15 (2020).

[3] Vikram D. Amar and Akhil Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1 (2022).

[4] Michael Morley, *The Independent State Legislature Doctrine*, 55 GA. L. REV. 1, 10 (2021) (noting that "lower federal courts in recent years have interpreted the Elections Clause and the Presidential Electors Clause as prohibiting state executive officials, as a matter of federal constitutional law, from regulating federal elections without authorization from the state legislature."). *See also id.* at 17-19 (noting that state legislatures would still be constrained by a number of other federal constitutional provisions). *See also* Michael Morley, The Independent State Legislature Doctrine, 90 FORDHAM L. REV. 501 (2021).

[5] U.S. Const. Art. II, Sec. 1 (emphasis added).

[6] *See* Elizabeth Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 Cardozo L. Rev. 2051 (2018).

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the Guarantee Clause of Article IV, which predicated the legitimacy of government on majority support.[7] This was a drastic departure from founding era beliefs that the state legislatures—and indeed, presidential electors—would exercise independent judgment to act on behalf of the voters with respect to federal elections.[8] By the early nineteenth century, republicanism required that state legislatures and, to a lesser extent, federal officials, be accountable to the people who elected them, accountability that prevented state legislatures in exercising their authority over federal elections in disregard of the people's wishes.

While state legislatures have significant authority under Article I and Article II, as Part I shows, there has been little discussion in the scholarly literature about how constitutional amendments have altered their authority by shifting state legislatures from a more paternal role, in which their discretion was absolute, to one in which the legislature acts as an agent for the people.[9] Debates over the independent state legislature theory have focused almost exclusively on the interpretive question of whether the term "state legislature" within the context of the Elections and Electors Clauses refers to the institutional state legislature or the process of legislative decision-making within the state.[10] The latter view would, of course, subject state legislatures to state court interpretations of their respective state constitution as they exercise authority over federal elections, particularly those provisions governing the right to vote and the conditions under which voting is exercised.[11]

This view of state legislatures as subordinate to the people and their governing documents is consistent with the constitutional text and structure, which underwent an evolution regarding which entity—the state legislature or the people—can claim to act under the aegis of the state. The text of the Electors Clause of Article II specifically imbues the state legislatures with the authority of the state in the allocation of electoral college votes, by vesting authority in each "state" to appoint electors and then tasking "state legislatures" with the job of choosing the manner of appointment. This delineation between the state and the state legislature within the text is often glossed over in the legal scholarship; however, this distinction is hugely important and finds support in *McPherson v. Blacker,* the case that most proponents of the independent state legislature theory often reference to establish its validity.[12] What counts as the "state" has not been a static concept that, in deciding the appropriate vehicle for awarding electoral college votes, makes the choice between the state legislature and the process of legislative decision-making within the state clear cut; instead, the myopic focus on the term "state legislature" ignores that subsequent constitutional amendments, most notably the Twelfth Amendment, embraced a broader conception of the term "state" than that which existed in 1789.

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[7] U.S. CONST. ART. IV, SEC. IV.

[8] MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016).

[9] The Twelfth Amendment was intended to change the meaning of Article II, yet most commentators have not assessed its impact on Article II beyond the technical changes to the presidential election process. For a notable exception, EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE (2020).

[10] *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm., 576 U.S. 787 (2015) (holding that the Elections Clause embraces the process of legislative decisionmaking in the state). *See also* Amar & Amar, *supra* note , at 24 ("the meaning of state "legislature" was well accepted and bore a clear public understanding at the Founding: A state "legislature" was an entity created and constrained by its state constitution").

[11] *See* Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 Mich. St. L. Rev. __ ("Our constitutional system provides two sources of protection for civil rights – the federal constitution and state constitutions. The independent state legislature theory would eliminate the second level of protection and, in this way, make voting rights the least protected civil right.").

[12] 146 U.S. 1 (1892).

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As Part II and III demonstrates, a new understanding of the role of the people within their states, and of founding era notions of republican government, emerged after the chaos of the 1800 election. During that election cycle, Congress resolved the stalemate over whether Aaron Burr or Thomas Jefferson would be president, the first of several interventions over the next century after the popular election process failed to definitively identify the candidate with majority support.[13] This dispute, which ultimately led to the Twelfth Amendment, not only changed the process for selecting the president, but also altered our understanding of what constitutes the republican government to which each state must adhere to be consistent with the Guarantee Clause.

As Part II shows, the requirements of majoritarianism that James Madison and other founding fathers advocated in 1787 as central to the theory of republicanism underlying the Clause was unclear. Many questions remained unanswered. For example, in what circumstances does the requirement of majority will permit states to disenfranchise substantial portions of their population? Can state legislatures act contrary to the wishes of this electorate in holding the national government accountable at a key moment—during the election of the president and other federal officials—provided that state officials are held accountable for these choices in their own elections?

The Twelfth Amendment answered these inquiries by embracing a vision of Article II in which the legitimacy of the presidency was tied to a decisive electoral college win, sanctioned by a majority of the voters in the state either directly through popular election or indirectly through their state legislatures.[14] Because republican principles now applied to the structure of presidential elections, this meant that state legislatures were no longer free to disregard the preferences of their voters in deploying their authority over federal elections.

Part III explains how, with the ratification of the Twelfth Amendment, "We the Voters" became more important than the amorphous and ill-defined "We the People" in republican theory, which affected the scope of state power over federal elections. Since their actions in regulating federal elections could render a state unrepublican in form, the Twelfth Amendment made the state legislature accountable to the voting public in how they exercised this authority in real time (as opposed to legislators merely standing to account in their own elections for misdeeds committed while in office). Rather than the legislature, the voters—using the medium of political parties that had been cause for alarm at the founding—became the conduits of popular preferences. Thus, one cannot have a conversation about the state legislature, institutional or not, without considering the relationship between this entity and the people it purports to represent. The interpretive project is not, and never has been, just about constitutional text, structure, and history; it is also about how the document's political framework, and the theory of republicanism upon which it is based, has been augmented by subsequent constitutional amendments designed to facilitate the preferences of the people through the political parties and partisan politics.

Indeed, the Supreme Court, in *Chiafalo v. Washington*, embraced a post-Twelfth Amendment vision of Article II that recognized the connection between presidential electors and the will of the people. Just as the relationship between the state legislatures and the people shifted in the early nineteenth century to make the former more accountable, so to has the relationship between the electors and

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[13] FOLEY, *supra* note .

[14] *Id.* (arguing that the Twelfth Amendment anticipated that the President would emerge as the winner of a compound majority of majorities in the states key to his electoral college victory).

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the people. Previously, the electors, like the state legislature, were constrained only by their respective judgments about what is best for the polity; now both are accountable to the people. Instead of the state legislatures having unencumbered power in how electors are allocated, the debates surrounding the Twelfth Amendment reveal that its founders left this authority in their hands *precisely* because it made them more accountable to the people.[15]

This article concludes that when state legislatures exercise the authority delegated to them by Article I and Article II over federal elections, they are not acting on behalf of the legislature itself; rather, they are acting on behalf of the state which, under our system of republicanism, is identified as its people. Post-Twelfth Amendment, state legislatures could no longer disregard the preferences of its electorate in the selection of state and federal officials, at least not without running afoul of republican principles.

I. The "Independent" State Legislature in Constitutional Law and Theory: Fact or Fiction?

In recent decades, the U.S. Supreme Court has repeatedly faced, and punted, on the question of whether state courts have the authority to interpret the state constitution in a manner that conflicts with the election rules adopted by the state legislature based on the premise that the state legislature has the final say over all rules governing federal elections.[16] A 2015 Supreme Court decision, *Arizona*

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[15] In contrast, Article I's Elections Clause lacks the textual reference to the "state," which is the focus of this article. *See* U.S. Const. Art. I, Sec. 4 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations…"). This provision nonetheless embodies the same conception of a state legislature constrained by the people that is the focus of Article II since the Twelfth Amendment changed our understanding of what republican government requires as a general matter. *See also* Weingartner, *supra* note , at 9 ("Despite their textual differences, the Elections and Electors Clauses share two important features. First, each confers the same substantive power on states and Congress. Second, each delegates that power to states—and state "legislatures"—in an identical manner. To the extent either disrupts the status quo of state legislatures as constrained by state constitutions, they do so in the same way and to the same degree.").

The text and structure of Article I also demonstrates the normative undesirability of a strong version of the independent state legislature theory in a system in which the preferences of the people can become subordinate to the political stagnation and/or manipulation within and between the elected branches. But Congress' reluctance may have been less concerning, historically, since the people had traditionally served as a check on the state legislatures. For example, I talk about the people as a check on the state legislature in the context of the Dorr Rebellion. See Franita Tolson, *Countering the Real Countermajoritarian Difficulty,* 109 CAL. L. REV. 2381 (2021). Although the rebellion failed, Rhode Island's General Assembly adopted some changes to its election law in order to liberalize access to the ballot in the Rebellion's wake. Id. The people often took matters into their own hands in the face of unresponsive state governments, invoking their right to alter or abolish government. *Id.* In addition to the people serving as a check on state legislatures, Congress has also ratified delegations of authority over federal elections to local officials who had enormous discretion in implementing the laws that governed federal elections under the Elections Clause, further illustrating that the independent legislature was more fiction than fact and that entity has long been constrained by other actors within both the state's political system and in Congress. *See* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. _ (forthcoming 2022); *See* Eliza Sweren-Becker and Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. (2021). While Article I's text is the focus of this article, the fact that the people serve as a constraint on the state legislature in the context of both provisions should not be overlooked.

[16] *See, e.g.,* Democratic National Committee v. Wisconsin State Legislature, 592 U. S. ___ (2020); Scarnati v. Boockvar, 592 U. S. ___ (2020); Moore v. Circosta, 592 U. S. ___ (2020); Wise v. Circosta, 592 U. S. ___ (2020); Bush v. Gore, 531 U. S. 98, 112 (2000) (Rehnquist, C. J., concurring); see also Republican Party of Pennsylvania v. Degraffenreid, 592 U. S. ___ (2021) (THOMAS, J., dissenting from denial of certiorari); id., at ___ (ALITO, J., dissenting from denial of certiorari); Wisconsin State Legislature, 592 U. S., at ___ (GORSUCH, J., concurring). *See also* Carson v. Simon, 978 F.3d 1051 (8th Cir. 2020).

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State Legislature v. Arizona Independent Redistricting Commission, rejected an interpretation of Article I that placed final decision-making authority in the institutional legislature, holding that the term "legislature" embodied the lawmaking process in the state such that voters, through ballot initiative, could shift authority to draw congressional districts from the state legislature to an independent commission.[17]

But the fundamental question of whether the state legislature is free of state constitutional constraints when setting the rules of federal elections is a question that has lingered since three justices, in *Bush v. Gore*, suggested that the Florida legislature was not bound by the state supreme court's interpretation of the state constitution because the court's pronouncement was a "significant[] depart[ure] from the statutory framework."[18] During the 2020 election, the Trump campaign repeatedly pushed this theory before the Supreme Court, and a number of justices warmed to the idea that federal courts, not state courts, are empowered to determine whether state legislatures have faithfully executed state election laws in the context of federal elections.[19] More recently, a similar argument emerged in *Moore v. Harper*, which concerned the constitutionality of North Carolina's congressional redistricting plan. A dissent penned by Justice Alito, and joined by Justices Thomas and Gorsuch, noted that "[t]his Clause could have said that these rules are to be prescribed 'by each State'…[b]ut that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously."[20] Thus, the strong version of the independent state legislature theory, seemingly endorsed by three justices in *Moore* and three justices in *Bush v. Gore*, would mean that state courts cannot interpret state constitutions in a way that unduly constrains the authority of state legislatures to determine how presidential elections will be appointed under Article II, or alternatively, set the times, places and manner of federal elections under Article I.[21]

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[17] 576 U.S. 787 (2015). *See also* Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690 (2016); Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L. Q. 599, 626 (2008).

[18] Bush v. Gore, 531 U.S. 98, 122 (2000) (Rehnquist, J., concurring).

[19] Shapiro, *supra* note , at 4 ("Repeatedly, Justices Thomas, Alito, and Gorsuch, accused state courts (and in one case, the state Board of Elections) of "rewriting" the laws, without considering whether those state officials had accurately applied precedent and practice or had appropriately taken into account legislative intent and the broader statutory scheme.").

[20] Moore v. Harper, 595 U.S. ___ (2022) (denial of application for stay) (Alito, J., dissenting).

[21] *See* Amar & Amar, *supra* note , at 18 ("On this view, the Federal Constitution empowers each state legislature to discharge its Article II duties independent from—and unencumbered by—the state constitution and the state judiciary interpreting that constitution."). It would also limit the ability of the governor to have any role in the state legislative process that governs federal elections, even though the Supreme Court has long endorsed such a role. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932). Professor Shapiro has noted that the maximalist version of the theory would also prevent state legislatures from delegating election administration to local officials. Shapiro, *supra* note , at 40 (citing Moore II, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief)).

While courts do not necessarily have to adopt its most extreme version—where state legislatures have the final say on all matters relating to the administration of federal elections—because there are more modest alternatives available that, if not constitutionally required, are at least textually and historically defensible. Morley. See also Shapiro, supra note (referring to the "maximalist" independent state legislature theory which not only frees state legislature from the constraints of the state constitution, but also empowers "the Supreme Court to undertake its own textualist interpretation of state election law, de novo, without deference to state court interpretation"). Even Chief Justice Rehnquist's concurrence in *Bush v. Gore* seemed to leave some room here, conceding that "[i]solated sections of the code may well admit of more than one interpretation," but emphasizing that "the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies." 531 U.S. 98, 114 (2000) (Rehnquist, J., concurring).

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The argument that the power to set the rules of federal elections belongs to the state legislature and not the state, writ large, is not new.[22] This premise has been contested in the courts for decades, and its application has varied.[23] As Professor Michael Morley painstakingly details in his in-depth assessment of the theory, "the admittedly few state courts to consider the issue generally enforced state laws governing congressional elections, even when they violated state constitutional provisions."[24] Many of these decisions date back to the nineteenth century,[25] but so to does an 1892 Supreme Court decision, *McPherson v. Blacker*, that falls short of treating the state legislature as completely distinct from the state, and therefore free of state law, in regulating federal elections.

In *McPherson*, the Court interpreted Article II to permit the state legislature to allocate electors by congressional district, but the Court resisted an interpretation of Article II that would allow the state legislature to act completely independent of the "State," given that both the state and the state legislature are referenced in Article II.

While rejecting the argument that the allocation of electors has to accord with the conception of the State as a unit, rather than delegating to subunits (here, congressional districts) the allocation of electors, *McPherson* did not construe the legislature's power to deprive the state of all authority:

> It is said that this clause of the Constitution provides that this appointment shall be made "in such manner as the legislature may direct," and it is claimed that these words are so plenary as to permit the legislature to take this great power from the sovereign State, and, cutting it up, divide it among fourteen disjointed fractions of the territory of the State, each of which shall choose one elector of President and Vice President of the United States. It is sufficient answer to this to say, that under the form of prescribing the manner in which the State shall appoint, the power is not conferred upon the legislature to deprive the State of all appointing power.

In other words, the state, tasked by the Constitution with appointing electors, is distinct from the state legislature, responsible for "direct[ing] the manner of appointment." The *McPherson* Court defined the state as "in the ordinary sense of the Constitution…a political community of free citizens, occupying a territory of definite boundaries and organized under the government's sanction and limited by a written constitution and established by the consent of the governed."[26] Moreover, it would be odd for the Court to conclude that the "State," which it painstakingly distinguishes from its legislature, is constrained by "written constitution" and "the consent of the governed," while the

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[22] Marisam, *supra* note (arguing that, as a result of the theory, "other state actors cannot review and reject the election rules produced by a state legislature for federal elections in the state"). Nonetheless, it is not clear how much interpretive room the theory leaves state officials in implementing the dictates of the state legislature, even if officials cannot act counter to these dictates. *See* Morley, *supra* note , at 505 (describing a version of the theory that would require "state and local officials to be able to point to some source of statutory authorization for the policies they adopt or restrictions they enforce for [federal] elections").

[23] Morley, *supra* note , at 9 ("The 1890 edition of Thomas Cooley's Constitutional Limitations treatise reflects this understanding, too.22 The treatise explained, "So far as the election of representatives in Congress and electors of president and vicepresident is concerned, the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same, as allowed by the national Constitution.").

[24] *Id.* at 38-45.

[25] *See, e.g., id.* at 41 (discussing an 1862 New Hampshire Supreme Court advisory opinion that affirmed the power of the state legislature, under Article I and Article II of the U.S. Constitution, to provide absentee voting for military voters).

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legislature, arguably the lesser organ as the representative body of the state, is free of such constraints. It is nonetheless unclear post-*McPherson*, what constraints the state as a "political community of free citizens" can impose on its legislature as it appoints electors, a task undertaken on behalf of the state.[27]

Subsequent decisions have also failed to answer this question in any conclusive way; in fact, later cases implicitly reject the independent state legislature theory just by virtue of their holdings. For example, the Court in *Davis v. Hildebrandt*, which was decided a quarter century after *McPherson*, upheld an Ohio state constitutional provision that allowed the people to approve or reject all legislation, including regulations governing federal elections.[28] Similarly, in *Smiley v. Holm*, the Court held that state legislatures were constrained by state constitutions in drawing congressional districts under the Elections Clause.[29] Since the independent state legislature theory, by definition, requires that pronouncements by the state legislature be final with respect to federal elections, these holdings are at odds with its core tenet.

Contrary to later precedents, some justices have read *McPherson* broadly as an endorsement of the independent state legislature theory,[30] but that decision raises more questions about the scope of the theory than it answers. It is also clear that the constitutional history is not the universal endorsement of an unconstrained legislature that some of the more conservative Supreme Court justices think the Constitution demands. At most, the framing of Article I and Article II suggest that delegates to both the constitutional convention and the state ratifying conventions disagreed over which entity should have the role of appointing electors or regulating federal elections—either the President, Congress, or the people—but these debates did not resolve the question of whether the state legislature was free of any constraints that the people might impose through their governing documents.[31] At the founding, "legislature" might have meant "legislature," or to use Chancellor Kent's definition—"the two houses acting in their separate and organized capacities,"[32] but further clarification would be

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[27] Amar & Amar, *supra* note , at 38 ("Blacker was a case in which Michigan was using popular election of presidential electors, not a case in which a state legislature was resisting the will of the people, as expressed in their state constitution. Nor did the case in any way involve an ostensible conflict between the wishes of the legislature and the views of the state judiciary. As such, the case on its facts had nothing—nothing!—to do with the independent state legislature theory or theory.").

[28] 241 U.S. 565 (1916).

[29] Smiley v. Holm, 285 U.S. 355 (1932). As Hayward Smith noted in his seminal work on the independent state legislature theory, *Smiley* and other cases suggest that the state legislature does not operate outside of its state constitutions in this context:

> As for Supreme Court precedent, the Court itself admitted in *Bush I* that the leading case on the meaning of the Elector Appointment Clause, *McPherson v. Blacker*, does not address the independence of state legislatures. With respect to intertextual analysis, the Court in *Smiley v. Holm* explicitly rejected the argument that state legislatures under Article I, Section 4 act independently of their constitutions when they prescribe the times, places, and manner of holding elections for Senators and Representatives. And while in *Hawke v. Smith* the Court held that state legislatures *do* enjoy independence when they decide whether to ratify a constitutional amendment under Article V, it was careful to explain that such "expression of assent or dissent" was "entirely different" than the authority "plainly given . . . to the state to legislate [with respect to the manner of holding elections]."

Hayward H. Smith, *History of the Article II Independent State Legislature Theory,* 29 Fla. St. U. L. Rev. 731, 737 (2001).

[30] Bush v. Gore, 531 U.S. 98, 113 (Rehnquist, J., concurring) (citing McPherson for the proposition that Article II 'conveys the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment.").

[31] *See* Morley, supra note , at 28-31.

[32] 1 CHANCELLOR JAMES KENT, COMMENTARIES ON AMERICAN 261–62 (John M. Gould ed., 14th ed. 1896)

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necessary, one would think, if the term "legislature" by definition permitted that body to disregard the constraints of the governing document that created it. In other words, "legislature" does not mean "king" and "broad" power does not mean "unconstrained" authority.

Such a reading would be contrary to the constitutional structure that denies state legislatures the freedom that this theory would seemingly give. As Vik and Akhil Amar note in a recent critique, the constitutional structure makes Congress, not the states, the final arbiter of disputes over presidential electors and congressional elections.[33] The Elections Clause has this congressional veto directly in its text—allowing Congress to "make or alter" state regulations for any reason, power that the Supreme Court has described as "paramount."[34] Congress has, for example, used this authority to set a deadline for the receipt of absentee ballots from American citizens living overseas, a deadline that sometimes exceeds that set by the legislatures of their respective home states.[35] Article I, Section 5 also allows Congress to judge the elections of its members, and in doing so, Congress can refuse to seat representatives elected in violation of the state constitution regardless of a contrary rule offered by the state legislature. Similarly, the role of Congress and the Vice President in overseeing the electoral college vote, and in the process determining the validity of a state's electoral slate, also allows the federal government to essentially override contrary determinations by the state legislature.[36]

But even then, these arguments, while persuasive in showing that state legislatures are subordinate to Congress—and possibly federal courts[37]—in the regulation of federal elections, they do not resolve if and how state law, as interpreted by state courts, constrains this entity. While the Amars' framing of the constitutional structure as "emphatically democratic" because "more directly democratic institutions" serve as a check on the state legislature is a key insight, their proposal underestimates the extent to which the Constitution, at first embodying a fear of state level democracy, came to embrace the ability of state level majoritarian politics to be a constraint on state institutions.

Post-Twelfth Amendment, the founding generation envisioned that majoritarian politics would be a strong constraint on state legislatures than they had been when the notoriously anti-party document was ratified and adopted in 1789.[38] By 1804, state legislatures served as a vehicle for the partisan politics that had come to dominant the electorate, where majoritarian sentiment would dictate electoral outcomes for even those offices, like the president, for which the electorate did not directly select. Thus, the underlying structural logic is not only "emphatically democratic" with respect to the structure of the federal government and its oversight, as the Amars assert; it is also "emphatically democratic" with respect to the ability of majoritarian politics to similarly check state institutions.

Recently, some state courts have been reluctant to free the state legislature from the will of the people, as manifested through their state constitutions. In *Pennsylvania Democratic Party v. Boockvar*, for example,

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[33] Amar & Amar, *supra* note . *See also* Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

[34] *See* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253 (2013) (describing this power as "paramount"); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317 (2019).

[35] *See, e.g.*, Pa. Dem. Party v. Boockvar, 238 A.3d 345 (Pa. 2020) (extending Pennsylvania's ballot receipt deadline for mail in ballots to 3 days after Election Day, which is the the deadline for ballots received under the federal Uniformed and Overseas Citizens Absentee Voting Act).

[36] See Electoral Count Act of 1887

[37] Amar & Amar, *supra* note , at 22 (noting that the independent state legislature theory empowers federal courts have the power to interpret state election statutes if they are any constraints on the power of state legislatures).

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the plaintiffs sought to extend the ballot receipt deadline from Election Day, as specified under Act 77 in the state's election code, to three days after Election Day. In resolving this claim, the Pennsylvania Supreme Court was guided by a state law, the Statutory Construction Act, which states that "the object of all statutory construction is to ascertain and effectuate the General Assembly intention."[39] Clear text always trumps under the law, but ambiguities within statutory language are resolved by resorting to a comprehensive list of factors to derive legislative intent including "the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations."[40] However, the court supplemented its analysis with a source that was not on this approved list: the state constitution. The "Free and Equal Elections" provision of the state constitution "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[41]

It is beyond dispute that the deadline for the receipt of absentee ballots, as specified within the statute, is not ambiguous; thus, the Statutory Construction Act would normally require a state court to yield to the clear text. In finding that a three day extension was nonetheless necessary to protect against massive disenfranchisement of voters, the Pennsylvania Supreme Court relied on the Free and Equal Elections provision of the state constitution as well state statutory provisions governing emergency situations that interfered with an election.[42] The court found that strict enforcement of the deadline would result in extensive disenfranchisement because of the COVID-19 pandemic, a contention that found wide support during the precedings June 2020 primary election where election boards were unable to process many of the ballots because of overwhelming demand and post office delays.[43]

The U.S. Supreme Court has also recognized the risk of disenfranchisement inherent in allowing those state officials or actors exercising federal functions to use their individual judgment without the constraints of state positive law, be it statutory, constitutional or otherwise. In *Chiafalo v. Washington*, the Court held that states could replace or fine presidential electors who did not cast their votes in accordance with the winner of the state's popular vote, as required by state law. *Chiafalo*, of course, presented a different issue than that present in *Boockvar* even though both cases arose in the context of a presidential election. While *Boockvar* dealt with the mechanics of administering the election, in *Chiafalo*, several electors argued that they had independent discretion to cast their ballot for the candidate of their choice after the election, even if their choice was not the choice of the people.

There is, nonetheless, one key similarity between the two cases—the risk of massive disenfranchisement of everyday voters contrary to their right to vote as protected within their governing document. In rejecting the elector's argument under Article II, the Court recognized the role of both political parties and electors as conduits of majority preferences such that states can punish and remove electors who cast ballots for individuals other than the winner of the state's popular vote in the presidential election.[44] The Court endorsed a post-Twelfth Amendment vision

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[39] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 356 (2020).
[40] *Id.*
[41] *Id.* (citing **Pa. Const. art. I, § 5**).
[42] *Id.* at 370 (finding that the COVID-19 pandemic equates to a natural disaster within the context of the statutory emergency code)
[43] *Id.* at 363-64.
[44] Chiafalo v. Washington, 591 U.S. ___ (2020).

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of the Electoral College in which the Amendment "brought the Electoral College's voting procedures into line with the Nation's new party system" and codified the expectation that the elector would "'vote the regular party ticket' and thereby carry out the desires of the people' who had sent him to the Electoral College."[45] Or, as the *Chiafalo* majority succinctly put it, "No independent electors need apply."

Similarly, the law of Pennsylvania prioritized the right to vote and by implication, majoritarian politics by constitutionalizing that right to vote, rather than the ballot receipt deadline or any of the provisions of Act 77 that dealt with the administration of the election itself. The Pennsylvania Supreme Court endorsed the same vision of republican government embraced by the Twelfth Amendment, finding that the clear statutory language of Act 77 nonetheless constituted an "as-applied infringement of electors' right to vote."[46] As detailed in the next Part, post Twelfth Amendment republicanism, which centers the voting public as the core of majoritarian politics, explains why the court reading of its own state constitution to require "all aspects of the electoral process…be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees… a voter's right to equal participation in the electoral process…" even in the face of a law that is otherwise facially constitutional.[47]

In reviewing the decision by the Pennsylvania Supreme Court and also a district court that issued a similar extension in Wisconsin, several justices seeking to breathe life into the independent state legislature theory sought to elevate the prerogatives of the state legislature no matter the impact on the voter. Justice Kavanaugh, in particular, explicitly endorsed a reading of Article II that requires the intent of the state legislature to always prevail.[48] However, in finding that states could shackle their electors to popular sentiment, both *Chiafalo* and *Boockvar* implicitly recognized that, during our country's first decades, political elites reimagined republicanism to carve out a larger role for partisan politics and majoritarian preferences than in the decade immediately following the founding.

For the founding generation, the structure of republican government—and the electorate that would safeguard its principles—should be determined by the states. But political elites challenged this intention within a few short years due to the rise of partisan political competition by proposing the Twelfth Amendment. By 1804, republican theory had evolved in ways that fundamentally altered the relationship between the state legislature and the people.

II. What is Republican Government?: The Voters versus the State Legislature as the Gatekeepers of Majoritarian Preferences

Scholars have documented the ways in which founding era practice at both the state and federal level refute arguments that state legislatures can act outside of the strictures of their state constitutions in regulating federal elections. Michael Weingartner, for example, points to a number of state constitutional provisions at the founding that circumscribed the state legislature's authority to regulate federal elections, precedents that stand at odds with an interpretation of Article II that

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[45] *Id.* (citing Ray v. Blair, 343 U.S. 214, 224 n.11 (1952)). *See also id.* (noting that "The Twelfth Amendment both acknowledge[ed] and facilitate[ed] the Electoral College's emergence as a mechanism not for deliberation but for party-line voting").

[46] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 369 (2020).

[47] *Id.*

[48] Democratic National Committee v. Wisconsin State Legislature, 141 S.Ct. 28, 34 n. 1 (2020) (Kavanaugh, J., concurring).

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would bar similar efforts to constrain the authority of these entities.[49] Scholars have also looked to this history to reject arguments that state legislatures only have to abide by procedural regulations in the state constitution and can act independent of any substantive constraints. Hayward Smith, for example, points to statements by framers of the Electors and Elections Clauses who voiced the expectation that state legislatures would be substantively constrained, joining a chorus of scholars who also look to founding era evidence that legislatures acted pursuant to the ordinary lawmaking processes of their states in regulating federal elections.[50]

But no scholar has examined how the Twelfth Amendment ratified an understanding of republican government that, contrary to how it was conceived in 1789, required government to be accountable to a majority of the voters. Republicanism, despite being a constitutional requirement for the composition of state political systems, has never had a universally applicable definition. James Madison and the other founding fathers, other than drawing knowledge from the great republics of classical antiquity, treated the concept as unnecessary of explanation and ingrained in the American psyche.[51]

In *The Federalist* 39, Madison described a republic as a "government which derives its powers directly or indirectly from the great body of the people, and is administered by officers holding their offices during pleasure, for a limited time, or during good behavior." By partaking in the selection of their rulers, who would presumably be virtuous individuals committed to translating popular preferences into policy, the people would happily submit to their authority in return. And a republic, unlike a democracy, could better mitigate the mischiefs of faction. By delegating decision making authority to a smaller representative body—not beholden to any special interests—to oversee a greater number of citizens spread out over a large geographic area, this makes it unlikely that government would succumb to "unworthy candidates to practice with success the vicious arts by which elections are too often carried."[52]

But key to this scheme is that these virtuous intermediaries would be responsible for implementing the preferences of the majority that they govern. *The Federalist 43* presented the Guarantee Clause as a bulwark against "aristocratic or monarchical innovations," with Madison noting that, "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim

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[49] Weingartner, *supra* note , at 38-39.

[50] Smith, *supra* note , at 12 (discussing Grace Brosofsky, Michael C. Dorf, and Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors* (Sept. 25, 2020), https://drive.google.com/file/d/ 109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view.). *See also* Amar & Amar, *supra* note , at 26 ("Since the Revolution, every state legislature has been defined and circumscribed, both procedurally (e.g., What counts as a quorum? Is the governor involved in legislation?) and substantively (e.g., What rights must the legislature respect?) by its state constitution, which in turn emanates from the people of each state. When a state legislature violates the procedural or substantive state constitutional limitations upon it, it is no longer operating as a true state legislature for these purposes.").

[51] WILLIAM WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 13 (1972) ("the word 'republican' may well not have had any single and universal denotation to the men who inserted it into the guarantee clause. It may, in fact, have had no meaning at all. John Adams complained late in life that 'the word *republic* as it is used, may signify anything, everything, or nothing.'"); Wood 48 ("the principles of republicanism permeated much of what the colonists read and found attractive. In fact, 'the true principles of republicanism are at present so well understood,' so much taken for granted, so much a part of the Americans' assumptions about politics, that few felt any need formally to explain their origin.").

[52] THE FEDERALIST NO. 10 (James Madison), *reprinted in* 2 DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (BERNARD BAILYN ED., 1993).

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the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."[53]

But republicanism's historical connection to monarchy, intended to counter the then-prevailing view of kings as all powerful rulers accountable only to God and not the people, led many opponents of the Constitution to question this new government that the founding generation sought to create.[54] But those who would later govern the new nation under the party label of "Federalists" refuted that the new government would institute a monarchy or oligarchy. By creating a virtuous intermediary to translate the preferences of the majority—the one clear purpose of republican government—Madison believed that the geographic dispersiveness of the population and the patriotism of the chosen representatives would prevent those who lack virtue from obtaining power, setting up a monarchy or aristocracy, and enacting countermajoritarian policies. Indeed, there was almost universal agreement among the founding generation that, in addition to obligating the federal government to come to the aid of states facing rebellion,[55] the Guarantee Clause required that states enfranchise some portion of their population to legitimize these intermediaries making policy decisions.[56]

In short, republicanism required accountability.[57] To this end, periodic elections ensured that elected officials continued to act in the interest of the whole and defy the notion of a hereditary ruler or

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[53] THE FEDERALIST NO. 43 (James Madison), *reprinted in* 2 DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (BERNARD BAILYN ED., 1993).

[54] *See, e.g.*, A Columbian Patriot, *Observations on the Constitution* (Feb. 1788), in 2 DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 288-89 (BERNARD BAILYN ED., 1993); Anonymous, Essays of Brutus 1, in Herbert J. Storing, ed., The Complete Antifederalist, Vol 2 363-72 (1981). Even where a king was a hereditary ruler, republican theorists argued that the king was accountable to law (not just God) and that his power derived from the trust of the people. *See* John Milton, The Tenure of Kings and Magistrates (1650).

[55] *See id. See also* Jonathan Toren, Note, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J. L. & LIBERTY 371, 405 (2007) (arguing that the purpose of the Clause is to "(1) protect[ing] the existing states from upheaval; (2) preventing the states from changing their government to one not republican; and (3) protecting the union as a whole from disintegration.").

[56] Countless law review articles have been written on what constitutes a republican form of government, and most scholars agree that republicanism requires that states extend political rights to their citizens. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 122–23 (1980) (noting that the Guarantee Clause could be the source of the Court's voting rights jurisprudence); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (arguing that republican government requires that "the structure of day-to-day government—the Constitution—be derived from 'the People' and be legally alterable by a 'majority' of them").

[57] As Roger Sherman argued during the ratification debates, a republican government is one that has three branches of government, including legislative and executive branches determined "by periodic elections, agreeable to an established constitution; and that what especially denominates it a republic is its dependence on the public or the people at large, without hereditary powers," a view that appeared to be fairly common during this period. Letter from Roger Sherman to John Adams, July 20, 1789, *in* 4 THE WORKS OF JOHN ADAMS 437 (C. Adams ed., 1856); *see* THE FEDERALIST NO. 39 (James Madison), *supra* note , at 27 (defining a republican government as "a government which derives all of its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior"); *see also* WIECEK, *supra* note , at 17 ("The negative senses of 'republican' that is nonmonarchical and nonaristocratic commanded the assent of most Americans in 1787. Beyond this it is unsafe to generalize about the precise meaning of the term."). *See also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 53 (1969) ("The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution").

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ruling class. In late eighteenth century republican theory, "there were no hereditary distinctions, no 'empty ornament and unmeaning grandeur,' where only sense, merit, and integrity commanded respect" so that the silent majority excluded from the community of voters had an equal opportunity to become a part of it (at least in theory).[58] Thomas Jefferson corroborated this sentiment, writing to Alexander von Humboldt, a prominent Prussian philosopher and scientist, that, "The first principle of republicanism is that the lex majoris partis [majority rule] is the fundamental law of every society of individuals of equal rights."[59]

The requirement of majority rule was therefore an explicit limit on the ability of the states to substantially disenfranchise their populations; republicanism required that *someone* be able to vote.[60] In fact, James Madison explicitly connected the right to vote to notions of republican government in *The Federalist 52*, noting that "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government."[61] The emphasis on the right to vote as the source of the people's authority—and the explicit link between state and federal electors in Article I, Section 2—was intentional. In *The Federalist 45*, Madison observed that "[e]ven the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislature."[62] Similarly, a supporter of the Constitution calling himself "A Landholder" wrote a spirited defense in *The Connecticut Courant*, noting that, among the advantages of the new government, "Every freeman is an elector. The same qualifications which enable you to vote for state representatives, give you a federal voice. It is a right you cannot lose, unless you first annihilate the state legislature, and declare yourselves incapable of electing, which is a degree of infatuation improbable as a second deluge to drown the world."[63]

The link between state and federal electors in the text not only ensured that the qualifications of either group would be coextensive, but forced states to define the political community for state and federal elections as republican theory required: as a sufficient amount of voters who had the requisite independence to cast a ballot without being beholden to more powerful overlords. The Guarantee Clause, and its requirement of republicanism, became a floor below which no state could fall in crafting this community.

Instead, delegates to the convention worried about a different problem, emphasizing concerns about disqualifying voters who would otherwise be eligible to vote under state law, fearing that this

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[58] Wood, *supra* note , at 46-47.

[59] *See also* Charles Pickney, Elliot's Debates ("A Republic is where the people at large, either collectively or by representation, form the Legislature."). John Taylor, Construction Construed ("The end of this guarantee is 'a republican form of government.' The meaning of this expression is not so unsettled here as in other countries, because we agree in one descriptive character as essential to the existence of a republican form of government. This is representation. We do not admit a Government to be even in its origin republican, unless it is instituted by representation; nor do we allow it to be so, unless its legislation is also founded upon representation.").

[60] Tying the qualifications of federal electors to those qualified to vote for the most numerous branch of the state governments, as Article I, Section 2 dictates, implicitly mandated federal intervention should the states fail to designate voters.

[61] THE FEDERALIST NO. 52 (James Madison), *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note **Error! Bookmark not defined.**, at 182–83.

[62] *Id.* at 103–04.

[63] "A Landholder" (Oliver Ellsworth), *Reply to Elbridge Gerry*, CONN. COURANT, Nov. 26, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note, at 236–37 (arguing that "State representation and government is the very basis of the congressional power proposed").

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development could lead the people to ultimately reject the proposed constitution.[64] For example, Oliver Ellsworth argued that, "[t]he people will not readily subscribe to the Nat[ional] Constitution if it should subject them to be disenfranchised. The States are the best Judges of the circumstances [and] temper of their own people."[65] Similarly, George Mason queried, "What will the people there say, if they should be disenfranchised?" He concluded that, "A power to alter the qualifications would be a dangerous power in the hands of the [Federal] Legislature."[66] A majority of the delegates agreed that the structure of Article I, Section 2, which let states determine voter qualifications for federal elections, would avoid the political blowback that might come from having uniform federal criteria that explicitly disenfranchised those otherwise qualified to vote under state law.[67] An alternative arrangement could be construed as disenfranchising those already within the community of voters, which was fundamentally inconsistent with republican ideals.

After the ratification of the constitution, republicanism—and its focus on majority rule—was further refined through constitutional amendment and the entry of new states into the union. For the founding generation, the structure of republican government—and the electorate that would safeguard its principles—should be determined by the states. But, as the next section shows, political elites challenged this intention within a few short years following ratification, due to the rise of partisan political competition, by proposing the Twelfth Amendment. No longer were states free to undermine majoritarian preferences in how they constructed their electorates; popular politics, embraced by the Amendment, would now dictate outcomes that reflected the preferences of the voters rather than those of the state legislatures.

III. Shifting from "We the People" to "We the Voters": The Twelfth Amendment as an Expression of Popular Sovereignty

In *Chiafalo v. Washington*, the Supreme Court held that states can fine and/or remove electors who failed to discharge their duties in accordance with the popular vote, as required by state law. Much of the recent scholarship on the *Chiafalo* focus on the majority's use of "historical gloss" to interpret the Constitution, or its reliance on over 200 years of historical practice to vindicate its conclusion that the Twelfth Amendment requires that electors follow state law rather than exercise independent judgment. Some scholars have questioned the validity of this interpretive move, with Professors Charles and Fuentes-Rohwer arguing that the *Chiafalo* majority used historical gloss to trump the plain meaning

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[64] 1 DEBATE ON THE CONSTITUTION, *supra* note, at 354. Benjamin Franklin argued that he did not think "the elected had any right in any case to narrow the privileges of electors" because the elected often used subterfuge to circumscribe the right to vote. As James Madison described in his notes:

> He [Franklin] quoted as arbitrary the British Statute setting forth the danger of tumultuous meetings, and under that pretext narrowing the right of suffrage to persons having freeholds of a certain value; observing that this Statute was soon followed by another under the succeeding Parliam[en]t subjecting the people who had no votes to peculiar labors & hardships. He was persuaded also that such a restriction as was proposed would give great uneasiness in the populous States. The sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disenfranchised, and there are a great many persons of that description.

Id.

[65] *Id.* at 351 (comments of Oliver Ellsworth) (arguing that "[t]he right of suffrage was a tender point, and strongly guarded by most of the State Constitutions")

[66] *Id.* (comments of George Mason).

[67] *Id.* at 354 (comments of John Rutledge) (arguing that "restraining the right of suffrage to the freeholders a very unadvised [idea]" because it "would create division among the people and make enemies of all those who should be excluded"); *see also id.* at 351 (comments of George Mason) (noting that "[e]ight or nine States have extended the right of suffrage beyond the freeholders").

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and structure of Article II, which permits electors to exercise judgment. The Court did so, according to these scholars, as a way of updating "a particular and modern view of political participation—which is best reflected by political American political practices—by rejecting an alternative and anachronistic view—which is best reflected in the text and structure of the Constitution."[68]

However, the ratification of and debates surrounding the Twelfth Amendment illustrates that arguments against elector discretion go well beyond post-Founding historical practice to endorsement, as the text of the Twelfth Amendment was adopted with a particular understanding of the word "State" in Article II as it relates to the role of the people in presidential politics.[69] According to its text, the Twelfth Amendment, ratified in 1804, requires that electors vote for the president and vice president on separate ballots; additionally, the Amendment provides that if no candidate garners a majority of the electoral votes, the top three vote getters (instead of the top five as under the original Constitution) will go to House of Representatives, where the candidate who receives a majority of the votes (with each state delegation having one vote) becomes President.[70] This is not just a technical fix. As this section will show, the Amendment established that republican principles should dictate the structure of presidential elections and required the outcome to reflect the will of a majority of the state's voters, rather than the people writ large.

The Federalist Papers foreshadowed this shift by explicitly tying notions of the virtue central to effective governance to the republic's size. Madison, quoting Montesquieu, noted that the federative republic "may support itself without any internal corruptions…As this government is composed of small republics, it enjoys the internal happiness of each; and with respect to its external situation, by means of the association, of all the advantages of large monarchies."[71] The internal happiness of each state, or "small republic," likewise turned on a need to "break and control the violence of faction" even from within, a threat that, if magnified across jurisdictions, could undermine a "well constructed Union," as Madison warned in *The Federalist 10*. Thus, the shift from prioritizing the preferences of unpredictable numerical majorities to those of smaller electoral majorities more likely to act with virtue was probably inevitable.

By tying the legitimacy of the presidency to the selection of electors who translate the preferences of the majority who either voted for them or the state legislature that appointed them, the Twelfth Amendment endorsed a view of republican government that is voter, rather than population, centered. In altering the 1787 design, the framers of the Twelfth Amendment, both in what they changed about the original Electoral College and in what they left the same, clarified that "majoritarianism" centered on political influence rather than population. The text preserved the ability of state legislatures to choose how to select its electors, consistent with the original design. And its use of passive voice regarding the tallying of electoral college votes ("and the votes shall be counted") is power that has evolved over time to allow Congress to affirmatively weigh in on the

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[68] Charles & Fuentes-Rohwer, *supra* note , at 5.

[69] An originalist would frame this inquiry as what is the original public meaning of the word "state" in the context of Article II, as that provision was changed with the ratification of the Twelfth Amendment in 1804, rather than focusing exclusively on founding era debates and practices surrounding the adoption of Article II.

[70] U.S. CONST. amend. XII.

[71] The Federalist No. 9. *See also* Letter of Timothy Pickering to Richard Peters, Dec. 24, 1803; Letter of Timothy Pickering to George Cabot, June. 29, 1804, in Octavius Pickering and Charles Wentworth Upham, The Life of Timothy Pickering, vol. 3 (1867).

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state process for selecting electors.[72] But the Jeffersonian conception of majoritarianism, unlike the Madisonian vision, anticipated that the President would garner the support of those who held the political power in the state, either through the popularly elected state legislature that chooses electors or through electors selected by voters directly.[73]

While the requirement that electors vote for president and vice-president on separate ballots might have seemed like a common sense response to the 1800 Electoral College tie between Thomas Jefferson and Aaron Burr that almost plunge the country into chaos, this aspect of the Twelfth Amendment was deeply tied to respect for the principle of majority rule. By tinkering with the 1787 system, the framers of the Twelfth Amendment intended that the President emerge from an electoral process in which he (or she) is the preference of a compound majority of majorities in states central to his (or her) Electoral College victory rather than a mere plurality winner. A mere plurality winner, in contrast, would undermine republicanism's commitment to majority rule.[74] Thus, Aaron Burr emerged as a presidential contender in the election of 1800 despite not being the popular preference, contrary to republican ideals in which the preferences of the people are supposed to hold sway.

During debates on the Amendment, Democratic Republicans emphasized the centrality of majority rule to our system of representative government and, in particular, the danger of electing someone to the presidency who was not the choice of the voters.[75] According to Virginia congressman John Clopton, "When one person is intended for an office and another person actually obtains it, such election, if indeed it can properly be called an election, is not conformable to the will of those by whom it was made…"[76] Similarly, Maryland representative Robert Wright argued that the proposed Amendment was not a "party question," but transcended party because it sought to "prevent men not intended to be chosen from being edged into power. …to set up a man who had not a single vote…"[77] The Jeffersonians were, according to Professor Edward Foley, "much more committed to this federalist form of majoritarianism than the Philadelphia Convention delegates had ever been" by allowing states in which they were not a majority to continue to allocate electoral votes based on the popular will post-Twelfth Amendment. They also believed that federalism demanded that they leave to each state the decision of how to allocate its electors,[78] but as usual, partisanship tended to color what would otherwise appear to be principled positions.

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[72] See the Electoral Count Act of 1887. As Chapter 7 will show, this statute clarified the outline of Congress' power to "count the votes" in discarding or accepting slates of electors, some of which were allocated by popular vote. Congress passed this statute in response to the controversial election of 1876 and the close elections of 1880 and 1884.

[73] Foley. 13 Annals 492 (comments of Clopton) ("For, sir, however respectful the public attention might have been towards the person who thus becomes Chief Magistrate of the Union, contrary to the intention of the Electors [voters], it cannot be expected that with the acquisition of the office, under these circumstances, he will receive the public confidence.")

[74] Foley 40. According to Professor Foley, "Adhering to federalism required Republicans in 1803 to retain the idea, embedded in the Electoral College of 1787, that majority rule in a federal system entails a compound majority-of-majorities. Republicanism, as a philosophy, demands majority rule at the state level. A federal majority is then formed from an overall majority of these subsidiary state-level majorities."

[75] 13 Annals 491 (Comments of Clopton) ("in a Government constituted as our Government is, wherein all the constituted authorities are agents of the people, the suffrages given for the election of those agents ought ever to be a complete expression of the public will")

[76] 13 Annals 491. But see id. at 520 (comments of Huger) (arguing that Rep. Clopton has forgotten that "the Government under which we live is formed upon Federative no less than upon Republican principles" and the proposed amendment would lessen the power of the states).

[77] 13 Annals 200-01 (comments of Wright).

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Importantly, the framers of the Twelfth Amendment anticipated that each state's voting population would be organized by political parties, facilitating majoritarian principles in a way that was unthinkable in 1787.[79] The expectation that republicanism would be filtered through partisan politics is precisely why the Jeffersonians left to each state the decision of how to allocate its electors, recognizing that their party organization was dominant in enough states to secure an electoral victory moving forward. As Professor Foley observes, "members of the Eighth Congress …believe[d] that states would exercise their power to appoint presidential electors in a way that reflected the prevailing political perspective within each state. In particular, once intense two-party competition emerged during the elections of 1796 and 1800, politicians from both parties understood that state legislatures would select methods of appointing electors that would enable the dominant party in each state to promote its own presidential candidate."[80] Even in states where the Republicans were not a majority, they had, in 1800, been able to beat back efforts by the Federalist dominated state legislature in Maryland to use a general ticket system in the allocation of electors; that fall, Republicans were able to win five electors. The prospect of minor success in Federalist domains further reinforced that leaving the decision to the states would not imperil Republican political prospects.[81] The Twelfth Amendment therefore embodied a type of *voter centered* majority

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[79] As historian Noble Cunningham has argued, "Between the inaugurations of Washington and Jefferson, the two party system became rooted in American politics. So important had the role of parties become in the political life of the nation that the Constitution itself was soon to be amended to recognize the place of parties, whose rise had made the constitutional provisions for the election of the president and the vice president outdated and unrealistic and had led to the troublesome tie between Jefferson and Burr." *See* Cunningham 260.

[80] Foley; see also id. at 189 n.15 ("it is important to emphasize that the Jeffersonians of 803, in their Electoral College redesign, were looking forward to Jefferson's re-election of 184 at least as much as they were looking backward to his victory in 1800. Their conception of themselves as the majority party, to be vindicated as such by the redesigned Electoral College in 1804, was based in part on the strength of their midterm victories in 1802 and their still-increasing popularity after the Louisiana Purchase. Finally, the actual voting in 1804 vindicated the Jeffersonians on this crucial point."). Not only were political parties the way to gauge which candidates enjoyed majority support among voters in a particular state, Professor Foley illustrates that the system was ill-equipped to deal with third party candidates precisely because of the difficulty that individual encounters as he (or she) attempts to amass the popular support that the Jeffersonian experiment envisioned.

[81] "To Thomas Jefferson from Gabriel Duvall, 14 December 1802," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson/01-39-02-0142-0001. [Original source: *The Papers of Thomas Jefferson*, vol. 39, *13 November 1802–3 March 1803*, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2012, pp. 156–157.] (providing information to Jefferson as to "the probable result of a choice of Electors in Maryland by a general ticket" and concluding that district elections are unpopular but "in any rational division of the State, the Republican candidate will succeed in seven of the Eleven districts"); "To James Madison from John Beckley, 5 May 1803," *Founders Online,* National Archives, https://founders.archives.gov/documents/Madison/02-04-02-0682. [Original source: *The Papers of James Madison*, Secretary of State Series, vol. 4, *8 October 1802–15 May 1803*, ed. Mary A. Hackett, J. C. A. Stagg, Jeanne Kerr Cross, Susan Holbrook Perdue, and Ellen J. Barber. Charlottesville: University Press of Virginia, 1998, pp. 574–575.] ("N York elections are decisively democratic thro' the State, for both branches, and leave no doubt that the mode for choosing Electors in that state for the presidential Election will be such as the democrats shall prescribe"). The fact that the relative odds of Republican political success at the state level was part of the calculus behind the Twelfth Amendment was contrary to the expectations of Founders like Alexander Hamilton who thought that the proposed Amendment would both "strengthen[ ] the connection between the Foederal [sic] head and the people" and "diminish[ ] [ ] the means of party combination, in which also the burning zeal of our opponents will be generally an overmatch for our temperate flame." "From Alexander Hamilton to Gouverneur Morris, 4 March 1802," *Founders Online,* National Archives, https://founders.archives.gov/documents/Hamilton/01-25-02-0300. [Original source: *The Papers of Alexander Hamilton*, vol. 25, *July 1800–April 1802*, ed. Harold C. Syrett. New York: Columbia University Press, 1977, pp. 558–560.].

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rule that conflated majoritarianism with major party preferences, and outcomes contrary to the relative political power of the parties were immediately suspect.[82]

For example, Thomas Jefferson's wrote to Speaker of the House Nathaniel Macon regarding Democratic Republican Party success in the 1802 midterms in North Carolina, letters that illustrate this conflation of majoritarianism and majority political party rule. Although his party won 11 of the state's 12 congressional seats, Jefferson questioned the legitimacy of the election of the lone Federalist from a predominately Republican district:

> …the Republican cause is daily gaining ground with us, not only the late elections but the candid acknowledgment of many that they have been deceived fully confirm the fact; … and it is worthy of notice that the district which sends the only federalist from the state to Congress, gave a majority of votes to Republican candidates.[83]

The fact that the Federalists were still competitive in some places, contrary to what Republicans perceived to be majority sentiment, led Republican Thomas McKean, then Governor of Pennsylvania, to note in an 1803 letter to Jefferson that, "The people do not always know their good; and when they do, it is not always pursued." Yet the fact that Republicans had been successful in the last general election in Pennsylvania assured him that "their late conduct however in this State has not depreciated them, nor do I believe that it will in the next election of President."[84] He cautioned, however, that unless the Constitution was amended then the choice of Vice-President could still go to someone who lacked majority support. "I believe," McKean noted, "[the twenty electors] will surrender the choice of Vice-President to the Tories, unless Congress will propose an amendment to the Constitution for discriminating the characters to be voted for."[85]

The centrality of partisanship to the new Amendment was not in doubt.[86] As Kean wrote to Jefferson in January 1804 upon signing an Act to ratify the Twelfth Amendment, "We shall, if this amendment shall be adopted by thirteen States, (which I believe it will, tho' probably no more, unless the effects of party shall in the mean time cease) have our next President and Vice-President

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[82] Cunningham 259 ("Effective organization and aggressive campaigning were keys to Republican success in the election of 1800. In their attention to party organization and machinery, the Republicans remained constantly aware of the necessity of maintaining popular support….The nature of democracy made it imperative that the people should play a prominent part in party activities, and political machinery was geared to win their votes.").

[83] "To Thomas Jefferson from Nathaniel Macon, 3 September 1803," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson/01-41-02-0242. [Original source: *The Papers of Thomas Jefferson*, vol. 41, *11 July–15 November 1803*, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2014, pp. 311–312.].

[84] "To Thomas Jefferson from Thomas McKean, 7 February 1803," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson/01-39-02-0406. [Original source: *The Papers of Thomas Jefferson*, vol. 39, *13 November 1802–3 March 1803*, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2012, pp. 471–474.] (promising Jefferson that "in 1804 the twenty electors of President & Vice-President will give their unanimous vote for the present Chief Magistrate").

[85] *Id.*

[86] "To Thomas Jefferson from DeWitt Clinton, 10 June 1802," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson/01-37-02-0464. [Original source: *The Papers of Thomas Jefferson*, vol. 37, *4 March–30 June 1802*, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2010, pp. 573–574.] Jefferson noted that the prospects of the Republican Party in South Carolina are "very good" and included, in his missive, a pamphlet that, according to an editorial note, believed to be *Considerations on the Propriety of Adopting a General Ticket in South-Carolina, for the Election of Representatives in Congress and Electors of President and Vice-President of the United States. Addressed to the People of South Carolina by Crito* (see Shaw-Shoemaker, No. 354). *Id.*

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genuine Republicans, otherwise I doubt it."[87] Moreover, the election of 1800 had led to the decline of the Federalist Party and, by implication, any meaningful opposition to both ratification and the path to the presidency.[88] In elections prior to the ratification of the Twelfth Amendment, the Republicans were "endeavoring not only to beat them [the Federalists]," according to a New York partisan, but "to beat them soundly; that they may be still next Spring and not attempt to intermeddle in the Legislature which is to appoint Electors for P. U.S. & V.P."[89]

The premise that political parties should filter majority preferences in the selection of the president was not without its controversy. By putting power back in the hands of the people, the Amendment reduced the likelihood that the presidency would be thrown to the House of Representatives, where all states—big and small—enjoyed equal voting power in the selection of the President and could maneuver the presidency into the hands of someone not preferred by a majority of voters.[90] In addition, delegations could only select among the top three candidates instead of the top five, thereby decreasing the likelihood that a political minority could conspire in the election of a fourth or fifth place finisher lacking in majority support. Some representatives opposed the Amendment because of this perceived shift of authority from the states (particularly the smaller states) to the people, given that the Amendment would make it less likely that presidential elections would be resolved by the House of Representatives, where each state delegation has one vote, and would be instead left to the public that was, in the words of one representative, "agitated with violent party rage."[91]

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[87] "To Thomas Jefferson from Thomas McKean, 8 January 1804," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-42-02-0222. [Original source: *The Papers of Thomas Jefferson*, vol. 42, *16 November 1803–10 March 1804*, ed. James P. McClure. Princeton: Princeton University Press, 2016, pp. 243–244.].

[88] The fact that a bill had been introduced in Massachusetts to divide the states into districts for the purpose of chosen presidential electors in 1803 is notable, given that the state had traditionally been a Federalist stronghold. See "To Thomas Jefferson from Joshua Danforth, 16 July 1803," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-41-02-0036. [Original source: *The Papers of Thomas Jefferson*, vol. 41, *11 July–15 November 1803*, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2014, pp. 60–61.] ("A motion will be made at the next Session of the Legislature of Massachusetts to divide the State into districts, for the Choice of electors of President&c, but it is very uncertain whether it will succeed, if it should, Massachusetts will give eight or nine Votes to the republican Candidate for President."). See also "To Thomas Jefferson from Joseph Barnes, 25 March 1804," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-43-02-0082. [Original source: *The Papers of Thomas Jefferson*, vol. 43, *11 March–30 June 1804*, ed. James P. McClure. Princeton: Princeton University Press, 2017, pp. 86–90.] ("In fine; so highly do I approve, & so ardent is my zeal for the principles & measures of the present Administration that were my efforts necessary, and were it possible, I would *waft* myself on the wings of friendship & esteem to *Ensure* the re-election of Mr Jefferson—however I am happy in the Opinion there will be but a *feeble* Opposition made especially as the Federalist party, from the general advice I receive, Seems daily to decline.").

[89] "To James Madison from Samuel Latham Mitchill, 28 April 1803," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/02-04-02-0660. [Original source: *The Papers of James Madison*, Secretary of State Series, vol. 4, *8 October 1802–15 May 1803*, ed. Mary A. Hackett, J. C. A. Stagg, Jeanne Kerr Cross, Susan Holbrook Perdue, and Ellen J. Barber. Charlottesville: University Press of Virginia, 1998, p. 558.].

[90] Cunningham 240.

[91] 13 Annals 518 (comments of Randolph) ("The present mode of bringing forward candidates for the office of President and Vice President is the least liable to call forth art, intrigue, and corruption; the uncertainty of the event and the difficulty of making arrangements are strong checks to the artful and designing. But the moment the mode pointed out by this resolution is adopted, the door for intrigue and corruption is open; the candidates and their friends can calculate with certainty and apply the means direct; the power of party, influence of office, art, cunning, intrigue, and corruption, will all be used, and used to effect, because the object is certain."); Id. at 532 (comments of Huger) ("when I see (it matters not whether intentionally or from inadvertence) that advantage is about to be taken of this circumstance, that in the moment of party irritation and party zeal, and at a time when it may be truly stated that the influence and interests of the larger States are completely triumphant, and many of the smaller States, unconscious of danger. are

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Majoritarianism nonetheless served a legitimizing function, and its reach extended beyond the formal strictures of the Twelfth Amendment to the informal congressional nominating caucuses that selected presidential candidates. The perceived absence of majority sentiment from the manner in which presidential candidates were chosen, by artificially shrinking the pool of available candidates, would lead to attacks on that mechanism from all corners of the political spectrum. The Federalists held a congressional nominating convention in 1800, selecting John Adams as their candidates, but abandoned the practice in subsequent elections due to their declining political strength. After the election of 1800, Federalists and Republicans alike attacked the Republican presidential caucus as undemocratic and divorced from majority rule; in the words of Republican dissidents, the caucus was "an attempt to produce an undue bias in the ensuing election of president and vice president, and virtually to transfer the appointment of those officers from the people, to a majority of the two Houses of Congress."[92] Republican principles required that the mediating institutions between the government and the people—in this context, the Electoral College—reflect the voters' preferences without the accompanying chaos of direct election that could result in the selection of the wrong individual to the highest office in the land. Some critics viewed the congressional caucuses as an additional intermediary, not constitutionally sanctioned, that could distort this process.

Yet the congressional nominating caucus was designed to throw party support behind a consensus candidate that would avoid a repeat of the election of 1800 in which the House of Representatives would select the president, potentially landing on someone who—like Aaron Burr—did not have the support of the people. The value of the caucus, according to North Carolina Republican (and 1824 caucus attendee) Richard Dodds Spaight, was that it was "consonant to the opinions of the majority of the people; or because that majority, having confidence in the persons recommending, adopt it as their own…The avowed object of these recommendations has been to concentrate and unite public sentiment…"[93] However, intra-party divisions and the expansion of the electorate led to increased calls for the abolition of the congressional nominating caucus, which, over time, had become increasingly unable to play this role. So long as the caucus continued to result in candidates that had broad support among the public, drama was mostly averted…until 1824.

The lack of a consensus candidate in the 1824 election led to the eventual demise of the caucus, which could no longer effectively communicate the preferences of the majority. In 1824, the presidential election was thrown to the House for the first time since 1800, an indication that the congressional nominating caucus could no longer serve the legitimizing function that it had served over the course of five election cycles (where party elites would filter, but still be largely reflective of, majority preferences). This was the first election in which the country had run out of founders to run for president, and a new crop of leaders vied for the presidency—John Quincy Adams, the son of a founding father; Andrew Johnson, a hero of the War of 1812; and Henry Clay, a powerful senator and eventual leader of the Whig Party. While William H. Crawford, Secretary of the

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enlisted from various causes under their banners; that at such a moment a proposition is brought forward to alter the Constitution in one of its most important features, and, under the plausible pretext of giving effect to the will of the people, the small States are at one blow to be deprived of the checks and safeguards secured to them by the Federal compact in the election of the Executive, and this important branch of the Government is henceforward and forevermore to be put entirely and exclusively into the hands of the larger States"); Id. at 536 (comments of Hastings) ("Besides, sir, I fear if the amendment obtains, that it may give a weight and influence to the large States in the Union, in the election of a President and Vice Present, that they ought not to possess.").

[92] History of U.S. Political Parties, Vol I, at 264.

[93] History of U.S. Political Parties, Vol I, at 270-71.

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Treasury under James Monroe, was considered by many to be the obvious preference of the caucus leading up to the 1824 presidential election, supporters of the other candidates nominated their preferred candidates in state legislative caucuses designed to compete with the congressional caucus. In 1822, the Tennessee legislature nominated Andrew Jackson; Massachusetts followed suit by nominating John Quincy Adams in 1823. Likewise, the legislatures of Kentucky and Missouri threw their support behind Henry Clay.[94] William Crawford would only receive 41 electoral votes after his selection in a caucus in which only a fraction of congressional Republicans participated.[95] The House of Representatives awarded John Quincy Adams the presidency, an outcome that many Jackson supporters decried as a corrupt bargain between Adams and Clay, then speaker of the House. Cries of a corrupt bargain would motivate Jackson supporters leading into the election of 1828, and form the basis of the second party system.

Despite the upheaval of the 1824 election, the ability of political parties to shape and redefine republicanism would not only survive the death of the caucuses and the first party system, but also have significant implications for the scope of federal power over voting and elections. First, political parties blurred the lines between state and federal officials, creating a synergy across branches that were originally supposed to work in opposition to each other.[96] State legislatures became more assertive in putting forward their own candidates, a splinter in the party that lead some congressional Republicans to also abandon the caucus and hasten its demise. Federalism—ostensibly preserved by the Twelfth Amendment—could not prevent coordination between officials at each level of government in the context of presidential elections. Political parties also connected state and federal officials in a way that prevented the states' role in the composition of the federal government from cabining federal authority. These entities rendered obsolete the Electoral College's intended purpose of protecting smaller states, by making it less likely that presidential disputes would be resolved by the House of Representatives in which small states had equal voting power with larger states.

Political parties also made it difficult to maintain the independence of the president because electors were committed to vote for the party's slate of candidates in advance of the election.[97] This remained true after the abolition of the congressional caucus and the move towards national nominating conventions. Political parties facilitated coordination across elections that extended beyond the presidency. For example, future Vice President Aaron Burr recruited candidates for New York's General Assembly in the spring of 1800 and campaigned relentlessly, resulting in a sweeping Republican victory for all 13 of New York's General Assembly seats.[98] The Republican dominance in the spring elections ensured that Democratic Republicans would receive all of New York's electoral votes for president that fall. Just as Burr's political maneuvering in the New York state legislative elections was key to the Democratic Republicans' fortunes in the 1800 presidential election that fall, partisan presidential politics would continue to impact and shape state and federal elections moving forward. Thus, the Twelfth Amendment, by elevating the role of both the voter

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[94] History of U.S. Political Parties, Vol I, at 268.

[95] History of U.S. Political Parties, Vol I, at 271.

[96] Separation of Parties, not Powers (arguing that separation of powers has to be viewed through the lens of party competition)

[97] Levinson & Pildes, *supra* note, at 2323; *see also* Kramer, *supra* note **Error! Bookmark not defined.**, at 225 ("[T]he power of state legislators to pick electors could have given the states considerable leverage over the chief executive had the Electoral College stayed true to its original design. But the emergence of the popular canvass and winner-take-all rule have deprived the College of most of its significance.").

[98] JOHN ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 233-24 (1993).

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and of political parties in presidential politics, set the stage for state and federal governments that were now accountable to the people.[99]

Conclusion

The independent state legislature theory, particularly in its strongest iteration in which the state legislature can act independent of the state courts and the state constitution, runs counter to the democratizing effect that the Twelfth Amendment was intended to have on presidential elections. But above all, any version of the doctrine, if adopted, has to respect majoritarian preferences. The Twelfth Amendment, largely viewed as a technical fix to Article II after the disastrous presidential election of 1800, endorsed this view of republicanism by elevating the preferences of "We the Voters" over those of the more amorphous "We the People" for whom legislatures could speak largely without direct accountability. With the Twelfth Amendment, the state legislatures were now beholden, not to themselves, but to the people. Conflicting with this principle, the independent state legislature theory allows the state legislature to disregard the preferences of the people right at the juncture in which they are exercising the oversight and accountability at the core of the majoritarian principles underlying our system of republicanism: during the election of federal officials.

[99] Partisan Gerrymandering as a Safeguard of Federalism (arguing that argue that states can gerrymander to maximize the number of districts that mirror the partisan composition of a majority of the electorate and the majority party in the state in order to ensure that state interests are represented nationally); Benign Partisanship

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LIQUIDATING THE INDEPENDENT STATE LEGISLATURE THEORY

46 HARV. J.L. & PUB. POL'Y ___ (FORTHCOMING 2023).

MICHAEL WEINGARTNER*

Following the 2020 Presidential election, an obscure and potentially revolutionary constitutional theory re-emerged. The so-called "independent state legislature" theory posits that the Constitution vests state legislatures with plenary power to craft rules for Congressional elections and to direct the appointment of presidential electors, unbound by state constitutions and free from review by state courts. Though the Supreme Court rejected this theory in the past, in 2020 four Justices signaled their seeming approval.

The debate over the independent state legislature theory pits textual arguments against the longstanding practice of states throughout our history. Every state constitution dictates the procedure by which state legislatures may enact election laws, and state constitutions are full of provisions which regulate nearly every aspect of federal elections from voter registration to congressional redistricting to absentee voting. Nearly all these provisions were enacted with the affirmative participation of state legislatures, and since the Founding they have, though state court review, constrained the authority of state legislatures when enacting election laws.

This Article operationalizes this history by applying James Madison's analytical framework of "constitutional liquidation," recently endorsed by the Supreme Court in Chiafalo v. Washington *to resolve whether states could control the votes of presidential electors. This framework posits that the meaning of indeterminate constitutional text may be liquidated—that is, settled—by longstanding and broadly accepted historical practice. Applying that framework here reveals that, while the constitution's text may be unclear as to the role of state constitutions in regulating federal elections, subsequent practice and the acquiescence of state legislatures, Congress, and the public has settled the Constitution's meaning and rejected the independent state legislature theory.*

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INTRODUCTION

Following the 2020 presidential election, an obscure and potentially revolutionary constitutional theory re-emerged. According to the so-called "independent state legislature" ("ISL") theory, the Constitution, through Article I, Section 4 (the Elections Clause) and Article II, Section 2 (the Electors Clause), vests state legislatures with plenary power to craft rules for Congressional and Presidential elections unbound by state constitutions and free from review by state courts.[1] This theory, repeatedly rejected by the Supreme Court, was roused from its slumber by a wave of litigation that pitted state legislatures against their constitutions. In the months before the election, the COVID-19 pandemic and concerns over in-person voting prompted numerous challenges to state election laws that limited absentee and early voting or imposed onerous signature match or witness requirements.[2] Roughly half of these challenges were brought in state courts under state constitutions,[3] many of which include election and voting rights provisions that go far beyond those found in the U.S. Constitution.[4] The Pennsylvania Supreme Court, for example, extended the absentee ballot deadline based on the state constitution's guarantee of "free and equal elections."[5] Meanwhile, changes to election rules made by governors, secretaries of state, and elections boards were challenged as usurping the exclusive power of state legislatures.[6] After election day, the theory took on a troubling new dimension as supporters of former President Trump called for Republican-controlled legislatures in states won by Joe Biden to reject the electors chosen by voters and instead appoint their own slates of pro-Trump electors.[7] While no alternate electors were appointed and efforts

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[1] *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Georgia L. Rev. 1 (2020).

[2] *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 Election Law Journal, 263 (2020); Eugene D. Mazo, *Voting During a Pandemic*, 100 Boston L. Rev. Online 233 (2020).

[3] *See* Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker, available at* https://healthyelections-case-tracker.stanford.edu/.

[4] *See* Joshua A. Douglas, *The Right to Vote under State Constitutions*, 67 Vand. L. Rev. 89 (2014).

[5] *See* Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

[6] *See* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. at *13 (forthcoming 2022) (listing four categories of Elections Clause challenges).

[7] *See* Lawrence Lessig & Jason Harrow, *State Legislatures Can't Ignore the Popular*

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to invoke the ISL theory in court were unsuccessful, four Justices signaled their willingness to consider at least some version of the theory,[8] including Justice Alito, who suggested the Pennsylvania Supreme Court's extended absentee ballot deadline may have violated the Elections Clause.[9]

Proponents of the ISL theory rely primarily on the textual argument that when the Elections and Electors Clauses grant authority to "the Legislature" of each state, they refer solely and exclusively to institutional representative legislative bodies.[10] This novel reading, however, conflicts with over two hundred years of historical practice. Since the Founding, state constitutions have regulated nearly every aspect of federal elections, from voter registration and balloting to congressional redistricting and election administration.[11] Most of these election-related provisions were presented by state legislatures and approved by voters. For centuries, these provisions have constrained both the process and substance of state election laws.

This Article contends that this longstanding practice, spanning all fifty states and with only scattered exceptions throughout history, has settled the meaning of the Elections and Electors Clauses and foreclosed the ISL theory. It draws on James Madison's analytical framework of "constitutional liquidation," under which the meaning of unclear or ambiguous constitutional text may be liquidated—i.e., settled—by a "regular course of practice".[12] The Supreme Court has increasingly looked to historical practice to resolve constitutional ambiguities,[13] including in election law.[14] Most recently, the Court explicitly adopted a liquidation framework in *Chiafalo v. Washington* to settle whether states may control

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Vote in Appointing Electors, Lawfare (Nov. 6, 2020), *available at* https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors.

[8] *See Democratic National Committee v. Wisconsin State Legislature,* 592 U.S. __ at 9, n.1 (2020) (Kavanaugh, J, concurring) (arguing that under the Electors Clause state courts may not "rewrite state election laws."); *Moore v. Circosta*, 141 S.Ct. 46, 47 (2020) (Gorsuch, J. dissenting) (noting that "under the Federal Constitution, only the state 'Legislature'" may enact election laws).

[9] *Republican Party of Pennsylvania v. Boockvar,* 592 U.S. __ at 3 (statement of Alito, J.).

[10] *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. 847, 855-59 (2015).

[11] *See infra* Part III.B.

[12] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 The Papers of James Madison: Retirement Series 500, 502 (David B. Mattern et al, eds. 2009).

[13] *See infra* Part II.A.

[14] *See infra* Part II.B.

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the votes of members of the Electoral College.[15]

Following the Court's lead, this Article examines the debate over the ISL theory through the liquidation framework. Part I provides background on the Clauses, the Supreme Court's doctrine, and the theory's 2020 re-emergence. Part II explores how settled historical practice informs the Court's interpretation of the Constitution and how the Court has applied liquidation in election cases, including *Chiafalo*. Part III then applies the liquidation framework to the ISL theory and concludes that, while the Constitution's text is not dispositive, the subsequent history is. Since the Founding, there has been a consistent, deliberate practice of state constitutions regulating federal elections and constraining state legislatures, one which enjoys the acceptance of courts, Congress, the public, and even state legislatures themselves. This strongly suggests the meaning of the Elections and Electors clauses has been settled in favor of state constitutional constraints and that the ISL theory should, once again, be rejected.

I. BACKGROUND

A. The Clauses

The Constitution empowers states to regulate federal elections in two places. First, the Elections Clause of Article I provides that "[t]he Times, Places, and Manner" for congressional elections "shall be prescribed in each State by the Legislature thereof."[16] Second, the Electors Clause of Article II empowers states to "appoint, in such Manner as the legislature thereof may direct, a number of electors"[17] to cast votes for president and vice president.[18] Both Clauses refer to state legislatures using identical language, suggesting each confers authority in the same manner and with the same effect—if any—on the power of state constitutions to constrain state legislatures.[19]

1. The Elections Clause

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[15] 140 S.Ct. 2316.

[16] U.S. Const. Art. I. § 4.

[17] U.S. Const. Art. II, §1, cl. 2.

[18] *See* U.S. Const. Amend. XII.

[19] *See* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. Rev. at *9 (forthcoming 2021) ("What is true of the delegation to the 'Legislature' for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors.").

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The Elections Clause empowers states to regulate the "times, places, and manner" of congressional elections, with the caveat that "Congress may at any time by Law make or alter such Regulations."[20] Congress's power under the Elections Clause is thus coextensive with that of the states. The Constitution does not define the terms "times," "places," or "manner," but the Supreme Court has held that their "substantive scope is broad"[21] and that they "embrace authority to provide a complete code for congressional elections," including "notice, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[22] This authority overlaps with several state constitutional provisions.[23]

A thornier question is whether the Elections Clause confers the power to regulate voter qualifications, which nearly all state constitutions do.[24] On the one hand, Article I's Qualifications Clause states that voters in House elections "shall have the Qualifications requisite" for state legislative elections.[25] In light of this specific language, the Supreme Court has stated in dicta that the more general Elections Clause does not extend to voter qualifications.[26] On the other hand, in *Oregon v. Mitchell* the Court upheld amendments to the Voting Rights Act which lowered the minimum voting age from twenty-one to eighteen for congressional elections.[27] Four Justices would have upheld the amendments under the Fourteenth Amendment,[28] but Justice Black's controlling opinion upheld it under the Elections Clause, writing that "[T]he powers of Congress to regulate congressional elections[]

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[20] U.S. Const. Art. I S 4, cl. 1.

[21] Arizona v. Inter-Tribal Council, 570 U.S. 1, 8 (2013).

[22] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[23] *See infra* Part III.B.

[24] *See* Douglas, *supra* note **Error! Bookmark not defined.** at 101-02.

[25] U.S. Const. Art I, Sec 2, cl 1. The Seventeenth Amendment applies the same requirement to U.S. Senate elections. *See id.* Amend. XVII, cl. 1.

[26] *See* Inter-Tribal Council, 570 U.S. at 16 ("One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly."); *see* also Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) ("It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control.").

[27] 400 U.S. 112 (1970).

[28] *See id.* At 117-118 (Opinion of Black, J.).

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includ[e] the age and other qualifications of the voters."[29] Despite the Court's more recent statements, *Mitchell* has not been overturned and remains good law today.[30] Congress has also imposed a citizenship requirement for congressional elections and required states to allow military and overseas citizens to vote for Congress.[31] The line between a voter qualification and a "manner" regulation may also be blurry. Requiring voters to register or pay a poll tax may be a qualification, but laws laying out specific payment or registration procedures go farther and regulate the "manner" of elections.[32]

2. The Electors Clause

While the Elections Clause empowers states to regulate the time, place, and manner of congressional elections, the Electors Clause addresses only the "manner" of appointing presidential electors.[33] Though this narrower text may appear to confer a narrower authority,[34] the Supreme Court has construed the Electors Clause as coextensive with the Elections Clause,[35] holding that the Clause grants states "plenary authority to direct the manner of appointment."[36] The use of the word "manner" in both clauses suggests

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[29] *Id.* at 122. *See also id.* at 124 ("Congress has ultimate supervisory power over congressional elections.").

[30] *See* Richard L. Hasen, *Too Plain for Argument: The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees through Direct and Equal Primaries*, 102 Nw. U. L. Rev. 2009, 2018 (2008).

[31] *See* 18 U.S.C. S 611 (2018) (citizenship requirement); 52 U.S.C. SS 20301-11 (2018) (overseas requirement). While neither provision has been challenged in court, some commentators have criticized them. *See generally* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCOVA and Voting Rights to Permanent Expatriates on a Sound Constitutional Footing*, 81 Brook. L. Rev. 441 (2016); Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 Loy. L. Rev. 447 (2017).

[32] *See infra* note 303 and accompanying text.

[33] U.S. Const. art. II, § 1, cl.2.

[34] *See* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power,* Constitutional Commentary at *40 (forthcoming 2021) ("As a textual matter, the Electors Clause is plainly narrower than the Elections Clause.").

[35] *See* Morley, *supra* note **Error! Bookmark not defined.** at *15 n.45 (discussing Supreme Court precedent); Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 Wm. & Mary L. Rev. 851, 892 (2002) ("[T]he [Electors Clause] power is fully coextensive with Congress's sweeping authority to regulate in any way the 'Manner' of House and Senate elections.").

[36] McPherson v. Blacker, 146 U.S. 1, 25 (1892).

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a similar meaning,[37] while omitting "times" and "places" from the Electors Clause may simply reflect that states may appoint electors without holding elections.[38]

Likewise, while Article II's text only allows Congress to set the time for choosing electors,[39] the Supreme Court has interpreted Congress's power as coextensive with states.[40] In *Ex Parte Yarborough*, the Court upheld a portion of the Ku Klux Klan Act criminalizing conspiracies to intimidate voters to prevent them from supporting congressional candidates or presidential electors.[41] In *Burroughs v. United States*, the Court upheld the financial disclosure and reporting requirements of the Federal Corrupt Practices Act, holding that Congress "undoubtedly" possesses the power "to safeguard [a presidential] election from the improper use of money to influence the result."[42] And when the *Mitchell* court upheld Congress's lowering of the voting age to eighteen, it did so for both congressional and presidential elections, explaining that "it cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[43]

There is a stronger case that voter qualifications fall within the Electors Clause's scope.[44] While the Qualifications Clause addresses qualifications for voters in congressional elections, it makes no reference to—and thus does not limit—qualifications to vote for presidential electors.[45] This suggests the "manner" of appointing electors under the Electors Clause

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[37] *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1750-51 (2002) ("There is little reason to suppose that the word "Manner" in [the Elections Clause] has a substantially different meaning from the word "Manner" in [The Electors Clause].").

[38] *See* Bush v. Gore, 531 U.S. 98, 105 (2000) (per curiam) (noting that a state may choose to "select the electors itself" rather than hold an election and may at any time "take back the power to appoint electors).

[39] U.S. Const. Art. II S 1 cl. 5.

[40] *See* U.S. Term Limits, Inc. V. Thornton, 514 U.S. 779, 894 (1995) (Thomas, J., dissenting) ("[T]he treatment of congressional elections in Article I parallels the treatment of Presidential elections in Article II.").

[41] 110 U.S. 651, 660-62 (1884).

[42] 290 U.S. 534, 545 (1934).

[43] 400 U.S. 112, 124 (opinion of Black, J.).

[44] *See* Derek T. Muller, *Weaponizing the Ballot*, 48 Fla. St. U. L. Rev. 61, 89 (explaining that the Electors Clause "includes the power to define the body of voters that chooses presidential electors").

[45] U.S. Const. art. I, § 5, cl. 1. *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. of Const. L. 1, 21 (2010) (arguing that the Electors Clause is "the counterpart to the provision in Article I authorizing the states to set the qualifications of persons choosing the House of Representatives").

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includes the power to decide voter qualifications.[46]

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Despite their textual differences, the Elections and Electors Clauses share two important features. First, each confers the same substantive power on states and Congress. Second, each delegates that power to states—and state "legislatures"—in an identical manner. To the extent either disrupts the status quo of state legislatures as constrained by state constitutions, they do so in the same way and to the same degree.

B. The Doctrine

Current Supreme Court doctrine rejects the ISL theory's literalist reading of the Elections and Electors Clauses and has consistently held that a state legislature's power to craft rules for federal elections is constrained by state constitutions. In *Ohio* ex rel. *Davis v. Hildebrant,* the Court considered a provision of the Ohio Constitution allowing citizens to nullify acts of the legislature by popular referendum.[47] Such a referendum was used to overturn Ohio's redistricting plan, and a group of voters sued claiming the Elections Clause granted the state legislature exclusive authority over redistricting.[48] The Supreme Court rejected this argument and upheld the referendum.[49] Four years later, in *Hawke v. Smith*, the Court held this same Ohio referendum could not be used to block ratification of the Eighteenth Amendment and stated that ratification was "entirely different" from states' Elections Clause authority.[50]

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[46] If the Electors Clause grants Congress the power to set voter qualifications in presidential elections, two structural arguments suggest it should have the same authority over congressional elections despite the Qualifications Clause. First, as in *Mitchell*, it makes little sense for Congress to have greater power over presidential elections than over congressional elections. Second, congressional and presidential elections are conducted simultaneously, and the Supreme Court has already held that the Congress may make laws affecting state elections held concurrently with federal elections. *See Ex Parte Yarborough,* 110 U.S. at 662; Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 17 (2007) ("[T]he Elections Clause has long been interpreted to give Congress power over so-called 'mixed elections'—that is, to permit Congress to regulate all aspects of an election (or an electoral process) used even in part to select members of Congress."). It thus follows that Congress may regulate "mixed" congressional and presidential elections, including as to setting voter qualifications.

[47] 241 U.S. 565, 566 (1916).

[48] *Id.* at 566-67.

[49] *Id.* at 569.

[50] 253 U.S. 221, 225, 231 (1920).

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That difference was clarified in *Smiley v. Holm*, which asked whether the Minnesota legislature's congressional redistricting plan was subject to a gubernatorial veto per the state constitution.[51] The Supreme Court held that it was, and explained that the Constitution confers upon state legislatures a variety of different functions, including an "electoral" function when selecting Senators (prior to the adoption of the Seventeenth Amendment), a "ratifying" function for proposed Constitutional Amendments, and a "consenting" function with respect to lands acquired by the United States.[52] Because these functions go beyond ordinary lawmaking, they are not subject to state constitutional limits.[53] But, the Court explained, when a state legislature enacts laws under the Elections Clause it is engaged in ordinary lawmaking and therefore subject to the usual constraints.[54] Thus, while a state constitution may not restrict a state legislature's ratification function,[55] a state's redistricting plan—an act of ordinary lawmaking—remains subject to a governor's veto.[56]

The Court reaffirmed the power of state constitutions to constrain state legislatures in *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*.[57] There, the people of Arizona had adopted a state constitutional amendment via ballot initiative establishing an independent redistricting commission.[58] The Arizona legislature challenged the Commission's map, arguing that the Elections Clause precluded any entity other than it from redistricting.[59] The Court rejected this argument, holding that the term "legislature" under the Elections Clause included the initiative process as established by the Arizona Constitution.[60] Thus, state constitutions could both constrain and remove the authority of state legislatures. *AIRC* generated significant scholarly debate and a strong dissent by Chief Justice Roberts.[61] But four years later in *Rucho v. Common Cause*, all nine Justices embraced state constitutions, state courts, and independent redistricting commissions as valid means of curbing excessive

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[51] 285 U.S. 355, 363 (1932).

[52] *See id.* 365-366.

[53] *Id.* at 369.

[54] *Id.* at 367-68 (holding the Elections Clause did not "endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the state has provided").

[55] *See Hawke*, 253 U.S. 221.

[56] *See Smiley* 285 U.S. 355.

[57] 576 U.S. 787 (2015).

[58] *Id.* at 792.

[59] *Id.*

[60] *Id.* at 793.

[61] *See id.* at 823-850 (Roberts, C.J., dissenting).

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partisan gerrymandering.[62]

Proponents of the ISL theory, however, claim to find support in a different set of Supreme Court decisions. The first of these, *McPherson v. Blacker*,[63] is frequently cited as controlling precedent for its discussion—in dicta—of the role of state constitutions under the Electors Clause.[64] Decided in 1892, *McPherson* involved a challenge to the Michigan legislature's decision to elect presidential electors by district, rather than on a winner-take-all basis.[65] The claim was that this scheme violated the Electors Clause, which required "[e]ach state" to appoint presidential electors, rather than subdivisions of a state.[66] The Supreme Court disagreed, explaining that the Electors Clause "leaves it to the legislature exclusively to define the method" of appointing electors.[67] *McPherson*'s holding thus does not address state constitutions at all. In dicta, however, the Court wrote that, while state legislatures ordinarily must exercise "legislative power under state constitutions as they exist," the express delegation of authority under the Electors Clause "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power."[68] But the Court did not elaborate on the nature of such a limitation, and the surrounding context does not suggest that the Court embraced the ISL theory; a few pages later, the Court cited with approval federal statutes that required states in special circumstances to appoint electors "by law;" that is, via the ordinary lawmaking process laid out in state constitutions.[69]

Proponents of the ISL theory also point to *Bush v. Palm Beach County Canvassing Board* (*Bush I*), decided after the 2000 presidential election.[70] The Court vacated the Florida Supreme Court's decision requiring election officials to include votes from recounts requested by Al Gore.[71] The Florida Supreme Court had construed the state's election code based in part on the Florida constitution's right to vote.[72] The Supreme Court explained, though,

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[62] See *Rucho v. Common Cause,* 139 S.Ct. 2484, 2507 (2019) (opinion of Roberts, C.J.); *id.* at 2524 (Kagan, J., dissenting).

[63] 146 U.S. 1 (1892).

[64] *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 516 (2021).

[65] *Id.* at 4-5

[66] *Id.* at 6.

[67] *Id.* at 36.

[68] *Id.* at 25.

[69] *Id.* at 40-41. *See also* Levitt, *supra* note 19 at 13.

[70] 531 U.S. 70 (2000).

[71] *See Palm Beach County Canvassing Bd. v. Harris,* 772 So. 2d 1220 (Fla. 2000).

[72] *See Bush I*, 531 U.S. at 77 (quoting *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1236-37.

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that when a state enacts laws governing the selection of presidential electors it is "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" from the Presidential Electors Clause.[73] The Court cited *McPherson*'s "limitation" on how much a state constitution could "circumscribe" the state legislature, but declined to rule on the matter, instead remanding the case so the Florida Supreme Court could clarify the extent to which it had relied on the state constitution.[74]

Before this could be resolved, the Florida Supreme Court issued another opinion ordering a manual recount in certain counties, this time based on state law with no reference to the state constitution.[75] In *Bush v. Gore (Bush II)*, a divided Supreme Court stayed the recounts based on the Fourteenth Amendment and thus never reached the Electors Clause issue.[76] Chief Justice Rehnquist, however, wrote a concurring opinion that embraced a form of the ISL theory under which the Electors Clause not only precluded state constitutional limits on state legislatures but also prohibited state courts from departing too far from the "plain text" of state election laws.[77] The rest of the Court, however, did not embrace this view, which drew sharp dissents from four Justices.[78]

In sum, the Court has consistently held that state legislatures remain constrained by state constitutions when they exercise authority under the Elections and Electors Clauses, and neither *McPherson* nor *Bush I* demonstrate a departure from that doctrine or an embrace of the ISL theory.

C. The Debate

Although a majority of the Supreme Court rejected the ISL theory in *AIRC* and all nine Justices endorsed state constitutions as a check on state legislatures in *Rucho*, this does not appear to have resolved the matter. The 2020 election breathed new life into the debate, with four Justices signaling their willingness to consider some version of the theory. In an appeal from the Pennsylvania Supreme Court's decision to extend the absentee ballot deadline, Justice Alito—joined by Justices Thomas and Gorsuch—wrote that the Elections and Electors Clauses confer authority "on state legislatures, not state courts," and that they "would be meaningless if a state court could

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[73] *Id.* at 76.

[74] *Id.* at 77 (quoting *McPherson,* 146 U.S. at 25).

[75] *See Gore v. Harris,* 772 So. 2d 1243, 1248 (2000).

[76] *Bush v. Gore,* 531 U.S. 98, 110-11.

[77] *Id.* at 111, 113 (Rehnquist, C.J., concurring).

[78] *Id.* at 123 (Stevens, J., dissenting); *id.* at 130 (Souter, J., dissenting); *id.* at 141 (Ginsburg, J., dissenting); *id.* at 148 (Breyer, J., dissenting).

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override the rules adopted by the legislatures simply by claiming at a state constitutional provision gave the courts the authority to make what rules it thought appropriate for the conduct of a fair election."[79] Justice Gorsuch wrote that a state elections board had no authority to "(re)writ[e] election laws" enacted by the state legislature, and that doing so "offend[s] the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators."[80] And Justice Kavanaugh cited Chief Justice Rehnquist's *Bush II* concurrence for the proposition that "state courts do not have a blank check to rewrite state election laws for federal elections" and argued that "a state court may not depart from the state election code enacted by the legislature."[81]

These Justices were not alone. The Eighth Circuit held that "the Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state," and that "this vested authority is not just the typical legislative power exercised pursuant to a state constitution."[82] Likewise, three Fourth Circuit judges wrote in dissent that the Elections and Electors Clauses grant power "to a specific entity within each State: the 'Legislature thereof,'" and that the only check on this power lies with Congress, not state courts.[83] Litigants in other cases attempted to invoke the theory with less success.[84] And while most scholars rejected the theory following *Bush II*,[85] some commentators have recently come to defend it.[86]

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[79] Repub. Party of Penn. V. Boockvar, 141 S.Ct. 1, 2 (mem) (2020) (statement of Alito, J.).

[80] Moore v. Circosta, 141 S.Ct. 46 (Mem) (2020) (Gorsuch, J., dissenting).

[81] Democratic Nat'l Comm. v. Wisc. St. Leg., 141 S.Ct. 28 (Mem) (2020) (Kavanaugh, J., concurring).

[82] Carson v. Simon, 978 F.3d 1051, 1059-60 (8th Cir. 2020).

[83] Wise v. Circosta, 978 F.3d 93, 111-12 (4th Cir. 2020) (en banc) (Wilkinson, Agee, and Neimeyer, J.J., dissenting).

[84] *See, e.g,* Complaint for Emergency Injunctive Relief, Hotze v. Hollins, No. 4:20-cv-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020) (alleging a violation of the Elections Clause in a challenge to a county allowing drive-in voting); Verified Complaint for Emergency Injunctive and Declaratory Relief, Trump v. Kemp, No. 1:20-cv-05310, 2020 WL 7872546 (N.D. Ga. Dec. 31, 2020) (alleging Georgia's Governor and Secretary of state violated the Electors Clause by certifying the state's presidential election results).

[85] See Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037 (2000); Robert Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 Fla. St. L. Rev. 661, 672 (2001). *But see* Richard Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. Chi. L. Rev. 613 (2001).

[86] *See* Morley, *supra* note **Error! Bookmark not defined.**.

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It is clear that the debate remains alive, and that arguments in favor of the ISL theory will only grow more numerous and sophisticated between now and the next federal election.[87] Despite longstanding precedent to the contrary, we cannot be certain how these arguments will fare either at the Supreme Court or in Congress, which has the power to decide contested congressional elections and which will ultimately have to certify the results of a future presidential election.

II. CONSTITUTIONAL INTERPRETATION AND SETTLED PRACTICE

Proponents of the ISL theory commonly rely on textual arguments.[88] Opponents largely point to precedent and Founding-era history[89] while noting how adopting the theory would disrupt our electoral system.[90] Missing from this discussion, however, is what should be most obvious: state legislatures already *are* constrained by state constitutions when they enact election laws and have been since the Founding. Every state constitution dictates the procedure by which election laws must be enacted, and state constitutions are full of provisions relating to nearly every aspect of federal elections, from voter qualifications and registration to congressional redistricting and the minutiae of election administration.[91] These provisions—nearly all of which were enacted with the active and

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[87] *See* Richard L. Hasen, *Trump is Planning a Much More Respectable Coup Next Time*, Slate.Com (Aug 5, 2021) ("[E]xpect white shoe-lawyers with Federalist Society bona fides to argue next time about application of the 'independent state legislature' doctrine.").

[88] *See AIRC*, 576 U.S. at 823-850 (Roberts, C.J., dissenting); Morley, *supra* note 10.

[89] *See* Larry D. Kramer, *The Supreme Court in Politics*, in The Unfinished Election of 2000, at 105, 122 (Jack N. Rakove ed., 2001) (noting a lack of historical evidence supporting the ISL theory); Robert A. Schapiro, Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore, 29 Fla. St. U. L. Rev. 661, 672 (2001) (arguing the ISL theory "does not rest on firm foundations of text, precedent, or history"); Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 Colum. L. Rev. 350, 354 (2003); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 Fla. St. U. L. Rev. 691 727-28 (2001) ("as a matter of historical practice, state legislatures were not understood at the [Founding] to be more 'independent' by virtue of Article II … than they were when acting pursuant to any other source of authority."); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. Pa. J. Const. L. 1167, 1194 n. 135 (2007) ("there is not historical support for the significance of the language in [the Electors Clause].").

[90] *See* Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L. J. 689, 690 (2016) (arguing the "consequences would be both bizarre and disastrous" if the Court were to adopt the ISL theory).

[91] *See infra* Part III.B.

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affirmative involvement of state legislatures[92]—have not only regulated federal elections directly but have also, through state court review, constrained state legislatures' exercise of their authority under the Elections and Electors Clauses for centuries.

What to make of this tension? Where practice conflicts with clear constitutional text, we would expect the text to prevail.[93] But where the text is unclear, the Supreme Court has long relied on historical practice to settle constitutional meaning.[94] Some scholars have termed this practice "historical gloss,"[95] after Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[96] and his contention that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on 'executive power' vested in the President."[97] Others ground the practice in James Madison's concept of "constitutional liquidation,"[98] which posits that indeterminate constitutional text "might require a regular course of practice to liquidate and settle [its] meaning."[99] Because gloss and liquidation look to the practice of government actors, they have been most commonly employed to resolve separation-of-powers disputes.[100] But the Court has also looked to historical practice to resolve constitutional ambiguities related to elections, most recently in *Chiafalo v. Washington*,[101] where the Court explicitly invoked Madisonian liquidation to settle whether states could cabin the discretion of presidential electors.[102] This Part discusses the Supreme Court's recent embrace of Madisonian liquidation and what that analysis entails before focusing on how the Court has applied liquidation to

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[92] *See infra* Part III.C.

[93] *See* Keith E. Whittington, *The New Originalism*, 2 Geo. J. L. & Pub. Pol'y 599, 610 (2004).

[94] *See United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915); *Ex Parte Grossman*, 267 U.S. 87, 118-19 (1925); *The Pocket Veto Case*, 279 U.S. 655, 689; *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

[95] *See* Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 417 (2012).

[96] 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

[97] *Id.*

[98] *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019).

[99] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 The Papers of James Madison: Retirement Series 500, 502 (David B. Mattern et al. eds., 2009).

[100] *See* Joseph Blocher & Margaret Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1 (2017); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 Va. L. Rev. 1, 3 (2020).

[101] 140 S.Ct. 2316.

[102] *Id.* at 2326.

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interpret the Constitution's various election-related provisions.

A. Settled Practice and the Liquidation Framework

The Supreme Court has often relied on historical practice to guide its interpretation of unclear constitutional text. Recently, the Court has embraced Madisonian liquidation as a specific framework for doing so.[103] In 2014, the Court in *National Labor Relations Board v. Noel Canning* interpreted the Recess Appointments Clause, which provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate."[104] Justice Breyer, writing for the majority, invoked Madison liquidation and characterized the Court's past reliance on historical practice as "continually confirm[ing] Madison's view."[105] After determining that the text was ambiguous as to whether it referred to inter- or intra-session recesses,[106] the Court looked to the history of intra-session recess appointments and the Senate's lack of opposition to conclude that the Clause addressed both types of vacancies.[107] This focus on text, historical practice, and acceptance by institutional actors laid out a basic framework for Madisonian liquidation.

Since then, the Court has applied the same framework to the President's recognition power,[108] the Appointments Clause,[109] and Congress's subpoena power.[110] Of the many scholars who have explored constitutional liquidation,[111] Professor William Baude provides the most thorough treatment of its requirements and application.[112] Examining the writings of

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[103] The degree to which Madisonian liquidation differs from related frameworks, such as historical gloss, is the subject of some debate. *See* Bradley & Siegel, *supra* note 100 at 39-59; Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame L. Rev. 1753, 1775 (2015).

[104] 573 U.S. 513, 520 (2014); *see also* U.S. Const. art. II, § 2, cl. 3.

[105] *Id.* at 525 (collecting cases).

[106] *See id.* at 528.

[107] *Id.* The Court invalidated the specific appointments at issue because it held a three-day recess was too short to trigger the Clause, again relying on historical practice. *See id.*

[108] *See Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2091 (2015).

[109] *See Financial Oversight and Management Board for Puerto Rico v. Aurelius,* 140 S.Ct. 1649, 1659.

[110] *See Trump v. Mazars USA, LLP,* 140 S.Ct. 2019, 2031 (2020).

[111] *See* Fallon, *supra* note 103; Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745 (2015); Daphna Renan, *Presidential Norms and Article II*, 131 Harv. L. Rev. 2187 (2018); Paul G. Ream, Note, *Liquidation of Constitutional Meaning Through Use*, 66 Duke L. J. 1645 (2017).

[112] *See* Baude, *supra* note 98.

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James Madison, he identifies three elements of a liquidation analysis: (1) a discrete textual indeterminacy, (2) a deliberate course of practice reflecting constitutional reasoning, and (3) acquiescence by institutional actors and the public.[113]

B. Liquidation and Election Law

Much of the discussion around liquidation has focused on separation-of-powers disputes, where historical practice and acquiescence by government actors are front and center.[114] Recently, some commentators have explored whether other areas of constitutional law, such as individual rights, might also be amenable to a liquidation analysis.[115] And since the Supreme Court's decision in *Chiafalo*, scholars such as Professors Guy Charles and Luis Fuentes-Rohwer have begun to examing liquidation's role in election law.[116] This Section helps build on this progress by providing an account of how election-related constitutional provisions can be liquidated, one informed by the Supreme Court's own practice.

There are several reasons why liquidation is an appropriate framework to resolve election-related constitutional ambiguities. First, because elections occur regularly, there is an ample historical record from which to ascertain whether a given practice is longstanding and consistent. Second, because elections are open and contested, there is strong incentive to challenge any perceived constitutional infirmities, so we may be confident that a settled course of practice is the result of deliberation and acceptance. Third, because elections depend on widespread public involvement, popular acquiescence is also ascertainable.

Historical practice featured in those cases that considered state constitutions under the Elections and Electors Clauses. *McPherson*

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[113] *See id.* at 16.

[114] *See Blocher & Lemos,* supra *note* 100; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 Geo. L.J. 255 (2016); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 Sup. Ct. Rev. 1 (2015); Bradley & Siegel, *supra* note 103.

[115] *See* Aziz Z. Huq, *Fourth Amendment Gloss*, 113 Nw. U. L. Rev. 701 (2019); Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, George Mason University Legal Studies Research Papers Series, LS 21-06 (2021).

[116] *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo, *Constitutionalizing Historical Gloss in Law & Democratic Politics*, Duke Law school Public Law & Legal Theory Series No. 2020-68 (2020). Rebecca Green provides another example, also inspired by the *Chiafalo* decision. *See* Rebecca Green, *Liquidating Elector Discretion*, 15 Harv. L. &. Pol'y Rev. 53 (2020).

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dedicated several pages to reviewing the various ways in which states had historically appointed presidential electors to hold Michigan's scheme constitutional.[117] The Court emphasized that "no question has ever arisen as to the constitutionality of either" a statewide or a district-based scheme[118] and thus construed the Electors Clause based on settled historical practice—i.e., liquidation.[119] The *Smiley* Court also endorsed a form of liquidation, holding that where the constitution is ambiguous, "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning"[120] and describing the settled and "uniform" practice of state election laws being subject to a governor's veto.[121] Likewise, the *AIRC* court looked to historical practice to hold that the term "Legislature" under the Elections Clause can include a ballot initiative.[122] The Court emphasized that, while "[d]irect lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted," the practice "gained a foothold" by the early twentieth century.[123] While *AIRC* did not rely solely on historical practice, the weight it gave to the history of direct lawmaking illustrates how a novel or still-emerging practice may be sufficiently settled for liquidation purposes.

The Supreme Court has also looked to settled practice to interpret other ambiguous constitutional provisions as they relate to elections. In *Burson v. Freeman*, the Court considered a First Amendment challenge to a Tennessee law prohibiting campaign speech within 100 feet of a polling place on election day.[124] After designating the area around polling places as a public forum, a plurality looked to historical practice to determine whether the state had a compelling interest in protecting voters and "the necessity of restricted areas in or around polling places."[125] That history revealed the vulnerability of voters to intimidation and undue influence.[126] In response, states adopted secret ballots and regulated election speech near polling

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[117] *See* McPherson, 146 U.S. at 18-35.

[118] *Id.* at 33 (quoting 1 Joseph L. Story, Commentaries on the Constitution of the United States § 1466 (1833)).

[119] *See Noel Canning*, 573 U.S. at 526 (citing *McPherson* as an early example of Madisonian liquidation).

[120] *See Smiley*, 285 U.S. at 369.

[121] *Id.* at 369-371.

[122] *See AIRC*, 576 U.S. at 793-96.

[123] *Id.* at 793-94 (quoting Donovan & Bowler, An Overview of Direct Democracy in the American States, in Citizens as Legislators 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998).

[124] 504 U.S. 191 (1992).

[125] *Id.* at 199-200.

[126] *Id.* at 200-02.

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places.[127] This practice persisted throughout the twentieth century, and the plurality noted that "all 50 States . . . settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments."[128] This "widespread and time-tested consensus" demonstrated that such laws satisfied strict scrutiny.[129]

The *Burson* plurality relied on historical practice as part of its strict scrutiny analysis, but Justice Scalia, who provided the crucial fifth vote, went further. In his view, the history cited by the plurality didn't just demonstrate the necessity of such laws; it also reflected a shared understanding that "the streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate," and that content-based restrictions there need only be "reasonable and viewpoint neutral."[130] In other words, historical practice had settled the meaning of the First Amendment with respect to polling places.

In 2016's *Evenwel v. Abbott*, a group of voters challenged Texas's legislative districting plan, arguing that the Fourteenth Amendment's equal protection clause required apportionment based on voter-eligible population, rather than total population.[131] The Supreme Court rejected this argument based not only on history and precedent, but also the "settled practice" of using total population, which "all 50 States and countless local jurisdictions have followed for decades, even centuries."[132] While *Evenwel* did not hold that the Constitution *required* apportionment based on total population, it may still be read as liquidating what the Constitution does *not* require—that is, apportionment based on eligible voter population.[133]

Most recently, the Supreme Court adopted a liquidation framework in *Chiafalo v. Washington*, which concerned whether, under the Electors Clause and the Twelfth Amendment,[134] States could subject presidential electors to fines or removal if they did not vote for their party's preferred candidate.[135] This question pitted the constitution's text—which many

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[127] *See id.* at 202-04

[128] *Id.* at 205-06.

[129] *Id.* at 206.

[130] *Id.* at 215, 216 (Scalia, J., concurring).

[131] 136 S.Ct. 1120 (2016).

[132] *Id.* at 1132.

[133] *See id.* at 1132-33 ("Because history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population.").

[134] U.S. Const. amend. XII.

[135] *Chiafalo,* 140 S.Ct. at 2319-20 (2020).

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argued envisioned electors exercising discretion[136]—against the longstanding practice of electors adhering to the will of the political parties and voters who select them.[137] Justice Kagan, writing for the court, resolved the issue by invoking Madisonian Liquidation.[138]

Justice Kagan began with the text of the Electors Clause, which "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint."[139] This authority, she continued, included placing conditions on appointment, such as a residency requirement or a pledge to vote for their party's nominee.[140] Absent any contrary constitutional provision, States are free to enforce such pledges.[141] The faithless electors, however, argued that three pieces of text provided for elector discretion. First, they argued the use of the term "electors"—which the Constitution also uses to describe individual voters—connotes choice.[142] Second, they argued that the Twelfth Amendment's requirement that electors shall "vote . . . for President and Vice President," likewise connotes discretion.[143] Third, they argued that the Twelfth Amendment's directive that electors vote "by ballot" suggests both secrecy and discretion, both of which "conflict[] with any notion of state control over the vote of an elector."[144] In short, if states could control the votes of presidential electors, then "the electors would not be 'Electors,' and their 'vote by Ballot' would not be a 'vote.'"[145]

But where the faithless electors saw the constitutional text as clear, Justice Kagan saw indeterminacy. As she explained, the terms "elector," "vote," and "ballot" "need not always connote independent choice."[146] She offered hypothetical examples of "electors" who lack meaningful choice but whose "ballots" might nonetheless be considered "votes," such as "a person [who] always votes in the way that his spouse, or pastor, or union tells him

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[136] *See* Charles & Fuentes-Rohwer, supra note 116 at 5; The Federalist No. 68, at 354 (Hamilton) (C. Rossiter ed. 1961); Stephen M. Sheppard, *A Case for the Elector College and for Its Faithless Elector*, 2015 Wis. L. Rev. Online 1, 3-5 (2015).

[137] *See Chiafalo*, 140 S.Ct. at 2328 (noting only 180 faithless votes out of over 23,000).

[138] *Id.* at 2326.

[139] *Id.* at 2324.

[140] *See id.*

[141] *See id.*

[142] *See* Consolidated Opening Brief for Presidential Electors at 23-26, *Chiafalo v. Washington*, 140 S.Ct. 2316 (2020) (Nos. 19-465), 2020 WL 1372783.

[143] *See id.* at 26-29.

[144] *Id.* at 29-31.

[145] *Id.* at 31.

[146] *Chiafalo*, 140 S.Ct. at 2325.

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to," a person casting a proxy ballot for another, or a person who votes in an election in which they have "no real choice because there is only one name on a ballot."[147] To Justice Kagan, these examples illustrated that "although voting and discretion are usually combined, voting is still voting when discretion departs."[148] She concluded that "the Framers did not reduce their thoughts about electors' discretion to the printed page," and the Constitution's "sparse instructions [take] no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be."[149]

In light of this indeterminacy, Justice Kagan turned to history and Madison's belief that "a regular course of practice can liquidate & settle the meaning of disputed or indeterminate terms and phrases."[150] She recounted the practice of electors voting in accordance with a state's wishes, starting with the first contested presidential election, in which would-be electors declared their support for specific candidates and "all but one elector did what everyone expected, faithfully representing their selectors' choice of presidential candidate."[151] She then explained how the Twelfth Amendment "embraced this new reality [by] both acknowledging and facilitating the Electoral College's emergence as a mechanism not for deliberation but for party-line voting."[152] She noted that "courts and commentators . . . recognized the electors as merely acting on other people's preferences" and that "state legislatures "dropped out of the picture" by allowing voters to choose presidential electors and by "enact[ing] statutes requiring electors to pledge that they would squelch any urge to break ranks with voters."[153] To the extent that there have been faithless electors, Justice Kagan argued, these have been "anomalies only," representing "just one-half of one percent of the total" number of Electoral College votes.[154] In light of this longstanding practice, Justice Kagan concluded that a state may "instruct[] its electors that they have no ground for reversing the vote of millions of its citizens."[155]

Chiafalo presents the Court's clearest endorsement of liquidation to interpret election-related constitutional provisions. As Professors Charles

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[147] *Id.*

[148] *Id.*

[149] *Id.* at 2326.

[150] *Id.* (citing Letter to S. Roane (Sept. 2, 1819), in 8 *Writings of James Madison* 450 (G. Hunt ed. 1908) (internal quotation marks omitted).

[151] *Id.* at 2326.

[152] *Id.* at 2327.

[153] *Id.* at 2327-2328.

[154] *Id.* at 2328.

[155] *Id.*

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and Fuentes-Rohwer have acutely observed, however, it does more than that.[156] Consider what Justice Kagan's textual analysis tells us about liquidation in practice. Though Justice Kagan twice claims that both "[t]he Constitution's text and the Nation's history . . . support allowing a State to enforce an elector's pledge,"[157] her textual analysis at best finds the text to be indeterminate.[158] It is history, not text, that is doing the real work in this opinion.[159] *Chiafalo* is thus instructive on how indeterminate text must be before liquidation is appropriate.[160] Justice Kagan's responses to the textual arguments put forth by the faithless electors—strained hypotheticals about coerced votes, proxy voting, and Soviet sham elections—are hardly irrefutable.[161] *Chiafalo* illustrates that liquidation's textual indeterminacy requirement may pose a lower hurdle and that historical practice can settle Constitutional meaning even where the text may tilt the other way.

Consider also Justice Kagan's historical analysis. One question raised by the liquidation framework is how consistent a practice must be to liquidate constitutional meaning.[162] As Justice Kagan notes, faithless electors, though rare, are not unheard of: there have been 180 faithless votes cast since the Founding.[163] One commentator has argued these votes pose a serious obstacle to *Chiafalo*'s analysis.[164] But the Court was clear that occasional "anomalies" do not defeat an otherwise consistent pattern.[165] This is most obvious where such anomalies go unchallenged,[166] but remains true even where a court or a body such as Congress acquiesces in the anomaly.[167] *Chiafalo* thus endorses a functionalist approach to liquidation

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[156] *See generally* Charles & Fuentes-Rohwer, *supra* note 119.

[157] *Chiafalo*, 140 S.Ct. at 2323; *see also id.* at 2328 ("The Electors' constitutional claim has neither text nor history on its side.").

[158] *See id.* at 2326

[159] *See* Charles & Fuentes-Rohwer, *supra* note 116.

[160] *See* Baude, supra note 98 at 66 ("A theory dependent on constitutional indeterminacy naturally prompts the question: What makes a constitutional provision indeterminate?").

[161] *See* Charles & Fuentes-Rohwer, *supra* note 116 at 14 (*Chiafalo* cannot be justified on textualist grounds and quite frankly *Chiafalo* is not a textualist case.").

[162] *See* Baude, *supra* note 98, at 16-17 (noting Madison's use of various terms, from "regular" and "continued" to the more restrictive "uniform").

[163] *See Chiafalo*, 140 S.Ct. at 2328.

[164] *See* Green, *supra* note 116.

[165] *Chiafalo*, 140 S.Ct. at 2328.

[166] *See id.* (stressing that, while Congress has counted every faithless elector's vote, "only one has ever been challenged").

[167] *See id.* (emphasizing that "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years" and that "Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one").

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that does not require perfect adherence.

Finally, consider what *Chiafalo* tells us about liquidation's third requirement, acceptance, and which actors must acquiesce in a practice to give it legitimacy. The Court looked to electors themselves, of course, but also to courts, contemporary commentators, Congress, and state legislatures.[168] The Court also credited the beliefs of individual voters, including one voter in the 1796 election who declared that "'[W]hen I voted for the [Federalist] ticket, I voted for John Adams . . . do I chuse [a presidential elector] to determine for me whether John Adams or Thomas Jefferson is the fittest man for President of the United States? No—I chuse him to *act*, not to *think*.'"[169] This analysis comports with Professor Baude's view that liquidation requires that a settled practice be accepted by both government actors and the public.[170]

In short, *Chiafalo* not only confirms that Madisonian liquidation is an appropriate framework for interpreting election-related constitutional provisions, but also provides important insights into how a liquidation analysis should be carried out in the context of election law.

III. LIQUIDATING THE ROLE OF STATE CONSTITUTIONS

Professor Baude identifies three elements to the liquidation framework: (1) a discrete textual indeterminacy; (2) a course of deliberate practice by institutional actors reflecting constitutional reasoning; and (3) settlement of the textual indeterminacy through institutional and popular acquiescence to the practice.[171] The Supreme Court in *Chiafalo* examined each of these elements with respect to the Electors Clause and the Twelfth Amendment.[172] This Part follows the Court's lead and applies the same liquidation framework to the Elections and Electors Clauses and concludes that their practical meaning has been settled in favor state legislatures remaining constrained by state constitutions.

A. Textual Indeterminacy

The first step in discerning the role of state constitutions under the

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[168] *See id.* at 2327-28.

[169] *Chiafalo*, 140 S.Ct. at 2326 n. 7 (citing Gazette of the United States, Dec. 15, 1796, p.3. col. 1 (emphasis in the original)).

[170] *See* Baude, *supra* note 98 at 18-20.

[171] *See id.* at 13-18.

[172] *See supra* notes **Error! Bookmark not defined.**-170 and accompanying text.

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Elections and Electors Clauses is to determine, to the extent possible, the text's original meaning.[173] ISL theory proponents argue that the text permits state legislatures to regulate federal elections free from state constitutional constraints.[174] This Section, however, demonstrates that the Clauses are indeterminate as to the role of state constitutions and that, while an "independent state legislature" interpretation is plausible, the text, history, and purpose of the Clauses also support an interpretation under which state legislatures remain constrained by state constitutions.

The Elections Clause provides that, "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof."[175] Similarly, the Electors Clause provides that "[e]ach State shall appoint [presidential electors] in such Manner as the *Legislature* thereof may direct."[176] Neither clause references state constitutions nor state courts. Two question thus arise; first, what is the meaning of the term "legislature," and second, are these "legislatures" subject to state constitutional constraints?

1. Defining "Legislature"

To what, exactly, does the term "Legislature" refer to under the Elections and Electors Clauses? One interpretation is that the term refers exclusively to elected multi-member bodies that exercise general lawmaking authority.[177] This definition would exclude other state entities such as governors and courts along with ballot initiatives and independent redistricting commissions.[178] An alternative interpretation is that the term refers to a state's general lawmaking authority as established and constrained by state constitutions. This interpretation has been embraced by the Supreme Court throughout the twentieth century.[179]

The text of the Clauses can support either interpretation. Most

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[173] *See* Baude, *supra* note 98 at 13-16; Whittington, *supra* note 14, at 608-10 (2004); Lawrence B. Solum, *the Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 306 (2015).

[174] Morley, *supra* note **Error! Bookmark not defined.**, at 18.

[175] U.S. Const. art. I, § 4, cl. 1 (emphasis added).

[176] U.S. Const. Art. II S 1 cl. 2.

[177] *See* Morley, *supra* note 10 at 863 (arguing the term "legislature" refers to "a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets for limited periods of time, and then enters into recess").

[178] *See id.* (arguing the Elections Clause precludes regulation by any "state-level entity or process" that does not meet the definition of legislature).

[179] *See supra* Part II.B.

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eighteenth-century dictionaries defined the word "legislature" simply as "the power that makes laws."[180] Some, however, recognized that "legislature" often referred to an institutional lawmaking body.[181] This ambiguity is mirrored in Founding-era debates over the Elections Clause, where the term "legislature" was often used interchangeably with the terms "state" or "state government."[182] In Virginia, for instance, one delegate noted how the "State Legislature" might fail to select a place for holding elections, but later discussed how Congress might alter election rules "established by the *States*."[183] Likewise, James Madison discussed the dangers associated with placing authority to regulate federal elections "exclusively under the control [sic] of the State Governments," while elsewhere referring to the "State Legislatures."[184] In other states, debates contemplated institutional legislatures.[185] Original meaning thus does not foreclose either a broad or a narrow interpretation.

But the Clauses are not the only places where state legislatures appear in the Constitution; they appear seventeen times in various contexts.[186] Most other mentions refer specifically to institutional legislatures,[187] including provisions empowering state legislatures to select Senators[188] and ratify Constitutional Amendments.[189] Several Founding-era documents discussing these provisions interpreted the term "legislature" as referring to institutional bodies.[190] Some commentators have advanced an

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[180] *See Legislature*, 2 A Dictionary of the English Language (1st ed. 1755) ("The power that makes laws).

[181] *Id.* (offering as an example "Without the concurrent consent of all three parts of the legislature, no law is or can be made").

[182] *See* Brief of the Brennan Center for Justice as Amicus Curiae in Support of Appellees at 6-7, *AIRC*, 576 U.S. 787 (2015) (No. 13-1314) (discussing a survey of founding era documents in which "the terms 'state' and 'state government' were used roughly half the time in reference to the first part of the Elections Clause").

[183] *See* IX The Documentary History of the Ratification of the Constitution Digital Edition 920 (John P. Kaminski et al. eds., 2009) [hereinafter Documentary History] (emphasis added).

[184] *See* X Documentary History 1260.

[185] *See* Natelson, *supra* note **Error! Bookmark not defined.** at 31.

[186] *See AIRC*, 576 U.S. at 829 (Roberts, C.J., dissenting).

[187] *See* Morley, *supra* note 19, at 855-59.

[188] U.S. Const. art I, § 3, cl. 1 (providing that Senators from each state shall be "chosen by the Legislature thereof").

[189] U.S. Const. art V (providing that amendments shall be valid "when ratified by the legislature of three fourths of the several states").

[190] *See* Federal Farmer, *Letter XII* (Jan. 12, 1788) (describing legislatures as bodies comprised of "two branches"). 1 Chancellor James Kent, Commentaries on American Law

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intratextualist[191] argument that the term "Legislature" should be given the same meaning in the Elections and Electors Clause.[192]

Others, however, caution against intratextualism on the grounds that different provisions of the Constitution were "enacted at different times, in different circumstances, and for different reasons," and even the original unamended Constitution is the product of various "tradeoffs, political battles won and lost, and compromised ideals."[193] Regulating federal elections is different than selecting Senators; debates over the former focused on Congress's authority to supersede state laws,[194] while debates over the latter focused on the need for different forms of federal representation.[195] So while references to institutional legislatures may provide some useful context, a one-size-fits-all definition of "legislature" may not reflect how the term was understood in different contexts.

2. Legislatures: Independent or Constrained?

Even if we assume that the Elections and Electors Clauses refer specifically to institutional legislatures, the question remains whether those legislatures are subject to state constitutional constraints when they regulate federal elections. One interpretation is that the Clauses grant state legislatures exclusive and plenary power, free from state constitutional constraints. A less dramatic interpretation is that the Clauses simply delegate power to state legislatures to regulate federal elections via their ordinary lawmaking authority.

261-62 (John M. Gould ed., 14th ed. 1896) (describing state legislatures "in the true technical sense, being the two houses acting in their separate and organized capacities"). Several of the Federalist Papers similarly use the term "legislature" in reference to the institutional bodies. *See* The Federalist No. 27, at 174-75 (C. rosier ed. 1961) (A. Hamilton) (describing "State legislatures" as "select bodies of men"); *id.*, No. 60, at 368 (contrasting "State legislatures" with "the people").

[191] *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999) (arguing in favor of interpreting "a contested word or phrase that appears in the Constitution" by looking to that word's meaning elsewhere in the document).

[192] *See* Morley, *supra* note 19 (making this argument in detail); AIRC, 576 U.S. at 829 (Roberts, C.J., dissenting) ("The unambiguous meaning of "the Legislature" in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way.").

[193] *See* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 Harv. L. Rev. 730, 731, 742 (2000).

[194] *See* Jamal Greene, Note, *Judging Partisan Gerrymanders under the Elections Clause,* 114 Yale L.J. 1021, 1030-40 (2005).

[195] *See* David Schleischer, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 Hastings L.J. 1043, 1050-52.

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Again, the text can support either interpretation. If, as discussed above, the term "legislature" refers to a state's general lawmaking authority, then the Clauses empower states government, rather than institutional legislatures. This comports with the drafting history—an early draft of the Elections Clause provided that "[e]ach state shall prescribe the time and manner of holding elections" for the federal legislature,[196] and the record provides no explanation for the insertion of the term "legislature" into the final version.[197] This insertion may not have been significant, as the text of the Elections Clause provides that election rules "shall be prescribed in each *State* by the Legislature *thereof*,"[198] suggesting that the Clause treats legislatures as creations *of*, and thus constrained by, the States.[199] This understanding aligns with the Framers' experience. The Constitution was drafted and ratified against a backdrop of state constitutions that empowered and constrained state legislatures,[200] and there is no indication the Framers sought to upset the balance of power within states.

One argument in favor of the "independent" interpretation is that, because federal offices derive from the Constitution, states lack inherent power to regulate federal elections. Any such power must therefore derive from the Constitution, the text of which appears to grant this power exclusively to institutional legislatures.[201] But even if the text of the Clauses singles out institutional legislatures, it is not clear that the Clauses were understood as a grant of power to states. Many saw the Elections Clause, with its built-in Congressional veto, as taking power away from the states.[202] Viewed this way, the Elections Clause, like the Qualifications Clause,[203] limits states' sovereign authority.[204] Justice Thomas has argued that states

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[196] *See* 1 Elliot's Debates, 149.

[197] Greene, *supra* note 194, at 1031 (noting "no recorded debate over the Clause until after it emerged from the Committee of Detail").

[198] U.S. Const. Art I, § 4.

[199] *See Bush v. Gore,* 531 U.S. at 142 (Ginsburg, J., dissenting) (emphasizing the words "State" and "thereof" in the Presidential Electors Clause and suggesting the Clause requires "solicitude ... to the legislature's sovereign").

[200] *See* Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, 48 The Federal Lawyer 27, 31 (2001).

[201] *See* Morley, *supra* note 6 at 6.

[202] *See* Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195, 1220 (2012) ("the founding generation, and in particular the Anti-Federalists, recognized that the Elections Clause deprived the states of their sovereign authority over elections").

[203] U.S. Const. art I, § 2, cl. 2 (laying out the qualifications for members of Congress).

[204] *See U.S. Term Limits v. Thornton*, 514 U.S. at 806 ("Even if we believed that states

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do have inherent power to regulate federal elections and that the Elections Clause "does not delegate any authority to the States," but "simply imposes a duty upon them" to hold congressional elections.[205] While this argument has not yet persuaded a majority of the Court,[206] it nonetheless offers a plausible alternative reading of the Clauses.

But even if the Clauses are affirmative grants of power, it does not necessarily follow that this power is unconstrained by state constitutions. Proponents of the ISL theory again make an intratextualist argument: the Constitution assigns state legislatures various functions in the federal system, including the selection of Senators[207] and the ratification of constitutional amendments,[208] most of which are not subject to state constitutional constraints.[209] As the argument goes, the use of similar language in the Elections and Electors Clauses suggests that state legislatures' power to regulate federal elections is similarly unconstrained.

But intratextualism cuts both ways. The Elections and Electors Clauses grant authority to Congress as well as state legislatures, but Congress's power under the Clauses is clearly subject to the usual constitutional constraints.[210] The Elections Clause provides that Congress may "make or alter" rules governing congressional elections, but that it must do so "by law."[211] Compare this with other congressional functions, such as impeachment or the power to judge the qualifications of members, which

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possessed as part of their original powers some control over congressional qualifications … the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.").

[205] *Id.* at 862 (Thomas, J., dissenting). *See also Chiafalo*, 140 S.Ct. at 2329 (2020) (Thomas, J., concurring) (arguing the use of the term "shall" in the Presidential Electors Clause "expressly requires action by the states" and that "[t]his obligation to provide the matter of appointing electors does not expressly delegate power to States").

[206] *See Chiafalo,* 140 S.Ct. at 2324 (2020) (holding the Presidential Electors Clause "gives the States far-reaching authority over presidential electors, absent some other constitutional restraint."); *Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [congressional] elections … only within the exclusive delegation of power under the Elections Clause."); *U.S. Term Limits v. Thornton*, 514 U.S. at 805 ("[I] certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.").

[207] U.S. Const. art I, § 3.

[208] U.S. Const. art. V.

[209] See *Hawke,* 253 U.S. 221.

[210] *Cf.* Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 Cornell L. Rev. Online 57, 66-67 (2021); Levitt, *supra* note 19 at 11 n.39.

[211] U.S. Const. art. I, § 4.

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are not subject to constitutional constraint or judicial review.[212] The respondents in *Smiley* seized upon the fact that the term "by law" seemingly applies only to Congress to argue that state legislatures were not so constrained, but the Supreme Court explained that "the inference is strongly to the contrary," and that, because the lawmaking power is "the same whether it is performed by [the] state or national Legislature . . . the use of the phrase ["by law"] places the intent of the whole provision in a strong light."[213] This inference is even stronger in light of Article II, which provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes."[214] Article II does not require Congress to do so "by law," but there is no indication that Congress may regulate the appointment of Electors free from constitutional constraints. As another example, the Twenty-Third Amendment provides that the District of Columbia "shall appoint [presidential electors] in such manner as Congress may direct" without using the term "by law,"[215] but this power is also exercised through the ordinary lawmaking process.[216] It is thus reasonable to read the Elections Clause as requiring state legislatures to also enact election laws through the ordinary lawmaking process, constrained by state constitutions.

The Electors Clause may also be read as constraining state legislatures. Unlike the original Article I, § 3, which gave state legislatures the unconstrained power to "chuse" Senators, Article II gives state legislatures only the power to "direct" the "manner of their appointment.[217] This language mirrors Article V of the Articles of Confederation, which provided that Congressional delegates "shall be appointed in such manner as the legislature of each State shall direct."[218] This language, in effect when the Constitution was drafted and ratified, was not understood to confer independence on state legislatures; when the Articles took effect, eight out of ten state constitutions regulated the selection of congressional delegates, as did three of the four state constitutions adopted after the Articles were

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[212] *See Reed v. County Comm'rs* 277 U.S. 376, 388 (1928) (noting that under Article I, Section 5, each house of Congress "is fully empowered, and may determine such matters without the aid of the [other house] or the Executive or Judicial Department.).

[213] *Smiley*, 285 U.S. at 367.

[214] U.S. Const. art. II, § 1, cl. 5.

[215] *See* U.S. Const. amend. XXIII.

[216] *See* Pub. L. 87-389, 75 Stat. 817 (1961) (providing that the District of Columbia's electors be provided by popular vote).

[217] *Compare* U.S. Const. art. I, § 3, cl. 1, *with* U.S. Const. art. II., § 1, cl.2.

[218] *Compare* U.S. Arts. Of Confederation art. V, *with* U.S. Const. art II, § 1.

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proposed.[219] The use of similar language in Article II suggests a similar understanding.

3. Purpose and Legislative History

Generally, it is the Constitution's text, rather than the purpose its authors may have had in drafting it, that is given legal effect.[220] As illustrated above, however, the text of the Clauses is indeterminate with respect to the role of state constitutions. In cases such as this, the intent of the drafters may help shed light on the text's meaning.[221]

a. The Elections Clause

At the Philadelphia Convention and state ratifying conventions, the Elections Clause proved controversial, generating significant debate.[222] This debate focused on the allocation of authority between States and Congress, including whether Congress would have the power to make or alter state election laws.[223] The allocation of power *within* a state, including the role of state constitutions, was not addressed.[224]

The first purpose of the Elections Clause was to impose upon states an affirmative duty to conduct federal elections.[225] As Alexander Hamilton observed in Number 59 of *The Federalist,* "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."[226] If a state

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[219] *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. U. L. Rev. 731, 755 (2001).

[220] *See* Whittington, *supra* note 93, at 610 (2004).

[221] *See* Keith E. Whittington, *Originalism, Constitutional Constructions, and the Problem of Faithless Electors*, 59 Ariz. L. Rev. 903, 921 (2017).

[222] *See* Natelson, *supra* note **Error! Bookmark not defined.**, at 23 (noting that because the Elections Clause was so controversial, "the historical record contains a massive number of references to it").

[223] *Id.* at 23-40.

[224] *See* Morley, *supra* note 6, at 25 ("The history of the Elections Clause … is silent on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections").

[225] *See* Inter-Tribal Council, 570 U.S. at 8 (describing the Elections Clause as "the Framers' insurance against the possibility that a state would refuse to provide for the election of representatives to the Federal Congress").

[226] The Federalist No. 59, at 361 (A. Hamilton) (C. Rossiter ed., 1961) (writing that without a constitutional check, the states "could at any moment annihilate [the federal government] by neglecting to provide" for elections)

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wanted to sabotage the federal government, it needed only refuse to elect Representatives.[227] Federalists cited Rhode Island's refusal to send delegates to the Confederation Congress as an example of this danger.[228] Proponents of the Elections Clause made this self-preservation argument repeatedly in the state ratifying conventions.[229] The Elections Clause, by dictating that the time, place, and manner of electing Representatives "*shall* be prescribed," safeguards against this threat.

The second purpose of the Elections Clause was to divide authority between the States and Congress to prevent either from enacting election laws designed to favor certain candidates and thwart the popular will. For the Anti-Federalists, assigning Congress ultimate authority over the manner of its own selection posed a significant threat. A congressional majority, they argued, could replace state election laws with new ones designed to entrench itself in power.[230] While some theories offered for how Congress might achieve this—extending term limits,[231] imposing new qualifications,[232] or altering the mechanism for selecting Senators[233]—were clearly foreclosed by the Constitution's text, others were more plausible. By manipulating the

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[227] *See id.*

[228] *See* A Landholder (Oliver Ellsworth), Letter IV, Nov. 26, 1787, *reprinted in* 14 Documentary History, at 231, 233-34 (citing the case of Rhode Island).

[229] *See* 2 Elliot's Debates 326 (statement of John Jay at the New York ratifying convention) ("[T]the states [might] neglect to appoint representatives" and the need for "some constitutional remedy for this evil"); *id.* at 24 (statement of Caleb Strong at the Massachusetts ratifying convention) ("If the legislature of a state should refuse to make [election rules], the consequence will be, that the representatives will not be chosen, and the general government will be dissolved.").

[230] *See Centinel, Letter VIII,* Phila Indep. Gazetteer, Jan. 2, 1788, *reprinted* in 15 Documentary History at 231, 232 ("[T]hat which gives Congress the absolute controul [sic] over the time and mode of its appointment and election ... may establish hereditary despotism . . .").

[231] *See* Samuel, Indep. Chron., Jan. 10, 1788, *reprinted in* 5 Documentary History at 678, 680 ("And there is nothing to hinder, but ample provision made, for Congress to make themselves perpetual. For by Art. I, Sect. 4 the Congress may at any time, make and alter the time, place and manner of choosing Representatives; and the time and manner of choosing Senators.")

[232] *See* Cornelius, Hampshire Chron., Dec. 18, 1787, *reprinted in 4* Documentary History at 410, 413 ("By this Federal Constitution, each House is to be the judge, not only of the elections, and returns, but also of the *qualifications* of its members; and that, without any other rule than such as they themselves may prescribe.").

[233] *See* Letter from Samuel Osgood, to Samuel Adams (Jan. 5, 1787), *reprinted in* 15 Documentary History at 263, 265 ("[I]f Congress should determine, that the People at large, or a certain Description of them, should vote on the Senators, it would only be altering the Manner of choosing them-If this be true, Congress will have the exclusive Right of pointing out the Qualification of the Voters for Senators ... .").

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time and location of elections—such as by holding elections during harvest time[234] or solely in urban centers[235]—Congress could favor certain groups. Likewise, Congress could mandate at-large elections,[236] adopt plurality-victor rules,[237] or institute voice voting[238] to entrench a dominant faction. The Anti-Federalists wanted to weaken congressional authority or limit it to instances where states neglected to provide for elections.[239] Ultimate authority over federal elections, they argued, should lie with the states, which were closer to the people and elected more frequently.[240]

Federalists, however, saw state legislatures as the greater threat. As James Madison observed at the Philadelphia Convention, state legislatures had equal incentive to craft election laws favoring their own interests and candidates.[241] One concern was malapportionment.[242] At the Massachusetts ratifying convention, Judge Francis Dana and Rufus King pointed to Connecticut and South Carolina, where representation was based on corporation rather than population, along with efforts by the Rhode Island legislature to enact a similar scheme.[243] Likewise, in Virginia, James Madison cautioned that "[s]ome states might regulate the elections on the

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[234] *See* Cato (N.Y. Gov. George Clinton), *Letter VII,* N.Y. J., Jan. 3, 1788, *reprinted in* 15 Documentary History at 240, 241 ("Congress may establish a place, or places, at either the extremes, center, or outer parts of the states; *at a time and season too, when it may be very inconvenient to attend;* and by these means destroy the rights of election").

[235] *See Vox Populi, Mass.* Gazette, Oct. 30, 1787, *reprinted in 4* Documentary History at 168, 170 (suggesting Congress might direct "that the representatives of this commonwealth should be chosen all in one town, (Boston, for instance) on the first day of March"); Cornelius, *supra* note 72, at 410, 413-14 (similar).

[236] *See* 2 Elliot's Debates at 327 (reporting remarks of Melancthon Smith at the New York ratifying convention).

[237] *See* Federal Farmer, *Letter III*, Oct. 10, 1787, *reprinted in* 14 Documentary History at 31.

[238] *See* Centinel III, Phila. Indep. Gazetteer, Nov. 8, 1787, *reprinted in* 14 Documentary History at 59.

[239] *See* Federal Farmer, *supra* note 34, at 318 ("[A]t most, congress ought to have power to regulate elections only where a state shall neglect to make them.").

[240] *See* Letter from William Symmes, Jr., to Peter Osgood, Jr. (Nov. 15, 1787), *reprinted in* 14 Documentary History at 107-16 (stating that he did not think Congress would have the wisdom to make regulations within the states); *Vox Populi, supra* note 75 at 170 ("And it is a little remarkable, that any gentleman should suppose, that Congress could possibly be in any measure as good judges of the time, place and manner of elections as the legislatures of the several respective states.").

[241] See 5 Elliott's Debates at 401.

[242] *See* 2 Elliott's Debates at 27 (arguing state legislatures might "make an unequal and partial division of the states into districts for the election of representatives").

[243] *See id.* 49 (remarks of Judge Francis Dana); *id.* at 50-51 (remarks of Rufus King).

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principles of equality, and other might regulate them otherwise."[244] These were not idle concerns; at the Philadelphia Convention, the South Carolina delegation sought to remove Congress's authority altogether to preserve their state's existing apportionment scheme.[245] Because state legislatures also controlled the means for their own election, Federalists argued such mischief could not be remedied without congressional oversight.[246]

Federalists felt Congress was the safest place to vest ultimate authority over federal elections. The diversity and national character of the House would prevent its capture by any one faction,[247] and the careful system of checks and balances between the House and the Senate provided a defense against abuse not present in the state legislatures.[248] As Theophilus Parsons noted at the Philadelphia Convention, the interests of the people and of the states were pitted against one another in the House and Senate, and election laws that unfairly benefitted one chamber would be rejected by the other such that no law "would ever obtain the consent of both branches of the legislatures, but such as did not affect their neutral rights and the balance of government."[249] Thus, while both the States and Congress might be tempted to manipulate election laws to anti-republican ends, the relatively unchecked state legislatures had the greater opportunity to do so. In the end, the Federalists prevailed; Congress would have ultimate authority not only to alter state election laws, but also to make its own.[250]

The Elections Clause had two major purposes: ensuring states held federal elections and dividing authority over federal elections between the states and Congress. Both purposes reveal an overriding concern with

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[244] 3 Elliott's Debates at 367.

[245] *See* 5 Elliott's Debates at 401 (motion by Charles Pinckney and John Rutledge of South Carolina); J Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 223-24 (1996).

[246] *See* 6 Documentary History at 1213, 1218 (arguing that, without congressional authority, "the people can have no remedy" against state electoral manipulations); 4 Elliot's Debates at 303 (noting that if the people dislike a state's election laws, "they can petition the general government to redress this inconvenience").

[247] *See* The Federalist No. 60, at 367 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The dissimilarity in the ingredients which will compose the national government ... must form a powerful obstacle to a concert of views in any particular scheme of elections.").

[248] *See* 2 Elliot's Debates at 26-27 ("These two branches ... have different constituents, and as they are designed as mutual checks upon each other, and to balance the legislative powers, there will be frequent struggles and contentions between them.").

[249] *Id.*

[250] *See* 5 Elliott's Debates at 402 (amendment proposed by George Read of Delaware and agreed to by the Convention).

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unchecked authority over elections and a distrust of state legislatures in particular.[251] Thus, while these debates do not mention state constitutions specifically, it is hard to imagine the Framers intended the Elections Clause to eliminate this important check on state legislatures; when the Federalists spoke of the checks on Congress's Elections Clause authority, they referred to federal courts and the federal constitution.[252] Read broadly, the Elections Clause serves to impose additional checks on state legislatures, not to remove existing ones.

b. The Electors Clause

As with the Elections Clause, there is no indication the Electors Clause was intended to grant state legislatures exclusive and unconstrained authority over presidential elections.[253] There was no mention of state constitutions.[254] Rather, debates over the Electors Clause centered on the more vexing question of how to elect the President.[255] During the Convention, delegates debated and voted down various methods, with most of the discussion focused on either direct popular election or selection by Congress.[256]

While popular election was more democratic,[257] opponents raised two primary concerns. First, they doubted whether voters would be able to

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[251] As Jamal Greene notes, the distrust of state legislatures demonstrated by Madison and others at the Philadelphia Convention may not reflect the broader views of the Framers or ratifies. *See* Greene, *supra* note 194, 1033. However, as he notes, the almost completely unchecked power the Elections Clause assigns to Congress is "difficult to justify ... without adopting at least part of Madison's rationale." *Id.* at 1034.

[252] *See* 4 Elliot's Debates at 71 (statement of John Steele at the North Carolina ratifying debates) ("The judicial power of the [federal] government is so well construed as to be a check ... If the Congress makes laws inconsistent with the Constitution, independent judges will not uphold them").

[253] *See* Smith, *supra* note 219 at 743 ("[T]here is no indication in the historical record that the [Electors Clause] was originally understood to grant independence to state legislatures.").

[254] *See id.* ("At the Constitutional Convention, the Funders did not specifically address whether state legislatures operate independently of their constitutions when they exercise their Article II powers."); Kirby, *supra* note **Error! Bookmark not defined.** at 502 ("The point simply did not occur to [the Framers].").

[255] *See* Rakove, *supra* note 245 at 259.

[256] *See* Clinton L. Rossiter, *1787—The Grand Convention* 198-200 (1996).

[257] *See* 1 Farrand at 80 (statement of James Wilson) (arguing popular election "would produce more confidence among the people . . than an election by the national Legislature").

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make an informed decision or reach a national consensus.[258] Second, they worried a national popular election would favor larger and northern states over smaller and southern ones.[259] On the other hand, legislative appointment risked making the President dependent upon Congress.[260] The Electoral College answered both sets of concerns. Electors could be more informed, their numbers could be weighted to protect states' interests, and because they "would meet once and then forever dissolve" Presidential independence was ensured.[261]

But once the Convention settled on an Electoral College, the question shifted to how electors would be chosen. A similar debate emerged between those who favored popular election and those who favored legislative appointment, with no clear consensus.[262] Proposals were made under which electors would be "chosen by the people,"[263] "chosen by the State Executives,"[264] "appointed by the Legislatures of the States,"[265] or chosen by the Legislatures of the States."[266] Finally, just two weeks before the end of the Convention, a new proposal was put forward which, borrowing the familiar language of the Articles of Confederation, would have electors "appoint[ed] in such manner as [the] Legislature may direct."[267] There was no meaningful discussion over this change.[268] The delegates simply adopted the language and proceeded to the more dramatic question of what to do if the College did not produce a majority.[269] Likewise, during the ratification debates, the mechanics of the Electoral College were eclipsed by other issues, and there was no discussion of state constitutions.[270]

This history does not suggest any clear overriding purpose behind the Electors Clause. Rather, the Clause was a compromise between several competing interests, none of which is furthered by insulating state

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[258] *See* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. Am. Hist. 35, 42 (1986).

[259] *See* Smith, *supra* note 219 at 749; Rakove, *supra* note 245 at 259.

[260] *See* Slonim, *supra* note 258 at 37-38.

[261] *See* Rakove, *supra* note 245 at 259-60; *see also* Smith, *supra* note 219 at 748-50 (discussing the debates).

[262] *See* Smith, *supra* note 219 at 748-756.

[263] 2 Farrand, Records at 55-56.

[264] *Id*. at 57.

[265] *Id*.

[266] *Id*. at 112.

[267] 2 Farrand Records at 493-94.

[268] *Id*.

[269] *Id*. at 500-29.

[270] *See* Smith, *supra* note 219 at 746.

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legislatures from state constitutional constraints.[271] What is clearest from the historical record is that the text of the Electors Clause was indeterminate even as it was adopted[272] and ratified.[273]

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The foregoing inquiry into the text, history, and purpose of the Elections and Electors Clauses reveals two points. First, textual arguments can be made in favor of either an independent or a constrained view of state legislatures under the Elections and Electors Clauses. Not only is the term "Legislature" amenable to more than one interpretation, but both the Clauses themselves and related constitutional provisions can be read to support either position. Second, neither the legislative history nor purpose resolves this indeterminacy. While reasonable minds may differ as to which set of arguments is most persuasive, the Supreme Court's reasoning in *Chiafalo* reminds us that textual indeterminacy does not require more than a plausible argument on either side.[274] Here, both interpretations are more than plausible, and thus the requirement is met.

B. Course of Deliberate Practice

Following *Chiafalo*'s lead, the liquidation analysis's second prong looks for a course of deliberate practice.[275] Here, two practices are relevant. First is the practice of states—via state legislatures and their citizens—enacting state constitutional provisions to regulate federal elections. Second is the practice of state courts reviewing state election laws under those provisions. Both practices enjoy a long and nearly uniform pedigree. While some commentators point to scattered departures from the norm during the late nineteenth century, under a liquidation framework, even if the issue was at one time briefly contested, a century of settled subsequent practice is more than sufficient to liquidate the Clauses' meaning.

1. State Constitutions Regulating Federal Elections

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[271] *See id.* at 754.

[272] *See id* at 732, 745 ("[I]t is difficult to know precisely what the language of [The Presidential Electors Clause] meant to the Framers, let alone the extent to which they thought it put limitations on state constitutions").

[273] *See id.* at 747 ("Thus, even in the most basic sense, the meaning of the words 'in such manner as the legislatures thereof may direct' was unclear to the Ratifiers.").

[274] *See supra* notes 157-**Error! Bookmark not defined.** and accompanying text.

[275] *See* notes 150-167 and accompanying text; *cf.* Baude, *supra* note 98 at 16-17.

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From the beginning, state constitutions have regulated both the procedure and substance of federal elections. After the federal constitution was ratified, several states adopted new constitutions which included election provisions, some of which explicitly regulated federal elections. In 1792, for instance, Delaware adopted a new constitution under which congressional representatives would be "voted for at the same Places where Representatives in the State Legislature are voted for, and in the same Manner."[276] Other provisions applied to both state and federal elections alike; nearly every state constitution set out voter qualifications,[277] and most included express protections for the right to vote or guarantees of free and equal elections.[278]

Many of these provisions went beyond general principles and regulated specific aspects of election administration, such as whether votes would be cast by ballot or by voice. The 1790 Pennsylvania constitution, for example, required that "[a]ll elections shall be by ballot,"[279] as did the constitutions of at least four other states.[280] This was one of the most important, and most contested, issues of election administration in the post-Founding era, with many concerned about the potential for fraud in ballot voting and for undue influence in voice voting.[281] Nonetheless, when states like Georgia and Kentucky sought to change these rules and switch to voice voting, they did so via the formal amendment process.[282] Other provisions encouraged voting, such as Georgia's imposition of a monetary penalty for those abstaining from elections,[283] while others protected voters by privileging them from arrest during elections so long as they were innocent

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[276] Del. Const. of 1792, art. VIII § 2.

[277] *See* Del. Const. of 1792, Art. IV. § 1; Pa. Const. of 1790, Art. III. § 1; N.J. Const. of 1776, Art. IV; Ga. Const. of 1777, Art. IX; Md. Const. of 1776, art. XIV (amended 1810) (guaranteeing suffrage to all free white male citizens).

[278] *See* Del. Const. of 1792, Art. I. § 3; Pa. Const. of 1790, Art. IX. § 5; Ga. Const. of 1777, Art. X.; Ky. Const. of 1792, art. XII, § 5; Ky Const. of 1799, art. X, § 5; N.H. Const. of 1792, art. XI; VT. Const. of 1793, ch. 1, art. VIII; VT. Const. of 1793, ch. 2, § 34; Tenn Const. of 1796, art. XI, § 5.

[279] Pa. Const. of 1790, art. III § 2.

[280] *See* Ga. Const. of 1789, art. IV, § 2; Ky. Const. of 1792, art. III, § 2; Tenn Const. of 1796, art. III, § 3; Ohio Const. of 1803, art. IV, § 2.

[281] *See* Rakove, supra note 245 at 204.

[282] *See* Ga Const. of 1798, art. IV, § 2 ("In all elections by the people the electors shall vote viva voce until the legislature shall otherwise direct."); Ky. Const. of 1799, art. VI, § 16 ("In all elections by the people, and also by the senate and house of representatives, jointly or separately, the votes shall be personally and publicly given viva voce.").

[283] Ga. Const. of 1777, art. XII.

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of treason, felony, or breach of the peace.[284]

The next flurry of state constitutional development occurred during the Jacksonian and antebellum periods when several states made significant changes to their constitutions, some for the first time since the Founding.[285] These new state constitutions continued to regulate important aspects of election administration, such as voting by ballot or viva voce,[286] but also expanded into new areas. The Kentucky constitution set the hours of voting for all elections,[287] while California's constitution instituted a plurality-winner rule.[288] State constitutions also regulated federal elections in new ways. Maryland amended its constitution in 1810 to guarantee to every free white male citizen the right to vote in all federal elections.[289] In 1838, Florida's Constitution provided that "[r]eturns for elections of members of Congress . . . shall be made to the secretary of state, in a manner to be prescribed by law."[290] In 1842, Rhode Island specified that votes in congressional elections be "by ballot."[291] A particular focus Congressional apportionment, with state constitutions instituting districting criteria including compactness,[292] population equality,[293] and respect for county boundaries.[294]

State constitutions continued regulating federal elections throughout

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[284] *See* Pa. Const. of 1790, art. III, § 3; Ky. Const. of 1792, art. III, § 3; Del Const. of 1792, art. IV, § 2; Tenn. Const. of 1796, art. III.

[285] Until this point, several states operated under their pre-ratification constitutions. *See* Va. Const. of 1776; N.J. Const. of 1776; N.Y. Const. of 1777; N.C. Const. of 1776. Others, like Connecticut and Rhode Island, had no constitutions until this period. *See* Conn. Const. of 1818; R.I. Const. of 1843.

[286] *See* Ohio. Const. of 1803, art. IV, § 2; La. Const. of 1812, art. VI, § 13; Ala. Const. of 1819, art. III, § 7; Mich. Const. of 1835, art. II, § 2; Tex. Const. of 1845, art. VII, § 6; Cal. Const. of 1849, art. II, § 6; Minn. Const. of 1857, art. VII, § 6; N.Y. Const. of 1821, art. II, § 4; Va Const. of 1830, art. III, § 15; Pa. Const. of 1838, art. III, § 2; Ky. Const. of 1850, art. VIII, § 15.

[287] *See* Ky. Const. of 1850, art. VIII, § 16.

[288] *See* Cal. Const. of 1849, art. XI, § 20.

[289] *See* Md. Const. of 1776, art. XIV (adopted 1810) ("[Every free white male citizen ... shall have a right of suffrage ... in the election ... for electors of the President and Vice-President of the United States, for Representatives of this State in the Congress of the United States, for delegates to the general assembly of this State, electors of the senate, and sheriffs.").

[290] Fla. Const. of 1838, art. VI, § 16. *See also* Fla Const. of 1865, art. VI, § 12,

[291] *See* R.I. Const. of 1842, art. VIII, § 2.

[292] *See* Va. Const. of 1850, art. IV, §§ 13-14.

[293] *See* Va. Const of 1830, art. III, § 6.

[294] *See* Va. Const. of 1830, art. III, § 6; Iowa Const. of 1846, art. 3, Legislative Department, § 32; Cal. Const. of 1849, art. IV § 30.

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the Civil War. When West Virginia and Nevada entered the Union during the war, their constitutions included provisions related to voting by ballot, plurality winner rules, and congressional districting.[295] Several states also amended their constitutions to allow soldiers fighting in the war to vote while absent from their home states. Three of these applied explicitly to federal elections,[296] while another four applied to both state and federal elections.[297]

Reconstruction saw another flurry of activity as Congress conditioned the readmission of former Confederate states on, among other things, adopting new state constitutions providing for universal male suffrage.[298] This same period saw new constitutions and amendments related to congressional districting[299] and popular election of presidential electors,[300] among other election-related provisions.[301]

Following Reconstruction, several southern states adopted new state constitutions with the explicit aim of circumventing the Fifteenth Amendment and restricting Black suffrage.[302] Beginning with Mississippi in 1890 and ending with Georgia in 1908, these new constitutions established poll taxes, literacy tests, grandfather clauses, and onerous registration rules and procedures.[303] While some of these provisions related solely to voter qualifications, many detailed the specific manner in which qualifications were to be assessed and voters registered.[304] Other provisions

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[295] *See* W.V. Const. of 1863, art. XI, § 6; *id*. at art. III, § 2; Nev. Const. of 1864, art. IV, §34; *id.* at art. II, § 5; *id.* at art. XV, § 14.

[296] *See* Conn. Const. of 1818, art. XIII (adopted Aug. 1864); Md. Const. of 1864, art. XII, § 11; R.I. Const. of 1842, amend. IV (adopted Aug. 1864).

[297] *See.* N.Y. Const. of 1846, art. II, § 1 (as amended in 1864); Pa. Const. of 1838, art. III, § 4 (adopted 1864); Mich. Const. of 1850, art. VII, § 1 (as amended in 1866); Kan. Const. of 1859, art. 5, § 3, (adopted 1864).

[298] Act of Mar. 2, 1867, ch. 163, 14 Stat. 428, § 5.

[299] *See* Ala. Const. of 1867, art. VII, § 6; Va. Const. of 1870, art. V, §§12-13; Tenn. Const. of 1870, art. X, § 5; Cal Const. of 1879, art. IV, § 27; Mont. Const. of 1889, art. VI, § 1; S.D. Const. of 1889, art. XIX, § 1; N.D. Const. of 1889, art. 18, § 214; Wyo. Const. of 1889, art. III, Apportionment, §§1, 3.

[300] *See* S.C. Const. of 1868, art. VIII, § 9; Pa. Const. of 1873, art. VIII, § 17; Colo. Const. of 1876, schedule §§ 19-20; La. Const. of 1879, art. 191;

[301] *See* Va. Const. of 1870, art III, § 2; Pa. Const. of 1873, art. VIII, § 4; Ga. Const. of 1868, art II, § 1; Ky. Const. of 1890, § 147 (replacing voice voting with election "by secret official ballot" for all elections).

[302] *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 301-02 (2000) (explaining that restoration of white supremacy in the south was the "avowed purpose" of these new constitutional conventions).

[303] *See* Va. Const. of 1902, art II, §§18-20 (1902).

[304] *See id.*

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imposed direct regulations of time, place, or manner, including providing for voting by ballot,[305] which in the late nineteenth century was effective in disenfranchising illiterate Blacks.[306] Importantly, while these states also enacted discriminatory statutes, they relied on state constitutions to ensure black disenfranchisement would endure.[307]

Around the turn of the century, the ballot initiative emerged as the dominate means of state constitutional change. In forty-nine states, state legislatures may refer a proposed amendment to voters for their approval, and in eighteen states, voters may, by gathering a certain number of signatures, place an amendment on the ballot without the involvement of the state legislature.[308] Through these two mechanisms, states have adopted constitutional amendments concerning nearly every aspect of federal elections, including registration,[309] primaries,[310] ballots,[311] voting

[305] *See* Ala. Const. of 1901, art. X, § 179 (1901).

[306] In an extreme example, South Carolina's "Eight-Box Ballot Law" was designed to disenfranchise illiterate black voters by requiring them to deposit ballots for individual offices in separate labeled boxes. *See* Charles L. Zelden, Voting Rights on Trial: A Handbook with Cases, Laws, and Documents 75 (2002).

[307] *See* Pildes, *supra* note 302 at 301 n.29 (describing constitutional disenfranchisement as "the capstone to the elimination of black political participation" and explaining that constitutional provisions "cast disfranchisement into the most endurable and symbolically significant legal form.").

[308] *See* Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 Cornell J. L. & Pub Pol'y 295, 298 (2008).

[309] *See* Texas Proposition 4 (1891) (authorizing the state legislature to provide for voter registration in cities); Connecticut Question 2 (1976) (pre-registration for 17-year olds); Oregon Measure 5 (1927); Maryland Question 2 (2018) (same day registration);

[310] *See* Arizona Proposition 103 (1998)

[311] *See* California Proposition 18 (1924) (providing for voting by ballot); North Dakota Amendment 2 (1978) (authorizing legislature to provide for secrecy in voting); Arkansas (2002).

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machines,[312] absentee voting,[313] voter ID,[314] and election integrity.[315] Several of these amendments explicitly constrain state legislatures, either by enacting new substantive rights for voters,[316] setting out rules for certain types of elections,[317] or taking power from the legislature and giving it to an independent redistricting commission.[318]

State constitutions have regulated federal elections and constrained state legislatures since the Founding. As elections evolved and states embraced direct democracy, the number and variety of election-related provisions in state constitutions increased. This longstanding practice, consistent across states, eras, and substantive areas of election law, demonstrates a deliberate course of action construing the practical meaning of the Elections and Electors Clauses.

2. State Court Review of Laws Regulating Federal Elections

The clearest evidence that state legislatures are constrained by state constitutions is the practice of state courts reviewing state election laws. Some of the earliest conflicts between state constitutions and election laws passed by state legislatures arose during the Civil War, when several states enacted soldier absentee voting laws in violation of state constitutional provisions requiring ballots be cast in person.[319] Some state supreme courts

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[312] *See* Kentucky Voting Machines Referendum (1941);

[313] *See* Maine Amendment 1 (1921); California Proposition 18 (1928); Maine Amendment 6 (1951); Connecticut Question 5 (1962); North Dakota Amendment 2 (1978) (Authorizing legislature to provide for absentee voting); Connecticut Question 1 (1932) (same); Maryland Amendment 3 (1954) (same); Kentucky Absentee Voting Referendum (1945) (same). Other amendments have expanded absentee voting to new groups of voters. *See* California Proposition 22 (1922) (military); Florida Amendment 2 (1960) (same); Maryland Amendment 1 (1918) (same); Missouri Issue 11 (1920) (same); Maryland Amendment 6 (1954) (people with disabilities); Massachusetts Question 4 (1944) (same); Massachusetts Question 3 (1976) (absentee voting for religious purposes); Connecticut Question 3 (1964) (same); Pennsylvania question 3 (1997) (expanding absentee voting); Pennsylvania Question 1 (1985) (poll workers and religious purposes);

[314] *See* Missouri Amendment 6 (2016); Arkansas Issue 2 (2018); North Carolina (2018).

[315] *See* Maryland Amendment 4 (1913).

[316] *See* Illinois Right to Vote Amendment (2014); California Proposition 43 (2002).

[317] *See* Ariz. Proposition 101 (1962).

[318] *See* Washington SJR 103 (1983); Montana Measure C-14 (1984); Hawaii HB 2322 (1992); Idaho SJR 105 (1994); New Jersey Public Question 1 (1995); Colorado Amendment Y (2018); Virginia Amendment 1 (2020); Arizona Proposition 106 (2000); California Proposition 20 (2010).

[319] *See* Smith, *supra* note 219, at 765.

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struck down these laws,[320] while others construed state constitutions to avoid conflict.[321]

From the Civil War through the early twentieth century, state courts consistently reviewed laws regulating federal elections, including laws relating to congressional redistricting,[322] voter registration,[323] absentee voting,[324] secret ballots,[325] and voting machines.[326] In contrast, only a handful of state courts embraced the ISL theory.[327] After the "one person, one vote" apportionment cases of the 1960s, challenges to congressional redistricting plans under state constitutions became more common.[328] In

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[320] *See* Bourland v. Hildreth, 26 Cal. 161 (Cal. 1864); Opinion of the Judges, 30 Conn. 591 (Conn. 1862); *Twitchell,* 13 Mich. 127 (Mich. 1865); *In re Opinion of the Justices,* 44 N.H. 633 (N.H. 1863). *See also* Smith, *supra* note 219, at 765-67.

[321] *See Morrison v. Springer*, 15 Iowa 304 (Iowa 1864); *Lehman v. McBride*, 15 Ohio St. 573 (Ohio 1863); *Vandler v. Main*, 16 Wis. 422 (Wis. 1863). A year after holding a soldier voter law unconstitutional, the New Hampshire Supreme Court changed course, holding that state legislatures could regulate the manner of elections "untrammeled" by the state constitution. *See* Opinion of the Justices, 45 N.H. 595, 605 (N.H. 1864). A few decades later, however, the New Hampshire Supreme Court changed course again. *See In re Opinion of the Justices*, 113 A. 293, 299 (N.H. 1921).

[322] *See Brown v. Saunders*, 166 S.E. 105, 107 (Va. 1932); *Moran v. Bowley*, 179 N.E. 526, 531-32 (Ill. 1932); *Schrader v. Polley*, 127 N.W. 848, 851 (S.D. 1910); *Carroll v. Becker*, 45 S.W.2d 533, 536-37 (Mo. 1932).

[323] *City of Owensboro v. Hickman*, 14 S.W. 688 (Ky. 1890); *Franklin v. Harper*, 55 S.E. 2d 221 (Ga. 1949); *Southerland v. Norris*, 22 A. 137 (Md. 1891).

[324] *See Chase v. Lujan*, 149 P.2d 1003, 1010-11 (N.M. 1944) (striking down absentee voting law); *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936) (same); *Jones v. Smith*, 165 Ark. 425 (Ark. 1924) (upholding a state absentee voting law); *Straughan v. Meyers*, 187 S.W. 1159 (Mo. 1916) (same);

[325] *See DeWalt v. Bartley*, 24 A. 185 (Pa. 1892) (upholding secret ballot law)

[326] *See Morrison v. Lamarre*, 65 A.2d 217 (R.I. 1949) (law providing for "master levers" on voting machines did not violate state constitution). *See also* Constitutionality of statutes providing for the use of voting machines. 66 A.L.R. 855 (1930) (describing similar challenges).

[327] *See State v. Williams*, 49 Miss. 640 (Miss. 1873) (state legislatures may schedule congressional elections notwithstanding contrary state constitutional provisions); *See In re Plurality Elections*, 8 A. 881 (R.I. 1887) (state constitutional provision requiring a majority vote did not constrain the state legislature); *Beeson v. Marsh*, 34 N.W.2d 279, 285-87 (Neb. 1948) (state constitution did not apply to laws concerning appointment of presidential electors); *Dummit v. O'Connell*, 181 S.W.2d 691, 694-96 (Ky. 1944) (state constitution could not restrict state legislature's power to permit absentee voting); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936) (state legislatures not subject to state constitutional limits when deciding the manner of choosing presidential electors).

[328] *See* Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. Pa. J. Const. L. 203, 253-56 (listing cases striking down congressional maps under state constitutions).

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recent years, since *Bush II* drew new attention to the nuts and bolts of election administration, the number of election law cases has more than doubled,[329] including numerous challenges brought under state constitutions.[330] Over the past two decades, state courts have reviewed state election laws relating to every aspect of federal elections, including redistricting,[331] Voter ID,[332] felon disenfranchisement,[333] voting machines,[334] polling hours,[335] absentee voting,[336] voter registration,[337] ballot access,[338] and

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[329] *See* Richard L. Hasen, *the Supreme court's Shrinking Election Docket 2001-2010: A Legacy of* Bush v. Gore *or Fear of the Roberts Court?*, 10 Election L.J. 325, 327 (2011).

[330] *See* Joshua A. Douglas, *State Judges and the Right to Vote,* 77 Ohio St. L. J. 1, 13-32 (2016) (describing various challenges under state constitutions since 2000).

[331] Arizona Minority Coalition for Fair Redistricting v. Arizona Indep. Redistricting Comm'n, No. CA-CV 07-0301 (Ariz. Ct. App. Apr. 20, 2008); Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002); People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003); In re 2003 Apportionment of the State Senate and U.S. Congressional Districts, 827 A.2d 844 (Me. 2003); LeRoux v. Secretary of State, 640 N.W. 2d 849 (Mich. 2002); Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002); Parella v. Montalbano, No. 2003-595 (R.I. 2006); League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018); Pearson v. Koster, 359 S.W.3d 35 (Mo. 2012); League of Women Voters of Florida v. Detzner, 172 So.3d 363 (Fla. 2015); Johnson v. State, 366 S.W.3d 11 (Mo. 2012);

[332] *See In re* Request for Advisory Op. Concerning Constitutionality of 2005 PA 71, 740 N.W. 2d 444 (Mich. 2007); *League of Women Voters of Ind., Inc. v. Rokita,* 929 N.E. 2d 758 (Ind. 2010); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E. 2d 67 (Ga. 2011); City of Memphis v. Hargett, 414 S.W. 3d 88 (Tenn. 2013); League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W. 2d 302 (Wis. 2014); Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014); Weinschenk v. State, 203 S.W. 3d 201 (Mo. 2006) (per curiam); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); Martin v. Kohls, 444 S.W. 3d 844, 852 (Ark. 2014).

[333] *See* League of Women Voters of Cal. V. McPherson, 52 Cal. Rptr. 3d 585 (Ct. App. 2006); May v. Carlton, 245 S.W. 3d 340 (Tenn. 2008); Chiodo v. Section 43.24 Panel, 846 N.W. 2d 845 (Iowa 2014); Snyder v. King, 958 N.E. 2d 764 (Ind. 2011); Madison v. State, 163 P.3d 757 (Wash. 2007).

[334] Favorito v. Handel, 684 S.E.2d 257 (Ga. 2009); Andrade v. NAACP of Austin, 345 S.W. 3d 1 (Tex. 2011); Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009);

[335] State ex rel. Bush-Cheney 2000, Inc. v. Baker, 34 S.W. 3d 410 (Mo. Ct. App. 2000); Republican Party of Ark. V. Kilgore, 98 S.W. 3d 798 (Ark. 2002) (per curiam);

[336] Sheehan v. Franken, 767 N.W. 2d (453 (Minn. 2009) (per curiam); In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223 (Pa. 2004); Townson v. Stonicher, 933 So. 2d 1062 (Ala. 2005); Stuart v. Anderson Cty. Election Comm'n, 300 S.W. 3d 683 (Tenn. Ct. App. 2009);

[337] Guare v. State, 117 A.3d 731 (N.H. 2015) (per curiam).

[338] Nader for President 2004 v. Md. State Bd. Of Elections, 926 A.2d 199 (Md. 2007); Walsh v. Katz, 953 N.E. 2d 753 (N.Y. 2011)

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campaign finance.[339] Finally, even as the ISL theory was invoked in the 2020 election cases, state courts reviewed an unprecedented number of state election laws under state constitutions.[340]

C. Settlement

The final requirement for liquidation to occur is settlement, which requires that a longstanding practice achieve "sufficient uniformity" to put any significant interpretive debate to rest.[341] The *Chiafalo* court looked to both the acquiescence of institutional actors and the public's sanction of a given practice.[342] This Section examines each in turn.

1. Institutional Acquiescence

Whether a given interpretation of the constitution's text has been settled depends in part on whether it has been accepted by the relevant government

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[339] Colo. Ethics Watch v. Senate Majority Fund, 269 P.3d 248 (Colo. 2012); State v. Green Mountain Future, 86 A.3d 981 (Vt. 2013).

[340] *See* Aguilera v. Fontes no. cv2020-014083 (Ariz. Super. Ct. 2020); LULAC of Iowa v. Pate, No. 20-1249 (Iowa Sup. Ct. 2020); Alaska Center Education Fund v. Fenumiai (Ak. 2020); Anti-Defamation League August, Southwest & Texoma Regions v. Abbott, (Tex Dist. Ct. 2020); Arnett v. North Carolina Bd. Of Elections (N.C. Super. Ct., Duplin Cnty. 2020); Ryan v. Benson, No. 20-000198-MZ (Mich. Ct. Claims 2020); Louisiana v. Center for Technology & Civic Life, No. 89811 (La. Dist. Ct., 2020); MOVE Texas Action Fund. v. DeBeauvoir, No. 03-20-00497-CV (TEx. Ct. App.); Middleton v. Andino, No. 20A55 (S.C. 2020); In re Hotze, No. 20-0751 (Tex. Sup. Ct.); In re McCarty, No. 20-0769 (Tex. Sup Ct.); Ohio Democratic Party v. LaRose, No.20AP428 (Ohio Ct. App. 2020); League of Women Voters v. Delaware Dep't of Elections, No. 2020-0761 (Del Chancery Ct. 2020); American Women v. Missouri, No. 20AC-cc00333 (Mo. Cir. Ct., 2020); Republican State Committee of Delaware v. Delaware Dep't of Elections, No. 2020-0685-SG (Del. Chancery Ct. 2020); Grossman v. Galvin, No. SJC-2020-XX (Mass. 2020); LaRose v. Simon, No. A20-1040 (Minn 2020); NAACP Minnesota v. Simon, No. A20-1041 (Minn 2020); American Federation of Teachers v. Gardner, No. XX (N.H. Super. Ct., Hillsborough Cnty 2020); North Carolina Alliance for Retired Americans v. North Carolina, No. 20 CVS 08881 (N.C. Super. Ct. 2020); Duggins v. Lucas, No. 2020-001042 (S.C. 2020); Stringer v. North Carolina, No. 20-CVS-05615 (N.C. Super. Ct., 2020); Western Native Voice v. Stapleton, No. DA-20-0394 (Mont. S.Ct. 2020); Sterne v. Adams, No. 20-CI-00538 (Ky. Cir. Ct., 2020); Alliance for Retired Americans v. Dunlap, No. CV-20-95 (Me. Super. Ct., 2020); Lay v. Goins, No. M2020-0083-SC-RDM-CV (Tenn. 2020); NAACP Pennsylvania State Conference v. Boockvar, No. 364-MD-2020 (Penn. Commonw. Ct. 2020); Fisher v. Hargett, No. M2020-00831-SC-RDM-CV (Tenn. Sup. Ct. 2020);

[341] *See supra* note 168-170 and accompanying text. *Cf.* Baude, *supra* note 98 at 18.

[342] *See id*. at 18-19.

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institutions.[343] Here, there is evidence of acceptance by both institutions contemplated by the Clauses: state legislatures and Congress.

a. State Legislatures

The clearest evidence of settlement occurs when the losing side of an interpretive debate concedes and accepts the interpretation embraced by longstanding practice.[344] Here, the institution with the most to lose from a constrained interpretation of the Elections and Electors Clauses are the state legislatures themselves. But rather than railing against state constitutions, state legislatures have long accepted that they remain subject to state constitutional constraints when they enact laws under the Elections and Elections Clauses.

State legislatures have, for instance, long complied with state constitutional provisions subjecting all laws—including those governing federal elections—to a governor's veto. At the Founding, only the Massachusetts and New York Constitutions included a veto.[345] In the leadup to the first presidential election 1788, Massachusetts presented its first law providing for the selection of Presidential electors to Governor Hancock for his signature.[346] Likewise, New York presented its first law providing for the election of federal Representatives to the Council of Revision—consisting of the governor, the chancellor, and members of the state supreme court—for its approval.[347] As more state constitutions adopted vetoes, election laws remained subject to gubernatorial approval,[348] and in 1932 the Supreme Court in *Smiley* observed that this "uniform practice" had gone unchallenged ever since.[349] This practice continues to this day, with election laws routinely being presented to—and often vetoed—by governors. State legislatures have also long accepted state constitutional constraints beyond the veto. Before the Massachusetts, New York, and

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[343] *See id.* at 18.

[344] *See id.*

[345] See John A. Fairlie, *The Veto Power of the State Governor*, 11 Am. Pol. Sci. Rev. 473, 474-75 (1917).

[346] *See* McPherson, 146 U.S. at 29; Smith, *supra* note 219 at 760.

[347] *See* Smith, *supra* note 219 at 760-61.

[348] *See* Commonwealth of PA., Vetoes by the Governor of Bills and Resolutions Passed by the Legislature Session of 1915, 449-50 (1915) (vetoing bill to reorder names of presidential candidates on the ballot).

[349] 285 U.S. 355, 370 (citing *Koening v. Flynn,* 258 N.Y. 292, 300 (N.Y. 1932) ("The uninterrupted practice in all of the states has been to create congressional districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be.").

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New Hampshire legislatures passed their first laws under the Elections Clause, each debated whether their respective state constitutions required them to do so via joint or concurrent session.[350] This pattern of deference to state constitutions demonstrates state legislature's acquiesced.

But state legislatures have done more than acquiesce; they have actively embraced state constitutional regulation of federal elections. For well over a century, state legislatures have drafted and enacted new election-related constitutional amendments. Nearly every state makes frequent use of legislatively-referred amendments, which are first passed by the state legislature and then presented to voters for their approval.[351] As ballot initiatives supplanted conventions as the primary means of state constitutional amendment, state legislatures began referring amendments related to voter qualifications, such as universal male suffrage,[352] residency requirements,[353] poll taxes,[354] and enfranchisement of women,[355] along with amendments focused on the time, place, and manner of elections, including voter registration[356] and voting by ballot.[357]

Beginning in the Progressive Era, state legislatures referred a wide variety of election-related amendments to voters. In addition to setting citizenship,[358] poll tax,[359] literacy,[360] and residency requirements[361] and extending the franchise to women,[362] these amendments provided for

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[350] *See* Smith, *supra* note 219 at 761-764; *id.* at 761 n. 194.

[351] *See* Krislov & Katz, *supra* note 308 at 298.

[352] See Iowa Amendment 1 (1868).

[353] See Minnesota Amendment 1 (1868).

[354] See Arkansas Poll Tax Amendment

[355] See Colorado Women's suffrage Amendment (1983); Idaho Women's Suffrage Amendment (1896).

[356] See Texas Proposition 4 (1891).

[357] See California Amendment 2 (1896)

[358] See Wisconsin Question 4 (1908); Nebraska Amendment 1 (1918); Oregon Measure 1).

[359] See Arkansas Amendment 11 (1926)

[360] See Oregon Measure 1 (1924)

[361] See Maine Amendment 2 (1919)

[362] See Texas Proposition 1 (1921); Arkansas Amendment 8 (1920); Kansas Womens Suffrage Amendment (1912); California Proposition 4 (1911); South Dakota Women's Suffrage Amendment (1918); Oklahoma Question 97 (1918); Michigan Womens Suffrage Amendment (1918); New York Amendment 1 (1917); Nevada Womens Suffrage Amdnemtn (1914); Montana Amendment 1 (1914); Washington Women's Suffrage Amendment (1910)

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absentee voting,[363] voter registration,[364] out-of-precinct voting,[365] and protections against vote-buying and corruption.[366] Through the mid and late twentieth century state legislatures referred amendments that expanded absentee voting,[367] permitted the use of voting machines[368] and secret ballots,[369] provided for elections to fill Congressional vacancies,[370] and lowered the voting age.[371] On no less than seven occasions, state legislatures have referred amendments to take away their own power over congressional redistricting and transfer it to an independent commission.[372]

Even today, state legislatures look to state constitutions to regulate federal elections. In recent years, three states—Missouri, Arkansas, and North Carolina—referred amendments to voters to impose Voter ID requirements,[373] while the Illinois legislature referred to voters an amendment designed to preclude voter ID laws.[374] Following the 2020 Election and the COVID-19 pandemic, several state legislatures placed new election-related amendments on the ballot. In 2021, New York unsuccessfully referred amendments that would have changed congressional redistricting criteria and provided for no-excuse absentee voting and same-day registration.[375] The 2022 election will see legislatively-referred amendments relating to early voting[376] and primaries,[377] and, in perhaps the

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[363] See Maine Amendment 1 (1921); California Proposition 22 (1922); Maryland Amendment 1 (1918); Missouri Issue 11 (1922);

[364] See Oregon Measure 5 (1927)

[365] See California Proposition 18 (1924)

[366] See Maryland Amendment 4 (1913)

[367] See Maryland Amendment 6 (1956) (people with disabilities); Massachusetts Question 4 (1944) (same); Massachusetts Question 3 (1976) (accommodating religious holidays); Connecticut Question 3 (1976) (same); Pennsylvania Question 1 (1985) (poll workers and religion).

[368] See Kentucky Voting Machines Referendum (1941).

[369] See Colorado Measure 1 (1946).

[370] See Arizona Proposition 101 (1962).

[371] *See* Georgia Amendment 6 (1943); Alaska Amendment 1 (1970); Massachusetts Question 3 (1970); Montana Amendment 3 (1970); Maine Amendment 1 (1970); Nebraska Amendment 1 (1970).

[372] See Washington SJR 103 (1983); Montana Measure C-14 (1984); Hawaii HB 2322 (1992); Idaho SJR 105 (1994); New Jersey Public Question 1 (1995); Colorado Amendment Y (2018); Virginia Amendment 1 (2020)

[373] See Missouri Amendment 6 (2016); Arkansas Issue 2 (2018); North Carolina (2018).

[374] *See* Illinois Right to Vote Amendment (2014).

[375] *See* New York Proposals 1, 3, and 4 (2021).

[376] *See* Connecticut Allow for Early Voting Amendment (2022).

[377] *See* Hawaii Primary Voting for 17-Year-Olds Amendment (2022).

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most extreme example of a constraint on state legislatures, the Alabama legislature has referred an amendment for 2022 which, if enacted, would prohibit itself from changing any election law within six months of a general election.[378]

Implicit in every effort to refer an election-related amendment to voters is the recognition that those amendments will be binding. That state legislatures continue to submit amendments to voters, rather than pass ordinary legislation, reflects their understanding of state constitutions as constraining legislative authority. Consider, for example, the many instances in which state legislatures referred amendments to voters seeking an affirmative *grant* of authority to pass new types of election-related legislation,[379] or where state legislatures turned to referenda, rather than ordinary legislation, to change or repeal election-related constitutional provisions.[380] Or consider instances where state legislatures referred amendments with judicial review explicitly in mind; in 2018, the Arkansas legislature referred a Voter ID amendment to voters in after the state supreme court struck down an earlier Voter ID statute,[381] and in 2014 the Illinois legislature referred an amendment designed to preclude Voter ID and other restrictive voting laws.[382] All these examples demonstrate state legislatures' acceptance both that state constitutions are binding and that

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[378] *See* Alabama Prohibit Changes to Election Conduct Laws within Six Months of General Elections Amendment (2022).

[379] See Texas Proposition 4 (1887) (authorizing legislature to provide for voter registration in cities); Texas Proposition 4 (1981) (same); Connecticut Question 1 (1932) (authorizing legislature to enact absentee voting); Kentucky Absentee Voting Referendum (1945) (same); Maryland Question 1 (2008) (authorizing legislature to provide for early voting); Maryland Amendment 4 (1913) (Authorizing legislature to regulate penalties for vote buying and selling); Maryland Question 5 (1972) (Authorizing legislature to prohibit voting for felons and the mentally disabled); Arkansas Amendment 39 (authorizing legislature to enact voter registration laws); Maryland Question 2 (2018) (authorizing legislature to provide for same-day registration). *See also* Connecticut Allow For Early Voting Amendment (2022) (seeking to authorize legislature to provide for early voting).

[380] See Maine Amendment 1 (1965) (removing bar on pauper voting); Massachusetts Question 3 (1972) (same); Wyoming Amendment B (1996) (removing bar on voting by mentally ill); Idaho HJR7 (1982) (removing disqualifications); Idaho HJR14 (1982) (removing voter requirements); Alaska Amendment 2 (1970) (eliminating English proficiency requirement); New Jersey Public Question 4 (2007) (changing competency requirement);

[381] See Arkansas Issue 2 (2018); *Martin v. Kohls*, 556 S.W.3d 509 (Ark. 2018).

[382] See Illinois Right to Vote Amendment (2014); http://www.sj-r.com/article/20140408/NEWS/140409416 (noting that the Amendment's primary sponsor described its purpose as "prevent[ing] the passage of inappropriate voter-suppression laws and discriminatory voting procedures").

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courts will apply them to review state laws regulating federal elections.

b. Congress

The Elections and Electors Clauses grant Congress final authority to make or alter laws regulating federal elections. Implicit in this authority is Congress's responsibility to carefully consider state election laws and to make changes as needed. Understanding how Congress has exercised this authority provides insight into its understanding of the relationship between state legislatures and state constitutions, and there is ample historical evidence that Congress has long accepted that state constitutions may regulate federal elections and constrain state legislatures.

i. Acts of Congress

When Congress has exercised its own authority under the Elections and Electors Clauses, it has implicitly recognized that state legislatures remain subject to the ordinary lawmaking process as laid out in state constitutions. Congressional redistricting provides one example. In 1862, Congress exercised its Elections Clause authority to require contiguous single-member districts, as opposed to at-large elections.[383] The 1862 Act also included a provision permitting Illinois to elect one representative at large, with the state's thirteen other Representatives being elected "as now prescribed by law in said State."[384] As Congress recognized, those districts had previously been prescribed "by law"—that is, according to the requirements of the Illinois constitution.[385] Likewise, the 1862 Act and others over the following decades continued to recognize that congressional districts had been drawn by state legislatures "as provided by law."[386]

To eliminate any doubt, Congress in 1911 eliminated the statutory reference to redistricting by a state "legislature" and replaced it with language stating that Representatives were to be elected "by the districts

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[383] *See* Apportionment Act of 1862, ch. 170 12 Stat. 572. Congress also required single-member districts in 1842, but this requirement was dropped in the 1850 apportionment Act before being restored in 1862. *See* Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1850, 9 Stat. 433.

[384] *Id.*

[385] *See* An Act to Establish Thirteen Congressional Districts, and to Provide for the Election of Representatives to the Congress of the United States, Under the Census of the Year One Thousand Eight Hundred and Sixty. (1861).

[386] See Apportionment Act of 1862, 12 Stat. 572; Apportionment Act of 1883 (22 Stat. 5); Apportionment Act of 1873 (17 Stat. 28); Apportionment act of 1893 (26 Stat. 735); Apportionment Act of 1901 (31 Stat. 734)

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now prescribed by law until such State shall be redistricted *in the manner provided by the laws thereof.*"[387] This change reflected the fact that many state constitutions allowed for lawmaking by direct initiative. As Senator Burton, the sponsor of the change, explained:

> It was very natural in 1890, and even in 1900, that a provision should be incorporated that the State should be redistricted "by the legislature thereof," because that was the only lawmaking power; but since then a new method of making laws has been devised, and we can not afford to cling either to obsolete phraseology or, in our dealing with the States, to adhere to obsolete methods—that is, to ignore their methods of enacting laws.[388]

To ignore these new methods and require states to redistrict only through the state legislature, Senator Burton explained, would be "to fix one inflexible way" among the many constitutionally-permissible means of redistricting.[389] Other members of Congress did not dispute that initiatives and referenda were appropriate mechanisms through which states could enact election laws; rather, they questioned whether the change in language was necessary at all, as the earlier language did not preclude a state legislature from submitting a new district map to the people in a referendum.[390] In response, proponents of the change pointed to the many states in which the legislature played no role at all in the initiative process.[391] They emphasized that in these states the people's right to referendum and initiative "does not come from the legislature at all," but rather from state constitutions.[392] Congress, of course, enacted the change, and has used the new language to this day.[393]

In *Hildebrant*, the Supreme Court read this language as Congress's

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[387] See Apportionment Act of 1911(37 Stat. 13).

[388] 47 Cong. Rec. 3508 (statement of Sen. Burton)

[389] *Id.* at 3507 (statement of Sen. Burton).

[390] *Id.* at 3508 (statement of Sen. Shively) (noting that the earlier language "does not prohibit the legislature from arranging the districts by referendum of the act the people").

[391] *See id.* (statement of Sen. Clapp) ("The law of the State in that case does not require the legislature to submit anything to the people. The right of the people under the initiative and referendum … is absolutely independent of the legislature.").

[392] *Id.* (statement of Sen. Works).

[393] *See* 1941 Apportionment Act, 55 Stat. 761-762 (providing redistricting procedures "[u]ntil a State is redistricted in the manner provided by the law thereof"); 2 U.S.C. §2a(c) (same).

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recognition of referenda and initiatives "as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws."[394] Similarly, in *Smiley* the Court explained that because "Congress had not power to alter" the Elections Clause, the changed language in the 1911 Act "could but operate as a legislative recognition of the authority deemed to have been conferred by" the Clause to the state constitution.[395] And in *AIRC*, the Court reaffirmed that the purpose of the 1911 Act was "to recognize the legislative authority each State has to determine its own redistricting regime," including regimes that excluded the legislature.[396]

Another example is 3 U.S.C. § 2, which provides that if a State is unable to select presidential electors after Election Day "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." Though this language at first glance seems to suggest that Congress intended to commit the task of choosing back-up electors to state legislative bodies, the legislative history in fact reveals the opposite to be true—Congress only empowered state legislatures to make this choice in accordance with the regular lawmaking process.[397] As Professor Levitt has explained, when Congress originally enacted the statute that would become 3 U.S.C. § 2 in 1845, it did not refer to state legislatures at all, but rather provided that "electors may be appointed . . . *in such manner as the State shall by law provide*."[398] As in the 1911 Apportionment Act, Congress in 1845 recognized that the Electors Clause granted power to the States, and that such power could only be exercised "by law" according to state constitutions.[399] But while the changed language in the 1911 Act reflected Congress' conscious recognition of the role of state constitutions, there is no indication the change to the 1845 language was the result of any serious consideration by Congress.[400] Rather, the change was made by a commission charged with recodifying federal statutes into what would

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[394] 241 U.S. at 569. *See also Hawke*, 253 U.S. at 230-31 (noting the *Hildebrandt* Court held "that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress was not unconstitutional").

[395] 285 U.S. at 372.

[396] 576 U.S. at 812 n.22.

[397] *See* Justin Levitt, *supra* note 19 at *25

[398] Act of Jan 23, 1845, Pub. L. No. 28-1, 5 Stat. 721 (emphasis added). *See also* Levitt, *supra* note 19 at *25.

[399] *See* Levitt, *supra* note 19 at *25 ("There was no suggestion in the 1845 federal statute that the state legislature had any authority whatsoever beyond its capacity as a lawmaking body, unless state law assigned it that role.").

[400] *See id.* at *26 ("[T]here is little contemporaneous evidence that the change was intended to reflect a considered alteration in the body empowered to choose electors.").

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become the Revised Statutes of 1873,[401] with no explanation provided for the changed language.[402] Thus the only language embraced by Congress is that of the 1845 Act, which suggests that Congress accepted that the power conferred upon state legislatures by the Electors Clause was constrained by state constitutions.[403]

ii. Direct Review of State Constitutional Provisions

Congress's acceptance is also evident from its review and approval of state constitutions. Article IV, § 3 of the Constitution grants Congress the power to admit new states to the Union.[404] Congress has generally done so by passing an enabling act laying out the process by which a territory can hold a constitutional convention to draft a state constitution.[405] These enabling acts required new state constitutions to include specific provisions as a condition of admission.[406] These conditions covered a wide range of substantive matters, from restrictions over land use to language requirements, civil rights, and family law.[407] In addition to these up-front conditions, Congress also reviewed and debated proposed new state constitutions to determine if they were consistent with the Constitution's guarantee of a republican form of government.[408]

Suffrage and political rights were among the most important issues Congress considered when reviewing state constitutions. In the years leading up to the Civil War, Congress debated whether to permit clauses in the Michigan and Minnesota constitutions granting suffrage to aliens.[409]

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[401] *See id.* at *26-27.

[402] *See id.* at *28 ("The commissioners tasked with revision gave no indication of any reason for making the change . . ..").

[403] *See id.* at *32-33 ("The implication is that, at least in 1845, Congress thought that allowing states to direct the manner of appointing electors by law and allowing the state legislature to direct the manner of the appointment electors, amounted to the same thing: normal state lawmaking power and constraint.").

[404] *See* U.S. Const. art. IV. § 3, cl. 1 ("New States may be admitted by the Congress into this Union.").

[405] *See, e.g. See* Ohio Enabling Act §§ 1, 4-5, 2 Stat. 173 (1802); Louisiana Enabling Act §§ 1-4, 2 Stat- 641 (1811); Illinois Enabling Act §§ 1, 3-4, 3 Stat. 429 (1818); Omnibus Enabling Act, 25 Stat. 676 (1889).

[406] *See* An Act for the Admission of the State of Louisiana into the Union, and to Extend the Laws of the United States to Said State, 2 Stat. 701 (1812).

[407] *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 130-131 (2004).

[408] *See* Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J of Pol. 578 (1949).

[409] *See id.* at 583-85.

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After the Civil War, Congress conditioned the readmission of confederate states on their including universal male suffrage in their new constitutions.[410] The Senate also considered at length whether to make voting by ballot as opposed to *viva voce*—the prototypical "manner" regulation—a condition of readmission. Senator Charles Drake of Missouri offered an amendment to the 1867 Reconstruction Act requiring readmitted state constitutions to provide that in "all elections by the people the electors shall vote by ballot."[411] In his view, enshrining the secret ballot in state constitutions was necessary to ensure elections remained free from the undue influence *viva voce* voting enabled.[412] Implicit in Senator Drake's proposal was the understanding that state constitutional provisions regulating the manner of elections would constrain state legislatures, and despite considerable debate over the amendment there was no suggestion this was not the case.[413] To the contrary, those present agreed they had the same power to require state constitutions to provide for voting by ballot as to require them to provide for universal suffrage.[414] Rather, they disagreed only as to whether Congress could require a state to agree to not change its constitution after

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[410] *See* Biber, *supra* note 407 at 140-41.

[411] *See* 40 Cong. Globe at 165 (amendment of Sen. Drake). The original amendment offered by Senator Drake conditioned readmission on state constitutions requiring voting by ballot "in all elections by the people for State, county, or municipal officers." *See id.* at 99. The debate, however, focused on Congressional elections. *See id.* at 100 (statement of Sen. Drake) (discussing what to do if "a State, after having formed is constitution and entered into this compact, should send up representatives here elected by a *viva voce* vote, in direct defiance of its own contract with this Government"). After two days of debate, Senator Drake modified the text of his amendment after it had "been suggested that if it were adopted in its terms it might not include elections for members of Congress." *Id.* at 165.

[412] *See id.* at 99 (statement of Sen. Drake) (emphasizing that without this amendment southern states would "form their constitutions and they will perpetuate *viva voce* voting in every one of these States; and when you have got that perpetuated in their constitution, goodbye to the will of the loyal people of these States. . .").

[413] *See id.* at 164 (statement of Sen. Stewart) ("There are a great many things these people ought to put into their constitutions which are matters of substance. I presume they ought to provide in their constitutions for a judiciary system; I presume they ought to provide in their constitutions for a Legislature; I presume they ought to provide various other things in their constitutions. The question is shall we make an entire constitution for them because there are material things which it is proper to put in a constitution?").

[414] *See id.* at 103 ((statement of Sen. Morton) ("We can prescribe the conditions upon which we will admit a State. We can say "You shall put universal suffrage in the constitution," or "You shall put voting by ballot in the constitution, or we will not receive you."); *id.* at 164 (statement of Sen. Yates) ("[W]e have just as much power and the same right under the Constitution to say that voting shall be by ballot as to say that these States shall provide in their constitutions that negroes shall vote at all.").

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admission[415] and whether it was proper to add new conditions at the eleventh hour.[416] If ever there was a moment to suggest that such a condition would violate the Elections Clause, this was it.

Of equal significance is the fact that Congress never rejected any state constitutional provision regulating federal elections. Most of the thirty-seven state constitutions approved by Congress contained provisions related

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[415] *See id.* at 103 (statement of Sen. Morton) (arguing that Congress could impose voting by ballot as a condition of readmission but that "after the State has been received, it is at liberty then to amend its constitution in any manner . . ."). Senator Conkling raised this constitutional question and debated whether such an agreement could be enforced. *See id.* at 100-01. In response, Senator Drake emphasized Congress's authority to judge its members' qualifications and to reject any Representatives elected by *viva voce* vote. *See id.* at 100 (statement of Sen. Drake).

[416] *See id.* at 101 (statement of Sen. Trumbull) (arguing that additional conditions would not be "acting in good faith"); *id.* at 102 (statement of Sen. Wilson) ("I am for the ballot instead of the *viva voce* mode of voting ... but I do not wish to make this a new mode of voting as a condition precedent to restoration. I fear this people will think we are trifling with them. I fear that our friends everywhere will think we are seeking here now grounds of difference rather than a reasonable plan of adjustment if we insist on making questions of this character conditions of the final restoration of these States to their practical relations."); *id.* at 164 (statement of Sen. Williams) ("At the last session of Congress we adopted a bill in which we provided that upon certain terms and conditions these States should be entitled to representation in Congress, and now we propose to make the mere mode of voting a question upon which shall turn the restoration of this Union."); *id.* at 164 (statement of Sen. Stewart) ("Nine of the ten States do [voting by secret ballot] now and will continue to do it undoubtedly, and Virginia very likely will change here constitution and adopt that form, so that there is not even a pretense of necessity for Congress acting a part which will be regarded as bad faith.").

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to the manner of voting.[417] Others regulated the timing of elections,[418] imposed majority- or plurality-winner rules,[419] guaranteed free and equal elections,[420] or required state legislatures to enact primary, registration, and

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[417] *See* Ala. Const. of 1819 art. VIII § 179 ("All elections by the people shall be by ballot . . .."); Alaska Const. of 1956 art. V, § 3 ("Secrecy of voting shall be preserved."); Ariz Const. of 1912 art. VII, § 1 ("All elections by the people shall be by ballot ... ."); Ark. Const. of 1836 art IV, § 8 ("All elections shall be viva voce until otherwise directed by law ... ."); Cal. Const. of 1849, art. II, § 6 ("All elections by the people shall be by ballot."); Colo Const. of 1876 art. VII, § 8 ("All elections by the people shall be by ballot ... ."); Fla. Const. of 1838, art. VI, § 17 ("[I]n all elections by the people, the vote shall be by ballot."); Haw. Const. of 1950 art. II, § 4 ("Secrecy of voting shall be preserved ... ."); Idaho Const. of 1890 art. VI, § 1 ("All elections by the people must be by ballot."); Ill. Const. of 1818, art. II, § 28 ("All votes shall be given viva voce"); Ind. Const. of 1816, art. II, § 13 ("All elections shall be by ballot ... ."); Iowa Const. of 1846, art. III, § 6 ("All elections by the people, shall be by ballot."); Kan. Const. of 1862, art. IV, § 1 ("All elections by the people shall be by ballot. . . ."); Ky. Const. of 1792, art. III, § 2 ("All elections shall be by Ballot."); La. Const. of 1812, art. VI, § 13 ("In all elections ... the vote shall be given by ballot."); Me. Const. of 1820 art. II, § 1 ("[E]lections shall be by written ballot.") Mich. Const. of 1835 art II, § 2 ("All votes shall be given by ballot ... ."); Minn. Const. of 1857 art. VII, § 6 ("All elections shall be by ballot ... ."); Miss. Const. of 1817 art. III, § 3 (requiring that the first election after admission "be by ballot."); Mont. Const. of 1889 art. IX, § 1 ("All elections of the people shall be by ballot."); Nev. Const. of 1864 art. II, § 5 ("All elections by the people shall be by ballot ... ."); N.M. Const. of 1911 art. VII, § 5 ("All elections shall be by ballot."); Ohio Const. of 1802 art. IV, § 2 ("All elections shall be by ballot."); Okla Const. of 1907, art. III, § 6 ("In all elections by the people the vote shall be by ballot ... ."); Or. Const. of 1857 art. II, § 15 ("[I]n all elections by the people, votes shall be given openly, or viva voce ... ."); S.D. Const. of 1889 art. VII, § 3 ("All votes shall be by ballot ... .); Tenn. Const. of 1796, art. III, § 3 ("All elections shall be by ballot."); Utah Const. of 1895 art IV. § 8 ("All elections shall be by secret ballot."); Wash. Const. of 1889 art. VI, § 6 ("All elections shall be by ballot."); W. Va. Const. of 1863 art. III, § 2 ("In all elections by the people, the mode of voting shall be by ballot ... ."); Wisc. Const. of 1848 art. III, § 3 ("All votes shall be given by ballot ... ."); Wyo Const. of 1889 art. VI, § 11 ("All elections shall be by ballot ... . All voters shall by guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.").

[418] *See* Ark. Const. of 1836, art. IV, § 8 (setting general elections for the "First Money in October until altered by law"); Haw. Const. of 1950 art. II, § 8; Kan. Const. of 1862, art. IV, § 2;

[419] *See* Ariz. Const. of 1912, art. VII, § 7;

[420] *See* Ark. Const. of 1836, art. II § 5; Ill. Const. of 1818, art. VII, § 5;

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absentee voting laws,[421] among others.[422] In many newly admitted states, the first federal elections were held under rules laid out in these original state constitutions because no state legislature yet existed to prescribe new ones.[423] Congress approved of all these provisions, and explicitly blessed the practice in an 1850 election contest.[424] This acceptance demonstrates that, though Congress scrutinized other provisions, those regulating federal elections were uncontroversial.

iii. Resolution of Contested House Elections

Congress's acquiescence can also be gleaned by looking to its resolution of contested House elections. The Constitution confers on each chamber of Congress the sole authority to judge the qualifications of its members.[425] From time to time, disputed elections have involved conflicts between state constitutions and laws passed by state legislatures. It is important not to overstate the value of these cases in discerning Congress's views as an institution. When Congress resolves a disputed election, it does not sit as a court, nor is it constrained by law or precedent.[426] The Supreme Court has observed that the partisan nature of contested elections limits the degree to which we should rely on the reasoning in any one case.[427] Nonetheless, a review of these cases demonstrates Congress's consistent deference to state constitutions.

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[421] *See* Ariz. Const. of 1912, art. VII, §§ 10, 12; Fla. Const. of 1838, art. VI, § 2; Haw. Const. of 1950 art. II, § 4. Notably, the original Texas constitution prohibited the legislature from requiring voter registration before later being amended. *See* Tex. Const. of 1876, art. VI, § 4 ("[N]o law shall ever be enacted requiring a registration of the voters of this State.").

[422] Iowa Const. of 1846, art. XIII, § 7 (declaring that any country attached to a county for judicial purposes shall also be attached for election purposes); Haw. Const. of 1950, art II, § 8 (requiring at least forty-five days between primary and general elections);

[423] *See, e.g,* Ariz. Const. of 1912, art. VII, § 11; Cal. Const. of 1849, Schedule § 12; Colo. Const. of 1876, art. VII, § 7; Iowa Const. of 1846, art. XIII, § 6;

[424] *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. at *44-45 (Forthcoming 2022). *See also* 31 Cong. Globe at 1779-1789, 1795, App. at 1253-55 (1850).

[425] *See* U.S. Const. art I § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .").

[426] For a lengthy discussion of the non-judicial nature of contested House elections, *see* Smith, *supra* note 424 at *74-90.

[427] *See AIRC*, 576 U.S. at 818-19 (noting that "it was perhaps not entirely accidental" that the declared winner of one such contested election "belonged to the same political party as all but one member of the House Committee majority responsible for the decision.").

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State constitutions featured in some of the earliest contested House elections, and in each case, there was no doubt they controlled. In 1791, James Jackson contested the election of Anthony Wayne, arguing that several voters had cast their ballots outside of their home counties in violation of the Georgia Constitution, which required that voters "have resided six months within the county."[428] The House voted to unseat Wayne, and there was no suggestion Georgia's constitution did not control.[429] In 1804, Representative William Hoge of Pennsylvania resigned his seat in Congress, prompting a special election, which was challenged on the ground that the Pennsylvania legislature had not yet enacted laws providing for Congressional special elections.[430] In response, Representative William Findley[431] observed that every part of the special election had been provided for by law: the U.S. Constitution authorized the Governor to call a special election,[432] laws enacted by the Pennsylvania legislature established elections officers and their duties, and "the constitution of Pennsylvania prescribe[d] the manner that citizens shall vote, by ballot."[433] The House agreed the election was valid, and voted for the winner to retain his seat.[434]

Throughout the nineteenth and twentieth centuries, the House operated with the understanding that state constitutions were controlling. In several cases, the House scrutinized state election laws for compliance with state constitutions.

- In *Miller v. Thompson* (1849), the House considered the validity of votes cast in an Iowa county that had been split into a different congressional district from its neighbor in violation of the state

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[428] *See* 3 Annals of Cong. 460-463 (1792); Ga. Const. of 1789, art. IV, § 1.

[429] *See* 3 Annals of Cong. at 472. *See also* Smith, *supra* note 424 at *33 n. 195.

[430] *See* 14 Annals of Cong. 839.

[431] Findley's views likely carried special weight; before being elected to Congress, Findley had been a delegate to the Pennsylvania Constitutional Convention, where he helped draft the portion of the Pennsylvania Constitution requiring that all elections be "by ballot" alongside James Wilson, who helped draft the Elections Clause. *See* Smith, *supra* note 424 at *30 n.171.

[432] *See* U.S. Const., art. I, § 2 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall Issue Writs on Election to fill such Vacancies.").

[433] *Id.* at 849-50.

[434] *See id.* at 857-58.

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constitution.[435] There was no question during debate that the state constitution controlled.[436]

- In *McLean v. Broadhead* (1885) and *Frank v. Glover* (1888), the House determined that, because registration was not a voter qualification, Missouri's registration law did not violate the state's constitution.[437]
- In *Johnston v. Stokes* (1896), the House determined that a portion of South Carolina's voter registration law did violate the state constitution but upheld the election as the number of affected votes would not have changed the outcome.[438]
- In *Davison v. Gilbert* (1901), the Committee determined that Kentucky's Congressional redistricting statute had been passed in accordance with the state constitution.[439]
- In *Gerling v. Dunn* (1919), the Committee rejected the argument that using voting machines in a congressional election violated the New York state constitution because "[v]oting machines have been in use in New York State for many years, authorized by its constitution, provided for by its legislature, and sanctioned by its courts."[440]
- In *Paul v. Harrison* (1922), the House invalidated a Virginia election based on numerous state constitutional violations, writing that "there was such an utter, complete, and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia . . . that there was no legal election in those precincts."[441]
- In *Huber v. Ayres* (1951), the Committee found that Ohio election boards had violated the state constitution by not rotating the names

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[435] *See* Hind's Precedents §819 at 1062.

[436] *See* 31 Cong. Globe 1301 (statement of Rep. Leffler) ("The rule upon which this case must be decided was laid down in the Constitution of the United States and in the constitution of the State of Iowa."); *id.* at 1306 (statement of Rep. Thompson) ("Could they vote in either of the two counties? This cannot be so, because the [Iowa] constitution required the voter to vote in the county in which he resided."); *id.* at 1310 (statement of Rep. Strong) ("The manner having been prescribed [in Article III, Section 6 of the Iowa constitution], it having been declared that the vote should be by ballot, a man had no constitutional privilege to vote in any other way.").

[437] *See* H.R. Rep. No. 48-2613 at 2-5 (1885); H.R. Rep. No. 50-1887 (1888).

[438] *See* H.R. Rep. No. 54-1229 at 14 (1896).

[439] *See* H.R. Rep. No. 56-3000 (1901). The committee focused on whether Congress had authority to overrule state-drawn districts; it was uncontroversial that the state constitution governed. *See id.* at 2.

[440] *See* H.R. Rep. No. 65-1074 (1919).

[441] *See* H.R. Rep. No. 67-1101 at 9 (1922).

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of candidates on the ballots, though the House declined to overturn the election.[442]

- In *Macy v. Greenwood* (1952), the Committee considered a claim that New York voters had been registered in violation of the state constitution but found insufficient evidence to support the challenge.[443]

Often, the House deferred to state supreme court decisions to decide whether state election laws were valid:

- In *Curtin v. Yocum* (1880), the House considered whether a Pennsylvania statute permitting unregistered voters to cast a ballot if they attested to their qualifications conflicted with a new amendment to the state constitution providing that "no elector shall be deprived of the privilege of voting by reason of his name not being registered."[444] The Pennsylvania Supreme Court had not yet interpreted the new provision, but the Majority found that the statute had been "enacted to give effect" to the new amendment and found no conflict.[445] The minority was divided as to whether a conflict existed, but agreed the state constitution controlled.[446]
- In *California Contested Election Cases* (1886), a California congressional redistricting statute was challenged for not having been "read on three several days in each house" as required by the state constitution.[447] The Committee adopted the view of the California Supreme Court, explaining that such deference was "well-established".[448]
- In *Cornett v. Swanson* (1896), the House considered a claim that Virginia's secret ballot law violation the state constitution by

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[442] *See* H.R. Rep. 82-986 (1951); 97 Cong. Rec. 18479

[443] *See* H.R. Rep. No. 82-1599 (1952).

[444] *See* H.R. Rep. 46-345 at 2-4; Pa. Const. of 1873, art. VIII, § 7 (1873).

[445] *Id.* at 5-6.

[446] *See id.* at 13 (describing the 1874 statute as "repugnant" to the 1873 constitutional provision "which would seem to limit the power of the legislature to disfranchise an elector for nonregistration who is otherwise qualified"); *id.* at 21 (views of Representatives Field, Overton, and Camp) ("We think, however that the registry law of 1874 is a valid law under the constitution of 1873).

[447] *See* H.R. Rep. No. 48-2613 (1885); Cal. Const., art. IV, § 15.

[448] *See id.* at 4.

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disenfranchising illiterate voters.[449] The Committee deferred to the Virginia Supreme Court, which had upheld the law; a minority agreed that the Virginia constitution controlled but felt the Virginia Supreme Court's decision was dictum.[450]

- In *Davis v. Sims* (1904), Tennessee's secret ballot law was alleged to have violated the state constitution' "free and equal" elections clause because it only applied to some voters.[451] In reaching its decision, the House Committee examined at length decisions by the Kentucky, Virginia, Michigan, Massachusetts, and Pennsylvania supreme courts interpreting similar provisions in their state constitutions.[452]

In a few cases, candidates tried to invoke the ISL theory to argue state constitutions could not constrain state legislatures. *Shiel v. Thayer* (1862) is one example.[453] When Oregon was admitted to the Union in 1859, its constitution provided for a congressional election to be held in June 1860, at which George Shiel was elected.[454] At the presidential election held that November, however, Andrew Thayer received the most votes and claimed the June election was invalid because under the Elections Clause "a convention for a State has no power to fix the time and place for holding elections for Representatives and Senators, but that they must be prescribed by the Legislature of the State."[455] The House Committee, though, had "no doubt that the constitution of [Oregon] has fixed [the election date] beyond the control of the legislature."[456] On the House floor, the argument was raised that "no other power in a State" other than the legislature "has a right to prescribe" the time, place, or manner of a congressional election.[457] Representative Dawes, the chairman of the Committee, argued this flew "in the face of all the precedents of this House" and that the Elections Clause assigned authority not to the legislative body alone, but to the "constituted authority of the State," which included a constitutional convention.[458]

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[449] *See* H.R. Rep. No. 54-1473 (1896).
[450] *See id.*
[451] *See* H.R. Rep. No. 58-1382 (1904); Tenn. Const. art IV §1.
[452] *See* H.R. Rep. No. 58-1382 at 7-9.
[453] *See* H.R. Rep. No. 37-4 (1861).
[454] *See id.* at 1; Or. Const. of 1857, art. II, § 14.
[455] 37 Cong. Globe at 353 (1861).
[456] *See* H.R. Rep. No. 37-4, at 3.
[457] 37 Cong. Globe at 356 (remarks of Representative Stevens).
[458] *Id.* at 356-57. The Committee considered a similar issue in *Patterson v. Belford* in

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Likewise, in *West Virginia Contested Elections* (1874), the Committee considered whether to seat candidates elected in August under the state constitution or in October pursuant to a state statute.[459] The majority determined that the state constitution simply didn't regulate congressional elections, but Representative Speer went on to argue that the state legislature should control regardless.[460] A minority rejected this argument, explaining "it makes no difference whatsoever" whether a "constitutional convention or the legislature" sets a congressional election.[461] Ultimately, the House rejected Speer's view, seating the winners of the election held under the state constitution.[462]

In each of these cases, spanning over a century, the House either rejected the ISL theory or assumed state constitutions controlled. Professor Morley, however, has argued that several of these cases evince Congress's embrace of the theory, despite coming out against the candidate who would have benefitted from its application.[463] He also points to a few nineteenth century cases in which the candidate who invoked the theory did not lose, though these are equivocal at best as to Congress's views.

Baldwin v. Trowbridge (1866) involved a conflict between the Michigan constitution, which required voters to cast their ballots "in the township or ward" in which they were registered, and an 1864 statute providing for absentee voting by soldiers.[464] Augustus Baldwin argued the 1864 statute was unconstitutional and that therefore soldier votes cast for Rowland Trowbridge should not have been counted.[465] The majority presented two rationales in favor of Trowbridge. First, there was no conflict between the soldier-voting law and the state constitution.[466] Second, under the Elections Clause, the state constitution could not constrain the legislature.[467] The minority rejected the latter ground, citing the House's decision in *Shiel* just

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1876 regarding a Colorado election held shortly after the state was admitted to the Union. *See* H.R. Rep. No. 45-15 (1877). As in *Shiel*, the House upheld the election held under the state constitution. *See* Hind's precedents at §§523-24 at 660-67.

[459] *See* H.R. Rep. No 43-7 (1874).

[460] *See id.* at 5, 17.

[461] *See id.* at 23.

[462] *See* Hind's Precedents, § 522 at 660 (1907).

[463] *See* Morley *supra* note **Error! Bookmark not defined.** at 48. For a detailed rebuttal, *see* Smith, *supra* note 424 at *57-59.

[464] *See* 39 Cong. Globe at 3460 (1866).

[465] *See id.*

[466] *See* H.R. Rep. No. 39-13 at 3 (emphasizing that if the Michigan constitution did not "fix[] the place of holding the election ... there is no conflict between the law and the constitution and the argument is at an end.")

[467] *See id.*

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four years earlier.[468] While the House voted to seat Trowbridge,[469] the floor debate reveals that many who voted to seat Trowbridge opposed the ISL theory. Representative Dawes, the Committee chair, said he voted for Trowbridge because he saw no conflict between the soldier-voting law and the Michigan constitution, and emphasized that if there were a conflict he would have voted in favor of Baldwin and the state constitution.[470] Trowbridge himself argued there was no conflict.[471] In light of both the support for an alternative rationale and the opposition to the ISL theory, *Baldwin* simply does not demonstrate that Congress abandoned its longstanding acceptance of the role of state constitutions in regulating federal elections.

In *Iowa Contested Election Cases* (1880), the House considered a federal statute that required states to hold congressional elections in November unless doing so required amending their constitutions regarding state elections.[472] Iowa's constitution required state officers and members of Congress to be elected simultaneously, so Iowa held its 1878 election in October as provided in the state constitution.[473] The Committee concluded that Iowa's election was proper.[474] The Committee clarified that its decision was not based on a provision of Iowa's constitution that the state's first congressional election in 1858 was to occur in October, but nonetheless stated that "the time of electing members of Congress cannot be prescribed by the constitution of a State, as against an act of the legislature of a state or an act of Congress."[475] In short, while the ISL theory made a brief appearance, it was only in reference to an argument not considered related to a constitutional provision deemed not relevant.

In another case, *Donnelly v. Washburn*, the Committee considered a claim that unnumbered ballots in a Minnesota election violated the state constitution's requirement that "all elections shall be by ballot" as interpreted by the Minnesota Supreme Court.[476] The majority agreed and

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[468] *See* H.R. Rep. No. 39-14 at 3 (stressing that Americans "everywhere supposed that they had the power to fix a limitation upon the action of their legislature, in determining the times, places, and manner of holding elections for all offices.")

[469] *See* 39 Cong. Globe at 845 (1866).

[470] *See id.* at 822. Representative Davis also saw no conflict between the statute and the constitution. *See id.* at 844.

[471] *See id.* at 840.

[472] *See* H.R. Rep. No. 46-19 (1880).

[473] *See id.*

[474] *See id.*

[475] *See id.* at 18.

[476] *See* H.R. Rep. No. 46-1791.

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determined that the votes should not be counted.[477] The minority cited *Baldwin* and argued the Minnesota constitution did not apply to federal elections.[478] Ultimately, the House never voted on the matter.[479] Thus, while Washburn kept his seat, it cannot be inferred that Congress as an institution embraced the minority's reasoning.

2. Popular Acceptance

Nearly every constitutional provision that regulates federal elections was enacted with the public's approval, signaling its acceptance of their role in constraining state legislatures. In forty-nine states, legislatively-referred amendments must be approved by voters.[480] In eighteen, voters may place amendments on the ballot with enough signatures—usually at least eight percent of the total votes cast for Governor in the prior election—and approve them without the legislature's involvement.[481] Some states also require that amendments win a certain percentage of overall votes, a supermajority of votes, or a majority of votes in successive elections.[482]

Over the past century, voters have initiated and adopted several state constitutional provisions regulating federal elections. Some were adopted in response to state supreme court rulings; in Arkansas, for instance, voters amended the state constitution to allow for voting machines after the state supreme court declared them unconstitutional.[483] Others were adopted in response to unpopular laws enacted by state legislatures. In 1949, republican voters who feared Ohio's "straight ticket" ballot law would prevent Senator Robert Taft's re-election successfully initiated an amendment to repeal it;[484] similarly, in 1977, Ohio republicans initiated an amendment to repeal the democrat-controlled legislature's same-day registration law.[485] Voters have also turned to the initiative where state

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[477] *See id.* at 32.

[478] *See id.* at 59.

[479] *See id.*

[480] *See* Krislov & Katz, *supra* note 308 at 298.

[481] *See id.* at 315. In some states, signatures must also come from a minimum number of the state's counties to ensure broad geographic support. *See id.*

[482] *See id.* at 317.

[483] *See* Arkansas Amendment 54 (1962); *Women Press Drive in Arkansas to Legalize the Voting Machine*, Special to the New York Times, pg. 52 (Mar. 18, 1962).

[484] *See* Ohio Amendment 2 (1949); *Ohio Vote Decision Could Assist Taft*, Special to the New York Times, pg. 39 (Nov. 6, 1949); *Straight Ballot Outlawed in Ohio*, Special to the New York Times, pg. 17 (Nov. 9, 1949).

[485] *See* Abe S. Zaiden, *Repeal of Ohio's Instant Voter Registration Law Eyed*, Special to the Washington Post A.5 (Aug 27, 1977).

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legislatures were unable to make needed changes. In 1964, when the Twenty-Fourth Amendment outlawed poll taxes in federal elections,[486] Arkansas was left without a voter registration system for federal elections.[487] The state legislature scrambled to pass a new system, but the Arkansas Supreme Court held it conflicted with the state constitution, leaving the state with different registration systems for state and federal elections.[488] In response, voters initiated and adopted an amendment creating a permanent registration system for all elections, which remains in effect today.[489]

In recent decades, voters have successfully initiated amendments addressing election administration,[490] establishing substantive rights,[491] requiring Voter ID,[492] creating independent redistricting commissions,[493] and setting congressional redistricting criteria.[494] Voters have also placed several election-related amendments on the ballot which, though unsuccessful, demonstrate the public's embrace of state constitutions as a mechanism for regulating elections.[495] Following the 2020 Election, voters are on track to place an unprecedented number of election-related amendments on the ballot. For the 2022 election, signatures are already being collected for proposed amendments related to registration,[496] early

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[486] U.S. Const. amend. XXIV.

[487] *See* Calvin R. Ledbetter, Jr., *Arkansas Amendment for Voter Registration without Poll Tax Payment*, 54 Ark. Hist. Q. 134, 138 (1995).

[488] *See id.* at 148-150.

[489] *See id.* at 159-161; Ark Const. amend. 51.

[490] Michigan Proposal 3 (2018) (providing straight-ticket voting, automatic registration, same-day registration, and no-excuse absentee voting); Oregon Measure 13 (1986) (thirty-day cut-off for voter registration).

[491] California Proposition 43 (2002).

[492] Mississippi Initiative 27 (2011).

[493] Michigan Proposal 2 (2018); California Proposition 20 (2010); Arizona Proposition 106 (2000)

[494] Florida Amendment 6 (2010)

[495] *See* Nebraska (1924) (direct primary); Ohio (1926) (eliminating compulsory primary); Colorado Voter Registration, Initiative 30 (2002) (same-day registration); California Proposition 39 (1984) (independent redistricting commission); California Proposition 14 (1982) (same); Colorado Initiative 36 (2004) (proportional allocation of electoral college votes); California Proposition 62 (2004) (top-two primary); California Proposition 77 (2005) (changed congressional redistricting); Ohio Amendment 4 (2005) (independent redistricting commission); Ohio Amendment 2 (2005) (no-excuse absentee voting); Oregon Measure 90 (2014) (open primary); Arizona Proposition 121 (2012) (top-two primary); Minnesota Amendment 2 (2012) (Voter ID requirement).

[496] California Voter Identification Initiative (2022).

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voting,[497] ranked-choice voting,[498] voter ID,[499] absentee voting,[500] primary elections,[501] lines at polling places,[502] and even procedures for counting ballots.[503]

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As the above discussion illustrates, the three elements of Professor Baude's Liquidation framework are satisfied. The Elections and Electors Clauses are indeterminate as to the role of state constitutions. Since the Founding, however, state constitutions have consistently constrained state legislatures when it comes to federal elections, and this deliberate course of practice has remained almost completely uniform to the present day. Finally, state legislatures, Congress, and the public have all demonstrated their acquiescence to and active participation in this state of affairs.

CONCLUSION

The text of the Elections and Electors clauses is silent as to the role of state constitutions, but the subsequent history is anything but. Since the Founding, state constitutions have both directly regulated federal elections constrained state legislatures' exercise of their authority under the Clauses. Over time, the historical trend has been for state constitutions to take on a greater role in regulating the time, place, and manner of federal elections. In the past century and a half, nearly every election-related state constitutional provision was either approved and presented to voters by state legislatures or placed on the ballot and enacted by voters directly. Together, this evidence demonstrates both a course of deliberate practice and a significant degree of institutional and popular acceptance, including by state legislatures themselves. This suggests the meaning of the Elections and Electors Clauses with respect to state constitutions has been settled in favor of constraint.

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[497] Connecticut Allow for Early Voting Amendment (2022).

[498] Florida Ranked-Choice Voting Initiative (2022); Missouri Top-Four Ranked-Choice Voting Initiative (2022)

[499] Arizona Voter ID Initiative (2022); California Voter Identification Initiative (2022).

[500] Arizona Voter ID Initiative (2022).

[501] Florida Top-Two Open Primary Initiative (2022); South Dakota Top-Two Primary Initiative (2022)

[502] California Voter Identification Initiative (2022).

[503] Arizona Voter ID Initiative (2022).

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This inquiry also provides another illustration of how historical practice and unwritten constitutional norms combine to construct constitutional meaning. To date, most of the commentary discussing historical practice and constitutional liquidation has focused on separation-of-powers issues. As the Supreme Court's recent decision in *Chiafalo* demonstrates, however, longstanding practice may also establish constitutional rules in the context of law and democracy. Since the Founding, state constitutions have become important safeguards of free elections and voting rights. Recognizing the role they have assumed in our constitutional system is vital to the preservation of those protections.

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State of Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916)
36 S.Ct. 708, 60 L.Ed. 1172

36 S.Ct. 708
Supreme Court of the United States.

STATE OF OHIO ON RELATION OF DAVID DAVIS, Plff. in Err.,
v.
CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor and Inspector of Elections, and State Supervisor of Elections, et al.

No. 987.
|
Submitted May 22, 1916.
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Decided June 12, 1916.

Synopsis
IN ERROR to the Supreme Court of the State of Ohio to review a judgment denying a writ of mandamus to compel state election officers to disregard the popular vote on a referendum disapproving a statute redistricting the state for the purpose of congressional elections. Affirmed.

For opinion below, see 94 Ohio St. 154, 114 N.E. 55.

The facts are stated in the opinion.

Attorneys and Law Firms

***565** ****709** Messrs. **Sherman T. McPherson** and **J. Warren Keifer** for plaintiff in error.

Mr. **Edward C. Turner,** Attorney General of Ohio, and Messrs. **Edmond H. Moore** and **Timothy S. Hogan** for defendants in error.

Opinion

***566** Mr. Chief Justice **White** delivered the opinion of the court:

By an amendment to the Constitution of Ohio, adopted September 3d, 1912, the legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly. And by other constitutional provisions the machinery to carry out the referendum was created. Briefly they were this: Within a certain time after the enactment of a law by the senate and house of representatives, and its approval by the governor, upon petition of 6 per centum of the voters, the question of whether the law should become operative was to be submitted to a vote of the people, and, if approved, the law should be operative; and, if not approved, it should have no effect whatever.

In May, 1915, the general assembly of Ohio passed an act redistricting the state for the purpose of congressional elections, by which act twenty-two congressional districts were created, in some respects differing from the previously established districts, and this act, after approval by the governor, was filed in the office of the secretary of state. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved. Thereupon, in the supreme court of the state, the suit before us was begun against state election officers for the purpose of procuring a mandamus, directing them to disregard the vote of the people on the referendum, disapproving the law, and to proceed to discharge their duties as such officers in the next congressional election, upon the assumption that

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the action by way of referendum was void, and that the law which was disapproved was ***567** subsisting and valid. The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the state, and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed, it was in substance charged that both from the point of view of the state Constitution and laws and from that of the Constitution of the United States, especially § 4 of article 1, providing that 'the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators;' and also from that of the provisions of the controlling act of Congress of August 8, 1911 (chap. 5, 37 Stat. at L. 13, Comp. Stat. 1913, § 15), apportioning representation among the states, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. The court below adversely disposed of these contentions, and held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.

Without going into the many irrelevant points which are pressed in the argument, and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view,—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States, referred to.

1. As to the state power, we pass from its consideration, ***568** since it is obvious that the decision below is conclusive on that subject, and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power; and therefore the claim ****710** that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit.

2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress, in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since, under the act of Congress dealing with apportionment, which preceded the act of 1911, by § 4 if was commanded that the existing districts in a state should continue in force 'until the legislature of such state, in the manner herein prescribed, shall redistrict such state' (act of February 7, 1891, chap. 116, 26 Stat. at L. 735); while in the act of 1911 there was substituted a provision that the redistricting should be made by a state 'in the manner provided by the laws thereof.' And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do ***569** it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec. vol. 47, pp. 3436, 3437, 3507.

3. To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of article 1 of the Constitution and hence void, even if sanctioned by Congress, because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance, for the following reasons: It must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution. Const. § 4, art. 4. But the proposition and the argument disregard the settled rule that the question of whether that guaranty of the Constitution has been disregarded presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224. In so far as the proposition challenges the power of Congress, as manifested by the clause in the act of 1911, treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained

by the state Constitutions and laws, the argument but asserts, on the one hand, that Congress had no power to do that which, from the point of view of § 4 of article 1, previously considered, the Constitution expressly gave the right to do. In so far as the proposition may be considered as asserting, on the other hand, that any attempt by Congress to recognize the referendum as a part of the legislative authority of a state is obnoxious to a republican form of government as provided by ***570** § 4 of article 4, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guaranty of a republican form of government, has done something which it is deemed is repugnant to that guaranty, therefore there was automatically created judicial authority to go beyond the limits of judicial power, and, in doing so, to usurp congressional power, on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control, free from judicial interference.

It is apparent from these reasons that there must either be a dismissal for want of jurisdiction, because there is no power to re-examine the state questions foreclosed by the decision below, and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent, as to the result, which of the two be applied. In view, however, of the subject-matter of the controversy and the Federal characteristics which inhere in it, we are of opinion, applying the rule laid down in Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, the decree proper to be rendered is one of affirmance, and such a decree is therefore ordered.

Affirmed.

All Citations

241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172

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Smiley v. Holm, 285 U.S. 355 (1932)
52 S.Ct. 397, 76 L.Ed. 795

52 S.Ct. 397
Supreme Court of the United States

SMILEY
v.
HOLM, as Secretary of State of Minnesota.

No. 617.
|
Argued March 16, 17, 1932.
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Decided April 11, 1932.

Synopsis
On writ of Certiorari to the Supreme Court of the State of Minnesota.

Mandamus by the State, on relation of W. Yale Smiley, against Mike Holm, as Secretary of State of Minnesota. Order sustaining a demurrer to the petition was affirmed by the state Supreme Court (238 N. W. 494), and subsequent judgment of dismissal was affirmed (238 N. W. 792), and petitioner brings certiorari.

Reversed and remanded.

Attorneys and Law Firms

****397** ***356** Messrs. George T. Simpson, Alfred W. Bowen, W. Yale Smiley, John A. Weeks, and F. J. Donahue, all of Minneapolis, Minn., for petitioner.

Messrs. Henry N. Benson, Atty. Gen., and William H. Gurnee, Asst. Atty. Gen., both of St. Paul, Minn., for respondent.

Opinion

***361** Mr. Chief Justice HUGHES delivered the opinion of the Court.

Under the reapportionment following the fifteenth decennial census, as provided by the Act of Congress of June 18, 1929 (c. 28, s 22, 46 Stat. 21, 26 (2 USCA s 2a)), Minnesota is entitled to nine Representatives in Congress, being one less than the number previously allotted. In April, 1931, the bill known as House File No. 1456 (Laws Minn. 1931, p. 640), dividing the state into nine congressional districts and specifying the counties of which they should be composed, was passed by the House of Representatives and the Senate of the state, and was transmitted to the Governor, who returned it without his approval. Thereupon, without further action upon the measure by the House of Representatives and the Senate, and in compliance with a resolution of the House of Representatives, House File No. 1456 was deposited with the secretary of state of Minnesota. This suit was brought by the petitioner as a 'citizen, elector and taxpayer' of the state to obtain a judgment declaring invalid all fillings for nomination for the office of Representative in Congress, which should designate a subdivision of the state as a congressional district, and to enjoin the secretary of state from giving notice of the holding of elections for that office in such subdivisions. ***362** The petition alleged that House File No. 1456 was a nullity, in that, after the Governor's veto, it was not repassed by the Legislature as required by law, and also in that the proposed congressional districts were not 'compact' and did not 'contain an equal number of inhabitants as nearly as practicable' in accordance with the Act of Congress of August 8, 1911. [1]

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1 The Act of August 8, 1911, c. 5, 37 Stat. 13 (2 USCA s 2 and note, 3-5), provided for the apportionment of Representatives in Congress among the several states under the thirteenth census. After fixing the total number of Representatives and their apportionment, in sections 1 and 2, the act provided as follows:
'Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.
'Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no charge in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.
'Sec. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.'

The respondent, secretary of state, demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action. He maintained the validity of House File No. 1456 by virtue of the authority ****398** conferred upon the Legislature by article 1, s 4, of the Federal Constitution, and he insisted that the act of ***363** Congress of August 8, 1911, was no longer in force, and that the asserted inequalities in redistricting presented a political and not a judicial question. The trial court sustained the demurrer, and its order was affirmed by the Supreme Court of the state. 238 N. W. 494. The action was then dismissed upon the merits, and the Supreme Court affirmed the judgment upon its previous opinion. 238 N. W. 792. This Court granted a writ of certiorari. 284 U. S. 616, 52 S. Ct. 266, 76 L. Ed. —.

Article 1, s 4, of the Constitution of the United States, provides:

> 'The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.'

Under the Constitution of Minnesota, the 'legislature' consists 'of the senate and house of representatives.' Const. Minn. art. 4, s 1. Before any bill passed by the Senate and House of Representatives 'becomes a law,' it must 'be presented to the governor of the state,' and if he returns it, within the time stated, without his approval, the bill may become a law provided it is reconsidered and thereupon passed by each house by a two-thirds vote. Id. art. 4, s 11. The state Constitution also provides that, after each Federal census, 'the legislature shall have the power to prescribe the bounds of congressional * * * districts.' Id. art. 4, s 23. We do not understand that the Supreme Court of the state has held that, under these provisions, a measure redistricting the state for congressional elections could be put in force by the Legislature without participation by the Governor, as required in the case of legislative bills, if such action were regarded as a performance of the function of the Legislature as a lawmaking body. No decision to that effect has been cited. It appears that 'on seven occasions' prior to the measure now under consideration the Legislature of Minnesota ***364** had 'made state and federal reapportionments in the form of a bill for an act which was approved by the Governor.'[2] While, in the instant case, the Supreme Court regarded that procedure as insufficient to support the petitioner's contention as to practical construction, that question was dismissed from consideration because of the controlling effect which the court ascribed to the federal provision. 238 N. W. page 500. The court expressed the opinion that 'the various provisions of our state Constitution cited in the briefs are of little importance in relation to the matter now in controversy'; that 'the power of the state Legislature to prescribe congressional districts rests exclusively and solely in the language of article 1, s 4, of the United States Constitution.' Id. 238 N. W. page 497. Construing that provision, the court reached the conclusion

that the Legislature in redistricting the state was not acting strictly in the exercise of the lawmaking power, but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required. Upon this point the court said (Id. 238 N. W. page 499):

[2] See Laws of Minnesota 1858, c. 83; 1872, c. 21; 1881, c. 128; 1891, c. 3; 1901, c. 92; 1913, c. 513; 1929, c. 64.

'The Legislature in districting the state is not strictly in the discharge of legislative duties as a lawmaking body, acting in its sovereign capacity, but is acting as representative of the people of the state under the power granted by said article 1, s 4. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving primarily the federal government and secondly the people of the state. The Legislature is designated as a mere agency to discharge the particular duty. The Governor's veto has no relation to such matters; that power pertains, under the state Constitution, exclusively *365 to state affairs. The word 'legislature' has reference to the well-recognized branch of the state government-created by the state as one of its three branches for a specific purpose-and when the framers of the Federal Constitution employed this term, we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state or as meaning the lawmaking power of the state.'

The question then is whether the provision of the Federal Constitution, thus regarded as determinative, invests the Legislature with a particular authority, and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver, and thus renders inapplicable the **399 conditions which attach to the making of state laws. Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in Hawke v. Smith, No. 1, 253 U. S. 221, 227, 40 S. Ct. 495, 497, 64 L. Ed. 871, 10 A. L. R. 1504, the term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.' The question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The Legislature may act as an electoral body, as in the choice of United States Senators under article 1, s 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the *366 Constitution under article 5. Hawke v. Smith, No. 1, supra; Hawke v. Smith, No. 2, 253 U. S. 231, 40 S. Ct. 498, 64 L. Ed. 877; Leser v. Garnett, 258 U. S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505. It may act as a consenting body, as in relation to the acquisition of lands by the United States under article 1, s 8, par. 17. Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by article 1, s 4, is that of making laws.

Consideration of the subject-matter and of the terms of the provision requires affirmative answer. The subject-matter is the 'times, places and manner of holding elections for senators and representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect.

This view is confirmed by the second clause of article 1, s 4, which provides that 'the Congress may at any time by law make or alter such regulations,' with the single exception stated. The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations *367 or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It 'has a general supervisory power over the whole subject.' Ex parte Siebold, 100 U. S. 371, 387, 25 L. Ed. 717; Ex parte Yarbrough, 110 U. S. 651, 661, 4 S. Ct. 152, 28 L. Ed. 274; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; United States v. Mosley, 238 U. S. 383, 386, 35 S. Ct. 904, 59 L.

Ed. 1355; Newberry v. United States, 256 U. S. 232, 255, 41 S. Ct. 469, 65 L. Ed. 913. But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making 'such regulations'; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.

The term defining the method of action, equally with the nature of the subject matter, aptly points to the making of laws. The state Legislature is authorized to 'prescribe' the times, places, and manner of holding elections. Respondent urges that the fact that the words 'by law' are found in the clause relating to the action of the Congress, and not in the clause giving authority to the state Legislature, supports the contention that the latter was not to act in the exercise of the lawmaking power. We think that the inference is strongly to the contrary. It is the nature of the function that makes the phrase 'by law' apposite. That is the same whether it is performed by state or national Legislature, and the use of the phrase places the intent of the whole provision in a strong light. Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character.

As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments. We find ***368** no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted. Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article ****400** 1, s 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. At the time of the adoption of the Federal Constitution, it appears that only two states had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a council of revision. [3] But the restriction which existed in the case of these states was well known. That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, s 7. ***369** The latter consequence was not expressed, but there is no question that it was necessarily implied, as the Congress was to act by law; and there is no intimation, either in the debates in the Federal Convention or in contemporaneous exposition, of a purpose to exclude a similar restriction imposed by state Constitutions upon state Legislatures when exercising the lawmaking power.

3 The Constitution of Massachusetts of 1780 provided for the Governor's veto of 'bills' or 'resolves.' Part Second, ch. 1, s 1, art. 2; 3 Thorpe, American Charters, Constitutions and Organic Laws, 1893, 1894. The council of revision in New York, which had the veto power under the first Constitution of 1777 (art. 3), was composed of the Governor, the chancellor, and the judges of the Supreme Court, 'or any two of them, together with the Governor.' The veto power was given to the Governor alone by the Constitution of 1821. Article 1, s 12, 3 Thorpe, op. cit. 2628, 2641, 2642. In South Carolina, the veto power had been given by the Constitution of 1776 to the 'president' (article 7), but under the Constitution of 1778 the Governor had no veto power; see article 14, 6 Thorpe, op. cit., 3244, 3252.

The practical construction of article 1, s 4, is impressive. General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states. McPherson v. Blacker, 146 U. S. 1, 36, 13 S. Ct. 3, 36 L. Ed. 869; Missouri Pacific Railway Co. v. Kansas, 248 U. S. 276, 284, 39 S. Ct. 93, 63 L. Ed. 239, 2 A. L. R. 1589; Myers v. United States, 272 U. S. 52, 119, 136, 47 S. Ct. 21, 71 L. Ed. 160; The Pocket Veto Case, 279 U. S. 655, 688-690, 49 S. Ct. 463, 73 L. Ed. 894, 64 A. L. R. 1434. That practice is eloquent of the conviction of the people of the states, and of their representatives in state Legislatures and executive office, that in providing for congressional elections, and for the districts in which they were to be held, these Legislatures were exercising the lawmaking power and thus subject, where the state Constitution so provided, to the veto of theGovernor as a part of the legislative process. The early action in Massachusetts under this authority was by

'resolves,' and these, under the Constitution of 1780, were required to be submitted to the Governor, and it appears that they were so submitted and approved by him. [4] In New York, ***370** from the outset, provision for congressional districts was made by statute, [5] and this method was followed until 1931. The argument based on the disposition, during the early period, to curtail executive authority in the states, and on the long time which elapsed in a number of states before the veto power was granted to the Governor, is of slight weight in the light of the fact that this power was given in four states shortly after the adoption of the Federal Constitution, [6] that the use of this check has gradually been extended, and that the uniform practice (prior to the questions raised in relation to the present reapportionment) has been to provide for congressional districts by the enactment of statutes with the participation of the Governor wherever the state Constitution provided for such participation as part of the process of making laws. See Moran v. Bowley, 347 Ill. 148, 179 N. E. 526, 527; Koening v. Flynn, 258 N. Y. 292, 300, 179 N. E. 705; Carroll v. Becker (Mo. Sup.) 45 S.W.(2d) 533; State ex rel. Schrader v. Polley, 26 S. D. 5, 7, 127 N. W. 848. The Attorney General of Minnesota, in his argument in the instant case, states: 'It is conceded that until 1931 whenever the State of Minnesota was divided into districts for the purpose of congressional elections such action was taken by the legislature in the form ****401** of a bill and presented to and approved by the governor.'

4 Const. Mass. 1780; 3 Thorpe, op. cit. 1893, 1894, Mass. Resolves, Oct.Nov., 1788, c. XLIX, p. 52; May-June, 1792, c. LXIX, p. 23.

5 New York, Laws of 1789, c. 11; 1797, c. 62; 1802, c. 72. See Koenig v. Flynn, 258 N. Y. 292.

6 Georgia, Const. 1789, art. 2, s 10, 2 Thorpe, op. cit. 788; Pennsylvania, Const. 1790, art. 1, s 22, 5 Thorpe, op. cit., 3094; New Hampshire, Const. 1792; Part Second, s 44, 4 Thorpe, op. cit., 2482; Kentucky, Const. 1792, art. 1, s 28, 3 Thorpe, op. cit., 1267. In Vermont, the Gonstitution of 1793 (chapter 2, s 16) gave the Governor and council a power of suspension similar to that for which provision had been made in the Constitution of 1786 (chapter 2, s 14) before the admission of Vermont to the Union. See, also, Constitution of 1777 (chapter 2, s 14), 6 Thorpe, op. cit., 3744, 3757, 3767.

***371** That the constitutional provision contemplates the exercise of the lawmaking power was definitely recognized by the Congress in the Act of August 8, 1911, [7] which expressly provided in section 4 for the election of Representatives in Congress, as stated, 'by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof, and in accordance with the rules enumerated in section three of this Act.' The significance of the clause 'in the manner provided by the laws thereof' is manifest from its occasion and purpose. It was to recognize the propriety of the referendum in establishing congressional districts where the state had made it a part of the legislative process. 'It is clear,' said this Court in Davis v. Hildebrant, 241 U. S. 565, 568, 36 S. Ct. 708, 710, 60 L. Ed. 1172, 'that Congress, in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.'

7 See note 1.

The case of Davis v. Hildebrant, supra, arose under the amendment of 1912 to the Constitution of Ohio reserving the right 'by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly.' Id., 241 U. S. page 566, 36 S. Ct. 708, 709, 60 L. Ed. 1172. The act passed by the General Assembly of Ohio in 1915, redistricting the state for the purpose of congressional elections, was disapproved under the referendum provision, and the validity of that action was challenged under ***372** article 1, s 4, of the Federal Constitution. The Supreme Court of the state, denying a mandamus to enforce the disapproved act, 'held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved law had no existence.' Id. 241 U. S. page 567, 36 S. Ct. 708, 709, 60 L. Ed. 1172. This Court affirmed the judgment of the state court. It is manifest that the Congress had no power to alter article 1, s 4, and that the

act of 1911, in its reference to state laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision. And it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained. This was explicitly stated by this Court as the ground of the distinction which was made in Hawke v. Smith No. 1, supra, where, referring to the Davis Case, the Court said: 'As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.'

It clearly follows that there is nothing in article 1, s 4, which precludes a state from providing that ***373** legislative action in districting the state for congressional elections shall be subject to the veto power of theGovernor as in other cases of the exercise of the lawmaking power. Accordingly, in this instance, the validity of House File No. 1456 cannot be sustained by virtue of any authority conferred by the Federal Constitution upon the Legislature of Minnesota to create congressional districts independently of the participation of the Governor as required by the state Constitution with respect to the enactment of laws.

The further question has been presented whether the Act of Congress of August 8, 1911, is still in force. The state court held that it was not, that it had been wholly replaced by the Act of June 18, 1929. Sections 1 and 2 of the former act, making specific provision for the apportionment under the thirteenth census, are, of course, superseded; the present question relates to the other sections. These have not been expressly repealed. The act of 1929 repeals 'all other laws and parts of laws' that are inconsistent with its provisions (section 21 (46 Stat. 26, 13 USCA s 1 note)). The petitioner urges that this act contains nothing inconsistent with sections 3, 4, and 5[8] of the act of 1911, and the only question is whether these sections by their very terms have ceased to be effective. It is pointed out that the provisions of the act of 1911 were carried into the United States Code. ****402** U. S. C., tit. 2, ss 2-5 (2 USCA ss 2 and note 3-5). Inclusion in the Code does not operate as a re-enactment; it establishes 'prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925.' Act of June 30, 1926, c. 712, 44 Stat. 777. While sections 3 and 4 of the act of 1911 expressly referred to 'this apportionment' (the one made by that Act), the argument is pressed that they contain provisions setting forth a general policy which was intended to apply ***374** to the future creation of congressional districts, and the election of Representatives, until Congress should provide otherwise.

8 See note 1.

There are three classes of states with respect to the number of Representatives under the present apportionment pursuant to the act of 1929, (1) where the number remains the same, (2) where it is increased, and (3) where it is decreased. In states where the number of Representatives remains the same, and the districts are unchanged, no question is presented; there is nothing inconsistent with any of the requirements of the Congress in proceeding with the election of Representatives in such states in the same manner as heretofore. Section 4 of the act of 1911 (2 USCA s 4) provided that, in case of an increase in the number of Representatives in any state, 'such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law' until such state shall be redistricted. The Constitution itself provides in article 1, s 2, that 'The house of representatives shall be composed of members chosen every second year by the people of the several states,' and we are of the opinion that under this provision, in the absence of the creation of new districts, additional Representatives allotted to a state under the present reapportionment would appropriately be elected by the state at large. Such a course, with the election of the other Representatives in the existing districts until a redistricting act was passed, would present no inconsistency with any policy declared in the act of 1911.

Where, as in the case of Minnesota, the number of Representatives has been decreased, there is a different situation, as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all Representatives allotted to the state must be elected by the state at ***375** large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the state is constitutionally entitled, and the general provisions of the act of 1911 cannot be regarded as intended to have a different import.

This conclusion disposes of all the questions properly before the Court. Questions in relation to the application of the standards defined in section 3 of the act of 1911 to a redistricting statute, if such a statute should hereafter be enacted, are wholly abstract. The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

All Citations

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135 S.Ct. 2652
Supreme Court of the United States

ARIZONA STATE LEGISLATURE, Appellant
v.
ARIZONA INDEPENDENT REDISTRICTING COMMISSION et al.

No. 13–1314.
|
Argued March 2, 2015.
|
Decided June 29, 2015.

Synopsis
Background: Arizona state legislature brought action against state's independent congressional redistricting commission, its five members, and Arizona Secretary of State seeking judgment declaring that ballot initiative creating commission violated Elections Clause of United States Constitution, and injunction against use of commission maps for any future congressional election. A three-judge panel of the United States District Court for the District of Arizona, Snow, J., 997 F.Supp.2d 1047, determined that legislature had standing to sue, but rejected its complaint on the merits. State legislature appealed.

Holdings: The Supreme Court, Justice Ginsburg, held that:

legislature had standing to bring action challenging initiative;

statutory provision setting forth congressional-redistricting procedures permitted state's use of independent congressional redistricting commission; and

ballot initiative creating commission did not violate Elections Clause.

Affirmed.

Chief Justice Roberts filed dissenting opinion in which Justice Scalia, Justice Thomas, and Justice Alito joined.

Justice Scalia filed dissenting opinion in which Justice Thomas joined.

Justice Thomas filed dissenting opinion in which Justice Scalia joined.

Procedural Posture(s): On Appeal.

West Codenotes

Recognized as Unconstitutional
2 U.S.C.A. § 2a(c)(1–4)

****2655** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***787** Under Arizona's Constitution, the electorate shares lawmaking authority on equal footing with the Arizona Legislature. The voters may adopt laws and constitutional amendments by ballot initiative, and they may approve or disapprove, by referendum, measures passed by the Legislature. Ariz. Const., Art. IV, pt. 1, § 1. "Any law which may be enacted by the Legislature ... may be enacted by the people under the Initiative." Art. XXII, § 14.

In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona's Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map the Commission adopted in 2012 for congressional districts, arguing that the AIRC and its map violated the "Elections Clause" of the U.S. Constitution, which provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Because "Legislature" means the State's representative assembly, the Arizona Legislature contended, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. A three-judge District Court held that the Arizona Legislature had standing to sue, but rejected its complaint on the merits.

Held:

1. The Arizona Legislature has standing to bring this suit. In claiming that Proposition 106 stripped it of its alleged constitutional prerogative to engage in redistricting and that its injury would be remedied by a court order enjoining the proposition's enforcement, the Legislature ****2656** has shown injury that is 'concrete and particularized' and 'actual or imminent,' *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170, "fairly traceable to the challenged action," and "redressable by a favorable ruling," *Clapper v. Amnesty Int'l USA*, 568 U.S. ——, ——, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264. Specifically ***788**, Proposition 106, together with the Arizona Constitution's ban on efforts by the Arizona Legislature to undermine the purposes of an initiative, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan. *Raines v. Byrd*, 521 U.S. 811, 823–824, 117 S.Ct. 2312, 138 L.Ed.2d 849. Pp. 2663 – 2666.

2. The Elections Clause and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts. Pp. 2666 – 2677.

(a) Redistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567, 36 S.Ct. 708, 60 L.Ed. 1172, and the Governor's veto, *Smiley v. Holm*, 285 U.S. 355, 369, 52 S.Ct. 397, 76 L.Ed. 795. While exercise of the initiative was not at issue in this Court's prior decisions, there is no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking. Pp. 2666 – 2668.

(b) Title 2 U.S.C. § 2a(c)—which provides that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," it must follow federally prescribed redistricting procedures—permits redistricting in accord with Arizona's initiative. From 1862 through 1901, apportionment Acts required a State to follow federal procedures unless "the [state] legislature" drew district lines. In 1911, Congress, recognizing that States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, replaced the reference to redistricting by the state "legislature" with a reference to redistricting of a State "in the manner provided by the laws thereof." § 4, 37 Stat. 14. The Act's legislative history "leaves no ... doubt," *Hildebrant*, 241 U.S., at 568, 36 S.Ct. 708, that the change was made to safeguard to "each state full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437. "If they include

the initiative, it is included." *Id.*, at 3508. Congress used virtually identical language in enacting § 2a(c) in 1941. This provision also accords full respect to the redistricting procedures adopted by the States. Thus, so long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure in its Constitution—the resulting redistricting plan becomes the presumptively governing map.

Though four of § 2a(c)'s five default redistricting procedures—operative only when a State is not "redistricted in the manner provided by [state] law"—have become obsolete as a result of this Court's decisions embracing the one-person, one-vote principle, this infirmity does not bear on the question whether a State has been "redistricted in the manner provided by [state] law." Pp. 2668 – 2671.

***789** (c) The Elections Clause permits the people of Arizona to provide for redistricting by independent commission. The history and purpose of the Clause weigh heavily against precluding the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such preclusion would also run up against the Constitution's animating principle that the ****2657** people themselves are the originating source of all the powers of government. Pp. 2671 – 2677.

(1) The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. See *Inter Tribal Council of Ariz.*, 570 U.S., at ——, 133 S.Ct., at 2253. Ratification arguments in support of congressional oversight focused on potential abuses by state politicians, but the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. P. 2672.

(2) There is no suggestion that the Election Clause, by specifying "the Legislature thereof," required assignment of congressional redistricting authority to the State's representative body. It is characteristic of the federal system that States retain autonomy to establish their own governmental processes free from incursion by the Federal Government. See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 752, 119 S.Ct. 2240, 144 L.Ed.2d 636. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410. Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority, Ariz. Const., Art. IV. The Elections Clause should not be read to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. And reading the Clause to permit the use of the initiative to control state and local elections but not federal elections would "deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, p. 374 (Hamilton). Pp. 2673 – 2674.

(3) The Framers may not have imagined the modern initiative process in which the people's legislative power is coextensive with the state legislature's authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. It would thus be perverse to interpret "Legislature" in the Elections Clause to exclude lawmaking by the people, particularly when such lawmaking is intended to advance the prospect ***790** that Members of Congress will in fact be "chosen ... by the People of the several States," Art. I, § 2. Pp. 2674 – 2676.

(4) Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would not just stymie attempts to curb gerrymandering. It would also cast doubt on numerous other time, place, and manner regulations governing federal elections that States have adopted by the initiative method. As well, it could endanger election provisions in state constitutions adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." Pp. 2676 – 2677.

997 F.Supp.2d 1047, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

***791** This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.[1] "[P]artisan gerrymanders," this Court has recognized, "[are incompatible] with democratic principles." *Vieth v. Jubelirer*, 541 U.S. 267, 292, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion); *id.*, at 316, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment). Even so, the Court in *Vieth* did not grant relief on the plaintiffs' partisan gerrymander claim. ***792** The plurality held the matter nonjusticiable. *Id.*, at 281, 124 S.Ct. 1769. Justice KENNEDY found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation. *Id.*, at 317, 124 S.Ct. 1769.

1 The term "gerrymander" is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander. See E. Griffith, The Rise and Development of the Gerrymander 16–19 (Arno ed. 1974).

In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections." App. 50. Proposition 106 amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission, the Arizona Independent Redistricting Commission (AIRC or Commission). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts.

The Arizona Legislature challenged the map the Commission adopted in January 2012 for congressional districts. Recognizing that the voters could control redistricting for state legislators, Brief for Appellant 42, 47; Tr. of Oral Arg. 3–4, the Arizona Legislature sued the AIRC in federal court seeking a declaration that the ****2659** Commission and its map for congressional districts violated the "Elections Clause" of the U.S. Constitution. That Clause, critical to the resolution of this case, provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...." Art. I, § 4, cl. 1.

The Arizona Legislature's complaint alleged that "[t]he word 'Legislature' in the Elections Clause means [specifically and only] the representative body which makes the laws of the people," App. 21, ¶ 37; so read, the Legislature urges, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. The AIRC responded that, for Elections Clause purposes, "the Legislature ***793** " is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.

A three-judge District Court held, unanimously, that the Arizona Legislature had standing to sue; dividing two to one, the Court rejected the Legislature's complaint on the merits. We postponed jurisdiction and instructed the parties to address two questions: (1) Does the Arizona Legislature have standing to bring this suit? (2) Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts? 573 U.S. ——, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014).

We now affirm the District Court's judgment. We hold, first, that the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106. Next, we hold that lawmaking power in Arizona includes the initiative process, and that both § 2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature.

I

A

Direct lawmaking by the people was "virtually unknown when the Constitution of 1787 was drafted." Donovan & Bowler, An Overview of Direct Democracy in the American States, in Citizens as Legislators 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998). There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England's town hall meetings and the submission of early state constitutions to the people for ratification. See Lowell, The Referendum in the United States, in The Initiative, Referendum and Recall 126, 127 (W. Munro ed. 1912) (hereinafter IRR); W. Dodd, The Revision and ***794** Amendment of State Constitutions 64–67 (1910). [2] But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States. See generally Persily, ****2660** The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11 (1997).

2 The Massachusetts Constitution of 1780 is illustrative of the understanding that the people's authority could trump the state legislature's. Framed by a separate convention, it was submitted to the people for ratification. That occurred after the legislature attempted to promulgate a Constitution it had written, an endeavor that drew opposition from many Massachusetts towns. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 96–101 (1996); G. Wood, The Creation of the American Republic, 1776–1787, pp. 339–341 (1969).

The two main "agencies of direct legislation" are the initiative and the referendum. Munro, Introductory, in IRR 8. The initiative operates entirely outside the States' representative assemblies; it allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." D. Magleby, Direct Legislation 1 (1984). While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls." *Ibid.* "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission." Johnson, Direct Legislation as an Ally of Representative Government, in IRR 139, 142.

In 1898, South Dakota took the pathmarking step of affirming in its Constitution the people's power "directly [to] control the making of all ordinary laws" by initiative and referendum. Introductory, *id.*, at 9. In 1902, Oregon became the first State to adopt the initiative as a means, not only to enact ordinary laws, but also to amend the State's Constitution. J. Dinan, The American State Constitutional ***795** Tradition 62 (2006). By 1920, the people in 19 States had reserved for themselves the power to initiate ordinary lawmaking, and, in 13 States, the power to initiate amendments to the State's Constitution. *Id.*, at 62, and n. 132, 94, and n. 151. Those numbers increased to 21 and 18, respectively, by the close of the 20th century. *Ibid.* [3]

3 The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (rejecting challenge to referendum mounted under Article IV, § 4 's undertaking by the United States to "guarantee to every State in th[e] Union a Republican Form of Government"). But see *New York v. United States*, 505 U.S. 144, 185, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

B

For the delegates to Arizona's constitutional convention, direct lawmaking was a "principal issu[e]." J. Leshy, The Arizona State Constitution 8–9 (2d ed. 2013) (hereinafter Leshy). By a margin of more than three to one, the people of Arizona ratified the State's Constitution, which included, among lawmaking means, initiative and referendum provisions. *Id.*, at 14–16, 22. In the runup to Arizona's admission to the Union in 1912, those provisions generated no controversy. *Id.*, at 22.

In particular, the Arizona Constitution "establishes the electorate [of Arizona] as a coordinate source of legislation" on equal footing with the representative legislative body. *Queen Creek Land & Cattle Corp. v. Yavapai Cty. Bd. of Supervisors*, 108 Ariz. 449, 451, 501 P.2d 391, 393 (1972); *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4, 308 P.3d 1152, 1155 (2013) ("The legislature and electorate share lawmaking power under Arizona's system of government." (internal quotation marks omitted)). The initiative, housed under the article of the Arizona Constitution concerning the ***796** "Legislative Department" and the section defining the State's " legislative authority," reserves for the people "the power to propose laws and amendments to the ****2661** constitution." Art. IV, pt. 1, § 1. The Arizona Constitution further states that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Art. XXII, § 14. Accordingly, "[g]eneral references to the power of the 'legislature' " in the Arizona Constitution "include the people's right (specified in Article IV, part 1) to bypass their elected representatives and make laws directly through the initiative." Leshy xxii.

C

Proposition 106, vesting redistricting authority in the AIRC, was adopted by citizen initiative in 2000 against a "background of recurring redistricting turmoil" in Arizona. Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1831 (2012). Redistricting plans adopted by the Arizona Legislature sparked controversy in every redistricting cycle since the 1970's, and several of those plans were rejected by a federal court or refused preclearance by the Department of Justice under the Voting Rights Act of 1965. See *id.*, at 1830–1832. [4]

4 From Arizona's admission to the Union in 1912 to 1940, no congressional districting occurred because Arizona had only one Member of Congress. K. Martis, The Historical Atlas of United States Congressional Districts, 1789–1983, p. 3 (1982) (Table 1). Court-ordered congressional districting plans were in place from 1966 to 1970, and from 1982 through 2000. See *Klahr v. Williams*, 313 F.Supp. 148 (Ariz.1970); *Goddard v. Babbitt*, 536 F.Supp. 538 (Ariz.1982);

Arizonans for Fair Representation v. Symington, 828 F.Supp. 684 (Ariz.1992); Norrander & Wendland, Redistricting in Arizona, in Reapportionment and Redistricting in the West 177, 178–179 (G. Moncrief ed. 2011).

Aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections," App. 50, Proposition 106 amended the Arizona Constitution to remove congressional redistricting authority from the state ***797** legislature, lodging that authority, instead, in a new entity, the AIRC. Ariz. Const., Art. IV, pt. 2, § 1, ¶¶ 3–23. The AIRC convenes after each census, establishes final district boundaries, and certifies the new districts to the Arizona Secretary of State. ¶¶ 16–17. The legislature may submit nonbinding recommendations to the AIRC, ¶ 16, and is required to make necessary appropriations for its operation, ¶ 18. The highest ranking officer and minority leader of each chamber of the legislature each select one member of the AIRC from a list compiled by Arizona's Commission on Appellate Court Appointments. ¶¶ 4–7. The four appointed members of the AIRC then choose, from the same list, the fifth member, who chairs the Commission. ¶ 8. A Commission's tenure is confined to one redistricting cycle; each member's time in office "expire[s] upon the appointment of the first member of the next redistricting commission." ¶ 23.

Holders of, or candidates for, public office may not serve on the AIRC, except candidates for or members of a school board. ¶ 3. No more than two members of the Commission may be members of the same political party, *ibid.*, and the presiding fifth member cannot be registered with any party already represented on the Commission, ¶ 8. Subject to the concurrence of two-thirds of the Arizona Senate, AIRC members may be removed by the Arizona Governor for gross misconduct, substantial neglect of duty, or inability to discharge the duties of office. ¶ 10. [5]

5 In the current climate of heightened partisanship, the AIRC has encountered interference with its operations. In particular, its dependence on the Arizona Legislature for funding, and the removal provision have proved problematic. In 2011, when the AIRC proposed boundaries the majority party did not like, the Governor of Arizona attempted to remove the Commission's independent chair. Her attempt was stopped by the Arizona Supreme Court. See Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1835–1836 (2012) (citing *Mathis v. Brewer*, No. CV–11–0313–SA (Ariz.2011)); *Arizona Independent Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267 (2012).

****2662** ***798** Several other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting. Some States, in common with Arizona, have given nonpartisan or bipartisan commissions binding authority over redistricting. [6] The California Redistricting Commission, established by popular initiative, develops redistricting plans which become effective if approved by public referendum. [7] Still other States have given commissions an auxiliary role, advising the legislatures on redistricting, [8] or serving as a " backup" in the event the State's representative body fails to complete redistricting. [9] Studies report that nonpartisan and bipartisan commissions generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge. See Miller & Grofman, Redistricting Commissions in the Western United States, 3 U.C. Irvine L. Rev. 637, 661, 663–664, 666 (2013).

6 See Haw. Const., Art. IV, § 2, and Haw.Rev.Stat. §§ 25–1 to 25–9 (2009 and 2013 Cum. Supp.); Idaho Const., Art. III, § 2; Mont. Const., Art. V, § 14; N.J. Const., Art. II, § 2; Wash. Const., Art. II, § 43.

7 See Cal. Const., Art. XXI, § 2; Cal. Govt.Code Ann. §§ 8251–8253.6 (West Supp.2015).

8 See Iowa Code §§ 42.1–42.6 (2013); Ohio Rev.Code Ann. § 103.51 (Lexis 2014); Me. Const., Art. IV, pt. 3, § 1–A.

9 See Conn. Const., Art. III, § 6; Ind.Code § 3–3–2–2 (2014).

D

On January 17, 2012, the AIRC approved final congressional and state legislative maps based on the 2010 census. See Arizona Independent Redistricting, Final Maps, http://azredistricting.org/Maps/Final–Maps/default. asp (all Internet materials as visited

June 25, 2015, and included in Clerk of Court's case file). Less than four months later, on June 6, 2012, the Arizona Legislature filed suit in the United States District Court for the District of Arizona, naming as defendants the AIRC, its five members, and the Arizona Secretary of State. The Legislature sought both a declaration ***799** that Proposition 106 and congressional maps adopted by the AIRC are unconstitutional, and, as affirmative relief, an injunction against use of AIRC maps for any congressional election after the 2012 general election.

A three-judge District Court, convened pursuant to 28 U.S.C. § 2284(a), unanimously denied a motion by the AIRC to dismiss the suit for lack of standing. The Arizona Legislature, the court determined, had "demonstrated that its loss of redistricting power constitute[d] a [sufficiently] concrete injury." 997 F.Supp.2d 1047, 1050 (2014). On the merits, dividing two to one, the District Court granted the AIRC's motion to dismiss the complaint for failure to state a claim. Decisions of this Court, the majority concluded, "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws." *Id.,* at 1054. As the "lawmaking power" in Arizona "plainly includes the power to enact laws through initiative," the District Court held, the "Elections Clause permits [Arizona's] establishment and use" of the Commission. *Id.,* at 1056. Judge Rosenblatt dissented in part. Proposition 106, in his view, unconstitutionally denied "the ****2663** Legislature" of Arizona the "ability to have any outcome-defining effect on the congressional redistricting process." *Id.,* at 1058.

We postponed jurisdiction, and now affirm.

II

We turn first to the threshold question: Does the Arizona Legislature have standing to bring this suit? Trained on "whether the plaintiff is [a] proper party to bring [a particular lawsuit,]" standing is "[o]ne element" of the Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution. *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). "To qualify as a party with standing to litigate," the Arizona Legislature "must show, first and foremost," injury in the form of " 'invasion of a legally ***800** protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English v. Arizona,* 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The Legislature's injury also must be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA,* 568 U.S. ——, ——, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (internal quotation marks omitted).

The Arizona Legislature maintains that the Elections Clause vests in it "primary responsibility" for redistricting. Brief for Appellant 51, 53. To exercise that responsibility, the Legislature urges, it must have at least the opportunity to engage (or decline to engage) in redistricting before the State may involve other actors in the redistricting process. See *id.,* at 51–53. Proposition 106, which gives the AIRC binding authority over redistricting, regardless of the Legislature's action or inaction, strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106. Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, see *infra,* at 2671 – 2677, one must not "confus[e] weakness on the merits with absence of Article III standing." *Davis v. United States,* 564 U.S. ——, ——, n. 10, 131 S.Ct. 2419, 2434, n. 10, 180 L.Ed.2d 285 (2011); see *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (standing "often turns on the nature and source of the claim asserted," but it "in no way depends on the merits" of the claim).

The AIRC argues that the Legislature's alleged injury is insufficiently concrete to meet the standing requirement absent some "specific legislative act that would have taken effect but for Proposition 106." Brief for Appellees 20. The United States, as *amicus curiae,* urges that even more is needed: the Legislature's injury will remain speculative, the United States contends, unless and until the Arizona Secretary of State refuses to implement a competing redistricting ***801** plan passed by the Legislature. Brief for United States 14–17. In our view, the Arizona Legislature's suit is not premature, nor is its alleged injury

too "conjectural" or "hypothetical" to establish standing. *Defenders of Wildlife,* 504 U.S., at 560, 112 S.Ct. 2130 (internal quotation marks omitted).

Two prescriptions of Arizona's Constitution would render the Legislature's passage of a competing plan and submission of that plan to the Secretary of State unavailing. Indeed, those actions would directly and immediately conflict with the regime Arizona's Constitution establishes. Cf. ****2664** *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 944, n. 2, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) (failure to apply for permit which "would not have been granted" under existing law did not deprive plaintiffs of standing to challenge permitting regime). First, the Arizona Constitution instructs that the Legislature "shall not have the power to adopt any measure that supersedes [an initiative], in whole or in part, ... unless the superseding measure furthers the purposes" of the initiative. Art. IV, pt. 1, § 1(14). Any redistricting map passed by the Legislature in an effort to supersede the AIRC's map surely would not "furthe[r] the purposes" of Proposition 106. Second, once the AIRC certifies its redistricting plan to the Secretary of State, Arizona's Constitution requires the Secretary to implement that plan and no other. See Art. IV, pt. 2, § 1(17); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n,* 211 Ariz. 337, 351, 121 P.3d 843, 857 (App.2005) (*per curiam*) ("Once the Commission certifies [its] maps, the secretary of state must use them in conducting the next election."). To establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government.

Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), does not aid AIRC's argument that there is no standing here. In *Raines,* this Court held that six *individual Members* of Congress lacked ***802** standing to challenge the Line Item Veto Act. *Id.,* at 813–814, 829–830, 117 S.Ct. 2312 (holding specifically and only that "individual members of Congress [lack] Article III standing"). The Act, which gave the President authority to cancel certain spending and tax benefit measures after signing them into law, allegedly diluted the efficacy of the Congressmembers' votes. *Id.,* at 815–817, 117 S.Ct. 2312. The "institutional injury" at issue, we reasoned, scarcely zeroed in on any individual Member. *Id.,* at 821, 117 S.Ct. 2312. "[W]idely dispersed," the alleged injury "necessarily [impacted] all Members of Congress and both Houses ... equally." *Id.,* at 829, 821, 117 S.Ct. 2312. None of the plaintiffs, therefore, could tenably claim a "personal stake" in the suit. *Id.,* at 830, 117 S.Ct. 2312.

In concluding that the individual Members lacked standing, the Court "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress." *Id.,* at 829, 117 S.Ct. 2312. "[I]ndeed," the Court observed, "both houses actively oppose[d] their suit." *Ibid.* Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain. The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers, App. 26–27, 46. That "different ... circumstanc[e]," 521 U.S., at 830, 117 S.Ct. 2312, was not *sub judice* in *Raines.* [10]

10 *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), featured in Justice SCALIA's dissent, *post,* at 2695 – 2696, bears little resemblance to this case. There, the Court unanimously found that Massachusetts lacked standing to sue the Secretary of the Treasury on a claim that a federal grant program exceeded Congress' Article I powers and thus violated the Tenth Amendment. *Id.,* at 480, 43 S.Ct. 597. If suing on its own behalf, the Court reasoned, Massachusetts' claim involved no "quasi-sovereign rights actually invaded or threatened." *Id.,* at 485, 43 S.Ct. 597. As *parens patriae,* the Court stated: "[I]t is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae.*" *Id.,* at 485–486, 43 S.Ct. 597. As astutely observed, moreover: "The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions ... are hard to reconcile." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263–266 (6th ed. 2009) (comparing *Mellon* with *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (rejecting on the merits the claim that the Voting Rights Act of 1965 invaded reserved powers of the States to determine voter qualifications and regulate elections), *Nebraska v. Wyoming,* 515 U.S. 1, 20, 115 S.Ct. 1933, 132 L.Ed.2d 1 (1995) (recognizing that Wyoming could bring suit to vindicate the State's "quasi-sovereign" interests in the physical environment within its domain (emphasis deleted; internal quotation marks

omitted)), and *Massachusetts v. EPA*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (maintaining that Massachusetts "is entitled to special solicitude in our standing analysis")).

**2665 *803 Closer to the mark is this Court's decision in *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." *Id.*, at 446, 59 S.Ct. 972. [11] We held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment. *Ibid. Coleman*, as we later explained in *Raines*, stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S., at 823, 117 S.Ct. 2312. [12] Our conclusion that the Arizona Legislature has standing fits that bill. *804 Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, see *supra*, at 2663 – 2664, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan. *Raines*, 521 U.S., at 823–824, 117 S.Ct. 2312. [13]

11 *Coleman* concerned the proposed Child Labor Amendment, which provided that "Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age." 307 U.S., at 435, n. 1, 59 S.Ct. 972 (internal quotation marks omitted).

12 The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819–820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

13 In an endeavor to wish away *Coleman*, Justice SCALIA, in dissent, suggests the case may have been "a 4–to–4 standoff." *Post*, at 2696. He overlooks that Chief Justice Hughes' opinion, announced by Justice Stone, was styled "Opinion of the Court." 307 U.S., at 435, 59 S.Ct. 972. Describing *Coleman*, the Court wrote in *Raines*: "By a vote of 5–4, we held that [the 20 Kansas Senators who voted against ratification of a proposed federal constitutional amendment] had standing." 521 U.S., at 822, 117 S.Ct. 2312. For opinions recognizing the precedential weight of *Coleman*, see *Baker v. Carr*, 369 U.S. 186, 208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *United States v. Windsor*, 570 U.S. ——, ——, 133 S.Ct. 2675, 2713–2714, 186 L.Ed.2d 808 (2013) (ALITO, J., dissenting).

This dispute, in short, "will be resolved ... in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." **2666 *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). [14] Accordingly, we proceed to the merits. [15]

14 Curiously, Justice SCALIA, dissenting on standing, berates the Court for "treading upon the powers of state legislatures." *Post*, at 2697. He forgets that the party invoking federal-court jurisdiction in this case, and inviting our review, is the Arizona State Legislature.

15 Justice THOMAS, on the way to deciding that the Arizona Legislature lacks standing, first addresses the merits. In so doing, he overlooks that, in the cases he features, it was entirely immaterial whether the law involved was adopted by a representative body or by the people, through exercise of the initiative.

III

On the merits, we instructed the parties to address this question: Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts? The Elections Clause is set out at the start of this opinion, *supra,* at 2658 – 2659. Section 2a(c) provides:

> "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives ***805** to which such State is entitled under such apportionment shall be elected in the following manner: [setting out five federally prescribed redistricting procedures]."

Before focusing directly on the statute and constitutional prescriptions in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. Three decisions compose the relevant case law: *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172 (1916); *Hawke v. Smith (No. 1),* 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920); and *Smiley v. Holm,* 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932).

A

Davis v. Hildebrant involved an amendment to the Constitution of Ohio vesting in the people the right, exercisable by referendum, to approve or disapprove by popular vote any law enacted by the State's legislature. A 1915 Act redistricting the State for the purpose of congressional elections had been submitted to a popular vote, resulting in disapproval of the legislature's measure. State election officials asked the State's Supreme Court to declare the referendum void. That court rejected the request, holding that the referendum authorized by Ohio's Constitution, "was a part of the legislative power of the State," and "nothing in [federal statutory law] or in [the Elections Clause] operated to the contrary." 241 U.S., at 567, 36 S.Ct. 708. This Court affirmed the Ohio Supreme Court's judgment. In upholding the state court's decision, we recognized that the referendum was "part of the legislative power" in Ohio, *ibid.,* legitimately exercised by the people to disapprove the legislation creating congressional districts. For redistricting purposes, *Hildebrant* thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people. See *id.,* at 569, 36 S.Ct. 708 (Elections Clause does not bar "treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws").

***806** *Hawke v. Smith* involved the Eighteenth Amendment to the Federal Constitution. Ohio's Legislature had ratified the Amendment, and a referendum on that ratification was at issue. Reversing the Ohio Supreme Court's decision upholding the referendum, we held that "ratification by a State of a constitutional amendment is not ****2667** an act of legislation within the proper sense of the word." 253 U.S., at 229, 40 S.Ct. 495. Instead, Article V governing ratification had lodged in "the legislatures of three-fourths of the several States" sole authority to assent to a proposed amendment. *Id.,* at 226, 40 S.Ct. 495. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Id.,* at 229, 40 S.Ct. 495. *Davis v. Hildebrant,* the Court explained, involved the enactment of legislation, *i.e.,* a redistricting plan, and properly held that "the referendum [was] part of the legislative authority of the State for [that] purpose." 253 U.S., at 230, 40 S.Ct. 495.

Smiley v. Holm raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor's veto. The Minnesota Supreme Court had held that the Elections Clause placed redistricting authority exclusively in the hands of the State's legislature, leaving no role for the Governor. We reversed that determination and held, for the purpose at hand, Minnesota's legislative authority includes not just the two houses of the legislature; it includes, in addition, a make-or-break role for the Governor. In holding that the Governor's veto counted, we distinguished instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking. State legislatures, we pointed out, performed an "electoral" function "in the choice of United States Senators under Article I, section 3, prior to the adoption of

the Seventeenth Amendment," [16] a "ratifying" function for "proposed amendments to the Constitution under Article V," ***807** as explained in *Hawke v. Smith,* and a "consenting" function "in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17." 285 U.S., at 365–366, 52 S.Ct. 397.

16 The Seventeenth Amendment provided for election of Senators "by the people" of each State.

In contrast to those other functions, we observed, redistricting "involves lawmaking in its essential features and most important aspect." *Id.,* at 366, 52 S.Ct. 397. Lawmaking, we further noted, ordinarily "must be in accordance with the method which the State has prescribed for legislative enactments." *Id.,* at 367, 52 S.Ct. 397. In Minnesota, the State's Constitution had made the Governor "part of the legislative process." *Id.,* at 369, 52 S.Ct. 397. And the Elections Clause, we explained, respected the State's choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to "the Legislature" a ratifying, electoral, or consenting function. Nothing in the Elections Clause, we said, "attempt[ed] to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted." *Id.,* at 368, 52 S.Ct. 397.

THE CHIEF JUSTICE, in dissent, features, indeed trumpets repeatedly, the pre-Seventeenth Amendment regime in which Senators were "chosen [in each State] by the Legislature thereof." Art. I, § 3; see *post,* at 2677 – 2678, 2681 – 2682, 2687. If we are right, he asks, why did popular election proponents resort to the amending process instead of simply interpreting "the Legislature" to mean "the people"? *Post,* at 2677 – 2678. *Smiley,* as just indicated, answers that question. Article I, § 3, gave state legislatures "a function different from that of lawgiver," 285 U.S., at 365, 52 S.Ct. 397; it made each of ****2668** them "an electoral body" charged to perform that function to the exclusion of other participants, *ibid.* So too, of the ratifying function. As we explained in *Hawke,* "the power to legislate in the enactment of the laws of a State is derived from the people of the State." 253 U.S., at 230, 40 S.Ct. 495. Ratification, however, "has its source in the Federal Constitution" and is not "an act ***808** of legislation within the proper sense of the word." *Id.,* at 229–230, 40 S.Ct. 495.

Constantly resisted by THE CHIEF JUSTICE, but well understood in opinions that speak for the Court: "[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise." *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 434, 52 S.Ct. 607, 76 L.Ed. 1204 (1932) (citing *Smiley,* 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795). Thus "the Legislature" comprises the referendum and the Governor's veto in the context of regulating congressional elections. *Hildebrant,* see *supra,* at 2666; *Smiley,* see *supra,* at 2667. In the context of ratifying constitutional amendments, in contrast, "the Legislature" has a different identity, one that excludes the referendum and the Governor's veto. *Hawke,* see *supra,* at 2666 – 2667. [17]

17 The list of constitutional provisions in which the word "legislature" appears, appended to THE CHIEF JUSTICE's opinion, *post,* at 2692 – 2694, is illustrative of the variety of functions state legislatures can be called upon to exercise. For example, Art. I, § 2, cl. 1, superseded by the Seventeenth Amendment, assigned an "electoral" function. See *Smiley,* 285 U.S., at 365, 52 S.Ct. 397. Article I, § 3, cl. 2, assigns an "appointive" function. Article I, § 8, cl. 17, assigns a "consenting" function, see *Smiley,* 285 U.S., at 366, 52 S.Ct. 397, as does Art. IV, § 3, cl. 1. "[R]atifying" functions are assigned in Art. V, Amdt. 18, § 3, Amdt. 20, § 6, and Amdt. 22, § 2. See *Hawke,* 253 U.S., at 229, 40 S.Ct. 495. But Art. I, § 4, cl. 1, unquestionably calls for the exercise of lawmaking authority. That authority can be carried out by a representative body, but if a State so chooses, legislative authority can also be lodged in the people themselves. See *infra,* at 2671 – 2677.

In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto. The exercise of the initiative, we acknowledge, was not at issue in our prior decisions. But as developed below, we see no constitutional barrier ***809** to a State's empowerment of its people by embracing that form of lawmaking.

B

We take up next the statute the Court asked the parties to address, 2 U.S.C. § 2a(c), a measure modeled on the Reapportionment Act Congress passed in 1911, Act of Aug. 8 (1911 Act), ch. 5, § 4, 37 Stat. 14. Section 2a(c), we hold, permits use of a commission to adopt Arizona's congressional districts. See *supra,* at 2666. [18]

18 The AIRC referenced § 2a(c) in briefing below, see Motion to Dismiss 8–9, and Response to Plaintiff's Motion for Preliminary Injunction 12–14, in No. 12–1211 (D Ariz.), and in its motion to dismiss or affirm in this Court, see Motion to Dismiss or Affirm 28–31.

From 1862 through 1901, the decennial congressional apportionment Acts provided that a State would be required to follow federally prescribed procedures for redistricting unless "the legislature" of the State drew district lines. *E.g.,* Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734. In drafting the 1911 Act, Congress focused on **2669 the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate). 47 Cong. Rec. 3508 (statement of Sen. Burton); see *supra,* at 2659 – 2660. To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the Act's default procedures for redistricting "until such State shall be redistricted *in the manner provided by the laws thereof.*" Ch. 5, § 4, 37 Stat. 14 (emphasis added). [19]

19 The 1911 Act also required States to comply with certain federally prescribed districting rules—namely, that Representatives be elected "by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants," and that the districts "be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative." Act of Aug. 8, 1911, ch. 5, §§ 3–4, 37 Stat. 14. When a State's apportionment of Representatives remained constant, the Act directed the State to continue using its pre-existing districts "until [the] State shall be redistricted as herein prescribed." See § 4, *ibid.* The 1911 Act did not address redistricting in the event a State's apportionment of Representatives decreased, likely because no State faced a decrease following the 1910 census.

*810 Some Members of Congress questioned whether the language change was needed. In their view, existing apportionment legislation (referring to redistricting by a State's "legislature") "suffic[ed] to allow, whatever the law of the State may be, the people of that State to control [redistricting]." 47 Cong. Rec. 3507 (statement of Sen. Shively); cf. *Shiel v. Thayer,* Bartlett Contested Election Cases, H.R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 351 (1861) (view of House Committee of Elections Member Dawes that Art. I, § 4's reference to "the Legislature" meant simply the " constituted authorities, through whom [the State] choose[s] to speak," prime among them, the State's Constitution, "which rises above ... all legislative action"). Others anticipated that retaining the reference to "the legislature" would "condem [n] ... any [redistricting] legislation by referendum or by initiative." 47 Cong. Rec. 3436 (statement of Sen. Burton). In any event, proponents of the change maintained, "[i]n view of the very serious evils arising from gerrymanders," Congress should not "take any chances in [the] matter." *Id.,* at 3508 (same). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States," they urged, required Congress "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.,* at 3436; see *id.,* at 3508 (statement of Sen. Works).

As this Court observed in *Hildebrant,* "the legislative history of th[e] [1911 Act] leaves no room for doubt [about why] *811 the prior words were stricken out and the new words inserted." 241 U.S., at 568, 36 S.Ct. 708. The change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437 (statement of Sen. Burton). The 1911 Act, in short, left the question of redistricting "to the laws and methods of the States. If they include initiative, it is included." *Id.,* at 3508.

While the 1911 Act applied only to reapportionment following the 1910 census, see *Wood v. Broom*, 287 U.S. 1, 6–7, 53 S.Ct. 1, 77 L.Ed. 131 (1932), Congress used virtually identical language when it ****2670** enacted § 2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761–762. Section 2a(c) sets forth congressional-redistricting procedures operative only if the State, "after any apportionment," had not redistricted "in the manner provided by the law thereof." The 1941 provision, like the 1911 Act, thus accorded full respect to the redistricting procedures adopted by the States. So long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map. [20]

20 Because a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map, nothing in § 2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.

The Arizona Legislature characterizes § 2a(c) as an "obscure provision, narrowed by subsequent developments to the brink of irrelevance." Brief for Appellant 56. True, four of the five default redistricting procedures—operative only when a State is *not* "redistricted in the manner provided by [state] law"—had "become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch v. Smith*, 538 U.S. 254, 273–274, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion). Concretely, the default ***812** procedures specified in § 2a(c)(1)-(4) contemplate that a State would continue to use pre-existing districts following a new census. The one-person, one-vote principle announced in *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), however, would bar those procedures, except in the " unlikely" event that "the decennial census makes no districting change constitutionally necessary," *Branch*, 538 U.S., at 273, 123 S.Ct. 1429 (plurality opinion).

Constitutional infirmity in § 2a(c)(1)-(4)'s default procedures, however, does not bear on the question whether a State has been "redistricted in the manner provided by [state] law." [21] As just observed, Congress expressly directed that when a State has been "redistricted in the manner provided by [state] law"—whether by the legislature, court decree (see *id.*, at 274, 123 S.Ct. 1429), or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives. [22]

21 The plurality in *Branch v. Smith*, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003), considered the question whether § 2a(c) had been repealed by implication and stated, "where what it prescribes is constitutional," the provision "continues to apply."

22 THE CHIEF JUSTICE, in dissent, insists that § 2a(c) and its precursor, the 1911 Act, have nothing to do with this case. *Post*, at 2687 – 2688, 2689 – 2690. Undeniably, however, it was the very purpose of the measures to recognize the legislative authority each State has to determine its own redistricting regime.

There can be no dispute that Congress itself may draw a State's congressional-district boundaries. See *Vieth*, 541 U.S., at 275, 124 S.Ct. 1769 (plurality opinion) (stating that the Elections Clause "permit[s] Congress to 'make or alter' " the "districts for federal elections"). The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State "Legislature[s]," precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting plan under ***813** its plenary authority to "make or alter" the State's plan. See Brief for Appellant 56– ****2671** 57; Reply Brief 17. In other words, the Arizona Legislature regards § 2a(c) as a futile exercise. The Congresses that passed § 2a(c) and its forerunner, the 1911 Act, did not share that wooden interpretation of the Clause, nor do we. Any uncertainty about the import of § 2a(c), however, is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative, see *infra*, at 2671 – 2677, leaving no arguable conflict between § 2a(c) and the first part of the Clause.

C

In accord with the District Court, see *supra*, at 2662 – 2663, we hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.

We note, preliminarily, that dictionaries, even those in circulation during the founding era, capaciously define the word "legislature." Samuel Johnson defined "legislature" simply as "[t]he power that makes laws." 2 A Dictionary of the English Language (1st ed. 1755); *ibid.* (6th ed. 1785); *ibid.* (10th ed. 1792); *ibid.* (12th ed. 1802). Thomas Sheridan's dictionary defined "legislature" exactly as Dr. Johnson did: "The power that makes laws." 2 A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. Compendious Dictionary of the English Language 174 (1806). And Nathan Bailey ***814** similarly defined "legislature" as "the Authority of making Laws, or Power which makes them." An Universal Etymological English Dictionary (20th ed. 1763). [23]

23 Illustrative of an embracive comprehension of the word "legislature," Charles Pinckney explained at South Carolina's ratifying convention that America is "[a] republic, where the people at large, either collectively or by representation, form the legislature." 4 Debates on the Federal Constitution 328 (J. Elliot 2d ed. 1863). Participants in the debates over the Elections Clause used the word "legislature" interchangeably with "state" and "state government." See Brief for Brennan Center for Justice at N.Y.U. School of Law as *Amicus Curiae* 6–7.

As to the "power that makes laws" in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do. See Ariz. Const., Art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."). See also *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) ("In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."). As well in Arizona, the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do. See Tr. of Oral Arg. 15–16 (answering the Court's question, may the Arizona Legislature itself establish a commission to attend to redistricting, ****2672** counsel for appellant responded yes, state legislatures may delegate their authority to a commission, subject to their prerogative to reclaim the authority for themselves).

1

The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override ***815** state election rules, not to restrict the way States enact legislation. As this Court explained in *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. ——, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013), the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Id.*, at ——, 133 S.Ct., at 2253 (citing The Federalist No. 59, pp. 362–363 (C. Rossiter ed. 1961) (A. Hamilton)).

The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. As Madison urged, without the Elections Clause, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention 241 (M. Farrand rev. 1966). Madison

spoke in response to a motion by South Carolina's delegates to strike out the federal power. Those delegates so moved because South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 223–224 (1996). The problem Madison identified has hardly lessened over time. Conflict of interest is inherent when "legislators dra[w] district lines that they ultimately have to run in." Cain, 121 Yale L. J., at 1817.

Arguments in support of congressional control under the Elections Clause were reiterated in the public debate over ratification. Theophilus Parsons, a delegate at the Massachusetts ratifying convention, warned that "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the states into districts for the election of representatives." Debate in Massachusetts Ratifying Convention (16–17, 21 Jan. 1788), in 2 The Founders' Constitution 256 (P. Kurland & R. Lerner eds. 1987). Timothy Pickering of Massachusetts similarly urged that the Clause was necessary because "the State governments ***816** *may* abuse their power, and regulate ... elections in such manner as would be highly inconvenient to the people." Letter to Charles Tillinghast (24 Dec. 1787), in *id.*, at 253. He described the Clause as a way to "ensure to the *people* their rights of election." *Ibid.*

While attention focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. That is hardly surprising. Recall that when the Constitution was composed in Philadelphia and later ratified, the people's legislative prerogatives—the initiative and the referendum—were not yet in our democracy's arsenal. See *supra,* at 2659 – 2660. The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands. [24]

24 THE CHIEF JUSTICE, in dissent, cites *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995), as an important precedent we overlook. *Post,* at 2690 – 2691. There, we held that state-imposed term limits on candidates for the House and Senate violated the Clauses of the Constitution setting forth qualifications for membership in Congress, Art. I, § 2, cl. 2, and Art. I, § 3, cl. 3. We did so for a reason entirely harmonious with today's decision. Adding state-imposed limits to the qualifications set forth in the Constitution, the Court wrote, would be "contrary to the 'fundamental principle of our representative democracy,' ... that 'the people should choose whom they please to govern them.' " 514 U.S., at 783, 115 S.Ct. 1842 (quoting *Powell v. McCormack,* 395 U.S. 486, 547, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)).

****2673** 2

The Arizona Legislature maintains that, by specifying "the Legislature thereof," the Elections Clause renders the State's representative body the sole "component of state government authorized to prescribe ... regulations ... for congressional redistricting." Brief for Appellant 30. THE CHIEF JUSTICE, in dissent, agrees. But it is characteristic of our federal system that States retain autonomy to establish their own governmental processes. See *Alden v.* ***817** *Maine,* 527 U.S. 706, 752, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) ("A State is entitled to order the processes of its own governance."); The Federalist No. 43, at 272 (J. Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do so."). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority. See Ariz. Const., Art. IV; *supra,* at 2660 – 2661.

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice,* 555 U.S. 160, 171, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009); see *United States v. Lopez,* 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct.

371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Deference to state lawmaking "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " *Bond v. United States,* 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011) (quoting *Gregory,* 501 U.S., at 458, 111 S.Ct. 2395).

We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on ***818** the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution. See *Shiel,* H.R. Misc. Doc. No. 57, at 349–352 (concluding that Oregon's Constitution prevailed over any conflicting legislative measure setting the date for a congressional election).

****2674** THE CHIEF JUSTICE, in dissent, maintains that, under the Elections Clause, the state legislature can trump any initiative-introduced constitutional provision regulating federal elections. He extracts support for this position from *Baldwin v. Trowbridge,* 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). See *post,* at 2685 – 2686. There, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in other locations. One candidate would win if the State Constitution's requirement controlled; his opponent would prevail under the Michigan Legislature's prescription. The House Elections Committee, in a divided vote, ruled that, under the Elections Clause, the Michigan Legislature had the paramount power.

As the minority report in *Baldwin* pointed out, however, the Supreme Court of Michigan had reached the opposite conclusion, holding, as courts generally do, that state legislation in direct conflict with the State's constitution is void. *Baldwin,* H.R. Misc. Doc. No. 152, at 50. The *Baldwin* majority's ruling, furthermore, appears in tension with the Election Committee's unanimous decision in *Shiel* just five years earlier. (The Committee, we repeat, "ha[d] no doubt that the constitution of the State ha[d] fixed, beyond the control of the legislature, the time for holding [a congressional] election." *Shiel,* H.R. Misc. Doc. No. 57, at 351.) Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision. See U.S. House of Representatives ***819** Congress Profiles: 39th Congress (1865–1867), http://history.house.gov/Congressional-Overview/Profiles/39th/; Biographical Directory of the United States Congress: Trowbridge, Rowland Ebenezer (1821–1881). Cf. Cain, 121 Yale L. J., at 1817 (identifying legislative conflict of interest as the problem independent redistricting commissions aimed to check). In short, *Baldwin* is not a disposition that should attract this Court's reliance.

We add, furthermore, that the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections. In considering whether Article I, § 4, really says "No" to similar control of federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: "[I]t would have been hardly advisable ... to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, at 374. The Elections Clause is not sensibly read to subject States to that deprivation. [25]

25 A State may choose to regulate state and national elections differently, which is its prerogative under the Clause. *E.g.,* Ind.Code § 3–3–2–2 (creating backup commission for congressional but not state legislative districts).

3

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the

Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty **2675 seems to demand ... not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *Id.*, No. 37, at 223.

*820 The people's ultimate sovereignty had been expressed by John Locke in 1690, a near century before the Constitution's formation:

> "[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security." Two Treatises of Government § 149, p. 385 (P. Laslett ed. 1964).

Our Declaration of Independence, ¶ 2, drew from Locke in stating: "Governments are instituted among Men, deriving their just powers from the consent of the governed." And our fundamental instrument of government derives its authority from "We the People." U.S. Const., Preamble. As this Court stated, quoting Hamilton: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540–541, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). In this light, it would be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be "chosen ... by the People of the several States," Art. I, § 2. See Cain, 121 Yale L. J., at 1817.

THE CHIEF JUSTICE, in dissent, suggests that independent commissions established by initiative are a high-minded experiment that has failed. *Post*, at 2691 – 2692. For this assessment, THE CHIEF JUSTICE cites a three-judge Federal *821 District Court opinion, *Harris v. Arizona Independent Redistricting Comm'n*, 993 F.Supp.2d 1042 (Ariz.2014). That opinion, he asserts, "detail[s] the partisanship that has affected the Commission." *Post*, at 2691. No careful reader could so conclude.

The report of the decision in *Harris* comprises a *per curiam* opinion, an opinion concurring in the judgment by Judge Silver, and a dissenting opinion by Judge Wake. The *per curiam* opinion found "in favor of the Commission." 993 F.Supp.2d, at 1080. Deviations from the one-person, one-vote principle, the *per curiam* opinion explained at length, were "small" and, in the main, could not be attributed to partisanship. *Ibid.* While partisanship "may have played some role," the *per curiam* opinion stated, deviations were "predominantly a result of the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act." *Id.*, at 1060. Judge Silver, although she joined the *per curiam* opinion, made clear at the very outset of that opinion her finding that "partisanship did not play a role." *Id.*, at 1046, n. 1. In her concurring opinion, she repeated her finding that the evidence did not show partisanship at work, *id.*, at 1087; instead, she found, the evidence "[was] overwhelming [that] the final map was a product of the commissioners's consideration of appropriate redistricting criteria." *Id.*, at 1088. To describe *Harris* as a decision criticizing the Commission for **2676 pervasive partisanship, *post*, at 2691, THE CHIEF JUSTICE could rely only upon the dissenting opinion, which expressed views the majority roundly rejected.

Independent redistricting commissions, it is true, "have not eliminated the inevitable partisan suspicions associated with political line-drawing." Cain, 121 Yale L. J., at 1808. But "they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." *Ibid.* They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives.

*822 4

Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

The people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the "Times, Places and Manner" of holding federal elections. Art. I, § 4. For example, the people of California provided for permanent voter registration, specifying that "no amendment by the Legislature shall provide for a general biennial or other periodic reregistration of voters." Cal. Elec.Code Ann. § 2123 (West 2003). The people of Ohio banned ballots providing for straight-ticket voting along party lines. Ohio Const., Art. V, § 2a. The people of Oregon shortened the deadline for voter registration to 20 days prior to an election. Ore. Const., Art. II, § 2. None of those measures permit the state legislatures to override the people's prescriptions. The Arizona Legislature's theory—that the lead role in regulating federal elections cannot be wrested from "the Legislature," and vested in commissions initiated by the people—would endanger all of them.

The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature."[26] ***823** Core aspects of the electoral process regulated by state constitutions include voting by "ballot" or "secret ballot,"[27] voter registration,[28] absentee voting,[29] vote counting,[30] and victory ****2677** thresholds.[31] Again, the States' legislatures had no hand in making these laws and may not alter or amend them.

26 See App. to Brief for Appellees 11a–29a (collecting state constitutional provisions governing elections). States' constitutional conventions are not simply past history predating the first election of state legislatures. Louisiana, for example, held the most recent of its 12 constitutional conventions in 1992. J. Dinan, The American State Constitutional Tradition 8–9 (2006) (Table 1–1). The State's provision for voting by "secret ballot" may be traced to the constitutional convention held by the State in 1812, see La. Const., Art. VI, § 13, but was most recently reenacted at the State's 1974 constitutional convention, see Art. XI, § 2.

27 Madison called the decision "[w]hether the electors should vote by ballot or vivâ voce" a quintessential subject of regulation under the Elections Clause. 2 Records of the Federal Convention 240–241 (M. Farrand rev. 1966).

28 Miss. Const., Art. XII, § 249; N.C. Const., Art. VI, § 3; Va. Const., Art. II, § 2; W. Va. Const., Art. IV, § 12; Wash. Const., Art. VI, § 7.

29 *E.g.*, Haw. Const., Art. II, § 4; La. Const., Art XI, § 2; N.D. Const., Art. II, § 1; Pa. Const., Art. VII, § 14.

30 *E.g.*, Ark. Const., Art. III, § 11 (ballots unlawfully not counted in the first instance must be counted after election); La. Const., Art XI, § 2 (all ballots must be counted publicly).

31 *E.g.*, Ariz. Const., Art. VII, § 7 (setting plurality of votes as the standard for victory in all elections, excluding runoffs); Mont. Const., Art. IV, § 5 (same); Ore. Const., Art. II, § 16 (same).

The importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people rather than the States' legislatures. The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures. See Persily & Anderson, Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1006–1008 (2005) (describing cases in which "indirect pressure of the initiative process ... was sufficient to spur [state] legislature[s] to action"). Turning the coin, the legislature's responsiveness to the people its members represent is hardly heightened when the representative body can be confident that what it does will not be overturned or modified by the voters themselves.

* * *

***824** Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State's voters from serving as the legislative power for redistricting purposes. But the Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes. Article I, § 4, stems from a different view. Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch v. Maryland,* 4 Wheat. 316, 404–405, 4 L.Ed. 579 (1819). So comprehended, the Clause doubly empowers the people. They may control the State's lawmaking processes in the first instance, as Arizona voters have done, and they may seek Congress' correction of regulations prescribed by state legislatures.

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." The Federalist No. 57, at 350 (J. Madison). In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around." Berman, Managing Gerrymandering, 83 Texas L.Rev. 781 (2005). The Elections Clause does not hinder that endeavor.

For the reasons stated, the judgment of the United States District Court for the District of Arizona is

Affirmed.

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.
Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, § 3, to "the people thereof." The Amendment resulted from an arduous, decades-long campaign in which reformers across the country ***825** worked hard to garner approval from Congress and three-quarters of the States.

What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, § 4. That Clause vests ****2678** congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

The Court's position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court. The Constitution contains seventeen provisions referring to the "Legislature" of a State, many of which cannot possibly be read to mean "the people." See Appendix, *infra.* Indeed, several provisions expressly distinguish "the Legislature" from "the People." See Art. I, § 2; Amdt. 17. This Court has accordingly defined "the Legislature" in the Elections Clause as "*the representative body* which ma[kes] the laws of the people." *Smiley v. Holm,* 285 U.S. 355, 365, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (quoting *Hawke v. Smith (No. 1),* 253 U.S. 221, 227, 40 S.Ct. 495, 64 L.Ed. 871 (1920); emphasis added).

The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting. Arizona's Commission might be a noble endeavor—although it does not seem so "independent" in practice—but the "fact that a given law or procedure is efficient, convenient, and useful ... will not save it if it is contrary to the Constitution." *INS v.* ***826** *Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution. I respectfully dissent.

I

The majority begins by discussing policy. I begin with the Constitution. The Elections Clause provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1.

The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives. And that duty "shall" be carried out "in each State by the Legislature thereof."

In Arizona, however, redistricting is not carried out by the legislature. Instead, as the result of a ballot initiative, an unelected body called the Independent Redistricting Commission draws the lines. See *ante*, at 2660 – 2661. The key question in the case is whether the Commission can conduct congressional districting consistent with the directive that such authority be exercised "by the Legislature."

The majority concedes that the unelected Commission is not "the Legislature" of Arizona. The Court contends instead that the people of Arizona as a whole constitute "the Legislature" for purposes of the Elections Clause, and that they may delegate the congressional districting authority conferred by that Clause to the Commission. *Ante*, at 2671 – 2672. The majority provides no support for the delegation part of **2679 its theory, and I am not sure whether the majority's analysis is correct on that issue. But even giving the Court the benefit *827 of the doubt in that regard, the Commission is still unconstitutional. Both the Constitution and our cases make clear that "the Legislature" in the Elections Clause is the representative body which makes the laws of the people.

A

The majority devotes much of its analysis to establishing that the people of Arizona may exercise lawmaking power under their State Constitution. See *ante*, at 2660 – 2661, 2671 – 2672, 2672 – 2673. Nobody doubts that. This case is governed, however, by the Federal Constitution. The States do not, in the majority's words, "retain autonomy to establish their own governmental processes," *ante*, at 2673, if those "processes" violate the United States Constitution. In a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way. Art. VI, cl. 2; *Cook v. Gralike*, 531 U.S. 510, 523, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001). The majority opinion therefore largely misses the point.

The relevant question in this case is how to define "the Legislature" under the Elections Clause. The majority opinion does not seriously turn to that question until page 2671, and even then it fails to provide a coherent answer. The Court seems to conclude, based largely on its understanding of the "history and purpose" of the Elections Clause, *ante*, at 2671, that "the Legislature" encompasses any entity in a State that exercises legislative power. That circular definition lacks any basis in the text of the Constitution or any other relevant legal source.

The majority's textual analysis consists, in its entirety, of one paragraph citing founding era dictionaries. The majority points to various dictionaries that follow Samuel Johnson's definition of "legislature" as the "power that makes laws." *Ibid.* (internal quotation marks omitted). The notion that this definition corresponds to the entire population of a State is strained to begin with, and largely discredited by the majority's own admission that "[d]irect lawmaking by *828 the people was virtually unknown when the Constitution of 1787 was drafted." *Ante*, at 2659 (internal quotation marks omitted); see *ante*, at 2672 – 2673. Moreover, Dr. Johnson's first example of the usage of "legislature" is this: "Without the concurrent consent of all three parts of the legislature, no law is or can be made." 2 A Dictionary of the English Language (1st ed. 1755) (emphasis deleted). Johnson borrowed that sentence from Matthew Hale, who defined the "Three Parts of the Legislature" of England as the King and the two houses of Parliament. History of the Common Law of England 2 (1713). (The contrary notion that the people as a whole make the laws would have cost you your head in England in 1713.) Thus, even under the majority's preferred definition, "the Legislature" referred to an institutional body of representatives, not the people at large.

Any ambiguity about the meaning of "the Legislature" is removed by other founding era sources. "[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." Morley, The Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. Online 131, 147, and n. 101 (2015) (citing eleven State Constitutions). The Federalist Papers are replete with references to "legislatures" that can only be understood as referring to representative institutions. *E.g.*, The Federalist No. 27, pp. 174–175 (C. Rossiter ed. 1961) (A. Hamilton) (describing "the State ****2680** legislatures" as "select bodies of men"); *id.*, No. 60, at 368 (contrasting "the State legislatures" with "the people"). Noah Webster's heralded American Dictionary of the English Language defines "legislature" as "[t]he body of men in a state or kingdom, invested with power to make and repeal laws." 2 An American Dictionary of the English Language (1828). It continues, "The legislatures of most of the states in America ... consist of two houses or branches." *Ibid.* (emphasis deleted).

***829** I could go on, but the Court has said this before. As we put it nearly a century ago, "Legislature" was "not a term of uncertain meaning when incorporated into the Constitution." *Hawke*, 253 U.S., at 227, 40 S.Ct. 495. "What it meant when adopted it still means for the purpose of interpretation." *Ibid.* "A Legislature" is "the representative body which ma [kes] the laws of the people." *Ibid.*; see *Smiley*, 285 U.S., at 365, 52 S.Ct. 397 (relying on this definition); *Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095, 124 S.Ct. 2228, 159 L.Ed.2d 260 (2004) (Rehnquist, C.J., dissenting from denial of certiorari) (same).

B

The unambiguous meaning of "the Legislature" in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way. When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself. Our precedents new and old have employed this structural method of interpretation to read the Constitution in the manner it was drafted and ratified—as a unified, coherent whole. See, *e.g.*, *NLRB v. Noel Canning*, 573 U.S. ——, —— – ——, 134 S.Ct. 2550, 2566–2567, 189 L.Ed.2d 538 (2014); *id.*, at ——, 134 S.Ct., at 2608–2609 (SCALIA, J., concurring in judgment); *McCulloch v. Maryland*, 4 Wheat. 316, 414–415, 4 L.Ed. 579 (1819); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328–330, 4 L.Ed. 97 (1816); Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999).

The Constitution includes seventeen provisions referring to a State's "Legislature." See Appendix, *infra*. Every one of those references is consistent with the understanding of a legislature as a representative body. More importantly, many of them are only consistent with an institutional legislature—and flatly incompatible with the majority's reading of "the Legislature" to refer to the people as a whole.

Start with the Constitution's first use of the term: "The House of Representatives shall be composed of Members ***830** chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Art. I, § 2, cl. 1. This reference to a "Branch of the State Legislature" can only be referring to an institutional body, and the explicit juxtaposition of "the State Legislature" with "the People of the several States" forecloses the majority's proposed reading.

The next Section of Article I describes how to fill vacancies in the United States Senate: "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." § 3, cl. 2. [1] The references to "the Recess of the Legislature of any State" and "the next Meeting of the Legislature" are only consistent with an institutional ****2681** legislature, and make no sense under the majority's reading. The people as a whole (schoolchildren and a few unnamed others excepted) do not take a "Recess."

1 This provision was modified by the Seventeenth Amendment.

The list goes on. Article IV provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." § 4. It is perhaps conceivable that all the people of a State could be "convened"—although this would seem difficult during an "Invasion" or outbreak of "domestic Violence"—but the only natural reading of the Clause is that "the Executive" may submit a federal application when "the Legislature" as a representative body cannot be convened.

Article VI provides that the "Senators and Representatives before mentioned, and the Members of the several ***831** State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Cl. 3. Unless the majority is prepared to make all the people of every State swear an "Oath or Affirmation, to support this Constitution," this provision can only refer to the "several State Legislatures" in their institutional capacity.

Each of these provisions offers strong structural indications about what "the Legislature" must mean. But the most powerful evidence of all comes from the Seventeenth Amendment. Under the original Constitution, Senators were "chosen by the Legislature" of each State, Art. I, § 3, cl. 1, while Members of the House of Representatives were chosen "by the People," Art. I, § 2, cl. 1. That distinction was critical to the Framers. As James Madison explained, the Senate would "derive its powers from the States," while the House would "derive its powers from the people of America." The Federalist No. 39, at 244. George Mason believed that the power of state legislatures to select Senators would "be a reasonable guard" against "the Danger ... that the national, will swallow up the State Legislatures." 1 Records of the Federal Convention of 1787, p. 160 (M. Farrand ed. 1911). Not everyone agreed. James Wilson proposed allowing the people to elect Senators directly. His proposal was rejected ten to one. Debates in the Federal Convention of 1787, S. Doc. No. 404, 57th Cong., 1st Sess., 8 (1902).

Before long, reformers took up Wilson's mantle and launched a protracted campaign to amend the Constitution. That effort began in 1826, when Representative Henry Storrs of New York proposed—but then set aside—a constitutional amendment transferring the power to elect Senators from the state legislatures to the people. 2 Cong. Deb. 1348–1349. Over the next three-quarters of a century, no fewer than 188 joint resolutions proposing similar reforms were introduced in both Houses of Congress. 1 W. Hall, The ***832** History and Effect of the Seventeenth Amendment 183–184 (1936).

At no point in this process did anyone suggest that a constitutional amendment was unnecessary because "Legislature" could simply be interpreted to mean "people." See *Hawke,* 253 U.S., at 228, 40 S.Ct. 495 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."). In fact, as the decades rolled by without an amendment, 28 of the 45 States settled for the next best thing by ****2682** holding a popular vote on candidates for Senate, then pressuring state legislators into choosing the winner. See, *e.g.,* Abstract of Laws Relating to the Election of United States Senators, S. Doc. No. 393, 59th Cong., 2d Sess. (1907). All agreed that cutting the state legislature out of senatorial selection entirely would require nothing less than to "Strike out" the original words in the Constitution and "insert, 'elected by the people' " in its place. Cong. Globe, 31st Cong., 1st Sess., 88 (1849) (proposal of Sen. Jeremiah Clemens).

Yet that is precisely what the majority does to the Elections Clause today—amending the text not through the process provided by Article V, but by judicial decision. The majority's revision renders the Seventeenth Amendment an 86–year waste of time, and singles out the Elections Clause as the only one of the Constitution's seventeen provisions referring to "the Legislature" that departs from the ordinary meaning of the term.

The Commission had no answer to this point. See Tr. of Oral Arg. 42 (Justice ALITO: "Is there any other provision where legislature means anything other than the conventional meaning?" Appellee: "I don't know the answer to that question.").

The Court's response is not much better. The majority observes that "the Legislature" of a State may perform different ***833** functions under different provisions of the Constitution. Under Article I, § 3, for example, "the Legislature" performed an "electoral" function by choosing Senators. The "Legislature" plays a "consenting" function under Article I, § 8, and Article IV, § 3; a "ratifying" function under Article V; and a "lawmaking" function under the Elections Clause. *Ante,* at 2668, and n. 17. All true. The majority, however, leaps from the premise that "the Legislature" performs different *functions* under different provisions to the conclusion that "the Legislature" assumes different *identities* under different provisions.

As a matter of ordinary language and common sense, however, a difference in function does not imply a difference in meaning. A car, for example, generally serves a transportation function. But it can also fulfill a storage function. At a tailgate party or a drive-in movie, it may play an entertainment function. In the absence of vacancies at the roadside motel, it could provide a lodging function. To a neighbor with a dead battery, it offers an electricity generation function. And yet, a person describing a "car" engaged in any of these varied functions would undoubtedly be referring to the same thing.

The Constitution itself confirms this point. Articles I and II assign many different functions to the Senate: a lawmaking function, an impeachment trial function, a treaty ratification function, an appointee confirmation function, an officer selection function, a qualification judging function, and a recordkeeping function. Art. I, § 1; § 3, cls. 5, 6; § 5, cls. 1, 3; § 7, cl. 2; Art. II, § 2, cl. 2. Yet the identity of the Senate remains the same as it discharges these various functions.

Similarly, the House of Representatives performs different functions, including lawmaking, impeachment, and resolving Presidential elections in which no candidate wins a majority in the Electoral College. Art. I, § 1; § 2, cl. 5; § 7, cl. 2; Amdt. 12. The President is assigned not only executive functions, Art. II, but also legislative functions, such as approving or vetoing bills, convening both Houses of Congress, and recommending ***834** measures for their consideration, Art. I, § 7, cl. 2; Art. II, § 3. Courts not only exercise a judicial function, Art. III, § 1, but may ****2683** also perform an appointment function, Art. II, § 2, cl. 2. And so on. Neither the majority nor the Commission points to a single instance in which the identity of these actors changes as they exercise different functions.

The majority attempts to draw support from precedent, but our cases only further undermine its position. In *Hawke,* this Court considered the meaning of "the Legislatur[e]" in Article V, which outlines the process for ratifying constitutional amendments. The Court concluded that "Legislature" meant "the representative body which ma[kes] the laws of the people." 253 U.S., at 227, 40 S.Ct. 495. The Court then explained that "[t]he term is often used in the Constitution *with this evident meaning.*" *Ibid.* (emphasis added). The Court proceeded to list other constitutional provisions that assign different functions to the "Legislature," just as the majority does today. *Id.,* at 227–228, 40 S.Ct. 495; see *ante,* at 2668, n. 17.

Unlike the majority today, however, the Court in *Hawke* never hinted that the meaning of "Legislature" varied across those different provisions because they assigned different functions. To the contrary, the Court drew inferences from the Seventeenth Amendment and its predecessor, Article I, § 3—in which "the Legislature" played an *electoral* function—to define the "Legislature" in Article V, which assigned it a *ratification* function. See 253 U.S., at 228, 40 S.Ct. 495. The Court concluded that "Legislature" refers to a representative body, whatever its function. As the Court put it, "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose." *Ibid.* (citing Art. I, § 2).

***835** *Smiley,* the leading precedent on the meaning of "the Legislature" in the Elections Clause, reaffirmed the definition announced in *Hawke.* In *Smiley,* the petitioner argued—as the Commission does here—that "the Legislature" referred not just to "the two houses of the legislature" but to "the entire legislative power of the state ... however exercised." Brief for Petitioner, O.T. 1931, No. 617, p. 22 (internal quotation marks omitted). The Court did not respond by holding, as the majority today suggests, that " 'the Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections," or that " 'the Legislature' has a different identity" in the Elections Clause than it does in Article V. *Ante,* at 2667 – 2668. Instead, the Court in *Smiley* said this:

"Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in *Hawke* ... the term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for purposes of interpretation. A Legislature was then the representative body which made the laws of the people.' " 285 U.S., at 365, 52 S.Ct. 397 (quoting *Hawke,* 253 U.S., at 227, 40 S.Ct. 495).

Remarkably, the majority refuses to even acknowledge the definition of "the Legislature" adopted in both *Smiley* and *Hawke,* and instead embraces the interpretation that this Court unanimously rejected more than 80 years ago. [2]

2 The only hint of support the majority can glean from precedent is a passing reference in *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 434, 52 S.Ct. 607, 76 L.Ed. 1204 (1932), a case about how to interpret "trade or commerce" in the Sherman Act. See *ante,* at 2668. And even that selected snippet describes the "legislature" as a "body." 286 U.S., at 434, 52 S.Ct. 607.

****2684** C

The history of the Elections Clause further supports the conclusion that "the Legislature" is a representative body. ***836** The first known draft of the Clause to appear at the Constitutional Convention provided that "Each state shall prescribe the time and manner of holding elections." 1 Debates on the Federal Constitution 146 (J. Elliot ed. 1836). After revision by the Committee of Detail, the Clause included the important limitation at issue here: "The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed *by the legislature of each state* ; but their provisions concerning them may, at any time, be altered *by the legislature of the United States*." *Id.,* at 225 (emphasis added). The insertion of "the legislature" indicates that the Framers thought carefully about which entity within the State was to perform congressional districting. And the parallel between "the legislature of each state" and "the legislature of the United States" further suggests that they meant "the legislature" as a representative body.

As the majority explains, the debate over the ratification of the Elections Clause centered on its second part, which empowers Congress to "make or alter" regulations prescribed by "the Legislature" of a State. See *ante,* at 2672. Importantly for our purposes, however, both sides in this debate "recognized the distinction between the state legislature and the people themselves." *Brown v. Secretary of State of Florida,* 668 F.3d 1271, 1275–1276, n. 4 (C.A.11 2012).

The Anti–Federalists, for example, supported vesting election regulation power solely in state legislatures because state "legislatures were more numerous *bodies,* usually *elected annually,* and thus more likely to be in sympathy with the interests *of the people*." Natelson, The Original Scope of the Congressional Power to Regulate Elections, 13 U. Pa. J. Const. L. 1, 31 (2010) (emphasis added) (citing sources from ratification debates). Alexander Hamilton and others responded by raising the specter of state legislatures—which he described as "local administrations"—deciding to "annihilate" the Federal Government by "neglecting to provide for ***837** the choice of persons to administer its affairs." The Federalist No. 59, at 363. As the majority acknowledges, the distinction between "the Legislature" and the people "occasioned no debate." *Ante,* at 2672. That is because everybody understood what "the Legislature" meant.

The majority contends that its counterintuitive reading of "the Legislature" is necessary to advance the "animating principle" of popular sovereignty. *Ante,* at 2671. But the ratification of the Constitution was the ultimate act of popular sovereignty, and the people who ratified the Elections Clause did so knowing that it assigned authority to "the Legislature" as a representative body. The Elections Clause was not, as the majority suggests, an all-purpose "safeguard against manipulation of electoral rules by politicians." *Ante,* at 2672. Like most provisions of the Constitution, the Elections Clause reflected a compromise—a pragmatic recognition that the grand project of forging a Union required everyone to accept some things they did not like. See The Federalist No. 59, at 364 (describing the power allocated to state legislatures as "an evil which could not have been avoided"). This Court has no power to upset such a compromise simply because we now think that ****2685** it should have been struck differently.

As we explained almost a century ago, "[t]he framers of the Constitution might have adopted a different method," but it "is not the function of courts ... to alter the method which the Constitution has fixed." *Hawke*, 253 U.S., at 227, 40 S.Ct. 495.

D

In addition to text, structure, and history, several precedents interpreting the Elections Clause further reinforce that "the Legislature" refers to a representative body.

The first precedent comes not from this Court, but from Congress. Acting under its authority to serve as "the Judge of the Elections, Returns and Qualifications of its own Members," Art. I, § 5, cl. 1, the House of Representatives in 1866 confronted a dispute about who should be seated as the Congressman ***838** from the Fifth District of Michigan. At a popular convention, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in alternative locations. If only the local votes counted, one candidate (Baldwin) would win; if the outside votes were included, the other candidate (Trowbridge) would be entitled to the seat. See *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866).

The House Elections Committee explained that the Elections Clause conferred power on "the Legislature" of Michigan to prescribe election regulations. "But," the Committee asked, "what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country?" *Id.*, at 47. The Committee decided, and the full House agreed, that "the Legislature" in the Elections Clause was the "legislature *eo nomine*"—the legislature *by that name*, a representative body. *Ibid.* That conclusion followed both from the known meaning of "the Legislature" at the time of the framing and the many other uses of the word in the Constitution that would not be compatible with a popular convention. Thus, "[w]here there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount." *Id.*, at 46; see *California Democratic Party v. Jones*, 530 U.S. 567, 603, and n. 11, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (Stevens, J., dissenting) (relying on *Baldwin* for its conclusion that "the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State' ").

The majority draws attention to the minority report in *Baldwin*. *Ante*, at 2674. Under the present circumstances, I take some comfort in the Court's willingness to consider ***839** dissenting views. Still, the minority report does not diminish the force of *Baldwin*. The report cites a Michigan Supreme Court precedent that allegedly reached a contrary result, but that case turned entirely on state constitutional questions arising from a state election—not federal constitutional questions arising from a federal election. See *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865). The majority also contends that *Baldwin* "appears in tension with" an earlier House Elections Committee precedent. *Ante*, at 2674. By its own terms, however, that earlier precedent did not involve a conflict between a state legislative act and a state constitutional provision. See *Shiel v. Thayer*, 1 Bartlett Contested Election ****2686** Cases, H.R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 350 (1861) ("the two branches of the legislature differed upon the question ... and so the bill never became a law"). In any event, to the degree that the two precedents are inconsistent, the later decision in *Baldwin* should govern. [3]

3 The majority's suggestion that *Baldwin* should be dismissed as an act of partisanship appears to have no basis, unless one is willing to regard as tainted every decision in favor of a candidate from the same party as a majority of the Elections Committee. *Ante*, at 2674.

The next relevant precedent is this Court's decision in *McPherson v. Blacker*, 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1892). That case involved a constitutional provision with considerable similarity to the Elections Clause, the Presidential Electors Clause of Article II: "Each State shall appoint, in such Manner *as the Legislature thereof* may direct, a Number of Electors...." § 1, cl. 2 (emphasis added). The question was whether the state legislature, as a body of representatives, could divide authority to

appoint electors across each of the State's congressional districts. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in "the Legislature" of the State. That power, the Court explained, ***840** "*can neither be taken away nor abdicated.*" 146 U.S., at 35, 13 S.Ct. 3 (emphasis added; internal quotation marks omitted).

Against that backdrop, the Court decided two cases regarding the meaning of "the Legislature" in the Elections Clause. In *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172 (1916), the Ohio Legislature passed a congressional redistricting law. Under the Ohio Constitution, voters held a referendum on the law and rejected it. A supporter of the law sued on behalf of the State, contending that the referendum "was not and could not be a part of the legislative authority of the State and therefore could have no influence on ... the law creating congressional districts" under the Elections Clause. *Id.,* at 567, 36 S.Ct. 708.

This Court rejected the challenger's constitutional argument as a nonjusticiable claim that the referendum "causes a State ... to be not republican" in violation of the Guarantee Clause of the Constitution. *Id.,* at 569, 36 S.Ct. 708 (citing Art. IV, § 4). The Court also rejected an argument that Ohio's use of the referendum violated a federal statute, and held that Congress had the power to pass that statute under the Elections Clause. *Id.,* at 568–569, 36 S.Ct. 708. *Hildebrant* in no way suggested that the state legislature could be displaced from the redistricting process, and *Hildebrant* certainly did not hold—as the majority today contends—that "the word ['Legislature' in the Elections Clause] encompassed a veto power lodged in the people." *Ante,* at 2666. *Hildebrant* simply approved a State's decision to employ a referendum *in addition to* redistricting by the Legislature. See 241 U.S., at 569, 36 S.Ct. 708. The result of the decision was to send *the Ohio Legislature* back to the drawing board to do the redistricting.

In *Smiley,* the Minnesota Legislature passed a law adopting new congressional districts, and the Governor exercised his veto power under the State Constitution. As noted above, the Minnesota secretary of state defended the veto on the ground that "the Legislature" in the Elections Clause referred not just to "the two houses of the legislature" but ***841** to "the entire legislative power of the state ... however exercised." This Court rejected that argument, reiterating that the term "Legislature" ****2687** meant "the representative body which made the laws of the people." 285 U.S., at 365, 52 S.Ct. 397 (quoting *Hawke,* 253 U.S., at 227, 40 S.Ct. 495). The Court nevertheless went on to hold that the Elections Clause did not prevent a State from applying the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature. 285 U.S., at 373, 52 S.Ct. 397. As in *Hildebrant,* the legislature was not displaced, nor was it redefined; it just had to start on a new redistricting plan.

The majority initially describes *Hildebrant* and *Smiley* as holding that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." *Ante,* at 2668. That description is true, so far as it goes. But it hardly supports the result the majority reaches here. There is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether. See *Salazar,* 541 U.S., at 1095, 124 S.Ct. 2228 (Rehnquist, C.J., dissenting from denial of certiorari) ("to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself"). Nothing in *Hildebrant, Smiley,* or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely.

* * *

The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be ***842** exclusive in congressional districting, but neither may it be excluded.

The majority's contrary understanding requires it to accept a definition of "the Legislature" that contradicts the term's plain meaning, creates discord with the Seventeenth Amendment and the Constitution's many other uses of the term, makes nonsense of the drafting and ratification of the Elections Clause, and breaks with the relevant precedents. In short, the effect of the majority's decision is to erase the words "by the Legislature thereof" from the Elections Clause. That is a judicial error of the most basic order. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible." *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803).

II

The Court also issues an alternative holding that a federal statute, 2 U.S.C. § 2a(c), permits Arizona to vest redistricting authority in the Commission. *Ante*, at 2668 – 2671. The majority does not contend that this statutory holding resolves the constitutional question presented, see *ante*, at 2670 – 2671, so its reading of Section 2a(c) is largely beside the point. With respect, its statutory argument is also hard to take seriously. Section 2a(c) does not apply to this case. And even if it did, it would likely be unconstitutional. [4]

4 Not surprisingly, Section 2a(c) was barely raised below and was not addressed by the District Court. See *ante*, at 2668, n. 18.

A

Section 2a(c) establishes a number of default rules that govern the States' manner ****2688** of electing representatives "[u]ntil a State is redistricted in the manner provided by the law thereof." Section 2a(c) is therefore "inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict" the State. ***843** *Branch v. Smith*, 538 U.S. 254, 275, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion); see *id.*, at 298–300, 123 S.Ct. 1429 (O'Connor, J., concurring in part and dissenting in part). Here, the Commission *has* redistricted the State "in the manner provided by the law thereof." So by its terms, Section 2a(c) does not come into play in this case.

The majority spends several pages discussing Section 2a(c), but it conspicuously declines to say that the statute actually applies to this case. [5] The majority notes that the pre–1911 versions of Section 2a(c) applied only until "the legislature" redistricted the State, while the post–1911 versions applied only until the State is redistricted "in the manner provided by the law thereof." The majority also describes in detail the legislative history that accompanied the 1911 amendment. But if Section 2a(c) does not apply, its legislative history is doubly irrelevant.

5 The majority is prepared to say that Section 2a(c) has more than "nothing to do with this case." *Ante*, at 2670, n. 22. Not exactly a ringing endorsement.

The majority seems to suggest that Section 2a(c) somehow indicates federal approval for the district lines that the Commission has drawn. See *ante*, at 2670 – 2671. But the statute does nothing of the sort. Section 2a(c) explains what rules apply "[u]ntil a State is redistricted"; it says nothing about what rules apply *after* a State is redistricted. And it certainly does not say that the State's redistricting plan will by some alchemy become federal law. No legislative drafter remotely familiar with the English language would say that a State had to follow default rules "[u]ntil [it] is redistricted in the manner provided by the law thereof," when what he meant was "any redistricting plan that the State adopts shall become federal law." And if the drafter was doing something as significant as transforming state law into federal law, he presumably would have taken care to make that dramatic step "unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted). Tellingly, our most recent case on the meaning of ***844** Section 2a(c) seems not to have even considered the majority's position. See *Branch*, 538 U.S. 254, 123 S.Ct. 1429, 155 L.Ed.2d 407.

Indeed, the majority does not even seem persuaded by its own argument. The majority quickly cautions, in discussing Section 2a(c), that "a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map." *Ante,* at 2670, n. 20. The majority therefore concludes that "nothing in § 2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements." *Ibid.* But here the Arizona Legislature has challenged "a state district map on the ground that it violates one ... of those federal requirements"—the Elections Clause. If we take the majority at its word, nothing in Section 2a(c) should affect that challenge.

B

Not only is the majority's reading of Section 2a(c) implausible as a matter of statutory interpretation, it would also likely violate the Constitution in multiple ways.

First, the majority's reading of Section 2a(c) as a statute approving the lines ****2689** drawn by the Commission would seemingly authorize Congress to alter the Elections Clause. The first part of the Elections Clause gives state legislatures the power to prescribe regulations regarding the times, places, and manner of elections; the second part of the Clause gives Congress the power to "make or alter such Regulations." There is a difference between making or altering election regulations prescribed by the state legislature and authorizing an entity *other than the state legislature* to prescribe election regulations. In essence, the majority's proposed reading permits Congress to use the second part of the Elections Clause to nullify the first. Yet this Court has expressly held that "Congress ha[s] no power to alter Article I, section 4 [the Elections Clause]." *Smiley,* 285 U.S., at 372, 52 S.Ct. 397; see also ***845** *Clinton v. City of New York,* 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (Congress may not circumvent Article I constraints on its lawmaking power); *Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (same).

Second, the majority's interpretation of Section 2a(c) would create a serious delegation problem. As a general matter, Congress may pass statutes that delegate some discretion to those who administer the laws. It is a well-accepted principle, however, that Congress may not delegate authority to one actor when the Constitution vests that authority in another actor. See *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). The majority's reading of Section 2a(c) contradicts that rule by allowing Congress to delegate federal redistricting authority to a state entity other than the one in which the Elections Clause vests that authority: "the Legislature."

Third, the majority's interpretation conflicts with our most recent Elections Clause precedent, *Arizona v. Inter Tribal Council of Ariz., Inc.,* 570 U.S. ——, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013). There we explained that when Congress legislates under the Elections Clause, it "*necessarily* displaces some element of a pre-existing legal regime erected by the States." *Id.,* at ——, 133 S.Ct., at 2257. That is so because "the power the Elections Clause confers [on Congress] is none other than the power to pre-empt." *Id.,* at —— – ——, 133 S.Ct., at 2257. Put differently, "*all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that." *Id.,* at ——, n. 6, 133 S.Ct., at 2257, n. 6. Under the majority's interpretation of Section 2a(c), however, Congress has done the opposite of preempting or displacing state law—it has *adopted* state law.

Normally, when "a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932). The multiple serious constitutional doubts raised by the majority's interpretation of Section 2a(c)—in addition to the sheer weakness of its ***846** reading as a textual matter—provide more than enough reason to reject the majority's construction. Section 2a(c) does not apply to this case.

III

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Justice Jackson once wrote that the Constitution speaks in "majestic generalities." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). In many places it does, and so we have cases expounding on "freedom of speech" and "unreasonable searches and seizures." Amdts. 1, 4. Yet ****2690** the Constitution also speaks in some places with elegant specificity. A Member of the House of Representatives must be 25 years old. Art. I, § 2, cl. 2. Every State gets two Senators. Art. I, § 3, cl. 1. And the times, places, and manner of holding elections for those federal representatives "shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1.

For the reasons I have explained, there is no real doubt about what "the Legislature" means. The Framers of the Constitution were "practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina v. United States*, 199 U.S. 437, 449, 26 S.Ct. 110, 50 L.Ed. 261 (1905). We ought to give effect to the words they used.

The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004); *ante*, at 2658. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law's virtues as a policy innovation cannot redeem its inconsistency with the Constitution. "Failure of political will does not justify unconstitutional remedies." *Clinton*, 524 U.S., at 449, 118 S.Ct. 2091 (KENNEDY, J., concurring); see ***847** *Stern v. Marshall*, 564 U.S. ——, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010); *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); *Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317; *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

Indeed, the Court has enforced the text of the Constitution to invalidate state laws with policy objectives reminiscent of this one. Two of our precedents held that States could not use their constitutions to impose term limits on their federal representatives in violation of the United States Constitution. *Cook*, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). The people of the States that enacted these reforms surely viewed them as measures that would "place the lead rein in the people's hands." *Ante*, at 2672. Yet the Court refused to accept "that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Term Limits*, 514 U.S., at 831, 115 S.Ct. 1842. The majority approves just such an evasion of the Constitution today. [6]

6 *Term Limits* was of course not decided on the abstract principle that "the people should choose whom they please to govern them." *Ante*, at 2672 – 2673, n. 24 (quoting 514 U.S., at 783, 115 S.Ct. 1842). If that were the rule, the people could choose a 20–year–old Congressman, a 25–year–old Senator, or a foreign President. But see Art. I, § 2, cl. 2; § 3, cl. 3; Art. II, § 1, cl. 5. *Term Limits* instead relied on analysis of the text, structure, and history of the Constitution—all factors that cut strongly against the majority's position today.

The Court also overstates the effects of enforcing the plain meaning of the Constitution in this case. There is no dispute that Arizona may continue to use its Commission to draw lines for state legislative elections. The representatives chosen in those elections will then be responsible for ****2691** congressional redistricting as members of the state legislature, so the work of the Commission will continue to influence Arizona's federal representation.

Moreover, reading the Elections Clause to require the involvement of the legislature will not affect most other redistricting ***848** commissions. As the majority notes, many States have commissions that play an "auxiliary role" in congressional redistricting. *Ante*, at 2662, and nn. 8–9. But in these States, unlike in Arizona, the legislature retains primary authority over congressional redistricting. See Brief for National Conference of State Legislatures as *Amicus Curiae* 3–17.

The majority also points to a scattered array of election-related laws and constitutional provisions enacted via popular lawmaking that it claims would be "endangered" by interpreting the Elections Clause to mean what it says. *Ante*, at 2676. Reviewing the constitutionality of these far-flung provisions is well outside the scope of this case. Suffice it to say that none of them purports to

do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process. "[T]his wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (SCALIA, J., dissenting).

Absent from the majority's portrayal of the high motives that inspired the Arizona Commission is any discussion of how it has actually functioned. The facts described in a recent opinion by a three-judge District Court detail the partisanship that has affected the Commission on issues ranging from staffing decisions to drawing the district lines. See *Harris v. Arizona Independent Redistricting Comm'n*, 993 F.Supp.2d 1042 (Ariz.2014). The *per curiam* opinion explained that "partisanship played some role in the design of the map," that "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts," and that the Commission retained a mapping consultant that "had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns." *Id.*, at 1046, 1047, 1053. The hiring of the mapping consultant provoked sufficient controversy that the Governor of Arizona, supported ***849** by two-thirds of the Arizona Senate, attempted to remove the chairwoman of the Commission for "substantial neglect of duty and gross misconduct in office." *Id.*, at 1057; see *Arizona Independent Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267 (2012) (explaining the removal and concluding that the Governor exceeded her authority under the Arizona Constitution).

Judge Silver's separate opinion noted that "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." 993 F.Supp.2d, at 1083. Judge Wake's separate opinion described the Commission's "systematic overpopulation of Republican plurality districts and underpopulation of Democratic plurality districts" as "old-fashioned partisan malapportionment." *Id.*, at 1091, 1108. In his words, the "Commission has been coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason." *Id.*, at 1092.

The District Court concluded by a two-to-one margin that this partisanship did not rise to the level of a constitutional violation. The case is pending on appeal before this Court, and I take no position on the merits question. But a finding that the partisanship in the redistricting plan did not violate the Constitution hardly ****2692** proves that the Commission is operating free of partisan influence—and certainly not that it complies with the Elections Clause.

* * *

The people of Arizona have concerns about the process of congressional redistricting in their State. For better or worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature. But it does allow them to seek relief from Congress, which can make or alter the regulations prescribed by the legislature. And the Constitution gives them another means of change. They can follow the lead of the reformers ***850** who won passage of the Seventeenth Amendment. Indeed, several constitutional amendments over the past century have involved modifications of the electoral process. Amdts. 19, 22, 24, 26. Unfortunately, today's decision will only discourage this democratic method of change. Why go through the hassle of writing a new provision into the Constitution when it is so much easier to write an old one out?

I respectfully dissent.

Appendix

APPENDIX:

"LEGISLATURE" IN THE CONSTITUTION

Art. I, § 2, cl. 1: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State *Legislature*."

Art. I, § 3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, chosen by the *Legislature* thereof, for six Years; and each Senator shall have one Vote." (Modified by Amdt. 17.)

Art. I, § 3, cl. 2: "Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the *Legislature* of any State, the Executive thereof may make temporary Appointments until the next Meeting of the *Legislature*, which shall then fill such Vacancies." (Modified by Amdt. 17.)

Art. I, § 4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed ***851** in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Art. I, § 8, cl. 17: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the *Legislature* of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings...."

Art. II, § 1, cl. 2: "Each State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding ****2693** an Office of Trust or Profit under the United States, shall be appointed an Elector."

Art. IV, § 3, cl. 1: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the *Legislatures* of the States concerned as well as of the Congress."

Art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the *Legislature*, or of the Executive (when the *Legislature* cannot be convened), against domestic Violence."

Art. V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the *Legislatures* of two thirds of the several States, shall call a Convention ***852** for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the *Legislatures* of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Art. VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State *Legislatures*, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amdt. 14, § 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the *Legislature* thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Modified by Amdts. 19, 26)

Amdt. 14, § 3: "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, ***853** or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State *legislature*, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

Amdt. 17, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, elected by the people ****2694** thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State *legislatures*."

Amdt. 17, cl. 2: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the *legislature* of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the *legislature* may direct."

Amdt. 18, § 3: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the *legislatures* of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." (Superseded by Amdt. 21.)

Amdt. 20, § 6: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the *legislatures* of three-fourths of the several States within seven years from the date of its submission."

Amdt. 22, § 2: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution ***854** by the *legislatures* of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."

Justice SCALIA, with whom Justice THOMAS joins, dissenting.
I do not believe that the question the Court answers is properly before us. Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute "cases" or "controversies" committed to our resolution by Art. III, § 2, of the Constitution.

What those who framed and ratified the Constitution had in mind when they entrusted the "judicial Power" to a separate and coequal branch of the Federal Government was the judicial power they were familiar with—that traditionally exercised by English and American courts. The "cases" and "controversies" that those courts entertained did not include suits between units of government regarding their legitimate powers. The job of the courts was, in Chief Justice Marshall's words, "solely, to decide on the rights of individuals," *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803). Tocqueville considered this one reason the new democracy could safely confer upon courts the immense power to hold legislation unconstitutional:

> "[B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit....
>
> "I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could only attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn.... But ***855** the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice." A. de Tocqueville, Democracy in America 102–03 (P. Bradley ed. 1948).

****2695** That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable "realistic appreciation of the consequences of judicial action," *ante*, at 2665. To the contrary. "[T]he law of Art. III standing is built on a single basic idea

—the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). It keeps us minding our own business.

We consult history and judicial tradition to determine whether a given " 'disput[e is] appropriately resolved through the judicial process.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted). What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers. Nearly every separation-of-powers case presents questions like the ones in this case. But we have *never* passed on a separation-of-powers question raised directly by a governmental subunit's complaint. We have *always* resolved those questions in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm. That is why, for example, it took this Court over 50 years to rule upon the constitutionality of the Tenure of Office Act, passed in 1867. If the law of standing had been otherwise, "presumably President Wilson, or Presidents Grant and Cleveland before him, would ... ***856** have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress." *Raines v. Byrd,* 521 U.S. 811, 828, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

We do not have to look far back in the United States Reports to find other separation-of-powers cases which, if the Arizona Legislature's theory of standing is correct, took an awfully circuitous route to get here. In *Zivotofsky v. Kerry,* —— U.S. ——, 135 S.Ct. 2076, —— L.Ed.2d —— (2015), the President could have sued for an injunction against Congress's attempted "direct usurpation" of his constitutionally-conferred authority to pronounce on foreign relations. Or in *Wellness Int'l Network, Ltd. v. Sharif,* 575 U.S. ——, 135 S.Ct. 1932, —— L.Ed.2d —— (2015), a Federal District Judge could have sought a declaratory judgment that a bankruptcy court's adjudicating a *Stern* claim improperly usurped his constitutionally conferred authority to decide cases and controversies. Or in *NLRB v. Noel Canning,* 573 U.S. ——, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014), the Senate could have sued the President, claiming a direct usurpation of its prerogative to advise on and consent to Presidential appointments. Each of these cases involved the allocation of power to one or more branches of a government; and we surely would have dismissed suits arising in the hypothesized fashions.

We have affirmatively rejected arguments for jurisdiction in cases like this one. For example, in *Raines,* 521 U.S., at 829–830, 117 S.Ct. 2312, we refused to allow Members of Congress to challenge the Line Item Veto Act, which they claimed " 'unconstitutionally expand[ed] the President's power' " and " 'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches.' " *Id.,* at 816, 117 S.Ct. 2312. In *Massachusetts v. Mellon,* 262 U.S. 447, 479–480, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we refused to allow a State to pursue its claim that a conditional congressional appropriation "constitute[d] an effective means of inducing the States to ****2696** yield a portion of their sovereign rights." (And *Mellon* involved a contention that *one* government infringed upon *another* government's power—far closer to the ***857** traditional party-versus-party lawsuit than is an intragovernmental dispute.) We put it plainly: "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States," *id.,* at 483, 43 S.Ct. 597—and because the State could not show a discrete harm except the alleged usurpation of its powers, we refused to allow the State's appeal.

The sole precedent the Court relies upon is *Coleman v. Miller,* 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). *Coleman* can be distinguished from the present case as readily as it was distinguished in *Raines*. In *Raines,* the accurate-in-fact (but inconsequential-in-principle) distinction was that the Senators in *Coleman* had their votes nullified, whereas the Members of Congress claimed that their votes could merely be rendered ineffective by a Presidential line-item veto. *Raines, supra,* at 823–824, 117 S.Ct. 2312. In the present case we could make the accurate-in-fact distinction that in *Coleman* individual legislators were found to have standing, whereas here it is the governmental body, the Arizona Legislature, that seeks to bring suit. But the reality is that the supposed holding of *Coleman* stands out like a sore thumb from the rest of our jurisprudence, which denies standing for intragovernmental disputes.

Coleman was a peculiar case that may well stand for nothing. The opinion discussing and finding standing, and going on to affirm the Kansas Supreme Court, was written by Chief Justice Hughes and announced by Justice Stone. Justice Frankfurter,

joined by three other Justices, held there was no standing, and would have dismissed the petition (leaving the judgment of the Kansas Supreme Court in place). Justice Butler, joined by Justice McReynolds, dissented (neither joining Hughes's opinion nor separately discussing standing) and would have reversed the Kansas Supreme Court.

That adds up to two votes to affirm on the merits, two to reverse on the merits (without discussing standing) and four ***858** to dismiss for lack of standing. Justice Stanley Reed, who was on the Court and apparently participated in the case, is not mentioned in any of the opinions recorded in the United States Reports. So, in order to find *Coleman* a binding precedent on standing, rather than a 4–to–4 standoff, one must assume that Justice Reed voted with Hughes. There is some reason to make that assumption: The four Justices rejecting standing went on to discuss the merits, because "the ruling of the Court just announced removes from the case the question of petitioners' standing to sue." 307 U.S., at 456, 59 S.Ct. 972 (Black, J., concurring). But then again, if nine Justices participated, how could it be that on one of the two issues in the case the Court was "equally divided and therefore ... expresse[d] no opinion"? *Id.*, at 447, 59 S.Ct. 972.

A pretty shaky foundation for a significant precedential ruling. Besides that, the two dissenters' mere assumption of standing —neither saying anything about the subject nor joining Hughes's opinion on the point—produces (if you assume Reed joined Hughes) a majority for standing but no majority opinion explaining why. And even under the most generous assumptions, since the Court's judgment on the issue it resolved rested on the ground that that issue presented a political question—which is itself a rejection of jurisdiction, ****2697** *Zivotofsky v. Clinton,* 566 U.S. ——, 132 S.Ct. 1421, 1426–1427, 182 L.Ed.2d 423 (2012)—*Coleman* 's discussion of the additional jurisdictional issue of standing was quite superfluous and arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored.

The Court asserts, quoting *Raines,* 521 U.S., at 819–820, 117 S.Ct. 2312, that the Court's standing analysis has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Ante,* at 2665, n. 12. The cases cited to support this dictum fail to do so; they are merely cases where a determination of unconstitutionality is avoided by applying what there is no reason to believe is anything other than *normal* ***859** standing requirements. It seems to me utterly implausible that the Framers wanted federal courts limited to traditional judicial cases only when they were pronouncing upon the rights of Congress and the President, and not when they were treading upon the powers of state legislatures and executives. Quite to the contrary, I think they would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments.

I would dismiss this case for want of jurisdiction.

* * *

Normally, having arrived at that conclusion, I would express no opinion on the merits unless my vote was necessary to enable the Court to produce a judgment. In the present case, however, the majority's resolution of the merits question ("legislature" means "the people") is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislatures, that I cannot avoid adding my vote to the devastating dissent of the Chief Justice.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.
Reading today's opinion, one would think the Court is a great defender of direct democracy in the States. As it reads "the Legislature" out of the Times, Places and Manner Clause, U.S. Const., Art. I, § 4, the majority offers a paean to the ballot initiative. It speaks in glowing terms of the "characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Ante,* at 2673. And it urges "[d]eference to state lawmaking" so that States may perform their vital function as " 'laboratories' " of democracy. *Ante,* at 2673.

These sentiments are difficult to accept. The conduct of the Court in so many other cases reveals a different attitude toward the States in general and ballot initiatives in particular ***860** . Just last week, in the antithesis of deference to state lawmaking through direct democracy, the Court cast aside state laws across the country—many of which were enacted through ballot initiative—that reflected the traditional definition of marriage. See *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, —— L.Ed.2d ——, 2015 WL 2473451 (2015).

This Court's tradition of disdain for state ballot initiatives goes back quite a while. Two decades ago, it held unconstitutional an Arkansas ballot initiative imposing term limits on that State's Members of Congress, finding "little significance" in the fact that such term limits were adopted by popular referendum. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822, n. 32, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). One year later, it held unconstitutional a ballot initiative that would have prevented the enactment of laws under which " 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships [would] constitute or otherwise be the basis of ... any minority status, quota preferences, protected ****2698** status or claim of discrimination.' " *Romer v. Evans*, 517 U.S. 620, 624, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). The Court neither gave deference to state lawmaking nor said anything about the virtues of direct democracy. It instead declared that the result of the ballot initiative was an aberration —that "[i]t is not within our constitutional tradition to enact laws of this sort." *Id.*, at 633, 116 S.Ct. 1620. But if "constitutional tradition" is the measuring stick, then it is hard to understand how the Court condones a redistricting practice that was unheard of for nearly 200 years after the ratification of the Constitution and that conflicts with the express constitutional command that election laws "be prescribed in each State by the Legislature thereof," Art. I, § 4.

The Court's lack of respect for ballot initiatives is evident not only in what it has done, but in what it has failed to do. Just this Term, the Court repeatedly refused to review cases in which the Courts of Appeals had set aside state laws passed through ballot initiative. See, *e.g.*, *County of Maricopa v. Lopez-Valenzuela*, 575 U.S. ——, 135 S.Ct. 2046, —— L.Ed.2d —— (2015) (THOMAS, J., dissenting from denial of certiorari) (state constitutional ***861** amendment denying bail for illegal aliens arrested in certain circumstances); *Herbert v. Kitchen*, 574 U.S. ——, 135 S.Ct. 396, 190 L.Ed.2d 248 (2014) (state constitutional amendment retaining traditional definition of marriage); *Smith v. Bishop*, 574 U.S. ——, 135 S.Ct. 271, 190 L.Ed.2d 139 (2014) (same); *Rainey v. Bostic*, 574 U.S. ——, 135 S.Ct. 286, 190 L.Ed.2d 140 (2014) (same); *Walker v. Wolf*, 574 U.S. ——, 135 S.Ct. 316, 190 L.Ed.2d 142 (2014) (same). It did so despite warnings that its indifference to such cases would "only embolden the lower courts to reject state laws on questionable constitutional grounds." *Lopez-Valenzuela, supra*, at ——, 135 S.Ct., at 2047. And it refused to grant a stay pending appeal of a decision purporting to require the State of Alabama to issue marriage licenses to same-sex couples, even though Alabama's licensing laws had not been challenged in that case. See *Strange v. Searcy*, 574 U.S. ——, 135 S.Ct. 940, 191 L.Ed.2d 149 (2015) (THOMAS, J., dissenting from denial of application for stay). In each decision, the cheers for direct democracy were conspicuously absent.

Sometimes disapproval of ballot initiatives has been even more blatant. Just last Term, one dissenting opinion castigated the product of a state ballot initiative as "stymieing the right of racial minorities to participate in the political process." *Schuette v. BAMN*, 572 U.S. ——, ——, 134 S.Ct. 1623, 1651, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., joined by GINSBURG, J., dissenting). It did not hail the ballot initiative as the result of a "State's empowerment of its people," *ante*, at 2668, nor offer any deference to state lawmaking. Instead, it complained that "[t]he majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process...." *Schuette*, 572 U.S., at ——, 134 S.Ct., at 1653. And it criticized state ballot initiatives as biased against racial minorities because such minorities "face an especially uphill battle" in seeking the passage of such initiatives. *Id.*, at ——, 134 S.Ct., at 1662. How quickly the tune has changed.

And how striking that it changed here. The ballot initiative in this case, unlike those that the Court has previously treated so dismissively, was unusually democracy-reducing. It did not ask the people to approve a particular redistricting ***862** plan through direct democracy, but instead to take districting away from the people's representatives and give it to an unelected committee, thereby reducing democratic control over the process in the future. The Court's characterization of this as direct democracy at its best is rather like ****2699** praising a plebiscite in a "banana republic" that installs a strongman as President for Life. And wrapping the analysis in a cloak of federalism does little to conceal the flaws in the Court's reasoning.

I would dispense with the faux federalism and would instead treat the States in an evenhanded manner. That means applying the Constitution as written. Although the straightforward text of Article I, § 4, prohibits redistricting by an unelected, independent commission, Article III limits our power to deciding cases or controversies. Because I agree with Justice SCALIA that the Arizona Legislature lacks Article III standing to assert an institutional injury against another entity of state government, I would dismiss its suit. I respectfully dissent.

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139 S.Ct. 2484
Supreme Court of the United States.

Robert A. RUCHO, et al., Appellants
v.
COMMON CAUSE, et al.;
Linda H. Lamone, et al., Appellants
v.
O. John Benisek, et al.

Nos. 18–422 and 18–726
|
June 27, 2019

Synopsis
Background: Voters and others in North Carolina and Maryland challenged their states' congressional districting maps as unconstitutional partisan gerrymanders. In first case, remedial congressional redistricting plan enacted by North Carolina's Republican-controlled legislature was alleged to violate Equal Protection Clause, Elections Clause, First Amendment, and Article I, and, following trial, a three-judge panel of the United States District Court for the Middle District of North Carolina, Wynn, Circuit Judge, 279 F.Supp.3d 587, issued order finding that plan was unconstitutional, enjoined state from conducting further elections using plan, and required drawing of new maps, and subsequently denied legislators' motion to stay court's order pending appeal to the Supreme Court, 284 F.Supp.3d 780. On direct appeal, the Supreme Court, 138 S.Ct. 2679, vacated the judgment and remanded for further consideration. On remand, the District Court, Wynn, Circuit Judge, 318 F.Supp.3d 777, again struck down plan, and direct appeal was taken. In second case, congressional redistricting map enacted by Maryland's Democrat-controlled legislature was alleged to violate First Amendment. On parties' cross-motions for summary judgment, a three-judge panel of the United States District Court for the District of Maryland, Niemeyer, Circuit Judge, 348 F.Supp.3d 493, granted voters' motion, and direct appeal was taken. The Supreme Court postponed its consideration of jurisdiction in both cases.

The Supreme Court, Chief Justice Roberts, held that partisan gerrymandering claims present political questions beyond the reach of the federal courts, abrogating *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85.

Vacated and remanded with instructions.

Justice Kagan filed a dissenting opinion in which Justices Ginsburg, Breyer, and Sotomayor joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs claimed that the State's districting plan discriminated against Democrats, while the Maryland plaintiffs claimed that their State's plan discriminated against Republicans. The plaintiffs

alleged violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts. Pp. 2493 – 2508.

(a) In these cases, the Court is asked to decide an important question of constitutional law. Before it does so, the Court "must find that the question is presented in a 'case' or 'controversy' that is ... 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589. While it is "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60, sometimes the law is that the Judiciary cannot entertain a claim because it presents a nonjusticiable "political question," *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663. Among the political question cases this Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.* This Court's partisan gerrymandering cases have left unresolved the question whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. See *Gill v. Whitford*, 585 U.S. ——, ——, 138 S.Ct. 1916, 1929, 201 L.Ed.2d 313.

Partisan gerrymandering was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. They addressed the election of Representatives to Congress in the Elections Clause, Art. I, § 4, cl. 1, assigning to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. But the Framers did not set aside all electoral issues as questions that only Congress can resolve. In two areas—one-person, one-vote and racial gerrymandering —this Court has held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. But the history of partisan gerrymandering is not irrelevant. Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker v. Carr*, for example, could be decided under basic equal protection principles. 369 U.S. at 226, 82 S.Ct. 691. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 81 S.Ct. 125, 5 L.Ed.2d 110. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is "determining when political gerrymandering has gone too far." *Vieth v. Jubelirer*, 541 U.S. 267, 296, 124 S.Ct. 1769, 158 L.Ed.2d 546 (plurality opinion). Despite considerable efforts in *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298; *Davis v. Bandemer*, 478 U.S. 109, 116–117, 106 S.Ct. 2797, 92 L.Ed.2d 85; *Vieth*, 541 U.S. at 272–273, 124 S.Ct. 1769; and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414, 126 S.Ct. 2594, 165 L.Ed.2d 609 (*LULAC*), this Court's prior cases have left "unresolved whether ... claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering," *Gill*, 585 U.S., at ——, 138 S.Ct., at 1929. Two "threshold questions" remained: standing, which was addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.* P. 2498.

(b) Any standard for resolving partisan gerrymandering claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 306–308, 124 S.Ct. 1769 (Kennedy, J., concurring in judgment). The question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.). Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context. It may mean achieving a greater number of competitive districts by undoing packing and cracking so

that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But it could mean engaging in cracking and packing to ensure each party its "appropriate" share of "safe" seats. Or perhaps it should be measured by adherence to "traditional" districting criteria. Deciding among those different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments. And it is only after determining how to define fairness that one can even begin to answer the determinative question: "How much is too much?"

The fact that the Court can adjudicate one-person, one-vote claims does not mean that partisan gerrymandering claims are justiciable. This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support. Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties; it does not mean that each party must be influential in proportion to the number of its supporters. The racial gerrymandering cases are also inapposite: They call for the elimination of a racial classification, but a partisan gerrymandering claim cannot ask for the elimination of partisanship. Pp. 2498 – 2502.

(c) None of the proposed "tests" for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable. Pp. 2502 – 2507.

(1) The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. It applied a three-part test, examining intent, effects, and causation. The District Court's "predominant intent" prong is borrowed from the test used in racial gerrymandering cases. However, unlike race-based decisionmaking, which is "inherently suspect," *Miller v. Johnson*, 515 U.S. 900, 915, 115 S.Ct. 2475, 132 L.Ed.2d 762, districting for some level of partisan advantage is not unconstitutional. Determining that lines were drawn on the basis of partisanship does not indicate that districting was constitutionally impermissible. The *Common Cause* District Court also required the plaintiffs to show that vote dilution is "likely to persist" to such a degree that the elected representatives will feel free to ignore the concerns of the supporters of the minority party. Experience proves that accurately predicting electoral outcomes is not simple, and asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. The District Court's third prong—which gave the defendants an opportunity to show that discriminatory effects were due to a "legitimate redistricting objective"—just restates the question asked at the "predominant intent" prong. P. 2502.

(2) The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation, an actual burden on political speech or associational rights, and a causal link between the invidious intent and actual burden. But their analysis offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. Pp. 2503 – 2505.

(3) Using a State's own districting criteria as a baseline from which to measure how extreme a partisan gerrymander is would be indeterminate and arbitrary. Doing so would still leave open the question of how much political motivation and effect is too much. Pp. 2505 – 2506.

(4) The North Carolina District Court further held that the 2016 Plan violated Article I, § 2, and the Elections Clause, Art. I, § 4, cl. 1. But the *Vieth* plurality concluded—without objection from any other Justice—that neither § 2 nor § 4 "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. at 305, 124 S.Ct. 1769. Any assertion that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377. Pp. 2506 – 2507.

(d) The conclusion that partisan gerrymandering claims are not justiciable neither condones excessive partisan gerrymandering nor condemns complaints about districting to echo into a void. Numerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage. The Framers also gave Congress the power to do something about partisan gerrymandering in the Elections Clause. That avenue for reform established by the Framers, and used by Congress in the past, remains open. Pp. 2506 – 2508.

318 F.Supp.3d 777 and 348 F.Supp.3d 493, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***2491** Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially

manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho v. Common Cause*. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F.Supp.3d 777, 807–808 (M.D.N.C. 2018). As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.*, at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." *Ibid.* The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. *Id.*, at 809.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. *Id.*, at 810. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. ***2492** The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of "the People" to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen "by the People of the several States." Finally, they alleged that the Plan violated the Elections Clause by exceeding the State's delegated authority to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. *Common Cause v. Rucho*, 279 F.Supp.3d 587 (M.D.N.C. 2018). The defendants appealed directly to this Court under 28 U.S.C. § 1253.

While that appeal was pending, we decided *Gill v. Whitford*, 585 U.S. ——, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly "cracked" or "packed" district. *Id.*, at ——, 138 S.Ct., at 1931. A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so

they win that district by a large margin, "wasting" many votes that would improve their chances in others. *Id.*, at ——— – ———, 138 S.Ct., at 1924

After deciding *Gill*, we remanded the present case for further consideration by the District Court. 585 U.S. ———, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018). On remand, the District Court again struck down the 2016 Plan. 318 F.Supp.3d 777. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that "the General Assembly's predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates," and to "entrench Republican candidates" through widespread cracking and packing of Democratic voters. *Id.*, at 883–884. The court rejected the defendants' arguments that the distribution of Republican and Democratic voters throughout North Carolina and the interest in protecting incumbents neutrally explained the 2016 Plan's discriminatory effects. *Id.*, at 896–899. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. *Id.*, at 923.

***2493** The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. *Id.*, at 935. Judge Osteen dissented with respect to that ruling. *Id.*, at 954–955. Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. *Id.*, at 935–941. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election. *Id.*, at 942.

The defendants again appealed to this Court, and we postponed jurisdiction. 586 U.S. ———, 139 S.Ct. 783, 202 L.Ed.2d 510 (2019).

B

The second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. 348 F.Supp.3d 493, 502 (D. Md. 2018). The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. *Ibid.* "[A] decision was made to go for the Sixth," *ibid.*, which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. *Id.*, at 498. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. *Id.*, at 499–501. The map was adopted by a party-line vote. *Id.*, at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, § 2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F.Supp.3d 493. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. *Id.*, at 498. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Id.*, at 524.

The District Court permanently enjoined the State from using the 2011 Plan and ordered it to promptly adopt a new plan for the 2020 election. *Id.*, at 525. The defendants appealed directly to this Court under 28 U.S.C. § 1253. We postponed jurisdiction. 586 U.S. ———, 139 S.Ct. 783, 202 L.Ed.2d 510 (2019).

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts ***2494** can address only questions "historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

Last Term in *Gill v. Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." 585 U.S., at ——, 138 S.Ct., at 1929. This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Ibid.* The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Id.*, at ——, 138 S.Ct., at 1926–1937

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See *Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792–794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house").

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See *Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (plurality opinion); E. Griffith, ***2495** The Rise and Development of the Gerrymander 17–19 (1907). "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." *Id.*, at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

> "[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices.... Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress's power under the Elections Clause would allow Congress to make itself "omnipotent," setting the "time" of elections as never or the "place" in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. M. Klarman, The Framers' Coup: The Making of the United States Constitution 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U.S.C. § 2c.) See *Vieth*, 541 U.S. at 276, 124 S.Ct. 1769 (plurality opinion). Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, *e.g.*, 52 U.S.C. § 10101 *et seq.*

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*, 369 U.S. at 217, 82 S.Ct. 691. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a ***2496** role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will ... not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See *Wood v. Broom*, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131 (1932); *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).

In the leading case of *Baker v. Carr*, voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents, including *Colegrove*. *Baker v. Carr*, 179 F.Supp. 824, 825, 826 (MD Tenn. 1959). This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217, 82 S.Ct. 691. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226, 82 S.Ct. 691. In *Wesberry v. Sanders*, the Court extended its ruling to malapportionment of congressional districts, holding that Article I, § 2, required that "one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 8, 84 S.Ct. 526.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot*, concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U.S. 339, 340, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). In *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), the Court extended ***2497** the reasoning of *Gomillion* to congressional districting. See *Shaw I*, 509 U.S. at 645, 113 S.Ct. 2816.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw I*, 509 U.S. at 646, 113 S.Ct. 2816). See also *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*, 541 U.S. at 296, 124 S.Ct. 1769 (plurality opinion). See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

We first considered a partisan gerrymandering claim in *Gaffney v. Cummings* in 1973. There we rejected an equal protection challenge to Connecticut's redistricting plan, which "aimed at a rough scheme of proportional representation of the two major political parties" by "wiggl[ing] and joggl[ing] boundary lines" to create the appropriate number of safe seats for each party. 412 U.S. at 738, 752, n. 18, 93 S.Ct. 2321 (internal quotation marks omitted). In upholding the State's plan, we reasoned that districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 753, 93 S.Ct. 2321.

Thirteen years later, in *Davis v. Bandemer, we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause.* 478 U.S. 109, 116–117, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion). A majority of the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory

effect on that group." *Id.*, at 127, 106 S.Ct. 2797. Two Justices would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165, 106 S.Ct. 2797 (Powell, J., concurring in part and dissenting in part). Three Justices, meanwhile, would have held that the Equal Protection Clause simply "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147, 106 S.Ct. 2797 (O'Connor, J., concurring in judgment). At the end of the day, there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander." *Id.*, at 185, n. 25, 106 S.Ct. 2797 (opinion of Powell, J.). In any event, the Court held that the plaintiffs had failed ***2498** to show that the plan violated the Constitution.

Eighteen years later, in *Vieth*, the plaintiffs complained that Pennsylvania's legislature "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to benefit Republican congressional candidates. 541 U.S. at 272–273, 124 S.Ct. 1769 (plurality opinion) (brackets omitted). Justice Scalia wrote for a four-Justice plurality. He would have held that the plaintiffs' claims were nonjusticiable because there was no "judicially discernible and manageable standard" for deciding them. *Id.*, at 306, 124 S.Ct. 1769. Justice Kennedy, concurring in the judgment, noted "the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention." *Id.*, at 306–307, 124 S.Ct. 1769. He nonetheless left open the possibility that "in another case a standard might emerge." *Id.*, at 312, 124 S.Ct. 1769. Four Justices dissented.

In *LULAC*, the plaintiffs challenged a mid-decade redistricting map approved by the Texas Legislature. Once again a majority of the Court could not find a justiciable standard for resolving the plaintiffs' partisan gerrymandering claims. See 548 U.S. at 414, 126 S.Ct. 2594 (noting that the "disagreement over what substantive standard to apply" that was evident in *Bandemer* "persists").

As we summed up last Term in *Gill*, our "considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether ... claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering." 585 U.S., at ——, 138 S.Ct., at 1929. Two "threshold questions" remained: standing, which we addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.*

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U.S. at 306–308, 124 S.Ct. 1769 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U.S. at 145, 106 S.Ct. 2797 (opinion of O'Connor, J.). See *Gaffney*, 412 U.S. at 749, 93 S.Ct. 2321 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 307, 124 S.Ct. 1769 ***2499** (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most

heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S. at 145, 106 S.Ct. 2797 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering." *Cromartie*, 526 U.S. at 551, 119 S.Ct. 1545.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U.S. at 159, 106 S.Ct. 2797 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> " 'Fairness' does not seem to us a judicially manageable standard.... Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, ***2500** to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U.S. at 291, 124 S.Ct. 1769.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U.S. at 130, 106 S.Ct. 2797 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. See *id.*, at 130–131, 106 S.Ct. 2797 ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."); *Gaffney*, 412 U.S. at 735–738, 93 S.Ct. 2321. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae*; Brief for Professor Wesley Pegden et al. as *Amici Curiae* in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U.S. at 308–309, 124 S.Ct. 1769 (opinion concurring in judgment). See *id.*, at 298, 124 S.Ct. 1769 (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012).

***2501** And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth*, 541 U.S. at 296, 124 S.Ct. 1769 (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.*, at 308, 124 S.Ct. 1769 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." 585 U.S., at ——, 138 S.Ct., at 1933–1934. See also *Bandemer*, 478 U.S. at 150, 106 S.Ct. 2797 (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' ... can be traced to the one person, one vote principle." (quoting *Bolden*, 446 U.S., at 77, 100 S.Ct., at 1505)). [1]

1 The dissent's observation that the Framers viewed political parties "with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic" *post*, at 2512, n. 1 (opinion of KAGAN, J.) (internal quotation marks and alteration omitted), is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.

***2502** Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race —would seem to compel the opposite conclusion." *Shaw I*, 509 U.S. at 650, 113 S.Ct. 2816 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. 318 F.Supp.3d at 923. In reaching that result the court first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.' " *Id.*, at 865 (quoting *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. ——, ——, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704 (2015)). The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." 318 F.Supp.3d at 867. Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation." *Id.*, at 868.

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant intent" inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. See

Bush, 517 U.S. at 959, 116 S.Ct. 1941 (principal opinion). But determining that lines were drawn on ***2503** the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. 318 F.Supp.3d at 867. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections ... invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160, 106 S.Ct. 2797 (opinion of O'Connor, J.). See *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner —they have to beat the point spread.

The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Brief for Appellees League of Women Voters of North Carolina et al. in No. 18422, p. 55. See also 318 F.Supp.3d at 885. Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional ***2504** holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. 318 F.Supp.3d at 861. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. See *Common Cause*, 318 F.Supp.3d at 929; *Benisek*, 348 F.Supp.3d at 522. Both District Courts concluded that the districting plans at issue

violated the plaintiffs' First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance." 318 F.Supp.3d at 932. Similarly, the District Court in Maryland examined testimony that "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and concluded that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting." 348 F.Supp.3d at 523–524.

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle ... to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U.S. at 752, 93 S.Ct. 2321. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The *Common Cause* District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. 318 F.Supp.3d at 930. The court went on to rule that there would be an adverse effect "even if the speech of [the plaintiffs] was not *in* ***2505** *fact* chilled"; it was enough that the districting plan "makes it easier for supporters of Republican candidates to translate their votes into seats," thereby "enhanc[ing] the[ir] relative voice." *Id.*, at 933 (internal quotation marks omitted).

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering." *Id.*, at 851. The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," 541 U.S. at 294, 124 S.Ct. 1769, contrary to our established precedent.

C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. *Post*, at 2517 – 2518, 2521 (opinion of KAGAN, J.).

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending

solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth*, 541 U.S. at 296–297, 124 S.Ct. 1769 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, see *post*, at 2519 – 2520, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." *Post*, at 2521. That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. See *post*, at 2522. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. *Post*, at 2522 (citing *Ohio v. American Express Co.*, 585 U.S. ——, 138 S.Ct. 2274, 201 L.Ed.2d 678 (2018)). That language, however, grew out of the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the ***2506** adoption of the [A]ct." *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 51, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1.

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.

Article I, § 2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F.Supp.3d at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. *Id.*, at 938–940. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither § 2 nor § 4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. at 305, 124 S.Ct. 1769.

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, § 2, "namely, that the voters should choose their representatives, not the other way around." 318 F.Supp.3d at 940 (quoting *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2677; internal quotation marks omitted; alteration in original). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2586, does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal ***2507** courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U.S. at 278, 279, 124 S.Ct. 1769 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court *can* address the problem of partisan gerrymandering because it *must*." 585 U.S., at ——, 138 S.Ct., at 1929. That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. ——, ——, 137 S.Ct. 1645, 1650, 198 L.Ed.2d 64 (2017).

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. See *post*, at 2525.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (2015). The dissent wonders why we can't do the same. See *post*, at 2524 – 2525. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan "shall be drawn with the intent to favor or disfavor a political party" provides little guidance on the question. See *post*, at 2524 –2525, n. 6.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§ 44, 46; Mich. Const., Art. IV, § 6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, § 3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. ***2508** See Fla. Const., Art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., § 2 (referred to committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence. H. R. 2642, 109th Cong., 1st Sess., § 4 (referred to subcommittee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch at 177. In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

***2509** For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas

of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U.S. House ***2510** of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. See *Harris v. McCrory*, 159 F.Supp.3d 600 (M.D.N.C. 2016), aff'd *sub nom. Cooper v. Harris*, 581 U.S. ——, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017). The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly's redistricting committee, Rep. David Lewis and Sen. Robert Rucho, instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10–3 composition of the State's congressional delegation come what might. Using sophisticated technological tools and precinct-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats' voting strength and ensure the election of 10 Republican Congressmen. See *Common Cause v. Rucho*, 318 F.Supp.3d 777, 805–806 (M.D.N.C. 2018).

- Lewis then presented for the redistricting committee's (retroactive) approval a list of the criteria Hofeller had employed —including one labeled "Partisan Advantage." That criterion, endorsed by a party-line vote, stated that the committee would make all "reasonable efforts to construct districts" to "maintain the current [10–3] partisan makeup" of the State's congressional delegation. *Id.*, at 807.

- Lewis explained the Partisan Advantage criterion to legislators as follows: We are "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808 (internal quotation marks omitted).

- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn. See *id.*, at 809.

- Lewis announced: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Ibid.* (internal quotation marks omitted).

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. In 2016, Republican congressional candidates won 10 of North Carolina's 13 seats, with 53% of the statewide vote. Two years later, Republican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, Almanac of American Politics 2016, p. 836 (2015). But in the 2010 districting cycle, the State's Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

- Governor Martin O'Malley, who oversaw the process, decided (in his own later words) "to create a map that was ***2511** more favorable for Democrats over the next ten years." Because flipping the First District was geographically next-to-impossible, "a decision was made to go for the Sixth." *Benisek v. Lamone*, 348 F.Supp.3d 493, 502 (D. Md. 2018) (quoting O'Malley; emphasis deleted).

- O'Malley appointed an advisory committee as the public face of his effort, while asking Congressman Steny Hoyer, a self-described "serial gerrymanderer," to hire and direct a mapmaker. *Id.*, at 502. Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats. See *id.*, at 502–503.

- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents. See *id.*, at 503.

- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications. Although new census figures required removing only 10,000 residents from the Sixth District, Hawkins proposed a large-scale population transfer. The map moved about 360,000 voters out of the district and another 350,000 in. That swap decreased the number of registered Republicans in the district by over 66,000 and increased the number of registered Democrats by about 24,000, all to produce a safe Democratic district. See *id.*, at 499, 501.

- After the advisory committee adopted the map on a party-line vote, State Senate President Thomas Miller briefed the General Assembly's Democratic caucuses about the new map's aims. Miller told his colleagues that the map would give "Democrats a real opportunity to pick up a seventh seat in the delegation" and that "[i]n the face of Republican gains in redistricting in other states[,] we have a serious obligation to create this opportunity." *Id.*, at 506 (internal quotation marks omitted).

- The General Assembly adopted the plan on a party-line vote. See *id.*, at 506.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District.

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." ***2512** 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[ ] [that] dependence" every day. *Id.*, No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.*, Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth v. Jubelirer*, 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. ——, ——, 135 S.Ct. 2652, 2677, 192 L.Ed.2d 704 (2015) (internal quotation marks omitted). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people." 4 Annals of Cong. 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." *Ante*, at 2506 (quoting *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2658). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See *ante*, at 2524 – 2525; *infra*, at 2523 – 2525. The other is that political gerrymanders have always been with us. See *ante*, at 2494 – 2495, 2503. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See *ante*, at 2495 – 2496. [1] The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

1 And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and "symptom[s] of disease in the body politic." G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, ***2513** based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as *Amici*

Curiae 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.*, at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history. I've already recounted the results from North Carolina and Maryland, and you'll hear even more about those. See *supra*, at 2510 – 2511; *infra*, at 2518 – 2519. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State's original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. See *League of Women Voters v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 764 (2018). Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. See *Ohio A. Philip Randolph Inst. v. Householder*, 373 F.Supp.3d 978, 1074 (S.D. Ohio. 2019). (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation. See *infra*, at 2515 – 2516, 2524 – 2525.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. See generally *Gill* v. *Whitford*, 585 U.S. ——, ——– ——, 138 S.Ct. 1916, 1929–1931, 201 L.Ed.2d 313 (2018). He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their ***2514** preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. See *id.*, at ——, 138 S.Ct., at 1924 (KAGAN, J., concurring). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555, 84 S.Ct. 1362. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." *Id.*, at 566, 84 S.Ct. 1362. The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[ ]." *Id.*, at 565, 84 S.Ct. 1362. As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U.S. at 312, 124

S.Ct. 1769. For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to "equal [electoral] participation." *Reynolds*, 377 U.S. at 566, 84 S.Ct. 1362; see *Gray v. Sanders*, 372 U.S. 368, 379–380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications").

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U.S. at 314, 124 S.Ct. 1769 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U.S., at ——, 138 S.Ct., at 1938 (KAGAN, J., concurring) ("Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their policy objectives"). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (internal quotation marks omitted).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: ***2515** Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, *e.g.*, *Vieth*, 541 U.S. at 293, 124 S.Ct. 1769 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful" (emphasis deleted)); *id.*, at 316, 124 S.Ct. 1769 (opinion of Kennedy, J.) ("[P]artisan gerrymandering that disfavors one party is [im]permissible"); *id.*, at 362, 124 S.Ct. 1769 (BREYER, J., dissenting) (Gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause"); *Davis v. Bandemer*, 478 U.S. 109, 132, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"); *id.*, at 165, 106 S.Ct. 2797 (Powell, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes"). Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." *Ante*, at 2501. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. See *ante*, at 2498 – 2501. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Ante*, at 2499. But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. *Ante*, at 2499 – 2500. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." *Ibid.* (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?' " *Ante*, at 2501. No "discernible and manageable"

standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan. *Ante,* at 2501 – 2502; see *ante,* at 2498 – 2499.

I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics ***2516** is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also *Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d 978; *League of Women Voters of Michigan v. Benson*, 373 F.Supp.3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts' analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority's more general view, described above, that judicial policing in this area cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into "a number of 'tests.' " *Ante,* at 2502; see *ante,* at 2502 – 2507. But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, see *supra,* at 2513 – 2514, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. *Rucho*, 318 F.Supp.3d at 864 (quoting *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2658). Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Lamone*, 348 F.Supp.3d at 498. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. See *Rucho*, 318 F.Supp.3d at 867.[2] If you are a lawyer, you know that ***2517** this test looks utterly ordinary. It is the sort of thing courts work with every day.

2 Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority, see *ante,* at 2503 – 2504, I therefore pass quickly over this part of the test.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, see *supra,* at 2510 – 2511: North Carolina's redistricting committee used "Partisan

Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. *Ante,* at 2502 – 2503. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. See *Vieth*, 541 U.S. at 286, 124 S.Ct. 1769 (plurality opinion). But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (*i.e.,* make count for as little as possible) the votes going to a rival party. See *supra,* at 2514. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution. See *supra,* at 2514 – 2515.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. See *ante,* at 2502 – 2503. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes. See *Vieth*, 541 U.S. at 312–313, 124 S.Ct. 1769 (opinion of Kennedy, J.) (predicting that development).

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects ***2518** mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.,* the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.[3] We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as *Amicus Curiae* 7–22.

3 As I'll discuss later, this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State's own plan. See *ante,* at 2499 – 2501; *supra,* at 2515; *infra,* at 2519 – 2521. It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. See *Rucho*, 318 F.Supp.3d at 875–876, 894; App. 276. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.*, compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. See *Rucho,* 318 F.Supp.3d at 893–894. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes. [4]

4 The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." See *Rucho*, 318 F.Supp.3d at 884–895. Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, The Measure of a Metric, 70 Stan. L. Rev. 1503, 1505–1507 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State. See *Rucho*, 318 F.Supp.3d at 886–887, 892–893.

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. You've heard some of the numbers before. See *supra,* at 2511. ***2519** The 2010 census required only a minimal change in the Sixth District's population—the subtraction of about 10,000 residents from more than 700,000. But instead of making a correspondingly minimal adjustment, Democratic officials reconfigured the entire district. They moved 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries. The upshot was a district with 66,000 fewer Republican voters and 24,000 more Democratic ones. In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes. See *Lamone,* 348 F.Supp.3d at 519–520.

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." *Ante,* at 2503 (internal quotation marks omitted). But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O'Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. See *ante,* at 2503 – 2504; but see Brief for Political Science Professors as *Amici Curiae* 14–20 (citing chapter and verse to the contrary). They did not bet America's future —as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." *Ante,* at 2500 – 2501; see *supra,* at 2515. Courts, the majority argues, will have to choose among contested notions of electoral fairness. (Should they take as the ideal mode of districting proportional representation, many competitive seats, adherence to traditional districting criteria, or so forth?) See *ante,* at 2499 – 2501. And even once courts have chosen, the majority continues, they will have to decide "[h]ow much is too much?"—that is, how much deviation from the chosen "touchstone" to allow? *Ante,* at 2500 – 2501. In answering that question, the majority surmises, they will likely go far too far. See *ante,* at 2498 – 2499. So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. ***2520** See *ante,* at 2500 – 2501.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you've already heard enough to know, is the latter. That kind of oversight is not only possible; it's been done.

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments. The effects evidence in these cases accepted as a given the State's physical geography (*e.g.,* where does the Chesapeake run?) and political geography (*e.g.,* where do the Democrats live on top of each other?). So the courts did not, in the majority's words, try to "counteract 'natural' gerrymandering caused, for example, by the urban concentration of one party." *Ante,* at 2501. Still more, the courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[ ] outlier." *Rucho,* 318 F.Supp.3d at 852 (internal quotation marks omitted); see *supra,* at 2517 – 2519. Those maps took the State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. See *Rucho,* 318 F.Supp.3d at 896–897. On top of that, the maps took the State's legal landscape as a given. They incorporated the State's districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. See *supra,* at 2518 – 2519. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. See Brief for Mathematicians et al. as *Amici Curiae* 19–20. The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina's fancy evidence, but analyzed the gerrymander's effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland's partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in ***2521** statewide elections. See Almanac of American Politics 2016, at 836, 880. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, à la the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the

delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override *its own* political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." *Ante,* at 2505. But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. *Ante,* at 2505 – 2506. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e.g.,* must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. See *ante,* at 2499 – 2500. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats ***2522** to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. See *Lamone,* 348 F.Supp.3d at 519. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." *Ante,* at 2505. If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, see *ante,* at 2505 – 2506, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See *ante,* at 2500 – 2501 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, *e.g., Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. (Most of the majority's difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly ... some matter of degree"—including the "substantial[ity]" of risk or harm. *Johnson v. United States*, 576 U.S. ——, ——, 135 S.Ct. 2551, 2561, 192 L.Ed.2d 569 (2015) (internal quotation marks omitted); see, *e.g., Ohio v. American Express Co.*, 585 U.S. ——, ——, 138 S.Ct. 2274, 201 L.Ed.2d 678 (2018) (determining "substantial anticompetitive effect[s]" when applying the Sherman Act); *United States* v. *Davis*, *ante,* at 2494 – 2496 (KAVANAUGH, J., dissenting) (cataloging countless statutes requiring a "substantial" risk of harm). The majority is wrong to think that these laws typically (let alone

uniformly) further "confine[ ] and guide[ ]" judicial decisionmaking. *Ante,* at 2505 – 2506. They do not, either in themselves or through "statutory context." *Ibid.* To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority's suggestion, see *ibid.*, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. See *supra,* at 2514 – 2515. Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. See *Rucho*, 318 F.Supp.3d at 808 (quoting Lewis's statements to that effect). They therefore felt free to openly proclaim their intent to ***2523** entrench their party in office. See *supra,* at 2510 – 2511. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials continued to try implementing extreme partisan gerrymanders, [5] they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan's vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

5 A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior. In districting cases no less than others, officials respond to what this Court determines the law to sanction. See, *e.g.,* Charles & Fuentes-Rohwer, Judicial Intervention as Judicial Restraint, 132 Harv. L. Rev. 236, 269 (2018) (discussing how the Court's prohibition of racial gerrymanders affected districting).

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." *Ante,* at 2499, 2502. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*, 377 U.S. at 566, 84 S.Ct. 1362. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 585 U.S., at ——, 138 S.Ct., at 1941 (KAGAN, J., concurring). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. "Dozens of [those] bills have been introduced," the majority says. *Ante,* at 2508. One was "introduced in 2005 and has been reintroduced ***2524** in every Congress since." *Ibid.* And might be reintroduced until the end of time. Because what all these *bills* have in

common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. See *ante,* at 2507 – 2508. Some Members of the majority, of course, once thought such initiatives unconstitutional. See *Arizona State Legislature,* 576 U.S., at ——, 135 S.Ct., at 2658 (ROBERTS, C. J., dissenting). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. See *ante,* at 2507 – 2508. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. See Mo. H. J. Res. 48, 100th Gen. Assembly, 1st Reg. Sess. (2019). I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. *Ante,* at 2506 – 2507. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution. *Ante,* at 2507; see *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. See *League of Women Voters*, 645 Pa. at 49, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?[6]

6 Contrary to the majority's suggestion, state courts do not typically have more specific "standards and guidance" to apply than federal courts have. *Ante*, at 2507. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that "elections shall be free and equal" and no one shall "interfere to prevent the free exercise of the right of suffrage." *League of Women Voters*, 645 Pa. at 38, 178 A. 3d, at 803–804 (quoting Pa. Const., Art. I, § 5). And even the Florida "Free Districts Amendment," which the majority touts, says nothing more than that no districting plan "shall be drawn with the intent to favor or disfavor a political party." Fla. Const., Art. III, § 20(a). If the majority wants the kind of guidance that will keep courts from intervening too far in the political sphere, see *ante,* at 2498 – 2499, that Amendment does not provide it: The standard is in fact a good deal less exacting than the one the District Courts below applied. In any event, only a few States have a constitutional provision like Florida's, so the majority's state-court solution does not go far.

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes ***2525** counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see *ante,* at 2508, this *was* law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." Brief as *Amicus Curiae* 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries;

make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See *id.*, at 5–6. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Brief as *Amicus Curiae* in *Gill* v. *Whitford*, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See *supra*, at 2494 – 2495. In our government, "all political power flows from the people." *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2677. And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

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THE HISTORIAN'S CASE AGAINST THE INDEPENDENT STATE LEGISLATURE THEORY

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ABSTRACT

The Independent State Legislature Theory ("ISLT") claims that the U.S. Constitution grants to state legislatures near-plenary authority to regulate federal elections, independent of other state actors, state courts, and state constitutions. The theory purports to find support in the text of the Elections Clause (Art. I, Sec. 4) and the Presidential Electors Clause (Art. II, Sec. 1) (together, the "Federal Election Clauses"), which assign the power to regulate federal elections to the "legislature" of each state. At least four sitting Justices on the U.S. Supreme Court have indicated support for the theory, and the Court has agreed to hear a case based on the theory this coming term.

This Essay—the first on the ISLT by an academic historian with an expertise in the founding period—demonstrates that the ISLT has no basis in historical fact. The Essay shows that the ISLT is inconsistent with: (1) the founding era's rejection of legislative supremacy; (2) the framing of the Constitution; and (3) the conduct of legislatures during the first federal elections.

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INTRODUCTION

In recent years, a legal theory has emerged called the "Independent State Legislature Theory" ("ISLT") which argues that "the U.S. Constitution does not confer

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authority to regulate federal elections in states as entities. Rather it grants that authority specifically to the 'Legislatures' of each state."[1] Extreme versions of the theory insist that only the legislatures themselves, acting independently of other branches of government, should have any role in making federal election laws. This formulation is sometimes also asserted to prevent state legislatures from delegating authority to other state actors, as in the case of independent redistricting commissions that draw congressional districts, or to claim that state courts have no jurisdiction over a state's federal election laws, including laws regarding the method of balloting for president or the makeup of congressional districts in gerrymandering cases. This formulation, it should be emphasized, is a "theory," or an interpretation, and one of very recent vintage—rather than, as some of its proponents would maintain, a longstanding "doctrine," i.e., a legal rule embedded in established legal precedent.[2] As a theory, it has recently gained a surprising number of adherents in legal circles, including certain sitting justices of the Supreme Court.[3]

Neither a close reading of the historical evidence nor the judgment of generations of historians provides support for the ISLT. Legal scholars have extensively shown that the ISLT cannot be squared with founding era practice[4] or understandings[5] (to say nothing of

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[1] *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GEORGIA L. REV. 1 (2021); *see also* Michael Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. L. REV. 847 (2015); 109 NW. L. REV. ONLINE 131 (2015).

[2] *See* Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 Mich. St. L. Rev. __ (forthcoming 2022) (adopting the term "theory" rather than "doctrine"); Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. ___ n.6 (forthcoming 2022) (same).

[3] *See, e.g.*, *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., dissenting from the denial of application to stay).

[4] Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022) (identifying founding era state constitutions that regulate federal elections); Krass, *Debunking*, 108 VA. L. REV. at __ (identifying founding era state statutes that delegate authority to regulate federal elections to other state actors); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. L. REV. 731 (2001) (identifying founding era state o [is this 'o' an error] mechanisms that were applied to federal election regulations).

[5] Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections*

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various legal doctrines and interpretative methodologies).[6] This Essay presents additional uncanvassed historical evidence against the ISLT.

The Essay proceeds in three parts. Part I shows how early states considered but ultimately rejected legislative supremacy, subordinating their legislatures to the state constitutions. Part II unearths evidence from the framing and ratification of the U.S. Constitution that is inconsistent with the ISLT. Part III turns to the practice of legislatures during the first federal elections, which confirms that no state interpreted the term "Legislature" in the federal election clauses to empower the legislatures to act as independent bodies, free from the constraints of their individual state constitutions, when passing the first federal election laws.

I. BEFORE THE FRAMING: THE RISE AND FALL OF LEGISLATIVE DOMINANCE

In order to understand why the framers used the term "Legislature" in the provisions concerning the federal election regulation, it is first necessary to review the role of the colonial charters in the North American British colonies, the importance of the colonial assemblies as reflections of the popular will, and, with the coming of independence, the role of the first state constitutions in institutionalizing government based on popular consent.

A. Pre-Revolutionary History: Emergence of Legislative Dominance

Long before the American Revolution, all thirteen British colonies in North America

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Clause, 96 WASH. L. REV. 997 (2021) (explaining how the ISLT is inconsistent with the purpose of the Elections Clause, which was designed to constrain state legislatures); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Claims Root and Branch*, 2022 SUP. CT. REV. 1 (explaining how the ISLT is inconsistent with the founding era theories of sovereignty).

[6] *See, e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Claims Root and Branch*, 2022 SUP. CT. REV. 1; Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052 (2021); Nathaniel Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57 (2021).

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were governed through their colonial charters. Bestowed by the British monarch, these charters granted settlers the right to reside in a certain region of North America, established the colony's boundaries, and guaranteed the inhabitants of the colony the privileges and liberties of free English subjects.[7] Under the auspices of its charter, each colony had its own separate and distinct government, including a legislature, with an upper and lower house, which passed laws for the colony. Each colony also had a governor, appointed by the King in the royal colonies or by the colonial proprietor the colonies of Pennsylvania and Maryland (e.g., the Penn family in Pennsylvania or the Calvert family in Maryland).[8] Only in Connecticut and Rhode Island did eligible voters elect their governors.[9] Laws passed by the colonial legislature were subject to approval by the colonial governor, and then submitted to Britain for final approval.[10]

During the colonial era, tensions frequently arose between the colonial governors and the colonial assemblies. Colonists regarded their governors with suspicion and mistrust. Mostly British in origin, governors came to the colonies for only a short time—on average, for about five years[11]—where they were regarded as interlopers who wished to enrich themselves at the colonists' expense. Seen as corrupt and self-serving, the governors occupied positions that, according to the colonists, concentrated too much power in the

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[7] *See* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 7-54 (1986); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 35-49 (1988) [hereinafter LUTZ, ORIGINS].

[8] *See* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 7-54 (1986); LUTZ, ORIGINS at 35-49; EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 15-17 (1959); BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 66-95 (1968).

[9] *See* LUTZ, ORIGINS, *supra* note __, at 46-49; MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 82 (1997).

[10] *See* BAILYN, *supra* note __, at 67; GREENE, *supra* note __, at 20-22.

[11] *See* BAILYN, *supra* note __, at 90-91; GREENE, *supra* note __, at 19-54.

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hands of a single individual.[12] Although their tenure tended to be brief, the governors enjoyed a great deal of discretionary power over the colonial government: they could call and dissolve the colonial legislatures; appoint members to the legislature's upper house; assert extensive patronage powers for lower offices; dismiss judges; assess a variety of fees for their own benefit, and perhaps most importantly, veto laws passed by the colonial legislatures.[13] Their will could contravene that of the popularly elected assembly.[14]

In the years immediately prior to the American Revolution, popular attachment to the colonial legislatures deepened. Colonial legislatures led the way in responding to a series of attempts by Parliament, beginning with the Sugar Act of 1764 and the Stamp Act of 1765, that were seen on infringing on the colonists' traditional rights and liberties.[15] The initial complaints related to taxation and representation. Since the colonists elected no representatives to Parliament, and had never been taxed directly by Parliament, they perceived parliamentary policies after 1764 as attacks on their right to self-government.[16] Over time, the range of Parliamentary assaults on American liberties expanded and the colonists grew increasingly hostile, defensive, and rebellious.

By the eve of the American Revolution, tensions between the colonial legislatures, the Crown, and the colonial governors reached a fever pitch.[17] Not inaccurately, the legislatures came to be seen as hotbeds of resistance to royal authority. After the Boston

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[12] *See* BAILYN, *supra* note __, at 69-95.

[13] *Id.*

[14] *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 128-46 (1989).

[15] *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, 53-65, 112-26, 165-80 (2005); MORGAN & MORGAN, *supra* note at 21-69.

[16] *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 53-65, 112-26, 165-80 (2005); MORGAN & MORGAN, *supra* note __, at 21-69; GREENE, *supra* note __, at 105-28; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 173-181(1969).

[17] *See* MIDDLEKAUFF, *supra* note __, at 165-80, 229-30; GREENE, *supra* note __, at 128-50.

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Tea Party, Parliament's passage of the so-called "Intolerable Acts" of 1774 punished the colonies. They altered the structure of the Massachusetts upper house, limited town meetings, and precluded the establishment of representative government in territories recently ceded from France.[18] Colonists regarded these acts not just as an assault on a particular colony but as an attack on the entire basis of self-government in the Anglo-American colonies.[19] When numerous colonial legislatures attempted to protest, royal governors dissolved the legislatures or refused to allow representatives to meet.[20]

When their officially sanctioned legislatures could no longer meet, colonists mounted a different kind of resistance. As royal government lost legitimacy in the people's eyes, there was, according to Massachusetts governor Thomas Hutchinson "a general dissolution of the established government in all the colonies."[21] In response, the people assumed the reins of government, holding elections and electing delegates to represent them in their own self-governing representative bodies. Between 1774 and 1776, these extra-legal bodies—local committees and provincial congresses—provided an alternative to the official royal institutions of governance.[22] When North Carolina's governor failed to call

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[18] *See* DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, at 1-17 (1974); MIDDLEKAUFF, *supra* note __, at 179-180; GREENE, *supra* note __, at 142.

[19] *See* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 228-70 (1972).

[20] *See* DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, at 128-129(1974); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 27-48 (Rita Kimber & Robert Kimber trans., 1980).

[21] THOMAS HUTCHINSON, STRICTURES UPON THE DECLARATION OF THE CONGRESS AT PHILADELPHIA IN A LETTER TO A NOBLE LORD, &C 12 (1776).

[22] *See* AMMERMAN, *supra* note __, at 103-24, 139-45; GREENE, *supra* note __, at 447-48; MIDDLEKAUFF, *supra* note __, at 230, 238; RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772, at 210-212, 230-36 (1970); ROBERT M. WEIR, "A MOST IMPORTANT EPOCHA"; THE COMING OF THE REVOLUTION IN SOUTH CAROLINA (TRICENTENNIAL BOOKLET NO. 5) 54-68 (1970); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 310-28 (1969); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 27-48 (Rita Kimber & Robert Kimber trans., 1980).

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its assembly into session in 1774, representative Joseph Hawley declared that "the people will convene themselves. . . . The people will have some government or other."[23] Existing outside the bounds of their royal charters, the provincial congresses had no sanction but the authority that came from the people themselves. They came into being, according to Governor Hutchinson, "by the meer act of the People."[24] In his 1774 pamphlet, *A Summary View of the Rights of British America*, Thomas Jefferson emphasized that the colonists had every right to organize such extra-legal bodies, saying "When [legislatures] are dissolved by lopping off one of their branches the power reverts to the people, who exercise it to an unlimited extent, either assembling together in person, sending deputies, or in any other way they may think proper."[25]

As a kind of shadow government, the provincial congresses were essentially free-standing, though irregular, legislative bodies. As royal authority in the colonies continued to deteriorate, the provincial congresses came to be seen as the colony's legitimate government.[26] During the years from 1774 to 1776, the congresses assumed the functions of government within each colony: collecting taxes, raising troops, purchasing ammunition and supplies, and maintaining order within the colony.[27] Although their existence was assumed to be temporary, until more regular forms of government could be established or re-established, they provided a critical source of continuity, order, and stability within the colonies.[28] The provincial congresses also elected delegates to represent their colony at the

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[23] WOOD, *supra* note __, at 314 (quoting Joseph Hawley).
[24] HUTCHINSON, *supra* note __, at 12.
[25] THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 19 (1774).
[26] *See* DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, at 128-129(1974); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 27-48 (Rita Kimber & Robert Kimber trans., 1980).
[27] *See* AMMERMAN, *supra* note __, at 103-24, 139-45, 238-243; WEIR, *supra* note __, at 54-68.
[28] *See* AMMERMAN, *supra* note __, at 103-24, 139-45; WEIR, *supra* note __, at 54-68; WOOD, *supra* note

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first and second Continental Congress—representative institutions which were themselves extra-legal in nature.[29] By the time of the American Revolution, then, Americans regarded their legislatures as the most important branch of government, the bodies that were most reflective of the people's wishes, the most protective of their interests, and the most dedicated to preserving their rights and liberties.

B. Early State Constitutions: Embrace of Legislative Dominance

When it became clear that independence from Britain was on the immediate horizon, the Second Continental Congress ordered on May 10 and 15, 1776 that each of the colonies replace its colonial charter with a new form of government that "would best conduce to the happiness and safety of their constituents."[30] Each of the thirteen "states" wrote their first constitutions, with the exception of Rhode Island and Connecticut, which simply revised their colonial charters.[31] (See Appendix 1).

In contrast to the British Constitution, which was unwritten, the states composed written documents that, like the colonial charters, created the framework of government within their individual polities.[32] In contrast to their colonial charters, however, the authority of the state constitutions flowed from the people themselves, not from a monarch. The North Carolina Constitution put the matter simply: "That all political power is vested in and derived from the people only."[33] Similarly, the Maryland Constitution of 1776

__, at 301-28.

[29] *See* AMMERMAN, *supra* note __, at 103-24, 139-45; WEIR, *supra* note __, at 54-68; WOOD, *supra* note __, at 301-28; JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 21-62 (1979).

[30] John Adams, *Preamble to Resolutions on Independent Governments, May 1776*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/06-04-02-0001-0006; ADAMS, *supra* note __, at 59-62.

[31] *See* ADAMS, *supra* note __, at 66-98; LUTZ, ORIGINS, *supra* note __, at 96-110. Connecticut and Rhode Island, whose charters contained many democratic features, only slightly modified their charters rather than wrote new constitution. *See* ADAMS, *supra* note __, at 66-68.

[32] *See* ADAMS, *supra* note __, at 66-98; LUTZ, ORIGINS, *supra* note __, at 96-110.

[33] Constitution of North Carolina (1776), *in* FRANCIS NEWTON THORPE, THE FEDERAL AND STATE

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stated, "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole."[34] Elaborating on this idea, the Massachusetts Constitution of 1780 asserted: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.[35] A state constitution, then, represented the original delegation of power from the people to their government, a compact based on the consent of the governed.[36]

The new state constitutions specified how government would be structured in each of the states. The Georgia Constitution of 1777, for example, declared its purpose, saying: "We . . . the representatives of the people, from whom all power originates, and for whose benefit all government is intended . . . do ordain and declare . . . that the following rules and regulations be adopted for the future government of this state."[37] Despite a wide variation in details, each of the early state constitutions created a tripartite system of government that included an executive, legislative, and judiciary branch and described what powers each branch possessed. [38] The first state constitutions also established the requirements of the state's legislature. These requirements included: how the legislature

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CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 5: 2787 (1909) [hereinafter THORPE, CONSTITUTIONS].

[34] Maryland Constitution (1776), *in* THORPE, CONSTITUTIONS, *supra* note __, at 3: 1686.

[35] Massachusetts Constitution (1780), *in* POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 443 (Oscar Handlin & Mary Handlin, eds., 1966) [hereinafter POPULAR SOURCES OF POLITICAL AUTHORITY].

[36] *See* WOOD, *supra* note __, at 268-73; DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 43-52, 72-84 (1980) [hereinafter LUTZ, POPULAR CONSENT]; J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 524-26 (1966).

[37] Georgia Constitution (1777), *in* THORPE, CONSTITUTIONS, *supra* note __, at 2: 778.

[38] *See* LUTZ, ORIGINS, *supra* note __, at 104-5, 131-54; KRUMAN, *supra* note at __, 35-86; ADAMS, *supra* note __, at 164-217, 230-55.

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should be structured (bicameral or unicameral), when the legislature should meet, how the representatives would be elected and by whom, qualifications for serving in office, what constituted a quorum, the basis of apportionment of representatives, and the relationship between the legislature and the other branches of government.[39] Without adhering to these provisions, the legislature did not represent a lawful assembly and could not pass bills that would become law for the state. .[40]

In effect, the state constitutions created the legislatures and brought them into being. In striking contrast to the provincial assemblies that had emerged in the colonies on the eve of the American Revolution, the authority of the new state legislatures did not come directly from the people but was mediated through the vehicle of the state constitution. Far from being independent, these legislatures had no existence apart from the constitutions that created them.[41]

The early constitutions represented a reaction to the colonists' experience during the colonial period. The result was a marked reduction in the powers of the executive and an enhancement in the powers of the legislature.[42] The diminution in the executive's power was dramatic. In most revolutionary-era state constitutions written in 1776-1777, governors were stripped of many powers they had possessed in the colonial era. Instead of being appointed, they were (in most states) elected by the legislature and subject to term limits.[43] They lost most of their patronage powers, could no longer call or dissolve the

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[39] *See* LUTZ, ORIGINS, *supra* note __, at 104-5, 131-54; KRUMAN, *supra* note at __, 35-86; ADAMS, *supra* note __, at 164-217, 230-55.

[40] *See* LUTZ, ORIGINS, *supra* note __, at 104-5, 131-54; KRUMAN, *supra* note at __, 35-86; ADAMS, *supra* note __, at 164-217, 230-55.

[41] *See* WOOD, *supra* note __, at 127-43, 313-19.

[42] *See* KRUMAN, *supra* note __, at 123-26, 132-34; WOOD, *supra* note __, at 132-43, 155.

[43] *See* WOOD, *supra* note __, at 132-61; LUTZ (which Lutz?), *supra* note __, at 104-7; ADAMS, *supra* note __, at 271-75.

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assemblies, and could not serve in multiple branches of government.[44] Under its 1776 constitution, Pennsylvania did not even have a governor at all, though it did have an executive council, elected by the people, made up of twelve members. [45] Most importantly, many of the first state constitutions, including Virginia, North Carolina, New Jersey, Maryland and Delaware, deprived their governors of their ability to veto laws passed by the legislatures.[46] Among the early constitutions, only the South Carolina constitution of 1776 and Massachusetts in 1780 endowed the executive with a gubernatorial veto.[47]

Whereas governors were seen as threats to the people's rights, legislatures were thought to be the branch of government most responsive to the people's sentiments and the most reflective of their will.[48] In addition to their traditional powers related to taxation and lawmaking, state legislatures gained many new powers. The legislatures now possessed the vast majority of appointment power or patronage authority, including the power to elect the governor.[49] In fact, legislatures in New Jersey, North Carolina, Virginia, and Georgia elected, in addition to the governor, their state's supreme court judges, inferior court judges, court clerks, and justices of the peace.[50] The structure of the legislature itself came under scrutiny. Viewing the upper house of the legislature as too aristocratic, the Pennsylvania and Georgia Constitutions dispensed with an upper house altogether. [51]

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[44] *See* WOOD, *supra* note __, at 132-61; LUTZ (which Lutz?), *supra* note __, at 104-7; ADAMS, *supra* note __, at 271-75.

[45] *See* LUTZ, POPULAR CONSENT, *supra* note __, at 29-49; WOOD, *supra* note __, at 438-46.

[46] *See* WOOD, *supra* note __, at 132-43; KRUMAN, *supra* note __, at 124-26, 133-34; ADAMS, *supra* note __, at 271-75.

[47] *See* KRUMAN, *supra* note __, at 123-26; ADAMS, *supra* note __, at 271-75. Note that the South Carolina constitution of 1778 took away the gubernatorial veto.

[48] *See* WOOD, *supra* note __, at 162-73; KRUMAN, *supra* note __, at 61-86; ADAMS, *supra* note __, at 23-255.

[49] *See* WOOD, *supra* note __, at 143-61; KRUMAN, *supra* note __, at 116-23.

[50] *See* KRUMAN, *supra* note __, at 119.

[51] *See* LUTZ, POPULAR CONSENT, *supra* note __, at 85-128; ADAMS, *supra* note __, at 264-66; WOOD, *supra* note__, at 137, 163.

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Under the theory of republican constitutionalism, the people were always considered to be the ultimate check on the legislature's power. Nonetheless, the new structure of government in the states meant that there were few institutional checks on the legislatures' power. The lack of a gubernatorial veto in most states freed the legislatures from executive oversight. At the same time, since the courts had not yet fully embraced their role in reviewing legislation—through the doctrine later known as judicial review—the judiciary played little role in controlling the legislatures.[52] A couple of states did, however, did see the need for some mechanism to provide oversight to the legislature. New York provided for a Council of Revision which consisted of the governor, the chancellor, and two state supreme court justices. This body reviewed all bills passed by the assembly for "revisal and consideration" before the bill could become law.[53] The Pennsylvania Constitution provided for a Council of Censors, composed of two delegates from each city and state. Meeting once every seven years, this body was "to enquire whether the constitution has been preserved inviolate in every part " and identify laws that contravened the state's constitution. [54] Vermont, when it entered the union in 1791, and New Hampshire in its revised 1794 Constitution, also provided for a Council of Censors.[55] Before the doctrine of judicial review could be fully articulated, these mechanisms provided oversight in ascertaining whether legislative statutes conformed to the principles enshrined in a state's constitution.

While the new constitutions made the legislatures the dominant branch of

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[52] *See* ADAMS, *supra* note __, at 268-70.

[53] *Id.* at 268; WOOD, *supra* note __, at 433.

[54] Pennsylvania Constitution (1776), *in* THORPE, CONSTITUTIONS, *supra* note __, at 5: 3091-92; LUTZ, POPULAR CONSENT, *supra* note __, at 129-149.

[55] *See* LUTZ, POPULAR CONSENT, *supra* note __, at 142-149; WOOD, *supra* note __, at 339, 407-8, 438-55.

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government, they did not make the legislatures independent. A state's constitution literally defined the conditions that allowed a legislature to exist.. This point is especially evident when contrasting the first state legislatures with the provincial congresses that had emerged between 1774 and 1776. Because they were extra-legal in nature, the provincial assemblies had come into being through a direct grant of authority from the people.[56] Significantly, however, the provincial assemblies did not continue to exist once a state constitution was written. In fact, the provincial assemblies in each state either wrote their state's constitution or called for elections for delegates who would write their state's constitution.[57] Once the state's constitution was written, the provincial congresses stopped meeting. [58] Thus, when American political leaders of the revolutionary era had a choice, they did not choose to empower freestanding legislatures as the basis of their government. Instead, they wrote individual state constitutions in which the legislature's authority was subordinate to, and derived from, the authority of the state constitution, which in turn, received its authority from the people.

C. Revised State Constitutions: Retreat from Legislative Dominance

Even before the American Revolution had ended, states had begun to ascertain flaws in their first constitutions.[59] With few institutional checks in place, the state legislatures could assert their will through ill-conceived legislation; few guardrails were in place to stop them.[60] State and national leaders began to point out the dangers of the legislatures' excessive power. In his *Notes on the State of Virginia*, Thomas Jefferson criticized the

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[56] *See* WOOD, *supra* note __, at 319-35; ADAMS, *supra* note __, at 29-48; KRUMAN, *supra* note __, at 20-24, 111-16.

[57] *See* WOOD, *supra* note __, at 319-35; ADAMS, *supra* note __, at 29-48; KRUMAN, *supra* note __, at 20-24, 111-16.

[58] *See* KRUMAN, *supra* note __, at 23.

[59] *See* WOOD, *supra* note __, at 403-39; KRUMAN, *supra* note __, at 126-30.

[60] *See id.* at 403-13.

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Virginia Constitution of 1776, saying, "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government."[61] Stating the matter even more emphatically, he pointedly observed, "An *elective despotism* was not the government we fought for."[62] In New York, Chancellor Robert Livingston condemned that state's legislature, saying that it was "daily committing the most flagrant acts of injustice."[63] In South Carolina, Aedanus Burke noted in 1783 that, "A popular assembly, not governed by fundamental laws, but under the bias of anger, malice, or a thirst for revenge, will commit more excess than an arbitrary monarch."[64] James Madison himself claimed that the state legislatures' excessive powers represented an existential threat to the union, threatening the country's very existence. "The legislative department is everywhere extending the sphere of its activity," he said in The *Federalist* No. 48, "and drawing all power into its impetuous vortex."[65]

In an attempt to address these defects, many states quickly began to rewrite their individual state constitutions. (See Appendix 1). During the period from late 1777 to 1789, five states, as well as Vermont (which had not yet entered the union) rewrote their constitutions.[66] Eight more states wrote, or rewrote, constitutions between 1790 and 1798.[67] The experience of writing and re-writing their constitutions at the state level would shape the delegates' decisions at the Philadelphia Convention in 1787 about how to

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[61] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 113 (1785).
[62] *Id.*
[63] GEORGE DANGERFIELD, CHANCELLOR ROBERT R. LIVINGSTON OF NEW YORK, 1746-1813, at 107 (1960) (quoting Chancellor Robert Livingston).
[64] AEDANUS BURKE, AN ADDRESS TO THE FREEMEN OF THE STATE OF SOUTH-CAROLINA 23 (Philadelphia, Robert Bell 1783).
[65] THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).
[66] *See* LUTZ, ORIGINS, *supra* note __, at 104.
[67] *See id.*

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structure the U.S. Constitution.

One of the most distinctive features of these second and third-wave state constitutions was the effort to limit the excessive powers of the state legislatures, to curb and restrain legislative dominance.[68] One way that the new constitutions addressed this issue was to heighten the distinction between statutory and constitutional law.[69] When it was determined that a new constitution was necessary, states would hold special elections specifically to choose delegates who would meet in convention and draft a new constitution. The separation of lawmaking from constitution-making enhanced the authority of the constitution as fundamental law.[70] Constitutional conventions, Thomas Jefferson observed in his *Notes on the State of Virginia,* gave the constitution "an authority superior to the laws."[71]

In 1778 and 1780, Massachusetts, followed by New Hampshire in 1784, also made another important innovation: they subjected their constitutions to ratification by the people.[72] In response, the voters of Massachusetts actually rejected the first constitution proposed in 1778.[73] Another Massachusetts constitution, written largely by John Adams, was subsequently submitted to the people and did receive popular approval in 1780.[74] With the trend toward the use of drafting conventions and the implementation of a ratification

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[68] *See* LUTZ, ORIGINS, *supra* note __, at 106-9.

[69] *See* WOOD, *supra* note __, at 273-82.

[70] ID*See id.*; ADAMS, *supra* note __, at 86-93; POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note __, at 23.

[71] JEFFERSON, *supra* note __, at 118; *see also* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 38-39 (2018) (discussing the importance of the emergence of constitutional drafting convention).

[72] *See* ADAMS, *supra* note __,at 86-93; POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note __, at 5-51.

[73] WOOD, *supra* note __, at 340-341; JAMES F. HRDLICKA, WAR AND CONSTITUTION-MAKING IN REVOLUTIONARY MASSACHUSETTS, 1754-1788, at 253-265 (PH.D. dissertation, University of Virginia, 2016).

[74] ADAMS, *supra* note __, at 92-93; J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 214-26 (1966).

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process—procedures that were later adopted for the U.S. Constitution—states further solidified the distinction between statutory law, passed by the legislature, and fundamental law, embodied in the state constitution.[75] Enhancing this distinction would provide an important check on legislative power in the states, opening up the possibility of reviewing state laws for their conformity with the state constitutions.

Second- and third-wave state constitutions written between 1777-1798 strengthened the institutional mechanisms that limited the powers of the state legislatures.[76] (See Appendix 1). They did so partly by increasing the powers of the other branches of government. The Massachusetts Constitution of 1780, along with the New York Constitution of 1777 and the Georgia Constitution of 1798, gave the governors of those states a limited veto over laws.[77] Although the legislature could still override the governor's veto (or what in Georgia was called "the revision"), the restoration of the gubernatorial veto greatly strengthened the executive branch. The governor could reject laws that were deemed inappropriate, not in the public interest, or contrary to the state constitution. The new constitutions of Massachusetts in 1780, New York in 1777, and New Hampshire in 1784 allowed for popular election of the governor, either directly or indirectly. Allowing the people to vote for the governor decreased the governor's dependence on the legislature and increased the separation of powers.[78] States such as

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[75] *See* WOOD, supra note __, at 328-343, 273-382; JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 98-100 (1996).

[76] *See infra* App. 1.

[77] *See* WOOD, *supra* note __, at 430-438; KRUMAN, *supra* note __, at 116-130; ADAMS, *supra* note __, at 262-271; GA. CONST. of 1798, art. II, § 10, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note __, at 797.

[78] *See* WOOD, *supra* note __, at 435; MASS. CONST. of 1780, pt. 2, ch. II, § I, art. III, *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note __, at 456-57; N.Y. CONST. of 1777, art. XVII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note __, at 2633; N.H. CONST. of 1784, pt. II, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note __, at 2463.

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Georgia and Pennsylvania also abandoned the experiment with a unicameral legislature, created bicameral legislatures , and established a single, independent executive.[79]

Highlighting the need for a stronger separation of powers, several second- and third-wave state constitutions also made the state courts more independent of the legislatures, often by limiting legislature's appointment powers over judges.[80] This shift was necessary, according to Thomas Jefferson, because a mingling of the branches left "the judiciary and executive members . . . dependent on the legislative for their subsistence in office, and some of them for their continuance in it."[81] Even more radically, certain state courts, especially in New York, New Jersey, Virginia, North Carolina, and Rhode Island, moved in the direction of embracing the doctrine that later became known as judicial review.[82] Judicial oversight was critical to reining in the power of the state legislatures. As Alexander Hamilton commented in Federalist No. 78, "Courts of justice are to be considered the bulwarks of a limited Constitution against legislative encroachments."[83]

II. THE FRAMING: THE U.S. CONSTITUTION MANDATES THAT STATE LEGISLATURES FOLLOW THEIR STATE CONSTITUTIONS

At the time of the Philadelphia Convention in 1787 legislatures remained the most powerful and dominant branch of state government in the states. It is not surprising, then, that when Americans thought about their state governments, they most often thought of

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[79] *See* WOOD, *supra* note __, at 438-53; PA. CONST. of 1790, art. I, § 1, art. II, § 1, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note __, at 3092, 3095; GA. CONST. of 1789, art. I, § 1, art. II, § 1, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note __, at 785, 787.

[80] *See* WOOD, *supra* note __, at 453-63.

[81] Jefferson, *supra* note __, at 114.

[82] *See* WOOD, supra note __, at 454-55. For a more detailed discussion of the emergence of judicial review in the states, see MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 186-96 (2004).

[83] THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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their state legislatures. Nor is it surprising, from this perspective, that the Elections Clause refers to the state "Legislatures." Yet by 1787, many political leaders had concluded that granting too much power to the individual state legislatures had been an egregious mistake.[84] Delegates to the federal Convention, led by James Madison, planned to create a new federal system that curbed the power of the states legislatures. Far from seeking to empower the legislatures, the new US Constitution was explicitly designed to control and contain state legislative supremacy.[85]

Shortly before the start of the Philadelphia Convention, James Madison discussed the role of the states in precipitating the crisis facing the union. In the *Vices of the Political System of the United States*, written in April 1787, Madison stated, "The evils which viciate the political system of the U.S." are found "within the States individually, as well as those which directly affect the States collectively."[86] Some problems, he said, resulted from the federal government's lack of coercive power over the states, including an inability to compel the states to pay their assessed taxes or to abide by treaty obligations to foreign nations.[87] An even more pernicious problem resulted from the overweening power of the state legislatures within the states. The states passed laws abolishing private debts, created too much paper money, and confiscated loyalist property without compensation.[88]

Provisions such as annual elections also caused problems, creating a great deal of membership turnover in the legislatures, which eroded continuity and stability in government. States also passed too many laws, changing or abolishing the laws before they

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[84] *See* WOOD, *supra* note __, at 238-243, 372-383, 430-438.

[85] *See id.* at 463-99; GREENE, *supra* note __, at 181-211; MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE U.S. CONSTITUTION 41-48 (2016).

[86] James Madison, *Vices of the Political System of the United States, April 1787*, *Founders Online*, https://founders.archives.gov./documents/Madison/01-09-02-0187.

[87] *Id.*

[88] *See* WOOD, *supra* note __, at 403-29, 463-67.

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could even go into effect.[89] In addition, some state legislatures passed laws that violated individual rights, thus fomenting what Madison called "injustice."[90] Madison considered this last defect—injustice—to be the most serious, "not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."[91] Madison's solution was neither to strengthen the Articles of Confederation nor to rewrite the state constitutions one by one. Instead, he proposed scrapping the Articles and replacing them with an entirely new system of national government that possessed sufficient power to control and contain the excesses of the state legislatures.[92]

Other delegates echoed Madison's concerns about the excessive powers of the state legislatures.[93] As John Francis Mercer of Maryland put it, "What led to the appointment of this convention? The Corruption and Mutability of the Legislative Councils of the States."[94] John Dickinson of Delaware agreed, saying that he "took it for granted that all [at the Convention] were convinced of the necessity of making the Genl. Govt. independent of the prejudices, passions, and improper views of the State Legislatures."[95] In fact, Madison was so convinced of the need to limit the power of the state legislatures that in his initial draft of the Constitution, commonly called, the Virginia plan, he included a provision giving Congress a veto over state laws.[96] While excluded from the final

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[89] *See id.*
[90] Madison, *supra* note __.
[91] *Id.*
[92] *See* WOOD, *supra* note __, at 471-75.
[93] *See id.* at 393-429.
[94] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 288 (Max Farrand ed., 1911).
[95] *Id.* at 292.
[96] RAKOVE, *supra* note __, at 51-53, 81-82, 169. Madison's exact proposal, in Art. 6 of the Virginia Plan, read: "[T]hat the National Legislature ought to be empowered . . . to negative all laws passed by the several

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Constitution, the proposed veto reveals the extent to which Madison and other nationalists regarded the excessive powers of the state legislatures as one of the most fundamental problems that the new national government must address.

Yet the nationalists at the Philadelphia Convention also had to contend with defenders of the Articles of Confederation, delegates who wished to preserve the powers of the state governments, and those who had a strong attachment to their colony's history, their state governments, and local institutions.[97] These two conflicting views of federal power came into particularly sharp focus during the debate over the Elections Clause. This clause gave the state legislatures the power to make laws concerning the times, places and manner of holding elections for members of Congress. While granting a great deal of power to the states, it also gave enormous power to Congress, allowing the federal government to alter the states' regulations "at any time."[98]

During the debate over the Elections Clause, certain delegates who wished to protect state power objected to the reservation of power to Congress. Delegates from South Carolina, for example, insisted that the states should have the exclusive authority to make federal election regulations. "The States . . . could and must be relied on in such cases," they said.[99] Madison and others defended the provision. States, Madison declared, "ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power." States might, for example, fail to make the

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States, contravening in the opinion of the National Legislature the articles of Union." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note __, at 21.

[97] *See generally* John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AMERICAN POLITICAL SCIENCE REVIEW 799 (1961).

[98] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note __, at 239-40; RAKOVE, *supra* note __, at 223-24.

[99] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note __, at 241.

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necessary laws for holding elections, refuse to call for the elections in a timely fashion, or to fail to hold the elections on the appointed days. The national government must have the power to protect itself, lest the states use their power to subvert the new system. Speaking to this point, Gouverneur Morris of New York added that, "States might make false returns and then make no provisions for new elections."[100] Roger Sherman of Connecticut, though more equivocal, was ultimately supportive of the clause, remarking, that "it might be best to retain the clause [giving Congress the ultimate authority over federal election laws], though he had himself sufficient confidence in the State Legislatures."[101] Whatever the reservations, the provision passed with only a few minor alterations and was incorporated into the Constitution.[102]

The wording of the Elections Clause reveals the delicate nature of compromise necessary to craft a Constitution that could gain approval from both the delegates in Philadelphia and from the state ratifying conventions, from those with a vested interest in preserving state power and those who wished to enhance the power of the national government. While the clause gave the states a great deal of discretionary power in making federal election regulations, it gave Congress the ultimate authority to intervene in federal elections. Contrary to the interpretation advanced by the ISLT, the Elections Clause did not unleash the power of the state legislatures to act independently. Rather, it was explicitly designed to insure that the states would not be able to manipulate federal elections in a manner that Congress deemed inappropriate or unjust.

At the same time, when the Framers crafted the Elections clause, it is clear that they

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[100] *Id.*
[101] *Id.*
[102] U.S. CONST. art. I, § 2, cl. 1.

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assumed that the state legislatures would operate within the parameters of lawmaking as determined by their individual state constitutions. This view is confirmed by examining the drafting and debate surrounding the Republican Guarantee Clause (Art. IV, Sec. 4). During the founding era, the term "republican government" was synonymous with a "representative" form of government in which the people (i.e, eligible electors) voted for representatives who would conduct the business of government.[103] As James Madison noted in Federalist #14, "in a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents."[104] In its final form, the Republican Guarantee Clause states, in part, that: "The United States shall guarantee to every State in this Union a Republican Form of Government."[105] In proposing this clause, James Madison desired to give the federal government the power to intervene militarily in the states, primarily to protect the states against domestic insurrections.

Yet the Republican Guarantee clause clearly implies that the basis of republican in government in the states rested on the state constitutions. Madison's original proposal, delivered on May 29, 1787, read: "that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State."[106] In the process of arriving at the final language for the clause, the Philadelphia delegates altered and expanded on Madison's original proposal and, in the process, articulated their assumptions about the fundamental nature of republican government and state constitutions to the union. On June 11, 1787,

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[103] *See* WOOD, *supra* note __, at 118-24; MAIER, *supra* note__, at 271-96.
[104] THE FEDERALIST NO. 14, at 100 (James Madison) (Clinton Rossiter ed., 1961).
[105] U.S. CONST. art. IV, § 4.
[106] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note __, at 559.

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the delegates agreed to a modified proposal that read: "that a **republican Constitution** & it's [sic] existing laws ought to be guaranteed to each State by the U. States." [107]

Subsequent resolutions in July and August of 1787 expanded the clause to protect the states explicitly from foreign invasion as well as domestic upheavals. On July 18, Madison proposed a reworded clause: "that the **Constitutional authority** (emphasis added) of the States shall be guarantied to them respectively ag[ain]st. Domestic as well as foreign violence."[108] This formulation highlights the emphasis on the state constitutions even more dramatically: the federal government was to protect the states' "Constitutional authority." Yet the delegates were not yet satisfied. The clause changed again as it went through successive rounds of revision..[109] Although the explicit reference to the state constitutions was removed, the implication remained clear: state constitutions provided the vehicles which created republican government in the states. Through the Republican Guarantee clause, the Constitution legitimized the authority of the state constitutions, not the state legislatures, as the basis of republican government in the states.

Ideas regarding the role of constitutions in republican government find fuller expression in the *Federalist* essays. In *Federalist* # 49, for example, Madison observes that the executive, legislative, and judicial branches all derive their power from the "constitutional charter." The constitution itself, however, derives its power from the ultimate source of authority, the people. "The people," he says, "are the only legitimate fountain of power and it is from them that the constitutional charter, under which several branches of government hold their power, is derived."[110] The constitution represents the

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[107] *Id.* at 560 (emphasis added).
[108] *Id.*
[109] *Id.* at 560-61.
[110] THE FEDERALIST No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961).

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original grant of authority from the people. The legislature's authority is derived from that of the constitution; it has no authority independent of the constitution. Similarly, in his discussion of judicial review in *Federalist* # 78, Alexander Hamilton also stressed the primacy of constitutions over legislatures. "The courts," he remarked, "were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter [the legislature] within the limits assigned to their authority. . . . A constitution is, and in fact, and must be regarded by the judges as, a fundamental law."[111] If, according to Hamilton, a constitution represents fundamental law, then the constitution limits and circumscribes the legislature's powers. For Madison, Hamilton and the other Framers, the implication of their theory for the states was clear. In a constitutional system, the legislature is, and must be constrained, by the constitution which created it. Accordingly, a theory such as ISLT, which postulates that a state legislature can operate separately from, or independently of, its state constitution, is antithetical to the fundamental theory of constitutional government underlying the US Constitution. Though the state legislatures may have been the dominant branch of state government, they were not considered independent from the constitutions which created them.

Moreover, even the meaning of the term "state legislature" as used in the Elections Clause and the Presidential Electors Clause was far more ambiguous during the founding era than it may appear today. Evidence from the founding era reveals that when discussing the federal election clauses members of the founding generation often used the terms "state governments" and "state legislatures" interchangeably. In *Federalist* #45, for example, Madison describes the particular role of the **"State legislatures"** in the election of the

[111] THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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president and members of both houses of Congress. In the same paragraph, he also observes that "each of the principal branches of the federal government will owe its existence more or less to the favor of the **State governments**."[112]

Other political leaders at the time also used "state legislature" and "state government" seamlessly and interchangeably. For example, during the debate at the Massachusetts ratifying convention, Mr. Bishop referred to Art. 1, Sec. 4's requirement that "each state by the **legislature** thereof" should make regulations regarding the time, place, and manner of electing members to Congress. Then he defended the possibility of congressional intervention in making federal election laws, saying, "If the **states** shall refuse to do their duty, then let the power be given to Congress to oblige them to do it."[113] Similarly, during the North Carolina ratifying convention in 1788 James Iredell remarked that, "The very existence of the general government depends on that of the **state governments.** The **state legislatures** are to choose the senators . . . . [and] to direct the manner of choosing the President . . . . [and] the House of Representatives. . . . Thus it is evident that the very existence of the general government depends on that of the **state legislatures."**[114] In two virtually identical sentences, Iredell makes no distinction between the term "state governments" and "state legislatures"; he uses the terms as synonyms. At the Pennsylvania ratifying convention, future Supreme Court justice James Wilson also uses the terms interchangeably. "What pains," he emphasized, "have been taken in the Convention to

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[112] THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[113] *Massachusetts Ratifying Convention, January 16, 1788, in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, IN 1787, at 23 (Jonathan Elliot ed., 1836) (emphasis added) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

[114] *North Carolina Ratifying Convention, in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note __, at 53 (emphasis added).

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secure the preservation of the **state governments**."[115] In making federal election laws, he noted, "I think it highly proper that the federal government should throw the exercise of this power into the hands of the **states legislatures**."[116] But Congress, he said, must reserve the right to intervene, for there was the possibility that "some **states** might make no regulations at all on the subject."[117] According to the usage during the Founding era, no substantive difference existed between the meaning of the terms "state governments" and "state legislatures."

The terms continued to be used interchangeably even after ratification. During a 1789 debate in the House of Representatives over amending the Elections Clause, Thomas Tudor Tucker of South Carolina urged Congress to leave the states alone in making the laws, insisting that "the **State Legislatures** might be left to themselves to perform every thing they were competent to, without the guidance of Congress." He then proceeded to say, "It seemed to him there was a strong propensity in this Government to take upon themselves the guidance of the **State Governments**, which to his mind implied a doubt of their capacity to govern themselves."[118] The interchangeability of the terms has a deeper significance.

To members of the founding generation, the use of the term "state legislature" did not necessarily, or even usually, refer to the legislature acting alone as an independent body. Rather, it was a more general term that referred to the legislature operating within the confines of its state government, which in turn, was created by its state constitution. The

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[115] *Pennsylvania Ratifying Convention*, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note __, at 440 (emphasis added).
[116] *Id.* (emphasis added).
[117] *Id.* (emphasis added).
[118] 1 ANNALS OF CONG. 800 (1789) (Joseph Gales ed., 1834) (emphasis added).

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repeated interchangeability of these terms by members of the founding generation thus calls into question a central contention of the ISLT. Counter-intuitive though it may seem today, "legislature" simply meant "state government." thus undercutting any claim that state legislatures may make federal election laws separately from, or independently of, other branches of government.

III. POST-FRAMING: THE LEGISLATURES' IMPLEMENTATION OF THE FEDERAL ELECTION CLAUSES

Beginning in the Fall 1788 and continuing into 1789, states held their first federal elections.[119] Pursuant to the Elections Clause, each state "Legislature" had to determine the times, places, and manner of electing members to the House of Representatives. According to the Presidential Electors Clause, each state "Legislature" also had to determine the manner in which it would appoint their presidential electors. If the ISLT had any basis in the historical record, it might be expected that when writing the provisions to implement these provisions at least some of the states would have understood the term "Legislature" to apply narrowly to the legislatures themselves, operating as independent bodies. This is not what happened.[120]

As states made their first federal election laws, the legislatures followed their state's normal lawmaking procedures, as prescribed by their individual state constitutions. The legislature must be constituted as a legal body. Then, legislators passed the laws just as they would any other legislation. Both houses of the legislature (or in Georgia and

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[119] *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 429-59 (2010). It should be noted that two states had not yet ratified the Constitution when the new government went into operation. North Carolina did not enter until late 1789 and Rhode Island in 1790. *See id.* at 403-25, 457-59.

[120] *See* FRANK FLETCHER STEPHENS, THE TRANSITIONAL PERIOD, 1788-1789, IN THE GOVERNMENT OF THE UNITED STATES 32-83 (1909). For a chronology of the passage of the state election laws, as well as primary documents for each state, see THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790 (Gordon DenBoer et al., eds., 1976-1989) [hereinafter DOCUMENTARY HISTORY].

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Pennsylvania, the single unified assembly) would consider the bill; the bill would be debated, revised, and eventually passed.[121] In states where the governor had a say in the making of laws, it would go to the governor for approval. In states where laws were subject to oversight by another body (e.g., New York's Council of Revision), laws would be submitted to that body, or later, reviewed by the state courts.[122] From election to election, legislatures frequently passed new laws that changed the mode of electing representatives or presidential electors.[123] In other words, far from acting as an independent body, the legislatures treated federal election laws as normal legislation, subject to the ordinary checks and balances prescribed by their constitutions.

Crucially, legislatures took a different route when choosing senators pursuant to Article I, Section 3. As relevant here, that provision—since superseded by the 17th Amendment—provides: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years."[124] In contrast to the Elections Clause, the legislatures understood the selection of Senators to refer

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[121] *See, e.g.*, 2 DOCUMENTARY HISTORY 65-66 (Delaware); *id.* at 431-21 (Georgia); *id.* at 105-06 (Maryland); 1 DOCUMENTARY HISTORY 772-73 (New Hampshire); 3 DOCUMENTARY HISTORY 8-9 (New Jersey); *id.* at 199-201 (New York); 4 DOCUMENTARY HISTORY at 310-11 (North Carolina); 1 DOCUMENTARY HISTORY 235-37 (Pennsylvania); 4 DOCUMENTARY HISTORY 383 (Rhode Island); 1 DOCUMENTARY HISTORY 150-51 (South Carolina); 2 DOCUMENTARY HISTORY 255-56 (Virginia).

[122] Two state states, Massachusetts and Connecticut, did deviate slightly and briefly from this pattern. For their first federal election, both states passed joint resolutions of both houses, rather than regular laws, to establish the procedures. Yet these were actually closer to laws than resolves. The Connecticut "resolve" was actually based on an earlier 1779 law, regarding the election of delegates to the Confederation Congress. In Massachusetts, resolves had to be signed by the governor and were thus, in effect, laws by another name. Even so, within only a few years, both states abandoned the resolution procedure and passed regular legislation for electing members of congress and presidential electors. 2 DOCUMENTARY HISTORY 440-43, 508-09 (Massachusetts); *id.* at 7, 18 (Connecticut). *See also* MASS. CONST. of 1780, ch. 1, § 1, art. II ("No bill or resolve of the Senate or House of Representatives shall become a law, or have force as such, until it shall be laid before the Governor for his revisal."), *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note __, at 448 .

[123] *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE, REPRESENTATION IN THE UNITED STATES, 1776-1850 at 105-124 (1987); ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 31-85 (2020).

[124] U.S. CONST. art. I, § 3.

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narrowly to the legislature acting in its appointive capacity, not as passing a law.[125] As James Madison made clear in *Federalist* #45, "The Senate will be elected absolutely and exclusively by the State legislatures."[126] Legislatures simply had to decide whether to elect their Senators by concurrent votes or through a joint resolution of both houses.[127]

The passage of New York's federal election laws provides compelling evidence about the extent to which legislatures were constrained by their state constitutions when regulating under the Elections Clause. Under the New York constitution, the governor, along with two judges from the state supreme court constituted a Council of Revision which would meet to review bills passed the legislature. Their assent was necessary before a bill became law.[128] In January 1789, the Council of Revision received a bill that had been passed by the New York legislature specifying the method by which the state would elect its members to the U.S. House of Representative, pursuant to the Elections Clause. After reviewing the bill, the Council approved the measure and allowed it to become law. Far from operating as an independent body, the New York legislature recognized that its acts could not become law until all the constitutional requirements for lawmaking had been met, including review by the Council of Revision.[129]

In July 1789, the Council reviewed another bill, this one relating to the election of US Senators. The Council of Revision rejected the bill.. "If by Legislature," the Council said, "is intended the two houses not acting [in] their Legislative Capacity no law to

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[125] *See* STEPHENS, *supra* note __, at 10-30.

[126] THE FEDERALIST No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).

[127] *See* STEPHENS, supra note __, at 10-30.

[128] N.Y. CONST. of 1777, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note __, at 2628; *see also* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD 1664-1830, at 176-80 (2005).

[129] 3 DOCUMENTARY HISTORY, *supra* note __, at 200 (New York); 3 DOCUMENTARY HISTORY, *supra* note __, at 538-39; STEPHENS, *supra* note __, at 26-27.

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prescribe the Mode of Election" was necessary. Such a law would be "a deviation from the Constitution of the United States" and "inconsistent with the Public good."[130] In other words, the Council of Revision informed the New York legislature that when it came to choosing senators under Article I, Section 3, the legislature acted in its appointive rather than its legislative capacity. It need not—in fact, it must not—pass a law in this instance.

In sum, during the first federal elections, state legislatures differentiated between their differing functions in electing federal representatives. Acting in their appointive capacity, legislatures elected Senators on their own initiative. For presidential electors and members of the House of Representatives, however, they passed laws following their normal legislative procedures, subject to the oversight provided by other branches of government. Far from being independent, the legislatures operated within the constraints mandated by their individual state constitutions.

CONCLUSION

The notion propounded by the ISLT that a state legislature possesses authority separate from, or independent of, its state constitution is contrary to the Framers' understanding of constitutional government, diverges from a common reading of the Constitution during the founding era, and is contrary to the interpretation of the Elections Clauses at the time of the first federal elections. It has no basis in historical fact.

[130] 3 DOCUMENTARY HISTORY 538-539; STEPHENS, *supra* note __, at 26-27.

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Appendix 1. **FIRST STATE CONSTITUTIONS—1776-1798**

Source: Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge, LA: Louisiana State University Press, 1988), 104.

First Wave		Second Wave		Third Wave	
1776	New Hampshire	1777	New York	1789	Georgia
	South Carolina		Vermont	1790	South Carolina
	Virginia	1778	South Carolina		Pennsylvania
	New Jersey	1780	Massachusetts	1792	Delaware
	Maryland	1784	New Hampshire		Kentucky
	Delaware	1786	Vermont		New Hampshire
	Rhode Island			1793	Vermont
	Connecticut			1796	Tennessee
	Pennsylvania			1798	Georgia
	North Carolina				
1777	Georgia				

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