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The Independent State Legislature Doctrine, Federal Elections, and State Constitutions

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THE INDEPENDENT STATE LEGISLATURE DOCTRINE, FEDERAL ELECTIONS, AND STATE CONSTITUTIONS

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The U.S. Constitution does not confer authority to regulate federal elections on states as entities. Rather, it grants that authority specifically to the "Legislature" of each state. The "independent state legislature doctrine" teaches that a state constitution is legally incapable of imposing substantive restrictions on the authority over federal elections that the U.S. Constitution confers directly upon a state's legislature. Over the past 130 years, the U.S. Supreme Court has repeatedly adopted conflicting positions on this doctrine without recognizing its deep historical roots or normative justifications.

The independent state legislature doctrine reflects the prevailing understanding of states, Congress, and other actors in the nineteenth century. Throughout that period, the doctrine was consistently applied across a broad range of circumstances. It protects important structural considerations and is consistent with the political theory underlying the U.S. Constitution's election-related provisions. The U.S. Supreme Court could reincorporate the doctrine into modern American law with minimal disruption to either its precedents or state

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election systems. Moreover, the doctrine may present a potentially substantial obstacle to the use of state constitutions to combat partisan gerrymandering in congressional elections.

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I. INTRODUCTION

After decades of acknowledging the possibility that the U.S. Constitution may prohibit partisan gerrymandering,[1] the U.S. Supreme Court closed the door on such claims in *Rucho v. Common Cause*.[2] The *Rucho* Court held that partisan gerrymandering claims are nonjusticiable political questions under the U.S. Constitution.[3] In the wake of *Rucho*, many commentators have advocated turning to state constitutions to prevent states from engaging in partisan gerrymandering.[4]

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[1] *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."); *see also* Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018) (vacating the district court's judgment in a partisan gerrymandering case for lack of standing, while noting that the "contours and justiciability" of partisan gerrymandering claims "are unresolved"); *cf.* Davis v. Bandemer, 478 U.S. 109, 124 (1986) ("[W]e decline to hold that [partisan gerrymandering] claims are never justiciable."), *abrogated by* Rucho v. Common Cause, 139 S. Ct. 2484 (2019). Partisan gerrymandering is the adoption of congressional or legislative districts that have been intentionally drawn to achieve political goals, usually by increasing the number of a particular political party's candidates who are likely to be elected. *See* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 301–02 (1991) ("Gerrymandering, broadly speaking, is any manipulation of district lines for partisan purposes."). Some definitions require that the districts be irregularly or unusually shaped in order to qualify as a political gerrymander. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring) ("[G]errymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.").

[2] 139 S. Ct. 2484 (2019).

[3] *Id.* at 2506–07 ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.").

[4] *See, e.g.*, 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, 213 (2019) ("[R]eformers should instead follow the examples of Pennsylvania and North Carolina and turn to state courts and state constitutions to achieve their goals."); Charlie Stewart, *State Court Litigation: The New Front in the War Against Partisan Gerrymandering*, 116 MICH. L. REV. ONLINE 152, 158 (2018) (arguing that state court litigation under state constitutions is "an effective new strategy in the war against partisan gerrymandering due to the potentially positive results, the speed with which it takes place, broad applicability, and its insulation from Supreme Court review" (footnote omitted)); *see also* James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 887 (2006) ("In seeking solutions to the problems of gerrymandering, an examination of state constitutions has much to recommend it."); Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan*

As Justice Brennan and others have explained, state constitutions often provide greater protection for individual rights than the U.S. Constitution.[5] Many commentators view state constitutions as fertile sources of new voting-related rights because they typically contain election-related provisions that lack analogues in the U.S. Constitution.[6] For example, most state constitutions include clauses affirmatively establishing a right to

Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 ELECTION L.J. 264, 270 (2018) (predicting that "more challenges to partisan gerrymanders" will be "brought in state court" under state constitutional provisions); *cf.* G. Michael Parsons, *Partisan Gerrymandering Under Federal and State Law*, *in* AMERICA VOTES! CHALLENGES TO MODERN ELECTION LAW AND VOTING RIGHTS 277, 283 (Benjamin E. Griffith & John Hardin Young eds., 4th ed. 2020) (arguing that federal district court precedents concerning partisan gerrymandering "provide a rich and valuable resource for voters to leverage as they seek to vindicate their rights under state constitutional law").

[5] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."); *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 178 (2018) (arguing that state constitutional law claims should not be "second thought[s]" or "argument[s] of last . . . resort").

[6] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014) (outlining various voting protections and provisions found in state constitutions that are absent from the U.S. Constitution); Gardner, *supra* note 4, at 969 n.319 (noting that "many state constitutions have provisions requiring elections to be 'free,'" which are "potentially promising sources of political rights" (citations omitted)); Wang, *supra* note 4, at 236 (discussing various provisions in state constitutions that "may be used to regulate extreme partisan gerrymanders").

vote[7] or requiring that elections be "free and equal."[8] Many state constitutions also impose some general restrictions on congressional redistricting by requiring districts to be contiguous and compact, and political subdivisions to each be included within a single district, where possible.[9]

Dicta in *Rucho* mentions state constitutions as potential tools for combatting partisan gerrymandering,[10] though the opinion does not consider possible objections under the U.S. Constitution. A few state constitutions specifically prohibit partisan gerrymandering in congressional elections.[11] The Florida Supreme Court invoked one such provision to conclude that a partisan gerrymander violated the Florida Constitution.[12] Some state constitutions transfer authority over congressional redistricting from the institutional legislature to

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[7] The U.S. Constitution contains many amendments prohibiting the federal and state governments from denying people the right to vote on certain specified grounds, including race, sex, inability to pay a poll tax, and age for those eighteen or older. *See* U.S. CONST. amend. XV, § 1; *id*. amend. XIX; *id*. amend. XXIV, § 1; *id.* amend. XXVI, § 1; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (holding that poll taxes for state and local elections violate the Equal Protection Clause). Three other provisions affirmatively guarantee voting rights. Article I and the Seventeenth Amendment specify that anyone eligible to vote for the larger house of a state legislature is also entitled to vote for the U.S. House of Representatives and Senate, respectively. U.S. CONST. art. I, § 2, cl. 1; *id*. amend. XVII. And Section 2 of the Fourteenth Amendment provides that a state will suffer reduction in its representation in the U.S. House of Representatives and, by extension, the Electoral College, if it deprives adult citizens of the right to vote for reasons other than felony convictions. *Id*. amend. XIV, § 2; *see also* Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 282 (discussing Section 2's "express recognition of a right to vote" (footnote omitted)).

[8] *See* Douglas, *supra* note 6, at 144–49 (listing election-related provisions in state constitutions).

[9] *See* Gardner, *supra* note 4, at 889–90 (concluding that such state constitutional provisions "are not adequate to the task of restricting *partisan* gerrymandering because they do not speak to gerrymandering undertaken for partisan gain").

[10] Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019) (explaining how states "are actively addressing the issue" of partisan gerrymandering "on a number of fronts," including through state constitutional provisions).

[11] *See, e.g.*, 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 . . . ."). The Eleventh Circuit upheld this provision's validity against a challenge under the U.S. Constitution. *See* Brown v. Sec'y of State, 668 F.3d 1271, 1285 (11th Cir. 2012).

[12] League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015) (affirming the trial court's finding that the redistricting plan was motivated "by unconstitutional intent to favor the Republican Party and incumbents").

independent redistricting commissions.[13] In other states, such as Pennsylvania[14] and North Carolina,[15] courts have re-interpreted longstanding provisions of their state constitutions to prohibit partisan gerrymandering.

This Article contends that, although state constitutions may validly restrict states' power to politically gerrymander state and local legislative districts, they cannot limit a legislature's power to regulate most aspects of federal elections—including the legislature's authority to draw congressional district boundaries. The U.S. Constitution confers power to regulate congressional elections and select presidential electors specifically upon the "Legislature" of each state, not the state as an entity. 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," although Congress may "make or alter" such rules "at any time."[16] Similarly, the Presidential Electors Clause states, "Each State shall appoint, in such manner as the *Legislature* thereof may direct, a Number of Electors" to select the President.[17]

States lack inherent power to regulate federal elections, since the U.S. Constitution creates all federal offices.[18] Accordingly, the

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[13] *E.g.*, ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI, § 2; HAW. CONST. art. IV, §§ 2, 9; IDAHO CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; WASH. CONST. art. II, § 43; VA. CONST. art. II, §§ 6, 6-A; *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (upholding the constitutionality of Arizona's independent redistricting commission).

[14] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 801–02 (Pa. 2018) (holding that the state's redistricting plan violated the state constitution's "Free and Equal Elections Clause").

[15] *See* Harper v. Lewis, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122, at *8–9, 25 (N.C. Super. Ct. Oct. 28, 2019) (enforcing the North Carolina Constitution's Free Elections Clause by enjoining the defendants from administering the 2020 congressional elections using gerrymandered districts).

[16] U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

[17] *Id.* art. II, § 1, cl. 2 (emphasis added); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) (noting that the Elections Clause and Presidential Electors Clause are both "express delegations of power to the States to act with respect to federal elections").

[18] *See* Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [congressional] elections, including balloting, only within the exclusive delegation of power under the Elections Clause."); *Thornton*, 514 U.S. at 805 ("[T]he power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.").

Elections Clause and Presidential Electors Clause are the only sources of states' authority to conduct and regulate nearly all aspects of federal elections.[19] Because these provisions confer power over federal elections specifically upon state legislatures, state constitutions cannot restrict the scope of that authority.

This reading of the Constitution, known as the "Independent State Legislature Doctrine" (the doctrine),[20] has a long and largely overlooked history. The U.S. Supreme Court, several state supreme courts, and both chambers of Congress employed this doctrine during the nineteenth century.[21] 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 vice-president 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."[23]

Starting in the early twentieth century, however, state courts largely rejected the doctrine,[24] and the U.S. Supreme Court's

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[19] The Elections Clause and Presidential Electors Clause do not empower states to establish candidate qualifications for federal offices and give states very little direct control over voter qualifications for such offices, since those matters are governed by separate provisions of the Constitution. *See infra* Section II.A.

[20] Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 764–75 (2001) (discussing the doctrine's role in facilitating absentee voting in federal elections during the Civil War).

[21] *See infra* Parts III–V.

[22] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 754 n.1 (6th ed. 1890) (discussing the Elections Clause and Presidential Electors Clause).

[23] *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1). The doctrine was likewise discussed in the "influential election law treatise," *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1160 (2006), by George Washington McCrary, who had served as chair of the U.S. House Committee on Elections and as a judge on the U.S. Court of Appeals for the Eighth Circuit. *See* GEORGE WASHINGTON MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS §§ 109–12, at 81–84 (1875) (discussing authorities supporting the independent state legislature doctrine).

[24] *See, e.g.*, Brown v. Saunders, 166 S.E. 105, 107 (Va. 1932) (invalidating congressional districts adopted by the state legislature because they violated the state constitution's requirements concerning equality of population); Moran v. Bowley, 179 N.E. 526, 531–32 (Ill. 1932) (same); *In re* Opinion of the Justices, 107 A. 705, 706 (Me. 1919) (holding that the state constitution limits the state legislature's authority under the Presidential Electors Clause); *see also* Chase v. Lujan, 149 P.2d 1003, 1010–11 (N.M. 1944) (holding that the state

attitude toward it began to vacillate[25]—all without recognizing or grappling with the doctrine's history throughout the previous century. Some opinions issued in the course of resolving the dispute over the 2000 presidential election suggested that the Court might have been revitalizing the doctrine.[26] And 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.[27] But the

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constitution prevented the legislature from allowing absentee voting, including for federal offices); State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 536–37 (Mo. 1932) (holding that the legislature must act pursuant to the lawmaking process set forth in the state constitution, including the Governor's veto, when enacting statutes under the Elections Clause); State *ex rel.* Schrader v. Polley, 127 N.W. 848, 851 (S.D. 1910) (holding that a state law establishing congressional districts could be suspended by a public referendum); *cf. In re* Opinion to the Governor, 103 A. 513, 516 (R.I. 1918) (noting changing judicial views of the doctrine).

A few courts, however, continued to apply the doctrine. *See, e.g.*, State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 285–87 (Neb. 1948) (holding that the court need not consider whether state statutes establishing ballot-access requirements for presidential candidates violated the state constitution, because the state constitution does not apply to laws concerning the appointment of presidential electors); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (holding that the state constitution likely could not restrict the state legislature's power to allow absentee military voting in presidential elections); Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) ("We are not persuaded by the argument that the enactment of election laws, being an exercise of police power, is subject to [state] constitutional restrictions which prevent the Legislature from limiting the right of candidates to have their names on the general ballot. As has been shown, the Federal Constitution commands the state Legislature to direct the manner of choosing electors.").

[25] *See infra* Sections V.A–V.B.

[26] *See* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 77 (2000) (per curiam) (questioning "the extent to which the Florida Constitution could, consistent with [the Presidential Electors Clause], 'circumscribe the legislative power'" over presidential elections (citation omitted)); *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (noting that a legislature's power over the appointment of presidential electors "can neither be taken away nor abdicated" (quoting S. REP. NO. 43-395, at 9 (1874))); *id.* at 112–13 (Rehnquist, C.J., concurring) (explaining that, because state legislatures enact laws governing presidential elections under the Presidential Electors Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance").

[27] *See* Libertarian Party v. Dardenne, No. 08-582-JJB, 2008 U.S. Dist. LEXIS 137402, at *7–9 (M.D. La. Sept. 25, 2008) (holding that, where Hurricane Norman forced the Secretary of State's office to be closed on the statutory deadline for political parties to file their presidential candidates' ballot-access petitions, the Secretary violated the Presidential Electors Clause by unilaterally establishing a new deadline and excluding parties that did not meet it), *vacated as moot*, 308 F. App'x 861 (5th Cir. 2009) (per curiam); Libertarian Party

Court's 5–4 opinion in the 2015 case *Arizona State Legislature v. Arizona Independent Redistricting Commission* brusquely rejected the doctrine.[28]

The independent state legislature doctrine has likewise received scant academic attention. Attorney Hayward Smith published an article following the 2000 election largely disputing the doctrine's historical underpinnings.[29] His analysis led several commentators to reject the doctrine.[30] Professor Vikram David Amar, based on his own survey of the relevant history, agreed that federal constitutional provisions conferring power on state legislatures

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of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1011–13 (S.D. Ohio 2008) (holding that a directive concerning ballot-access requirements for minor parties issued by the Ohio's Secretary of State after a federal court invalidated the state's statutory requirements violated the Elections Clause and Presidential Electors Clause, because the legislature had not delegated its authority to promulgate such rules); *cf*. Moore v. Hosemann, No. 3:08cv573 TSL-JCS, 2008 U.S. Dist. LEXIS 141865, at *4 (S.D. Miss. Sept. 29, 2008) (holding that, although "federal courts will review state actions that are a significant departure from, or go beyond a fair reading of, state election laws[,] . . . the [Mississippi] Secretary of State's interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes"); Baldwin v. Cortes, No. 1:08-cv-01626, 2008 U.S. Dist. LEXIS 72035, at *7–12 (M.D. Pa. Sept. 12, 2008) (rejecting Presidential Electors Clause challenge because the Pennsylvania Secretary of State had statutory authority to execute a consent decree changing the deadline for candidates to file ballot-access petitions), *aff'd*, 378 F. App'x 135, 138–39 (3d Cir. 2010) (rejecting plaintiffs' constitutional challenge to "the Secretary's 1984 entry into the consent decrees" due to "the Pennsylvania legislature's explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme"). *But see* Largess v. Supreme Judicial Court, 373 F.3d 219, 227 (1st Cir. 2004) (noting the disagreement among the Justices in *Bush v. Gore* over whether the Presidential Electors Clause limits "the internal allocations of power in a state government").

[28] 576 U.S. 787, 816–19 (2015).

[29] *See generally* Smith, *supra* note 20; *see also* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 726–28 (2016) (discussing congressional election contests in which the doctrine was invoked); Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 355–67 (2003) (reviewing episodes in the doctrine's history).

[30] *See, e.g.*, Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001) ("[A]s a matter of historical practice, state legislatures were not understood at the time to be more 'independent' by virtue 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* Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1194 n.135 (2007) ("[T]here is no historical support for the significance of the language in Article II." (citing Smith, *supra* note 20, at 783–84)).

were "not designed to interfere with the preexisting control that people enjoyed over their state legislatures" through their state constitutions.[31] After conducting their own analysis of the doctrine and its history, Professor Nathaniel Persily and his co-authors concluded that the doctrine's "consequences would be both bizarre and disastrous."[32] Others have similarly expressed skepticism[33] or outright rejected the doctrine.[34]

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[31] 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, 1041, 1074 (2000) [hereinafter, Amar, *The People Made Me Do It*] (contending that Article V allows a state's citizens to prevent agency problems by restricting or directing the institutional legislature's actions concerning federal constitutional amendments); *see also* Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631, 641 (2008) (presenting a condensed version of the argument that a state's citizens may use the initiative process to change a winner-take-all system for allocating presidential electors among presidential candidates to a district-based system).

[32] 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).

[33] *See* David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) ("Determining the ways in which a state constitution may and may not limit the legislature's decisions about presidential electors will . . . be a difficult and complex task."); *cf.* 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) (noting that "there are reasonable policy arguments to be made on both sides of th[e] question" of whether the term "Legislature" in the Presidential Electors Clause includes the initiative process).

[34] *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) (commenting on the dearth of historical evidence that the Framers intended to adopt the independent state legislature doctrine); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2001) (arguing that the independent state legislature doctrine "does not rest on firm foundations of text, precedent, or history"); Zipkin, *supra* note 29, at 354 (arguing, based on U.S. Supreme Court precedent, that state constitutions limit state legislatures' exercise of the power they receive from the U.S. Constitution when they are not acting as agents of the federal government). As discussed later, *see infra* notes 422–423, 533–534 and accompanying text, the Court and some commentators have gone so far as to conclude that a state constitution may redefine what constitutes a state "Legislature," so that laws or state constitutional amendments regulating federal elections may be enacted through public initiatives without the institutional legislature's involvement. *See, e.g.*, David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG.

This Article makes three contributions to the literature. First, it presents a competing, comprehensive historical analysis of the independent state legislature doctrine as applied throughout the nineteenth century, including several examples of the doctrine that have never before been identified in the literature or caselaw. Second, building on my previous work,[35] this Article offers an in-depth defense of the doctrine.[36] It demonstrates that the

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575, 599 (2006) ("[T]he better answer is to regard ballot initiatives as a constitutional exercise of a state's legislative power under Article II, Section 1.").

[35] *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 868 (2015) [hereinafter Morley, *Intratextual Independent "Legislature"*] ("The legislature, as referenced in [the Elections Clause and Presidential Electors Clause], is the state's general lawmaking body, and its power under the federal Constitution to regulate federal elections may not be reduced or withdrawn by state constitutions."); Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 204 (2014) [hereinafter Morley, *State Constitutions*] (concluding that "state constitutional provisions may not be used as the basis for invalidating state laws as they apply to federal elections").

[36] James C. Kirby, former Chief Counsel to the U.S. Senate Judiciary Committee's Subcommittee on Constitutional Amendments, published a brief defense of the independent state legislature doctrine over a half-century ago. *See* James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 501 (1962) (concluding that "it appears . . . the legislature is free of state constitutional limitations" when regulating presidential elections). Several commentators have adopted Kirby's analysis. *See, e.g.*, Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 834 (2001) ("The state constitution may make the ordinary procedures for the enactment of legislation applicable to the legislature's determination of the manner in which members of Congress are chosen or electors are appointed, but it may not restrict the manner of appointment that the legislature selects."); *Voting Rights—Residence Requirements for Voting in Presidential Elections*, 18 VAND. L. REV. 337, 342 (1964) ("It seems safe to conclude that the choosing of presidential electors is within the power of the state legislatures, in whatever manner they deem proper, and that this power is not limited by state constitutional provisions . . . ."); *Recent Statute*, 77 HARV. L. REV. 574, 578 (1964) ("[I]t seems safe to conclude that article II, section 1, grants to state legislatures plenary power to set suffrage qualifications."). Other pieces have affirmed the doctrine in passing while focusing on other topics. *See* Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 740 (1917) ("[T]he power and discretion . . . to provide the manner in which the presidential electors shall be chosen is derived solely from the Constitution of the United States, and no state constitution can restrict the execution of such power."); Emory Widener, Jr., Note, *The Virginia Absent Voters System*, 8 WASH. & LEE L. REV. 36, 37 (1951) (stating that the Elections Clause and Presidential Electors Clause "serve[] to protect absent voters statutes from restrictive regulations in state constitutions" (citing Commonwealth v. O'Connell, 181 S.W.2d 691 (Ky. 1944))); Joseph R. Wyatt II, *The Lessons of the Hayes-Tilden Election Controversy: Some Suggestions for Electoral College Reform*, 8 RUTGERS-CAMDEN

independent state legislature doctrine is consistent not only with historical practice, but the structure and political theory underlying the Constitution, as well.[37] Finally, this piece identifies various ways in which the U.S. Supreme Court may resuscitate the doctrine while preserving many precedents that appear to be in tension with it.

Part II of this Article begins by introducing the independent state legislature doctrine in greater depth. It then explores the development of the constitutional provisions that give rise to the doctrine: the Elections Clause and the Presidential Electors Clause. After tracing the evolution of these provisions during the Constitutional Convention, this Part examines the normative justifications for their delegations of authority specifically to state legislatures.

The following two Parts discuss how the doctrine was applied throughout the nineteenth century. Part III analyzes the doctrine's impact at the state level. Justice Joseph Story and Daniel Webster invoked the doctrine at the Massachusetts Constitutional Convention of 1820, convincing delegates that including restrictions on congressional redistricting in the Massachusetts Constitution would violate the U.S. Constitution.[38] State supreme courts also applied the doctrine when enforcing state laws governing congressional elections that violated state constitutional provisions.[39] Part IV turns to Congress, exploring how both the U.S. House and Senate embraced the doctrine when resolving election contests and crafting legislation.

Part V contrasts this nineteenth century history with the U.S. Supreme Court's vacillating attitude toward the independent state

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L.J. 617, 624 n.30 (1977) ("[A] state constitution may not circumscribe the legislature's range of choice."). One student note purportedly embraces the doctrine, but then suggests that state constitutions may impose various restrictions on federal elections. *See* Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 87, 89–90 (1937) (stating that "not even the provisions of the state constitutions can limit the state legislatures," but then concluding that state constitutional provisions creating voting rights prevent state legislatures from enacting unreasonable election regulations).

[37] This piece complements Professor Muller's work, which concluded that "the historical understanding of the power of the 'Legislature' precluded a delegation of its power to another entity." Muller, *supra* note 29, at 718.

[38] *See infra* Section III.A.

[39] *See infra* Sections III.B–III.D.

legislature doctrine. The Court endorsed the doctrine in 1892 in *McPherson v. Blacker*,[40] as well as in decisions regarding the disputed 2000 presidential election.[41] A contrasting line of precedents, culminating in the Court's 2015 ruling in *Arizona Independent Redistricting Commission*, rejects the doctrine.[42] This Part analyzes how the modern Court could implement the doctrine, even without overruling most of its contrary precedents. Part VI briefly concludes.

II. THE INDEPENDENT STATE LEGISLATURE DOCTRINE

A. THE DOCTRINE AND ITS LIMITS

States lack inherent power to regulate federal elections.[43] The only authority they have over such elections comes from the U.S. Constitution, which created federal offices and specifies how they are to be filled.[44] But the Constitution does not grant authority over federal elections to states as entities. Rather, the Elections Clause and Presidential Electors Clause confer the power to regulate the "[m]anner" in which Representatives, Senators, and presidential electors are chosen specifically upon the "Legislature" of each state.[45]

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[40] 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the [Presidential Electoral Clause] has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

[41] *See supra* note 26.

[42] 576 U.S. 787, 813–23 (2015).

[43] *See supra* notes 18–19 and accompanying text.

[44] *See id.*

[45] U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. The Elections Clause expressly allows Congress to "make or alter" rules concerning congressional elections "at any time . . . except as to the Places of [choosing] Senators." *Id.* art. I, § 4, cl. 1. The Presidential Electors Clause lacks such language. *See* McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes . . . but otherwise the power and jurisdiction of the State is exclusive . . . ."). The Court has held, however, that Congress's authority over presidential and congressional elections is coextensive. *See* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) (explaining that Congress has "very broad authority to prevent corruption in national Presidential elections"); Oregon v. Mitchell, 400 U.S. 112, 124 n.7 (1970) (plurality opinion) ("[T]his Court . . . [has] upheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, § 1,

The U.S. Supreme Court has held that these provisions delegate sweepingly broad authority. The "comprehensive words" of the Elections Clause, for example:

> 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.[46]

Likewise, the Presidential Electors Clause grants state legislatures "plenary" power over the selection of presidential electors.[47]

Together, these provisions give state legislatures far-reaching authority to regulate federal elections. The independent state legislature doctrine provides that a state constitution cannot legally limit that authority or prohibit the state legislature from exercising it in certain ways. Commentators such as Professor Nate Persily object that recognizing the doctrine today would be tremendously destabilizing, freeing legislatures from a wide range of state constitutional constraints.[48] Even under the independent state legislature doctrine, however, legislatures' authority to regulate federal elections would remain subject to numerous important constraints.

First, the Court has held that the Elections Clause contains implicit limitations on the power it conveys. It does not empower states to adopt laws that "dictate electoral outcomes, . . . favor or

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that would have curtailed the power of Congress, to regulate such elections." (citation omitted)); Burroughs v. United States, 290 U.S. 534, 545 (1934) (holding that Congress has power to "safeguard" the election of presidential electors "from the improper use of money to influence the result").

[46] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[47] Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

[48] Persily et al., *supra* note 32, at 708 (stating that the doctrine would roll back "all state laws or constitutional provisions regulating federal elections that were passed by initiative or by a state constitutional convention").

disfavor a class of candidates, or . . . evade important constitutional restraints."[49] The Court applied this principle in *Cook v. Gralike*, holding that states may not "disadvantage" certain congressional candidates by specifying on the ballot whether they complied, or promised to comply, with voter instructions regarding congressional term limits.[50]

Second, other constitutional provisions impose express restrictions on the scope of the Elections Clause and Presidential Electors Clause. The legislature's power to regulate the "manner" of federal elections does not enable it to establish qualifications for candidates in either congressional or presidential elections, or for voters in congressional elections, since those matters are expressly governed by other constitutional provisions. Article I specifies the age, citizenship, and residency requirements for Representatives and Senators.[51] Similarly, Article II provides that a person must be a "natural born citizen," at least thirty-five years old, and a resident of the United States for at least fourteen years to be eligible to serve as President.[52] The U.S. Supreme Court has held that neither

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[49] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995); *see also* Cook v. Gralike, 531 U.S. 510, 523 (2001) (reaffirming the existence of implicit limitations on the Elections Clause's grant of authority to state legislatures); Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting that states may enact "generally applicable and evenhanded restrictions that protect the integrity and reliability of the [federal] electoral process itself").

[50] *Cook*, 531 U.S. at 525; *see also id.* at 526 (concluding that the Elections Clause did not permit the state's use of ballot notations to "attempt to 'dictate electoral outcomes'" (quoting *Thornton*, 514 U.S. at 833–34)).

[51] A member of the House of Representatives must be at least twenty-five years old, have been a U.S. citizen for at least seven years, and "be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. Similar requirements apply to Senators, except they must be at least thirty years old and have been a U.S. citizen for at least nine years. *Id.* art. I, § 3, cl. 3.

[52] *Id.* art. II, § 1, cl. 5.

Congress[53] nor states[54] may impose additional qualifications for federal candidates.

Likewise, the Voter Qualifications Clause and Seventeenth Amendment specify that, to be qualified to vote for Representatives and Senators, a person "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[55] These provisions guarantee that anyone entitled to vote for the larger chamber of the state legislature may also vote for Congress.[56] Neither the Elections Clause nor any other provision of the U.S. Constitution authorizes state legislatures to directly alter these requirements.[57] An initial draft of the U.S. Constitution would have granted state legislatures the authority to establish voter qualifications for House elections, but the Framers rejected that proposal.[58]

Each state as an entity (i.e., not just the legislature) has inherent sovereign power to determine who is qualified to vote for state legislators and other state officials,[59] subject to federal

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[53] *See Thornton*, 514 U.S. at 832 ("[T]he Framers were particularly concerned that a grant to Congress of the authority to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance."); Powell v. McCormack, 395 U.S. 486, 522 (1969) (holding that a chamber of Congress's authority as the sole judge of its members' elections, qualifications, and returns does not allow it to adopt additional qualifications for membership).

[54] *See Thornton*, 514 U.S. at 836 ("[I]f the qualifications for Congress are fixed in the Constitution, then a state-passed measure with the avowed purpose of imposing indirectly such an additional qualification violates the Constitution.").

[55] U.S. CONST. art. I, § 2, cl. 1; *accord id*. amend. XVII.

[56] *See Ex parte* Yarbrough, 110 U.S. 651, 663 (1884) (holding that states "define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State").

[57] *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause . . . ." (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

[58] *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS] (reprinting a proposed constitutional provision stating, "The Qualifications of the Electors shall be . . . prescribed by the Legislatures of the several States; but their provisions . . . concerning them may at any Time be altered and superseded by the Legislature of the United States").

[59] *See* Taylor v. Beckham, 178 U.S. 548, 570–71 (1900) ("It is obviously essential to the independence of the States . . . that their power to prescribe . . . the manner of [state officials'] election . . . should be exclusive, and free from external interference, except so far as plainly

constitutional restraints.[60] States typically list the voter eligibility requirements for state offices in their constitutions.[61] Any power that a state legislature possesses over voter qualifications for state offices stems from the state constitution—not the U.S. Constitution—and is therefore subject to any constraints the state constitution may impose. By virtue of the Voter Qualifications Clause and the Seventeenth Amendment, state constitutional provisions establishing voter qualifications for state legislatures indirectly establish voter qualifications for Congress, too. Recognizing this limit on the independent state legislature doctrine, the chambers of Congress consistently enforced state constitutional restrictions concerning voter qualifications throughout the nineteenth century.[62] In short, the U.S. Constitution does not

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provided by the Constitution of the United States."); *see also* Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (recognizing the states' inherent authority, reflected in the Tenth Amendment, over the selection of their officials).

[60] *See infra* notes 63–68 and accompanying text.

[61] *See, e.g.*, FLA. CONST. art. VI, § 2 ("Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.").

[62] *See* DELANO VS. MORGAN, H.R. REP. NO. 40-42, at 1–2 (1868) (concluding that a state may enforce a state constitutional provision establishing U.S. citizenship as a "qualification[] for an elector"), *resolution proposed by committee report adopted*, CONG. GLOBE, 40th Cong., 2d Sess. 2809–10 (1868); JAMES H. BURCH, H.R. REP. NO. 40-4, at 5 (1867) (concluding that the U.S. Constitution did not prohibit a state constitutional provision that deemed "all persons who could not take the prescribed [loyalty] oath" ineligible to vote), *resolutions proposed by committee report adopted*, CONG. GLOBE, 40th Cong., 2d Sess. 403 (1868); Letcher v. Moore, 23rd Cong. (1833), *in* 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE § 54, at 41 (1907) [hereinafter HINDS' PRECEDENTS] (noting that "[t]he State constitution . . . allowed every male over the age of 21 to vote in the county where he was actually residing, provided he had resided in the State two years"); *see also* JOSHUA E. WILSON V. JOHN MCLAURIN, H.R. REP. NO. 54-1566, at 2, 4 (1896) (relying on a state constitutional provision to determine who qualified as eligible voters), *resolutions proposed by committee report adopted without debate*, 28 CONG. REC. 4673 (1896); THRASHER V. ENLOE, H.R. REP. NO. 53-842, at 5–6 (1894) (enforcing both a state constitutional provision making payment of a poll tax a voter qualification, as well as a state statute requiring voters to prove in a particular manner that they paid the tax), *resolutions proposed by committee report adopted without debate*, 26 CONG. REC. 7255 (1894); JOHN CESSNA V. BENJAMIN F. MEYERS, H.R. REP. NO. 42-11, at 1–2 (1872) (discussing a provision of the Pennsylvania Constitution concerning the qualifications of voters, particularly residency inside the election district), *resolution proposed by committee report adopted*, CONG. GLOBE, 42d Cong., 2d Sess. 1610–11 (1872).

empower legislatures to impose either candidate qualifications for any federal office or voter qualifications for congressional elections.

Third, laws enacted by state legislatures pursuant to either the Elections Clause or Presidential Electors Clause are subject to the restrictions of both the U.S. Constitution[63] and federal statutes. For example, the Fifteenth,[64] Nineteenth,[65] and Twenty-Sixth[66] Amendments prohibit the federal and state governments from discriminating based on race, sex, or age (for those over eighteen years old) with regard to the right to vote. The Twenty-Fourth Amendment prohibits poll taxes for federal elections.[67] Legislatures are also subject to due process and equal protection constraints when regulating federal elections.[68] Additionally, Congress itself retains plenary authority to directly regulate federal elections or to "alter"[69] any rules that a legislature adopts.[70] Thus, while the Elections Clause and Presidential Electors Clause permit state legislatures to regulate federal elections without state

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[63] *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968) (rejecting the notion that the Presidential Electors Clause "gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions").

[64] U.S. CONST. amend. XV, § 1.

[65] *Id.* amend. XIX.

[66] *Id.* amend. XXVI, § 1.

[67] *Id.* amend. XXIV, § 1; *cf.* Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (holding that the Equal Protection Clause prohibits poll taxes for state and local elections).

[68] It is debatable whether these constraints arise from the Fourteenth Amendment, which typically governs states, U.S. CONST. amend. XIV, § 1, or the parallel restrictions in the Fifth Amendment, *id.* amend. V, which generally constrains powers granted by the U.S. Constitution. Since the U.S. Supreme Court has interpreted the Fifth Amendment's Due Process Clause as providing the same protections as the Fourteenth Amendment, despite the provisions' linguistic differences, the analysis and outcome are substantively the same either way. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

[69] U.S. CONST. art. I, § 4, cl. 1.

[70] Even though the Presidential Electors Clause lacks comparable language, the U.S. Supreme Court has read it *in pari materia* with the Elections Clause, concluding that the scope of Congress's power over congressional and presidential elections is identical. *See* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 109 (2017) (noting that the Court has not "recognize[d] any difference between Congress's power over congressional elections and its power over presidential elections"); *see also supra* note 45 and accompanying text.

constitutional constraints, state legislatures remain bound by a wide range of explicit and implicit limitations stemming from both the U.S. Constitution and Congress.

B. THE DOCTRINE'S NUANCES

The independent state legislature doctrine raises three conceptually distinct questions about the relationship among the U.S. Constitution, state constitutions, and federal elections—though the doctrine does not require any particular resolution of these issues.

First, is the meaning of the U.S. Constitution's references to the state "legislature" a matter of federal or state constitutional law? The term might be defined under federal constitutional law, based on its plain meaning, as referring exclusively to institutions conventionally and historically understood as legislatures: multi-member bodies comprised of elected members that possess general lawmaking authority over a state and periodically convene and recess.[71] Under this approach, a state-level entity or process that does not satisfy these minimum requirements would not qualify as a "legislature" and therefore could not regulate federal elections. This interpretation would preclude the people of a state from adopting election-related rules or redistricting requirements through public initiatives and referenda.[72] It would likewise

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[71] *See* Morley, *Intratextual Independent "Legislature," supra* note 35, at 856 ("[E]very [constitutional] clause that gives some insight into the nature of a legislature uses the term to refer 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.").

[72] *See, e.g.*, 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) ("[T]he use of a ballot initiative is an unconstitutional means by which to alter the method of selecting electors." (footnote omitted)); Michael McLaughlin, Note, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943, 2947 (2008) ("Article II should be read to exclude a state from directing the manner of appointment by popular initiative.").

prohibit states from granting final authority over such matters to entities such as independent redistricting commissions.[73]

Alternatively, one may read the Elections Clause and Presidential Electors Clause as referring to any entity or lawmaking process that a state constitution recognizes or designates as the state "legislature."[74] The U.S. Supreme Court has applied this interpretation throughout much of the twentieth century, and most recently reaffirmed it in the 2015 case *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[75] That case allows states to grant independent commissions created through a public initiative process sole responsibility for drawing congressional districts, completely stripping the institutional state legislature of any authority over the matter.[76]

The text of the U.S. Constitution, the history of the Elections Clause and Presidential Electors Clause,[77] and the logic of the independent state legislature doctrine all strongly support the plain-meaning interpretation of "Legislature." Under that interpretation, only a state's institutional legislature may regulate federal elections. The Elections Clause allows state legislatures to regulate the "Times, Places and Manner" of federal elections, while allowing Congress to "make or alter" such rules, "except as to the Places of chusing Senators."[78] The Constitutional Convention

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[73] *See* Morley, *Intratextual Independent "Legislature," supra* note 35, at 863 ("[T]he best reading of the word legislature as it appears throughout the Constitution . . . is that it . . . cannot extend to other entities such as independent redistricting commissions.").

[74] *See, e.g.*, Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (holding that a state's voters may use a public referendum to reject a congressional redistricting plan adopted by the state legislature, because a state may "include the referendum in the scope of the legislative power"); *cf.* Smiley v. Holm, 285 U.S. 355, 368 (1932) (holding that the Elections Clause does 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 that laws shall be enacted").

[75] 576 U.S. 787 (2015).

[76] *Id.* at 813 (holding that the Elections Clause does not "preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts"). For an analysis of *Arizona Independent Redistricting Commission*'s impact on Elections Clause jurisprudence, see generally Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016).

[77] *See infra* Section II.C.

[78] U.S. CONST. art. I, § 4, cl. 1.

included that exception to ensure that state legislatures could convene at "the seats of Govt [government] in the States" to choose Senators.[79] This proviso in the Elections Clause suggests that its reference to the "Legislature" refers to the institutional state legislature, which typically conducts its business in the state capitol.

Perhaps more importantly, most other mentions of the term "legislature" throughout the Constitution expressly refer to a state's institutional legislature.[80] The Constitution contemplates that a legislature is an entity comprised of multiple[81] elected[82] members[83] that may periodically meet[84] and recess.[85] And Article I, § 3 unquestionably empowered each state's institutional "legislature," as distinct from the people of the state, to choose its U.S. Senators.[86]

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[79] 2 FARRAND'S RECORDS, *supra* note 58, at 613; *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 826, at 292 (1833) ("The choice is to be made by the state legislature; and it would not be either necessary, or becoming in congress to prescribe the place, where it should sit."). During the Virginia ratifying convention, James Madison explained, "[T]he reason of the exception was, that, if Congress could fix the place of choosing the senators, it might compel the state legislatures to elect them in a different place from that of their usual sessions, which would produce some inconvenience, and was not necessary for the object of regulating the elections." *The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution* (June 14, 1788) (statement of Madison), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 366 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT'S DEBATES].

[80] Morley, *Intratextual Independent "Legislature," supra* note 35, at 855–56; *see* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (referencing the Constitution's "seventeen provisions referring to a State's 'Legislature'").

[81] U.S. CONST. art. I, § 2, cl. 1 (discussing "the most *numerous* Branch of the State Legislature" (emphasis added)); *accord id*. amend. XVII.

[82] *Id.* art. I, § 2, cl. 1 (discussing "Electors" for state legislatures); *accord id*. amend. XVII.

[83] *Id.* art. VI, cl. 3 ("[T]he members of the several State Legislatures . . . shall be bound by Oath or Affirmation . . . .").

[84] *Id.* art. I, § 3, cl. 2 (specifying that a temporary appointment to the U.S. Senate shall last "until the next Meeting of the Legislature"); *id*. art. IV, § 4 (allowing a state Executive to request federal assistance against "domestic Violence" when "the Legislature cannot be convened").

[85] *Id.* art. I, § 3, cl. 2 (discussing the state Executive's power to fill U.S. Senate vacancies that "happen . . . during the Recess of the Legislature").

[86] *Id.* art. I, § 3, cl. 1 (specifying that a state's U.S. Senators shall be "chosen by the Legislature thereof"); *see also* Morley, *Intratextual Independent "Legislature," supra* note 35,

This was also how every Founding Era state constitution that used the term "legislature" employed it.[87]

Necessity might require us to interpret the term "legislature" in the Elections Clause and Presidential Electors Clause more broadly if a state engaged in radical experimentation—for example, by abolishing its institutional legislature and moving to a system of pure direct democracy.[88] Within the realm of realistic possibilities, however, a plain-meaning interpretation of those clauses would not allow a state that retains its traditional institutional legislature to assign ultimate authority over the regulation of federal elections to some other entity.[89] Having said that, the independent state legislature doctrine would technically be compatible with the broader interpretation of the term "legislature," too. Under this alternate possible reading, the state constitution could designate a particular entity or process as the "legislature" for the purpose of regulating federal elections, but the state constitution would be unable to impose substantive restrictions on the scope of its power under the Elections Clause and Presidential Electors Clause.

Second, may a state constitution regulate the process or procedure that the "legislature"—however that term is defined—must use to enact laws governing federal elections? For example, may a state constitution allow the state's governor to veto legislation concerning federal elections? On one hand, because the U.S. Constitution confers power to regulate federal elections

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at 858–59 (discussing evidence from the Constitutional Convention that the Framers empowered a state's institutional legislature to appoint its U.S. Senators).

[87] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 828 (2015) (Roberts, C.J., dissenting) ("[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." (alteration in original) (quoting Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 147 & n.101 (2015))).

[88] *See* Amar, *The People Made Me Do It*, *supra* note 31, at 1065 (discussing this hypothetical). Abolishing an institutional legislature would raise serious questions under the Guarantee Clause. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."); *cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916) (holding that a state constitutional provision allowing the state's electorate to reject a state law through a public referendum does not violate the Guarantee Clause).

[89] *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 842 (Roberts, C.J., dissenting) ("The majority's contrary understanding requires it to accept a definition of 'the Legislature' that contradicts the term's plain meaning . . . .").

exclusively upon the state legislature, other organs of state government, like the governor, arguably may not participate in that process. Alternatively, the U.S. Constitution may allow state legislatures to regulate federal elections without displacing the ordinary lawmaking processes set forth in state constitutions.

The U.S. Supreme Court has long adopted this latter conception, recognizing the authority of state governors to veto laws governing federal elections to the same extent the state constitution allows them to veto other enactments.[90] The independent state legislature doctrine appears largely agnostic on this issue. Indeed, a nineteenth century precedent in which the U.S. House embraced the doctrine concluded that an institutional legislature must adhere to the ordinary lawmaking procedure set forth in the state constitution.[91]

Third, must courts apply a super-strong plain meaning approach when construing state laws regulating federal elections, or may they interpret such measures the same way they would any other state law, potentially taking into account state constitutional principles and the court's own precedents? In the cases concerning the 2000 presidential election, the U.S. Supreme Court suggested that courts must place special emphasis on the text of state laws that a legislature enacts under the Presidential Electors Clause to regulate presidential elections.[92]

Some commentators agree with the approach set forth in *Bush v. Palm Beach County Canvassing Board*[93] and the three-Justice concurrence in *Bush v. Gore*.[94] Others maintain that federal courts

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[90] Smiley v. Holm, 285 U.S. 355, 372–73 (1932) ("[T]here is nothing in [the Elections Clause] 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.").

[91] *See infra* note 226 and accompanying text.

[92] *See* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam) (suggesting that, because state legislatures act "by virtue of a direct grant of authority" from the U.S. Constitution when regulating "the selection of Presidential electors," the "general rule" requiring the U.S. Supreme Court to "defer[] to a state court's interpretation of a state statute" is inapplicable to such laws); *see also* Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring) (stating that, for a statute that a legislature enacts under the Presidential Electors Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance").

[93] 531 U.S. at 76.

[94] *Bush*, 531 U.S. at 111–12 (Rehnquist, C.J., concurring); *see* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1262 (2002) ("Whatever authority there

may overrule a state court's construction of a state law governing presidential elections only in the most extreme cases,[95] while yet other scholars contend that courts should construe laws governing federal elections the same way they would any other state statute.[96] Professor Rick Hasen suggested that "reasonable jurists will differ" over this issue.[97] He has also argued, however, that federal and state courts may apply a "Democracy Canon," requiring them to construe laws governing federal elections in favor of allowing candidates to appear on the ballot, people to cast votes, and disputed ballots to be counted, even when such outcomes are contrary to the plain meaning of a statute.[98]

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might be for a state court to ignore the legislature's directions in other contexts, Article II of the Constitution appears on its face to forbid such judicial reshaping of the law in connection with the appointment of presidential electors."); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, 68 U. CHI. L. REV. 657, 663 (2001) ("[T]here is a constitutionally-based federal interest in ensuring that state executive and judicial branches adhere to the rules for selecting electors established by the legislature, and do not use their interpretive and enforcement powers to change the rules after the fact."); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 30 ("Article II may reasonably be interpreted as federalizing disputes over whether the authority thus granted to state legislatures has been usurped by another branch of state government."); *see also* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 155–56 (2001) (concluding that, because Article II designates the legislature as "the site within state government of the power to appoint electors," courts may not use their "power to fill statutory gaps and resolve statutory ambiguities" to instead re-write state laws governing presidential elections).

[95] *See, e.g.*, 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, 620 (2001) (opining that a federal court may review a state court's "gross deviation from the legislature's directives" in a state statute governing federal elections); Friedman, *supra* note 36, at 841 (arguing that Article II allows a federal court to reject state courts' constructions of state laws governing presidential elections only if they are "clearly implausible," determined relative to how "the law stood on Election Day").

[96] *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, 98 (2002) (arguing that the Presidential Electors Clause might not require special deference to state legislatures, but instead could require state courts to interpret state law based on "the usual interplay of state statutes, the state constitution, and judicial interpretations"); Schapiro, *supra* note 34, at 678 (arguing that "no federal interests justify the . . . intrusive federal intervention" of U.S. Supreme Court review of state courts' interpretations of election statutes).

[97] Hasen, *supra* note 33, at 601.

[98] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 113–14 (2009) ("[C]ourts should reject arguments that reliance on the Democracy Canon raises Article I or Article II concerns."). The U.S. Supreme Court has rejected invitations to specifically address this issue.

Regardless of how one resolves these ancillary issues, the core of the independent state legislature doctrine remains: a state legislature may regulate the manner in which federal elections are held, except for issues relating to candidate qualifications and, for congressional elections, voter qualifications. When exercising this authority, the legislature is subject to the implied internal restrictions of the Elections Clause and Presidential Electors Clause themselves, as well as explicit federal constitutional restrictions such as due process, equal protection, and the voting rights amendments. State constitutions, however, may not impose additional substantive restrictions on the scope of legislatures' authority over federal elections.

C. DEVELOPMENT OF THE ELECTIONS CLAUSE AND PRESIDENTIAL ELECTORS CLAUSE

The history of the Elections Clause and Presidential Electors Clause is silent on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections. The only definite conclusion that can be drawn is that the Framers specifically chose to vest power over federal elections with institutional state legislatures, rather than directly with the people themselves. The drafting history of these provisions is therefore inconsistent with the U.S. Supreme Court's interpretation of the term "legislature" as including public referenda or initiatives.[99] Otherwise, it neither bolsters nor undermines the case for the independent state legislature doctrine. The fact that the Framers may not have expressly discussed a particular application or consequence of the U.S. Constitution's language, however, does not change either the original public meaning of that language or the reasonable implications that may be drawn from it.

See, e.g., Marks v. Union Cty. Democratic Comm., 541 U.S. 937 (2004) (mem.) (denying certiorari); Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002) (mem.) (denying certiorari).

[99] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015) (holding that congressional "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, 569 (1916) (holding that the Elections Clause does not prevent a state's voters from using the public referendum process to reject congressional redistricting plans adopted by the state legislature).

1. The Elections Clause. At the Constitutional Convention, Edmund Randolph's initial resolutions concerning Congress specified that members of the first chamber would be elected by the people.[100] An early draft of the Constitution compiled by the Committee on Detail stated that elections for the first house of the national legislature "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."[101] The places for such elections "shall be fixed by the (national) legislature*s* from time to time, or on their default by the national legislature."[102] The Committee considered including a provision that votes be given "by ballot, unless 2/3 of the national legislature shall choose to vary the mode," but deleted it.[103] Finally, the draft provided that "*the legislature of* Each state shall (send) *appoint* two (members) senators using their discretion as to the time and manner of choosing them."[104] This precursor treats the "legislature" that appoints U.S. Senators as the same entity that may determine the time and manner for such appointments. It supports the notion that the term "Legislature" means the same thing in both Article I, § 3, which allows the state legislature to appoint the state's U.S. Senators,[105] and the Elections Clause, which grants the legislature authority over the time, place, and manner of Senate elections.

The Convention did not debate any of these provisions. The next draft condensed them together, stating, "The Times and Places and the Manner of holding the Elections (for) *of* the Members of each House shall be prescribed by the Legislatures of each State; but their Provisions concerning them may, at any Time, be altered and

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[100] *See* 1 FARRAND'S RECORDS, *supra* note 58, at 20 (quoting Randolph's proposed resolution "that the members of the first branch of the National Legislature ought to be elected by the people of the several States").

[101] 2 FARRAND'S RECORDS, *supra* note 58, at 139. The original document was "in the handwriting of Edmund Randolph." *Id.* at 137 n.6. Text that appears "in parentheses [was] crossed out in the original," and text in "italics represent[s] changes made in Randolph's handwriting." *Id.*

[102] *Id.* at 139.

[103] *Id.*

[104] *Id.* at 141.

[105] U.S. CONST. art. I, § 3, cl. 1 (stating that U.S. Senators "shall be . . . chosen by the Legislature" of each state).

superseded by the Legislature of the United States."[106] After minor amendments,[107] the Elections Clause assumed its current form.

The *Letters from a Federal Farmer*, published during the ratification debates, interpreted the Elections Clause as referring to institutional state legislatures.[108] The *Letters* refer to legislatures as being elected on a yearly basis, and discuss whether the chambers of a legislature comprised of "two branches" would vote separately when appointing a U.S. Senator, or instead meet together in joint session and hold a single vote.[109] Chancellor James Kent's *Commentaries on American Law* similarly explains that the Elections Clause refers to the state legislature "in the true technical sense, being the two houses acting in their separate and organized capacities."[110]

The *Federalist Papers* and Justice Joseph Story's *Commentaries on the Constitution* set forth the Framers' rationale for the Elections Clause. They explain that the Constitution could have allocated power to regulate federal elections in three ways: "wholly in the national legislature; or wholly in the state legislatures; or primarily in the latter, and ultimately in the former."[111] The third option was best because it left primary responsibility with state legislatures, yet allowed Congress to prevent abuse that would "hazard the safety and permanence of the Union."[112] Expanding upon this

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[106] 2 FARRAND'S RECORDS, *supra* note 58, at 155; *accord id.* at 165.

[107] *See id.* at 229, 567, 613.

[108] Letter XII from the Federal Farmer to the Republican (Jan. 12, 1788), *in* AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 100, 110 (Quadrangle Books, Inc. 1962) (1788) (arguing that election regulation "ought to be left to the state legislatures," which are "far nearest to the people").

[109] *Id.* at 109–10.

[110] 1 CHANCELLOR JAMES KENT, COMMENTARIES ON AMERICAN LAW 261–62 (John M. Gould ed., 14th ed. 1896); *see also id.* at 261 ("[Senators] were to be *chosen by the legislatures*, and the legislature was to prescribe the times, places, and manner of holding elections for senators . . . .").

[111] 2 STORY, *supra* note 79, § 814, at 281; *accord* THE FEDERALIST NO. 59, at 326 (Alexander Hamilton) (E.H. Scott ed., 1898).

[112] 2 STORY, *supra* note 79, § 814, at 282; THE FEDERALIST NO. 59, *supra* note 111, at 326 (Alexander Hamilton) (arguing that leaving "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").

sentiment, *Federalist No. 59* declared, "[E]very Government ought to contain in itself the means of its own preservation."[113]

2. The Presidential Electors Clause. Throughout debates over the development of the Presidential Electors Clause, delegates repeatedly distinguished between granting power to state legislatures and to the people.[114] In one of the earliest discussions at the Convention concerning the Presidency, James Wilson argued that the President should be directly elected by the people "without the intervention of the State Legislatures . . . in order to make [the office] as independent as possible . . . of the States."[115] Elbridge Gerry worried, however, that denying states a role in the process would cause "alarm," and instead suggested "letting the Legislatures nominate, and the [presidential] electors appoint," the President.[116] He questioned whether the people should be permitted to "act directly even in (the) choice of electors."[117] The Convention rejected Wilson's proposal and instead initially voted to have Congress—the "national legislature"—appoint the Executive.[118]

Later, Gouverneur Morris proposed an amendment that the people be permitted to elect the President.[119] He noted other delegates' concern that this would enable the "populous" states to

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[113] THE FEDERALIST NO. 59, *supra* note 111, at 325 (Alexander Hamilton) (emphasis removed); *accord* 2 STORY, *supra* note 79, § 814, at 281; *see also* 2 FARRAND'S RECORDS, *supra* note 58, at 240 (statement of Ghorum) ("It would be as improper [to] take this power from the Natl. Legislature, as to Restrain the British Parliament from regulating the circumstances of elections, leaving this business to the Counties themselves."); *The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution* (Oct. 28, 1787) (statement of Wilson) ("This clause is not only a proper, but necessary one. . . . [W]ithout this clause, [the federal government] would not possess self-preserving power."), *in* 2 ELLIOT'S DEBATES, *supra* note 79, at 415, 440.

[114] *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 58, at 109–10 (statement of Madison) (distinguishing between "the people themselves" and "some existing authority under the [National] or State Constitutions," including the "Legislatures of the States," which "had betrayed a strong propensity to a variety of pernicious measures"); *id.* at 114–15 (statement of Dickenson) (same).

[115] 1 FARRAND'S RECORDS, *supra* note 58, at 69 (statement of Wilson).

[116] *Id.* at 80 (statement of Gerry); *see also id.* at 176 (pointing out that the first branch of the national legislature would be "chosen by the *people* of the States" and the second branch "by the Legislatures of the States").

[117] *Id.* at 80.

[118] *Id.* at 81.

[119] *See* 2 FARRAND'S RECORDS, *supra* note 58, at 29 (statement of Morris) ("[The President] ought to be elected by the people at large . . . .").

conspire together to control the presidency. He responded, "The people of such States cannot combine. If [there] be any combination it must be among their representatives in the Legislature."[120] Hugh Williamson opposed the measure, arguing that the difference between election "by the people and by the legislature" is the same "as between an appt. by lot, and by choice."[121] The Convention rejected Morris' proposal.[122]

The Convention then summarily rejected a suggestion that the Executive "be chosen by Electors to be appointed by the several Legislatures of the individual States" (i.e., the Electoral College),[123] changed course by adopting that proposal without debate two days later,[124] and then switched back to having Congress select the President.[125] Further debate on the issue was postponed,[126] and the matter was referred to a committee comprised of one representative from each state (the "Committee of eleven").[127] The committee proposed the language that appears in the Constitution: "Each State shall appoint in such manner as its Legislature may direct, a number of electors . . . ."[128] Morris explained that the committee made this change because the delegates were both dissatisfied with allowing Congress to appoint the President and "anxious" about letting the people do so.[129]

During the Pennsylvania ratifying convention, James Wilson's discussions of the Presidential Electors Clause continued to

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[120] *Id.*

[121] *Id.* at 32 (statement of Williamson).

[122] *Id.*

[123] *Id.* at 22.

[124] *Id.* at 57–58 (statement of Ellsworth).

[125] *Id.* at 99.

[126] *Id.* at 404.

[127] *Id.* at 473. The committee was comprised of one delegate from each of the eleven states represented at the Convention at the time; Rhode Island never sent delegates, while New Hampshire's did not arrive until late July. *Id.*; *see also* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 476, 480 (discussing the absence of the two delegations).

[128] 2 FARRAND'S RECORDS, *supra* note 58, at 497.

[129] *Id.* at 500 (statement of Morris).

distinguish between the legislature and the people.[130] He explained that the Clause allows the people to vote directly on presidential electors "[w]ith the approbation of the state legislatures."[131] Kent's *Commentaries* drew the same distinction, explaining, "The Constitution . . . has not thought it safe or prudent to refer the election of a President directly and immediately to the people; but it has confided the power to a small body of electors, appointed in each state, under the direction of the legislature . . . ."[132]

Thus, the drafting and ratification histories of the Elections Clause and Presidential Electors Clause emphasize the Framers' repeated distinction between a state legislature and direct collective action by the people of a state. Those histories do not shed light, however, on whether either the Framers or the greater public intended or understood those provisions as establishing the independent state legislature doctrine.

D. NORMATIVE JUSTIFICATIONS

Beyond the text of the Elections Clause and Presidential Electors Clause, as well as the prevailing understanding of those provisions throughout the nineteenth century,[133] four normative rationales support the independent state legislature doctrine. First, Story's *Commentaries* explain that the Constitution delegated the power to regulate federal elections to state legislatures in order to give them flexibility in responding to local needs and exigencies.[134] He extolled legislatures' ability "to adapt the regulation, from time to time, to the peculiar local, or political convenience of the states," even in the absence of "an extreme necessity, or a very urgent exigency."[135] Allowing state constitutions to shackle legislatures' discretion would limit the flexibility that the Convention sought to guarantee.

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[130] *The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution* (Dec. 11, 1787) (statement of James Wilson), *in* 2 ELLIOT'S DEBATES, *supra* note 79, at 511–12.

[131] *Id.* at 512.

[132] KENT, *supra* note 110, at 334–35.

[133] *See infra* Parts III–V.

[134] *See* 2 STORY, *supra* note 79, § 820, at 287–88.

[135] *Id.*

Second, the Framers deliberately structured the Constitution to place ultimate responsibility for elections in the political branches of government.[136] Political entities—state legislatures and Congress—are responsible for determining most of the rules for congressional elections;[137] state legislatures are similarly responsible for deciding how to select presidential electors.[138] Each chamber of Congress is the sole judge of its members' elections and returns.[139] Congress is likewise responsible for determining the outcomes of presidential elections.[140] The Constitution grants the House and Senate authority to count electoral votes[141] and reject any they deem invalid.[142] If no candidate for President or Vice President receives a majority of electoral votes, then the House and Senate, respectively, determine who will serve.[143]

These provisions collectively reflect a fundamental structural decision to treat elections as essentially political matters,[144] under the ultimate control of political—and politically accountable—entities. Even Section 2 of the Fourteenth Amendment left enforcement of voting rights to Congress.[145] Subsequent

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[136] *See* Morley, *supra* note 76, at 90–92 (explaining how the Constitution's structure treats federal elections as primarily political matters under the principal control of political entities).

[137] U.S. CONST. art. I, § 4, cl. 1 (granting Congress and state legislatures power over the "Times, Places and Manner of holding Elections" for Congress).

[138] *Id.* art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of electors . . . .").

[139] *Id.* art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[140] *Id.* art. II, § 1, cl. 3 (detailing Congress's role in counting electoral votes in presidential elections); *see also id.* amend. XII.

[141] *Id.* art. II, § 1, cl. 3 ("The President of the Senate shall . . . open all the Certificates, and the Votes shall then be counted."); *accord id.* amend. XII.

[142] *See* 3 U.S.C. § 15 (2018) (outlining the procedure for Congress to review and determine the validity of electoral votes).

[143] U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII.

[144] *Cf.* Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) ("Courts ought not to enter this political thicket."), *abrogated by* Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that an equal protection challenge to legislative redistricting was justiciable).

[145] U.S. CONST. amend. XIV, § 2 (specifying that a state that denies or abridges the right to vote will have its representation in the U.S. House reduced proportionately). For contrasting views of the modern implications of Section 2 of the Fourteenth Amendment, compare Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 385 (2014), arguing that Section 2's extreme remedy of reduction in representation for states

constitutional amendments prohibiting discrimination regarding voting rights based on certain specified characteristics[146] do not disturb this fundamental allocation of power. It was not until the mid-twentieth century that the U.S. Supreme Court reinterpreted the Fourteenth Amendment as creating a broader, judicially enforceable right to vote.[147] Even while asserting constitutional authority to enforce voting rights, however, the Court has recognized the Constitution's delegations of authority in this area to Congress.[148]

The independent state legislature doctrine bolsters the Constitution's structural allocation of primary authority over federal elections to the political branches—specifically, to representative legislative assemblies. The doctrine is not an anomaly stemming from an ill-considered word in an isolated constitutional 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. If state constitutions could limit their respective state legislatures' authority over federal elections, then the courts—particularly state courts[149]—would have a larger role in overseeing such elections. Though the U.S. Supreme Court has expressed skepticism about the

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that violate voting rights suggests that Congress has power to adopt less extreme measures such as the Voting Rights Act, with Morley, *supra* note 7, at 285, contending that Section 2's extreme remedy for voting rights violations suggests that the Constitution implicitly sets a high threshold for what qualifies as a denial or abridgement of voting rights.

[146] *See supra* notes 64–67 and accompanying text.

[147] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (invalidating a poll tax for state elections on the grounds it violated "the right to vote" protected by the Equal Protection Clause); Carrington v. Rash, 380 U.S. 89, 96 (1965) (holding that a state law prohibiting soldiers stationed in Texas from registering to vote there violated "a right secured by the Equal Protection Clause"); Gray v. Sanders, 372 U.S. 368, 379–80 (1963) (holding that the Equal Protection Clause requires "all who participate in [an] election . . . to have an equal vote"); *see also* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2088–2112 (2018) (analyzing the development of the Court's Equal Protection jurisprudence regarding voting rights).

[148] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) ("[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.").

[149] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106–07 (1984) (holding that federal courts may not entertain suits for injunctive relief against state officials for violations of state law, including state constitutional provisions).

Framers' allocation of power over federal elections[150] and taken steps to supersede this allocation,[151] the independent state legislature doctrine is most faithful to the Constitution's underlying logic and structure.[152]

Third, as earlier drafts of the Elections Clause make clear,[153] the power of state legislatures to regulate federal elections was understood to be co-extensive with Congress' power to do so.[154] The

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[150] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818–19 (2015) (discounting a precedent arising from the U.S. House of Representatives' resolution of an election contest due to partisanship concerns).

[151] *See supra* notes 147 and accompanying text.

[152] *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7–8 (1969) (discussing a structuralist approach to constitutional interpretation).

[153] *See supra* note 106 and accompanying text.

[154] *See Debates of the North Carolina Ratifying Convention* (July 25, 1788) (statement of Davis), *in* 4 ELLIOT'S DEBATES, *supra* note 79, at 61 ("Congress has ultimately no power over elections, but what is primarily given to the state legislatures."); THE FEDERALIST NO. 59, *supra* note 111, at 326 (Alexander Hamilton) (explaining that the Constitution vests power to regulate federal elections "primarily" with state legislatures and "ultimately" in Congress); *see also* 1 KENT, *supra* note 110, at 273 (treating the scope of a state legislature's power and Congress's power over federal elections as equivalent); 2 STORY, *supra* note 79, § 814, at 281–82 (explaining that the Constitution vests "[t]he regulation of elections" with "the local governments," and allows the national government to exercise that authority "in extraordinary circumstances").

Indeed, if anything, the Election Clause's history could be read as suggesting that state legislatures would have broader power than Congress over federal elections. Some argued that the Elections Clause allows Congress to step in only if a state either attempts to undermine the federal government by refusing to hold federal elections or adopts patently improper or unfair rules. *See, e.g.*, THE FEDERALIST NO. 59, *supra* note 111, at 326 (Alexander Hamilton) (explaining that the Elections Clause grants Congress power to regulate federal elections "whenever extraordinary circumstances might render that interposition necessary to its safety"); 3 FARRAND'S RECORDS, *supra* note 58, at 148 (statement of McHenry) (explaining that the Constitution grants Congress the power to regulate federal elections in case of "particular exigencies" such as "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"); 1 KENT, *supra* note 110, at 273 (explaining that the Elections Clause grants Congress power to make or alter rules concerning congressional elections "for the sake of [its] own preservation," and "it is to be presumed, [that Congress] will not be disposed to exercise [such power], except when any state shall neglect or refuse to make adequate provision for the purpose"); 2 STORY, *supra* note 79, § 814, at 282 ("[I]n extraordinary circumstances, the power is reserved to the national government; so that it may not be abused, and thus hazard the safety and permanence of the union."); *see also The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal*

U.S. Supreme Court has repeatedly recognized this symmetry between state legislatures' power and congressional power.[155] Any substantive limits that a particular state's constitution imposes on the scope of a legislature's authority, however, would be inapplicable to Congress. Neither the text nor the history of the Elections Clause suggests that state legislatures would have narrower power than Congress over federal elections. Allowing state constitutions to impose substantive limits on state legislatures' authority concerning federal elections would destroy this symmetry between the power of the legislature and the power of Congress.

Finally, the Constitution's delegations of authority to state legislatures concern important federal interests: the election of federal officials,[156] the ratification of constitutional amendments,[157] and requests for federal military intervention.[158] As Professor Vikram Amar recognizes, these are all issues for which the Framers wanted to establish "smooth, orderly, and uncontroversial" ways to determine the "validity and legitimacy" of states' actions.[159] James Iredell, for example, expressed the importance of having "little

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Constitution (Nov. 20, 1787) (statement of Wilson), *in* 2 ELLIOT'S DEBATES, *supra* note 79, at 440–41 (describing scenarios when Congress may intervene in election regulation).

After the Constitution was ratified, however, a constitutional amendment was introduced in the First Congress to amend the Elections Clause to state that Congress may not "alter, modify, or interfere in" state laws governing congressional elections unless a state "shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." 1 ANNALS OF CONG. 768 (1789) (Joseph Gales ed., 1834) (statement of Rep. Burke). The House rejected the amendment by a vote of twenty-three to twenty-eight. *Id.* at 772–73.

[155] *See* Smiley v. Holm, 285 U.S. 355, 367 (1932) (holding that the Elections Clause allows Congress to make "regulations of the sort which . . . may be provided by the legislature of the State upon the same subject"); *Ex Parte* Siebold, 100 U.S. 371, 386 (1879) ("The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made."); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832 (1995) (holding that, if state legislatures were permitted to exercise certain authority under the Elections Clause, then Congress would be able to exercise the same power).

[156] U.S. CONST. art. I, § 3, cl. 1 (appointment of U.S. Senators); *id.* art. I, § 4, cl. 1 (Elections Clause); *id.* art. II, § 1, cl. 2 (Presidential Electors Clause); *id.* amend. XVII (allowing the legislature to authorize a governor to make temporary appointments to fill U.S. Senate vacancies).

[157] *Id.* art. V.

[158] *Id.* art. IV, § 4.

[159] Amar, *The People Made Me Do It*, *supra* note 31, at 1073.

confusion"[160] over whether amendments to the U.S. Constitution have been validly adopted, while George Mason emphasized the need to avoid "chance and violence."[161]

The independent state legislature doctrine makes it far easier to determine the validity of a state's exercise of the authority it received from the U.S. Constitution. When a legislature structures a congressional election, ratifies a federal constitutional amendment, or requests federal intervention, 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.[162] 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. Thus, to the extent the Elections Clause and Presidential Electors Clause were adopted to promote certainty and minimize unnecessary confusion and conflict, the independent state legislature doctrine furthers those critical goals.

III. STATE PRECEDENTS

Both the U.S. Supreme Court and commentators have largely overlooked the extent to which various federal and state authorities applied the independent state legislature doctrine throughout the

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[160] *Id.* (quoting 4 ELLIOT'S DEBATES, *supra* note 79, at 177 (statement of Iredell)).

[161] *Id.* (quoting 1 FARRAND'S RECORDS, *supra* note 58, at 203 (statement of Mason)).

[162] *See* SUTTON, *supra* note 5, at 17 ("State courts . . . have a freer hand in . . . allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee. . . . State constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history.").

The possibility of circuit splits undermines the uniformity of federal standards, but the U.S. Supreme Court may resolve such conflicts. Moreover, even when differences among circuits exist, the range of potential federal constitutional defects with a legislature's actions is typically far better recognizable than potential state-specific problems under state constitutions. *See* Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539, 539 (1988) ("Courts and commentators . . . widely accept the proposition that federal constitutional norms should be uniform . . . . Diversity should be expected, perhaps even encouraged, in matters of state law, both statutory and constitutional.").

nineteenth century. 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.[163] Throughout the rest of the century, the admittedly few state courts to consider the issue generally enforced state laws governing congressional elections, even when they violated state constitutional provisions.[164]

A. THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1820 AND CONGRESSIONAL DISTRICTS

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.[165] Consistent with the Elections Clause and Presidential Electors Clause, they left the matter to the plenary discretion of state legislatures. Some later state constitutions specified procedures for legislatures to follow to take certain actions relating to federal elections, such as requiring legislatures to appoint U.S. Senators in joint session.[166] Likewise, state governors that had a general veto power applied it to state laws regulating federal elections.[167] In general, however, "post-Founding state constitutions did not explicitly regulate" federal elections or limit legislatures' power to adopt "'manner' legislation."[168]

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[163] *See infra* Section III.A.

[164] *See infra* Section III.B–III.D.

[165] Smith, *supra* note 20, at 757–58.

[166] *See id.* at 759–64.

[167] *Id.* at 759–61 (discussing examples from Massachusetts and New York).

[168] *Id.* at 759. Smith identifies a few exceptions: Delaware's Constitution specified that voters shall elect federal representatives "at the same places" and "in the same manner" as state representatives, DEL. CONST. OF 1792, art. VIII, § 2, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 213 (William F. Swindler ed., 1973–79) [hereinafter SOURCES AND DOCUMENTS]; and the Kentucky Constitution required all elections to be held by voice vote, KY. CONST. OF 1799, art. VI, § 16, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* at 160. Whether the framers of these state constitutions took into account the Elections Clause, the Presidential Electors Clause, or the independent state legislature doctrine is unclear.

Smith also notes that the Maryland Constitution guaranteed free white male citizens the right to vote for all elected officials, including Representatives and presidential electors. *See* Smith, *supra* note 20, at 758 (citing MD. CONST. OF 1776, art. XIV (1810), *reprinted in* 4

The Massachusetts Constitutional Convention of 1820 is among the earliest examples of the independent state legislature doctrine being expressly applied. The Convention was called to replace the constitution that the state had adopted in 1780, during the Revolutionary War.[169] Attorney James T. Austin, future Attorney General of Massachusetts, proposed an amendment under which representatives in the U.S. House and presidential electors would have been chosen "in such convenient districts as the Legislature shall *by law provide*."[170] The amendment would have required the legislature to draw new districts after every congressional reapportionment, with no more than two representatives or electors in each district.[171] It barred the legislature from altering those districts until the next reapportionment.[172] The Convention's Committee of the Whole rejected the proposed amendment without much debate.[173]

The next day, Austin presented essentially the same proposal on the convention floor.[174] He explained that the amendment would "direct the Legislature in the exercise of the power which is given them by the [C]onstitution of the United States."[175] It would "limit" the legislature "in the exercise of their discretion" in redistricting.[176] He argued that the people had the right to impose this restriction because the legislature was "bound to exercise all [its] powers under the direction of the [state] constitution."[177]

SOURCES AND DOCUMENTS, *supra* at 387). Such voter qualification issues, however, were outside the scope of both the Elections Clause and the independent state legislature doctrine. *See supra* notes 55–62 and accompanying text.

[169] JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 3 (Boston Daily Advertiser, rev. ed. 1853) [hereinafter JOURNAL OF THE 1820 MASSACHUSETTS CONSTITUTIONAL CONVENTION] (explaining that a convention of delegates had been convened to revise the Massachusetts Constitution).

[170] *Id.* at 104 (Nov. 27, 1820) (statement of Austin).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 106 (Nov. 28, 1820) (statement of Austin).

[175] *Id.* at 107.

[176] *Id.*

[177] *Id.*; *see also id.* (discussing "the right of the people to instruct the Legislature in the manner of exercising their discretion").

Justice Joseph Story, a delegate to the Convention, responded that the proposed amendment was "plainly a violation of the [U.S.] [C]onstitution."[178] He explained that the Convention did not "have a right to insert in our [state] constitution a provision which controls or destroys a discretion . . . which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States."[179] The Elections Clause of the U.S. Constitution grants legislatures "unlimited discretion" over the manner in which representatives are elected.[180] Likewise, the Presidential Electors Clause affords them the same "unlimited" discretion over the selection of presidential electors.[181] The proposed amendment "destroy[s] this freedom of choice" and "assumes a control over the Legislature which the constitution of the United States does not justify."[182] The legislature is "bound to exercise [the] authority" it receives from the U.S. Constitution "according to its own views of public policy and principle," without substantive limitations.[183]

Daniel Webster, also serving as a delegate, agreed.[184] He explained that "it would not be well by a provision of [the state] constitution, to regulate the *mode* in which the Legislature should exercise a power conferred on it by *another* Constitution."[185] Following these speeches, the Convention rejected Austin's motion.[186] Thus, the Massachusetts Constitutional Convention of 1820 provides a stark example of how the independent state legislature doctrine was regarded when the issue was affirmatively raised and debated.

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[178] *Id.* at 110 (statement of J. Story).

[179] *Id.* at 109; *see also id.* (declaring that the state constitutional convention cannot "narrow[] or contract[] the powers delegated" by the U.S. Constitution to the state legislature).

[180] *Id.* at 110.

[181] *Id.*

[182] *Id.*; *see also id.* (arguing that the proposed amendment "affect[s] to control the Legislature in the exercise of its legitimate powers" under the U.S. Constitution).

[183] *Id.*

[184] *Id.* at 112 (statement of Webster) ("He would wish that the constitution of the State should have as little connection with the constitution of the United States as possible.").

[185] *Id.*

[186] *Id.* at 113.

B. NEW HAMPSHIRE AND ABSENTEE MILITARY VOTING

Litigation involving the independent state legislature doctrine arose periodically during the Civil War as state legislatures enacted laws allowing soldiers serving away from home to vote.[187] Several state constitutions required voters to cast their ballots in person in the precincts in which they were registered.[188] Absentee voting laws, even for members of the military, violated these provisions. Consequently, "in States where the place of voting was fixed by the [state] Constitution, an amendment to the [state] Constitution was necessary before a law could be passed authorizing soldiers to vote in the field *for State officers*."[189] Due to the independent state legislature doctrine, however, "no amendment was necessary to enable the Legislature to prescribe for voting in the field for presidential electors and representatives."[190]

In 1864, for example, the New Hampshire Supreme Court issued an advisory opinion affirming that military voters could cast absentee ballots for federal offices.[191] It declared that the election of members of Congress and presidential electors "is governed wholly by the Constitution of the United States as the paramount law, and the Constitution of this State has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States."[192] The court held that no "valid legal objections" existed to the legislature's exercise of its "unlimited authority" and

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[187] *See* JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 314–15 (1915) (providing a state-by-state examination of Civil-War-era absentee voting laws for military voters).

[188] John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 498 (2003).

[189] BENTON, *supra* note 187, at 11–12.

[190] *Id.* at 12.

[191] Opinion of the Justices, 45 N.H. 595, 596, 599 (1864); *see also* Opinion of the Judges, 37 Vt. 665, 677 (1864) (noting, in the course of upholding an absentee military voting law for federal offices, that the power to prescribe the time and place of federal elections "rests wholly in the discretion of the legislature to establish . . . by law," and that "[t]he whole subject is entrusted [by the Elections Clause] to the state legislature, subject to the control of [C]ongress").

[192] *Opinion of the Justices*, 45 N.H. at 599; *see also id.* at 600 (stating that the U.S. Constitution leaves the appointment of electors "wholly to the discretion of the State legislature").

"unqualified discretion" under the Presidential Electors Clause.[193] It likewise concluded that the Elections Clause allowed the legislature to determine the time, place, and manner of voting for the U.S. House of Representatives, "untrammeled" by potentially contrary provisions of the state constitution.[194]

The New Hampshire Supreme Court's opinion stands as one of the nineteenth century's clearest, most emphatic endorsements of the independent state legislature doctrine.[195] When the court considered another absentee voting law in the early twentieth century, however, it expressed doubt about this conclusion, exemplifying the shift in attitude toward the doctrine that occurred at the turn of the century.[196]

C. RHODE ISLAND AND PLURALITY ELECTIONS

The Rhode Island Supreme Court similarly applied the independent state legislature doctrine in 1887 when resolving a dispute over a contested congressional election.[197] The state constitution's Majority Vote Clause provided, "[I]n all elections held by the people under this constitution, a majority of all the electors voting shall be necessary to the election of the person voted for."[198] The court stated that this clause might apply to congressional elections, since another provision within the same article of the state constitution specified that the method of voting for various offices, including "representatives to [C]ongress[,] shall be by ballot."[199] A state statute, however, provided that only a plurality

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[193] *Id.* at 600; *see also id.* ("The whole discretion as to the manner of the appointment is lodged, in the broadest and most unqualified terms, in the legislature.").

[194] *Id.* at 605.

[195] *Cf. Opinion of the Judges*, 37 Vt. at 677 (discussing the legislature's complete discretion to regulate congressional elections under the Elections Clause, without expressly addressing whether the state constitution may constrain it).

[196] *In re* Opinion of the Justices, 113 A. 293, 298, 299 (N.H. 1921) (reaffirming the Court's earlier conclusion with regard to presidential electors but adding that the Court was "unable to say the [state statutory] provisions would be held valid [under the state constitution] as to the election of Senators and Representatives in Congress").

[197] *In re* Plurality Elections, 8 A. 881 (R.I. 1887) (responding to a certified question from the state's house of representatives).

[198] *Id.* at 882 (quoting R.I. CONST. art. VIII, § 10).

[199] *Id.* (quoting R.I. CONST. art. VIII, § 2).

was necessary to win special elections, including U.S. House races.[200]

The Rhode Island Supreme Court held that, assuming the Majority Vote Clause applied to congressional elections, it was "of no effect," except insofar as the state legislature "voluntarily deferred" to it "as an indication of the popular will."[201] The court explained that the provision violated the U.S. Constitution's Elections Clause.[202] The Majority Vote Clause could not validly "impose a restraint upon the power of prescribing the manner of holding [congressional] elections which is given to the legislature by the [C]onstitution of the United States without restraint."[203] Thus, a state law concerning congressional elections that violated the state constitution was nevertheless valid and enforceable.[204]

The court reached the same conclusion regarding the Presidential Electors Clause.[205] After quoting that provision, the court declared, "The manner of appointment is left entirely to the legislatures."[206] Again, however, when the Rhode Island Supreme Court considered the validity of a proposed military absentee voting law in the early twentieth century, it expressed much more uncertainty about the independent state legislature doctrine's validity.[207] Like the New Hampshire Supreme Court,[208] the Rhode Island court recognized that a contrasting view of the issue had arisen.[209]

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[200] *See id.*

[201] *Id.*

[202] *Id.* (holding that the Majority Vote Clause "is manifestly in conflict with [the Elections Clause]").

[203] *Id.*

[204] *Id.* (holding the state statute "lawful and constitutional, and that any representative elected under [the statute] will be allowed to have his seat regardless of [the state constitution's Majority Vote Clause]").

[205] *Id.*

[206] *Id.*

[207] *In re* Opinion to the Governor, 103 A. 513, 516 (R.I. 1918) (stating that "in carrying out this direction of the federal Constitution the [state] Legislature should not act independently and in disregard of the provisions of the state Constitution").

[208] *See supra* note 196 and accompanying text.

[209] *Opinion to the Governor*, 103 A. at 515–16 (citing a South Dakota case and two Congressional election contests).

D. MISSISSIPPI AND THE TIMING OF CONGRESSIONAL ELECTIONS

The Mississippi Supreme Court also applied the doctrine in 1873 in resolving a dispute over the timing of state and federal elections.[210] The Mississippi Constitution required the state to hold a "general election" every two years in November.[211] It did not specify either the years in which elections were to be held, or the year in which the first such election was to be held.[212] Nor did the state constitution expressly identify the offices to be elected at general elections.[213] The Mississippi legislature enacted a law requiring state legislators, as well as other state and county officials, to be elected starting in 1871 and every two or four years thereafter, depending on the length of the office's term.[214] The law further specified that a congressional election would be held in 1872 and every two years thereafter.[215]

The Mississippi Supreme Court recognized that the state constitution required general elections to be held biennially, but the law passed by the legislature required annual elections (albeit for different offices).[216] The court pointed out that the Elections Clause allowed Congress to schedule congressional elections for whenever it wished, regardless of what any state's constitution said or the timing of state and county elections.[217] The power that the Elections Clause granted to state legislatures to determine the timing of their states' congressional elections, the court reasoned, was just as broad.[218] Thus, the state constitution's requirement for biennial general elections did not limit the state legislature's discretion

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[210] State v. Williams, 49 Miss. 640 (1873).

[211] *Id.* at 665 (citing MISS. CONST. of 1868, art. IV, § 7).

[212] *Id.* (acknowledging that "the constitution is silent as to the year in which the election is to be held").

[213] *See id.* at 665–66.

[214] *Id.* at 666.

[215] *Id.*

[216] *Id.*

[217] *See id.*

[218] *Id.* at 666–67 (holding that, since the state constitution could not limit Congress's power to schedule Mississippi's congressional elections, the state constitution should not "have that effect, when the legislature has supplied the omission of Congress to prescribe the time for the election of members to the national legislature"); *id.* at 681 (Simrall, J., concurring) (recognizing that a state constitutional convention "could not fix absolutely and permanently the time of electing representatives in Congress").

under the Elections Clause to determine when congressional elections would be held.

Thus, in the few examples throughout the nineteenth century where state supreme courts squarely confronted the independent state legislature doctrine, they invariably accepted it. Different states applied the doctrine at different times throughout the century to a wide variety of issues. The next Part demonstrates that, throughout that same period, Congress generally was just as accepting of the doctrine.

IV. CONGRESSIONAL PRECEDENTS

During the nineteenth century, both chambers of Congress endorsed and applied the independent state legislature doctrine.[219] Most examples arose in the context of the House's or Senate's exercise of its authority under Article I, § 5 of the Constitution to resolve election contests concerning its members.[220] The Senate also embraced the doctrine when considering potential reforms to the electoral college.[221]

As this Part demonstrates, when Congress applied the doctrine, it faithfully distinguished between regulation of the "Manner" in which congressional elections were held, which was subject to the legislature's plenary power under the Elections Clause[222] (and not subject to review under state constitutions[223]), and voter qualifications for congressional elections, which were within the power of the state as an entity under the Voter Qualifications Clause[224] (and therefore could be controlled by state

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[219] Despite this history, Congress, too, largely abandoned the doctrine by the early twentieth century. *See, e.g.*, DAVISON VS. GILBERT, H.R. REP. NO. 56-3000, at 1 (1901) (reporting that a state law creating congressional districts "was not in contravention of the Kentucky constitution, and . . . was, as far as we have authority to inquire, properly passed by the legislature"), *no subsequent House action*.

[220] U.S. CONST. art. I, § 5 (providing that each chamber of Congress may determine the "Elections, Returns and Qualifications" of its members).

[221] *See infra* Section IV.D.

[222] U.S. CONST. art. I, § 4, cl. 1.

[223] *See infra* Sections IV.A–IV.D.

[224] U.S. CONST. art. I, § 2, cl. 1 (stating that voters for members of Congress "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").

constitutions[225]). Consistent with the doctrine, the chambers of Congress generally declined to enforce state constitutions' substantive restrictions on the scope of legislatures' authority over federal elections. The chambers nevertheless typically enforced state constitutions' procedural requirements concerning the legislative process that legislatures had to follow to exercise that power. Thus, the House enforced procedural provisions of state constitutions requiring bills to be read a certain number of times or over a certain number of days,[226] while the Senate Committee on Privileges and Elections recommended enforcing state constitutions' procedures governing legislatures' appointments of U.S. Senators.[227]

There were several contests in which the House acknowledged that one of the parties had invoked the doctrine, but found it unnecessary to address the issue because the contest could be resolved on other grounds.[228] There were also a few cases in which, rather than invoking the doctrine, the chamber simply rejected a state constitutional challenge on the merits, especially when the challenge was insubstantial and could be summarily rejected.[229] It

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[225] *See infra* Section IV.E.

[226] CALIFORNIA CONTESTED-ELECTION CASES, H.R. REP. NO. 49-2338, at 1, 4–5 (1886) (deferring to a decision of the California Supreme Court upholding the state's new congressional districts, because a state constitutional provision requiring bills to be read before the legislature three times did not apply to amendments to pending bills), *resolutions proposed by committee report adopted without debate*, 17 CONG. REC. 4381 (1886).

[227] DAVID T. CORBIN AND M.C. BUTLER, S. REP. NO. 45-707, at 12, 21 (1879) (majority report) (concluding that the South Carolina House of Representatives had satisfied the South Carolina constitution's quorum requirements at the time it appointed a U.S. Senator), *election contest withdrawn*, 8 CONG. REC. 2028 (1879).

[228] *See, e.g.*, F.M. DAVIS V. T.W. SIMS, H.R. REP. NO. 58-1382, at 10 (1904) (stating that it was unnecessary to decide "whether the Federal Constitution can confer upon a State legislature a power to act in conflict with the State constitution"), *resolution proposed by committee report adopted*, 38 CONG. REC. 2809 (1904); *see also* 38 CONG. REC. 2805 (1904) (statement of Rep. Olmsted) ("We have not . . . found it necessary . . . to pass upon the proposition . . . that . . . the legislature derives its power to fix the time, place, and manner of holding elections for Senators and Representatives from the Federal Constitution and can not be controlled by the State constitution in the exercise of that power.").

[229] *See* DAVISON VS. GILBERT, H.R. REP. NO. 56-3000, at 1 (1901) (finding "no difficulty in arriving at the conclusion that [the relevant state election law], was not in contravention of the Kentucky constitution"), *no subsequent House action*; NATHAN FRANK AGAINST JOHN M. GLOVER, H.R. REP. NO. 50-1887, at 2 (1888) (stating that the committee was "united in the opinion that the [state] law [was] constitutional"), *resolutions proposed by committee report*

appears that the House Committees on Elections preferred demonstrating that congressional elections were held in compliance with both the state constitution and state statute, when possible. Where unavoidable conflicts arose concerning the time, place, or manner of congressional elections, however, state statutes controlled over state constitutions.

In the twentieth century, the chambers of Congress did not expressly repudiate the doctrine, but instead reformulated it into a discretionary refusal to consider state constitutional challenges to the validity of state laws regulating federal elections.[230] For example, in *Gerling v. Dunn*, the contestant challenged the election on the grounds that New York's use of voting machines violated the state constitution.[231] The House Committee on Elections declined to consider the issue, declaring, "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."[232] In extreme cases of pervasive, structural

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adopted without debate, 19 CONG. REC. 5182–83 (1888); MCLEAN VS. BROADHEAD, H.R. REP. NO. 48-2613, at 4 (1885) ("The [state] constitution commands the general assembly to enact a registry law, and in order to compel obedience to the law the legislature clearly had the right to say that the failure to register should be conclusive evidence that such person was not a legal voter."), *no subsequent House action*.

[230] *See, e.g.*, ELECTION CONTEST CASE OF WALTER B. HUBER, CONTESTANT, AGAINST WILLIAM H. AYRES, CONTESTEE, FOURTEENTH CONGRESSIONAL DISTRICT OF OHIO, H.R. REP. NO. 82-906, at 2 (1951) (majority report) (dismissing an election challenge for failure to exhaust state-law remedies, where the contestant alleged that the ballot order of congressional candidates' names had not been rotated as required by the state constitution), *resolution proposed by committee report adopted without debate*, 97 CONG. REC. 10,479 (1951).

[231] CONTESTED ELECTION CASE, GERLING V. DUNN, H.R. REP. NO. 65-1074, at 2 (1919), *resolution proposed by committee report adopted without debate*, 57 CONG. REC. 3578 (1919).

[232] *Id.* at 2; *see also* CONTESTED ELECTION CASE OF JAMES D. SALTS V. SAM C. MAJOR, H.R. REP. NO. 66-961, at 4 (1920) (declining to consider the contestant's argument that a state law requiring ballots to be numbered in a manner that allowed the voters who cast them to be identified violated the state constitution), *resolutions proposed by committee report adopted*, 59 CONG. REC. 7231 (1920). Less notably, the House would also decline to consider state constitutional violations when the party raising the issue could not show they were sufficient to affect the election's outcome. *See, e.g.*, CONTESTED ELECTION CASE OF CAMPBELL V. DOUGHTON, H.R. REP. NO. 67-882, at 7 (1922) ("[W]hen acts alleged to have violated the provisions of a State constitution do not appear to have changed the result, either by themselves or in combination with statutory misdemeanor, the House is not justified in declaring a seat vacant."), *debated without a vote*, 62 CONG. REC. 7808–18 (1922).

unfairness, however, the twentieth century House nevertheless enforced state constitutional restrictions.[233] Thus, Congress—like state courts—has substantially changed its approach to the independent state legislature doctrine since the nineteenth century.

A. THE PLACE AND MANNER OF ELECTIONS

The best-known example of a chamber of Congress applying the independent state legislature doctrine is *Baldwin v. Trowbridge*[234]—the election contest that the majority and dissenting opinions in *Arizona Independent Redistricting Commission* debated.[235] The Michigan Constitution provided that a person must "offer[] to vote" in the "township or ward" of his residence.[236] In 1864, because many Michigan residents were fighting outside of the state in the Civil War, the legislature passed a law allowing any qualified voter serving in the military to vote, "whether at the time of voting he shall be within the limits of this State or not."[237] Many soldiers cast absentee ballots from other states.[238]

The House Committee on Elections explained that, if the absentee votes were counted, Trowbridge would prevail; if they were excluded, Baldwin would win.[239] The Committee recognized the conflict between the state constitution, which required people to vote in person, and the state statute, which permitted absentee

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[233] *See, e.g.*, CONTESTED-ELECTION CASE OF PAUL V. HARRISON, H.R. REP. NO. 67-1101, at 9 (1922) ("[T]here 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."), *resolutions proposed by committee report adopted*, 64 CONG. REC. 545–47 (1922).

[234] H.R. REP. NO. 39-13, at 3 (1866) (majority report), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[235] *Compare* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818–19 (2015) (rejecting *Baldwin*'s relevance), *with id.* at 838 (Roberts, C.J., dissenting) (citing *Baldwin* to demonstrate the independent state legislature doctrine's historical pedigree).

[236] H.R. REP. NO. 39-13, at 1 (quoting MICH. CONST. art. VII, § 1).

[237] *Id.* (quoting Act of Feb. 5, 1864).

[238] *Id.* ("Under this act . . . a large number of votes were cast by soldiers outside the limits of the State.").

[239] *Id.* at 1–2.

voting.[240] It then observed that the Elections Clause grants power to regulate congressional elections specifically to the state's legislature.[241] It declared that the term "legislature" does not refer broadly to the "legislative power of the State," but rather specifically to "the legislature *eo nomine*, as known in the political history of the country."[242] The Committee added that the Constitution's other mentions of a "legislature" refer exclusively to institutional state legislatures.[243] The term does not include a state's constitutional convention.[244]

Moreover, even if state constitutional provisions governing federal elections were presumptively enforceable in the absence of legislation on an issue, they could not limit the institutional legislature's authority under the Elections Clause to enact its own contrary laws.[245] At most, a state constitutional provision specifying the place where voters must cast their ballots was enforceable as a default rule until superseded by a statute from the legislature. The Committee also noted that rules concerning the location of polling places concerned the "place" of elections, rather than voter qualifications which the Elections Clause does not empower the legislature to regulate.[246] Accordingly, because the state constitution could not circumscribe the institutional legislature's authority under the Elections Clause to regulate the place of elections, the state law authorizing absentee voting was valid. Accordingly, the Committee recommended that the House seat Trowbridge.[247] The Committee's dissenting members also issued a

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[240] *Id.* at 2 (noting that the state constitution "plainly prohibits what the legislature as plainly permits").

[241] *Id.* (noting that "power is conferred upon the *legislature*" under the Elections Clause).

[242] *Id.*

[243] *Id.* at 2–3.

[244] *See id.* at 2 (explaining that the "framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law," and that "the words 'legislature' and 'convention' are both used to denote different legislative bodies").

[245] *Id.* at 3 ("[T]he people of Michigan had no power to enlarge or restrict the language of the constitution of the United States.").

[246] *Id.* (acknowledging that states may exercise "the power to prescribe the qualifications of electors . . . by an organic convention," but rejecting the premise that "the place of holding the election for a representative in Congress may be prescribed as one of the electoral qualifications").

[247] *Id.*

minority report that rejected the independent state legislature doctrine and contended that the Michigan Constitution precluded counting the absentee votes.[248]

During floor debates, several representatives defended Trowbridge's right to be seated, expressly endorsing and applying the independent state legislature doctrine.[249] Representative Beaman, for example, declared that the absentee voting law was valid as applied to federal elections, regardless of whether it violated the state constitution and even if it was unenforceable in state and local races.[250] "Michigan cannot control nor limit an express provision of the [U.S.] Constitution," he added.[251] The House voted overwhelmingly against the minority report's recommendations by a vote of 30–108, with forty-four members not voting.[252] The House then seated Trowbridge in accordance with the majority report by voice vote.[253]

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[248] BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-14, at 5 (1866) (dissenting report).

[249] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 816 (1866) (statement of Rep. Beaman) ("The Legislature, in providing the times, places, and manner of elections of Representatives, does not derive its authority from the people of the State through their constitution, but from the Constitution of the United States. This delegation of power is not in terms conveyed through the people of the State, nor the constitution of the State, but it is conferred directly upon the Legislature."); *id*. (reiterating that a legislature's power to regulate federal elections is "placed beyond the control of State constitutions"); *id.* at 845 (statement of Rep. Shellabarger) (contending that, because the legislature receives its power to regulate federal elections from the Elections Clause, allowing the legislature to change election details set forth in the state constitution "do[es] not override the constitution of any State"); *see also id*. at 841 (statement of Trowbridge) (contending that a state constitution may not "obtain a control" over the authority to determine the time, place, and manner of federal elections that "it is expressly restrained and prohibited from exercising" under the Elections Clause); *id.* at 844 (statement of Rep. Scofield) ("[T]he Constitution of the United States is supreme, and that . . . of Michigan must yield."); *id.* (statement of Rep. Davis) (explaining that the U.S. Constitution "took away from every State constitution any power which conflicted [with it]").

[250] *Id.* at 816 (statement of Rep. Beaman) (arguing that a state constitutional provision "in conflict with the act of the Legislature, which had the authority, sanction, and command even of the Federal Constitution . . . was absolutely null and void").

[251] *Id.* Beaman also recognized the distinction between voter qualifications for congressional elections, which were subject to state constitutional restrictions, and "times, places, and manner" regulations, which were not. *Id.* at 817; *see also id*. at 843 (statement of Rep. Scofield) ("The *Legislature*, by the Constitution of the United States, fixes the place where the ballot-box shall be kept; that is, where the election shall be held. The *State* fixes the qualification of voters . . . ." (emphasis added)).

[252] *Id.* at 845.

[253] *Id.*

Despite the U.S. Supreme Court's skepticism about the validity of *Baldwin*,[254] the precedent powerfully supports the independent state legislature doctrine. The doctrine's applicability was the only issue in the election contest: it was the focus of both the majority and minority reports of the House Committee on Elections, and the House held extensive floor debates over the doctrine for more than two days.[255] The contest involved a direct and dispositive conflict between a state constitutional provision and a state statute regulating a federal election. 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.

Baldwin distinguished a precedent that the minority report claimed had rejected the independent state legislature doctrine: *Shiel v. Thayer*.[256] In *Shiel*, the Oregon state constitution had required general elections, including for U.S. Representative, to be held biennially, on the first Monday of June, starting in 1858.[257] Shiel received a majority of votes at a congressional election held in June 1860.[258] Thayer had won a majority of votes at another congressional election held the following November.[259] The latter election had been conducted simultaneously with Oregon's presidential election without any apparent statutory or constitutional authorization.[260] The majority of the House Committee on Elections held that the June election was the only congressional election authorized by any state legal provisions.[261] It went further, however, declaring that the state constitution placed

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[254] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818 (2015) ("[I]t 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.").

[255] *See supra* notes 236–253 and accompanying text.

[256] *See* BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-13, at 3 (1866) (majority report) (citing GEORGE K. SHIEL VS. ANDREW J. THAYER, H.R. REP. NO. 37-4 (1861), *resolutions proposed by committee report adopted*, CONG. GLOBE, 37th Cong., 1st Sess. 357 (1861)), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[257] SHIEL, H.R. REP. NO. 37-4, at 2.

[258] *Id.* at 1.

[259] *Id.*

[260] *Id.*

[261] *Id.* at 1–2 ("[T]he election held for representative in Congress on the first Monday in June, 1860, was held in pursuance of, and in conformity with, the constitution and laws of Oregon . . . .").

the time for holding congressional elections "beyond the control of the legislature."[262] Accordingly, it concluded that Shiel was entitled to be seated.[263]

Neither the Committee nor the floor debate in *Shiel* mentioned the Elections Clause, discussed the Constitution's delegation of power to state legislatures, or considered the independent state legislature doctrine.[264] Moreover, the Committee's assertion about state constitutions was dicta because the election contest did not involve a conflict between a state constitution and state statute.[265] *Baldwin* partly endorsed *Shiel* by recognizing that a state constitutional convention could be considered a legislature, thereby making the state constitution a default source of law regulating congressional elections.[266] But, contrary to *Shiel*, *Baldwin* concluded that a state constitutional convention would have no authority to preclude the institutional legislature from exercising its power under the Elections Clause to change the rules governing congressional elections.[267] Thus, *Baldwin* interprets *Shiel* to mean that state constitutional provisions may govern federal elections in the absence of contrary statutes, but they cannot limit the scope of an institutional legislature's power.

Shiel is the strongest piece of evidence against the notion that the independent state legislature doctrine embodied the prevailing understanding of the Elections Clause in the nineteenth century. The fact that the Elections Committee did not consider the issue in *Shiel* cuts both ways, however. On the one hand, the House's apparent willingness to accept the Committee's reasoning suggests

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[262] *Id.* at 3.

[263] *Id.*

[264] *See id.* at 1–3.

[265] *Id.* at 3 (noting that a bill to reschedule congressional elections during presidential election years "never became a law"); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that *Shiel* "did not involve a conflict between a state legislative act and a state constitutional provision").

[266] BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-13, at 3 (1866) (stating that Michigan's state constitutional convention might "be considered a *legislature by construction*"), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[267] *Id.* (concluding that, even if the Elections Clause allowed a state constitutional convention to include rules governing congressional elections in the state constitution, such provisions could not "tie the hands of [the convention's] successors" by restricting the institutional legislature's authority to adopt different rules).

that the doctrine may not have been universally accepted. On the other hand, the fact that the Elections Clause was not even discussed undermines *Shiel*'s persuasiveness as a precedent for construing that provision. Had the Clause been raised, the House would have had to explicitly grapple with its language and meaning.

A final precedent that offers far less insight into the independent state legislature doctrine's vitality is *Donnelly v. Washburn*.[268] In that contest, the House Committee on Elections concluded that the contestant was not entitled to the seat at issue, but could not reach a consensus on whether the prevailing candidate was entitled to retain his seat.[269] Moreover, the Committee could not coalesce around a majority report, but rather issued two reports, each signed by five members.[270] The House ultimately did not take any action in the matter.[271]

In *Donnelly*, the congressional election in Minnesota's third congressional district had been infested with bribery, intimidation, and voter fraud.[272] State law required Minneapolis and St. Paul to number their ballots.[273] Prior to the election, a state trial court had held that this law violated the Minnesota Constitution's requirement that elections be conducted by ballot.[274] The court inferred that the state constitution implicitly required ballots to be secret, unmarked, and untraceable to particular voters.[275] Pursuant to that ruling, election judges in both cities met and decided not to number ballots.[276] Election judges in seven precincts in Minneapolis, however, nevertheless wrote voters' registration numbers on their ballots.[277] This decision raised concerns about

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[268] H.R. REP. NO. 46-1791 (1880), *recommitted to committee*, 10 CONG. REC. 4622 (1880).

[269] 2 HINDS' PRECEDENTS, *supra* note 62, § 945, at 231.

[270] *Compare* H.R. REP. NO. 46-1791, at 1–32 (report submitted by Rep. Manning), *with id.* at 33–79 (minority report submitted by Rep. Keifer); *see also* 10 CONG. REC. 4621 (1880) (statement of Rep. Manning) (calling the initial report the "views of certain members of the committee"); *id.* (statement of Rep. Keifer) (emphasizing that neither report was "signed by a majority of the committee").

[271] *See* 10 CONG. REC. 4622 (1880) (recommitting the report to the committee).

[272] H.R. REP. NO. 46-1791, at 13–14 (report submitted by Rep. Manning) (discussing bribery); *id.* at 16, 21–23 (discussing intimidation); *id.* at 24–31 (discussing fraud).

[273] *Id.* at 17.

[274] *Id.* at 18.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 19.

voter intimidation, due to the possibility that votes could be traced back to the people who had cast them.[278]

One of the reports issued by the Committee on Elections, submitted by Representative Manning, agreed that numbering ballots violated the state constitution, but nevertheless rested its analysis on the "broader foundation[]" that the numbered ballots were "incompatible with an honest, fair, and free election" because they had been numbered "for a corrupt and dishonest purpose."[279] That report concluded that certain judges had decided to number ballots to intimidate workers by making their votes identifiable.[280]

The other report—misleadingly labeled "Views of a Minority,"[281] even though it was signed by the same number of members—argued that the statute's validity under the state constitution was irrelevant.[282] This report, signed by Representative Keifer, explained that a state legislature receives its authority to regulate congressional elections from the Elections Clause, not the state constitution.[283] The report elaborated:

> The State legislature is not . . . controlled by the State constitution, in its action in regard to the manner of holding Federal elections. In case of a conflict between the act of a legislature and the constitution of the State in matters purely of a Federal character, the act of the legislature will prevail, provided it is not in conflict with the Constitution of the United States.[284]

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[278] *Id.* at 20 ("[The ballot numbering] was done to prevent a fair election, and to give the employers of workingmen an opportunity to still further intimidate them by preserving a record of how the men voted whose means of life depended upon the good-will of those who employed them . . . .").

[279] *Id.* at 18.

[280] *Id.* at 20.

[281] *Id.* at 33 (minority report submitted by Rep. Keifer).

[282] *Id.* at 58 ("Your committee need not . . . consider whether this law is unconstitutional or not . . . .").

[283] *Id.* ("The legislature of a State does not acquire its right or power to make a law regulating the manner of holding elections for Representatives in Congress from . . . the constitution of the State, but this right and power is derived exclusively from [the Elections Clause].").

[284] *Id.*

The House recommitted the matter to the Committee without voting on the competing reports' resolutions.[285] This precedent is of little value in determining the House's attitude toward the independent state legislature doctrine for several reasons. First, the Committee on Elections issued two reports. The Keifer report, which embraced the doctrine, was signed by as many members as the Manning report, which did not discuss it.[286] Second, the Manning report rested its conclusion on concerns about voter intimidation, rather than the unconstitutionality of the state ballot-marking law.[287] It neither considered nor rejected the independent state legislature doctrine, but rather ignored it. Finally—and most importantly—since the House apparently never voted on the matter, it is impossible to know which report it would have adopted.

B. THE TIMING OF ELECTIONS

1. West Virginia (1872). The House expressly relied upon the independent state legislature doctrine in resolving a dispute over the timing of the 1872 elections for West Virginia's first and second congressional districts.[288] State law specified that the "general election" for all state and local offices "shall be held on the fourth Thursday of October" each year.[289] Representatives to Congress were to be chosen "[a]t the said elections" every other year.[290] A state constitutional convention proposed a new constitution specifying that any state laws in force that were "not repugnant" to it would remain in effect upon ratification, unless the legislature amended or repealed them.[291] The convention also adopted a schedule requiring that an election be held in late August 1872 to allow voters to ratify both the new constitution and the schedule itself.[292] The

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[285] 10 CONG. REC. 4622 (1880).

[286] *Compare* H.R. REP. NO. 46-1791, at 32 (Manning report), *with id.* at 79 (Keifer report).

[287] *Id.* at 19–20 (Manning report).

[288] *See* WEST VIRGINIA CONTESTED ELECTIONS, H.R. REP. NO. 43-7, at 1 (1874) (majority report), *resolutions proposed by committee report rejected*, 2 CONG. REC. 962–63 (1874); *see also id.* at 19–20 (minority report of Rep. Hazelton), *resolutions proposed by minority report adopted*, 2 CONG. REC. 963–64 (1874).

[289] H.R. REP. NO. 43-7, at 1 (majority report) (citing W. VA. CODE § 3(1)).

[290] *Id.* (citing W. VA. CODE § 3(2)).

[291] *Id.* at 2 (citing W. VA. CONST. art. VIII, § 36).

[292] *Id.* at 1–2.

schedule further specified that elections would also be held at that time for state and local offices under the new constitution.[293]

The proposed schedule's effect on congressional elections was unclear, so the state held two elections: one in August, concurrently with the ratification vote, and another in October, consistent with state law.[294] The voters ratified the new state constitution in the August election.[295] In addition, a total of approximately 26,300 votes were cast in the congressional election in the first district, with John J. Davis prevailing, and over 4,000 in the second district, with J.M. Hagans prevailing.[296] In the October congressional election, only 4,100 votes were cast in the first district, with Benjamin Wilson prevailing, but nearly 6,000 votes were cast in the second district, with B.F. Martin prevailing.[297] The governor issued certificates of election to all four men,[298] and an election contest was filed with the House to decide which results were valid.[299]

The House referred the matter to the Committee on Elections.[300] The majority on the Committee concluded that neither the state constitution nor the accompanying schedule addressed the timing of congressional elections.[301] The legislature, however, had "implicitly obeyed the requirement" of the Elections Clause by enacting a statute "prescrib[ing]" a "day certain" for electing Representatives to the House: the fourth Thursday in October.[302] Since that law remained in effect under the new constitution, the majority recommended that Congress seat Wilson and Martin based on the results of the October election.[303]

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[293] *Id.* at 1.

[294] *Id.* at 1–2.

[295] *Id.* at 1.

[296] *Id.* at 2.

[297] *Id.*

[298] *Id.*

[299] *Id.* at 1.

[300] *Id.*

[301] *Id.* at 4 (describing how "[t]he new constitution did not in terms . . . [or] *by implication*, remove the election of Representatives in Congress . . . from the day fixed" by state law, which was in October); *id.* at 8 (noting that the Committee did not "think that [the schedule] authorized or undertook to authorize the election of Representatives in Congress" during the August ratification election).

[302] *Id.* at 3.

[303] *Id.* at 9.

Representative Speer drafted a minority report on behalf of two other committee members, concurring in the majority's conclusions.[304] Centered around the independent state legislature doctrine, the concurring report began by recognizing that a state legislature derives its power to hold and regulate congressional elections "not from the constitution of the State, but from the Constitution of the United States."[305] The Elections Clause "expressly committed to the legislature of each State the power to prescribe the time of holding congressional elections, subject only in its exercise to the higher power of Congress."[306] Consequently, "there was no power in the State, or out of it, competent to change the time" set by the legislature for congressional elections, "except Congress and the legislature itself."[307] Speer went on to emphasize that the state constitutional convention "had no authority at all to name a day for congressional elections," much less one that differed from that set by the legislature.[308]

Speer agreed with the majority that the draft constitution did not purport to change the time for holding congressional elections.[309] He went on to declare that any attempt to set a new date for congressional elections in the state constitution would have been "unauthorized and void."[310] He explained:

> The State constitution had not given to the legislature the power to say when Congressmen shall be elected, (for it did not have [such power] to give,) [*sic*] and neither State constitution nor State convention could take it away. The legislature derived it from *the*

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[304] *Id.* at 11 (minority report of Rep. Speer).

[305] *Id.* at 13.

[306] *Id.* at 11; *see also id.* at 13 ("The legislature alone, under the Constitution of the United States, was competent to prescribe the time [of congressional elections] . . . .").

[307] *Id.* at 12.

[308] *Id.*; *see also id.* at 13 (arguing that, because the legislature's authority to schedule congressional elections came from the U.S. Constitution, "it was beyond the reach of the State convention . . . to limit, modify, or control in any way the exercise of this power").

[309] *Id.* at 16 ("The convention did not touch the subject of congressional elections, but left it just where the legislature had placed it.").

[310] *Id.*

> *supreme law of the land*, the Constitution of the United States, and in its exercise it knew but one master.[311]

Speer concluded that state law required congressional elections to be held on the fourth Tuesday in October.[312]

Representative Hazelton issued another minority report which was more in the nature of a dissent, concluding that only the August election was legitimate.[313] It interpreted state law to require that congressional elections be held simultaneously with the general election for state and local offices.[314] Hazelton's minority report reasoned that, since no general election had been held in late October, state law did not allow congressional elections to occur at that time.[315] Conversely, since a general election for state and local offices had been held in August simultaneously with the ratification vote, state law required congressional elections to be held then, as well.[316] The report emphasized that, even under this approach, it was still the institutional legislature itself that had "prescribed" the time of the congressional election, as required by the Elections Clause under the independent state legislature doctrine.[317]

When the House debated the conflicting reports, numerous representatives—supporting candidates on both sides of the election contest—expressly embraced the independent state legislature doctrine.[318] For example, Representative Lamar

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[311] *Id.* at 17.

[312] *Id.* at 12–13.

[313] *Id.* at 19–20 (minority report of Rep. Hazelton), *resolutions proposed by minority report adopted*, 2 CONG. REC. 963–64 (1874).

[314] *Id.* at 20 (concluding that, under state law, "[t]he election of Representatives in Congress was hinged on to the State election. It was a mere incident of the State election.").

[315] *Id.*

[316] *Id.* at 21 ("It being, we think, clearly the purpose of the legislature that Representatives in Congress should be elected at the general election, it follows that when the occasion was changed, transplanted, the election of Representatives in Congress went with it.").

[317] *Id.* at 23 ("Even if we concede that the word 'prescribe' [in the Elections Clause] shall have here its narrowest and most technical signification, there seems to us to have been a sufficient prescription of the time [by the legislature].").

[318] *See, e.g.*, 2 CONG. REC. 878 (1874) (statement of Rep. Todd) (explaining that, while the state constitution's provisions concerning the timing of elections for state and local offices were binding on the legislature, the Elections Clause designated the legislature "as the one competent authority, specifically to fix and prescribe a time, place, and manner for the election of Representatives in Congress"); *id.* at 887 (statement of Rep. Thomas) (arguing that

declared that, "in requiring the Legislature to prescribe the time of holding the congressional election[,] [the Elections Clause] meant to exclude the idea that a [state constitutional] convention should be invested with that important power."[319] Representative Todd elaborated:

> The law providing for and regulating the election of State officers has its source in the State constitution; that for the election of congressional Representatives in the Constitution of the United States. Each is imperative and absolute within its own sphere, and may and do have entire freedom of action, without jostling or infringing on each other . . . .[320]

These representatives argued that only the institutional legislature itself—rather than the state's constitutional convention or even the state constitution—could set the "time" of congressional elections.[321]

Due to the general consensus that the Elections Clause allowed only the legislature—rather than the state constitutional convention or the state constitution—to set a date for congressional elections, the contest turned on a question of statutory

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a state constitutional convention lacks authority to "repeal or alter . . . a statute of this kind providing, in obedience to the national Constitution, for the election of Representatives in Congress"); *id.* at 934 (statement of Rep. Wilson) (arguing that, if the state constitutional convention had intended to move congressional elections to August, it "would not be a compliance with the mandate of the Federal Constitution, that the legislative power shall prescribe the time for such election"); *see also id.* at 884 (statement of Rep. Hyde) (explaining that "a constitutional convention, with its powers limited by a former constitution and by the act creating it, . . . is not a Legislature within the meaning of [the Elections Clause]," and therefore cannot regulate congressional elections); *id.* at 958 (statement of Rep. Butler) (noting that determining when congressional elections would be held was within the "constitutional province" of the legislature, rather than a constitutional convention).

[319] *Id.* at 846 (statement of Rep. Lamar).

[320] *Id.* at 878 (statement of Rep. Todd).

[321] *Id.* at 844 (statement of Rep. Lamar); *see also id.* at 889 (statement of Rep. Harrison) (explaining that, to find the August congressional election valid, the House must "find some warrant for it in an act of the Legislature," because of the Elections Clause); *id.* at 848 (statement of Rep. Danford) (emphasizing that the state legislature complied with the Elections Clause by enacting statutes governing the time and manner of congressional elections); *id.* at 932 (statement of Rep. Crossland) ("The Legislature of the State is the only body in the State that is authorized by the Constitution to prescribe the times and places for holding congressional elections . . . ."); *accord id.* at 933–34 (statement of Rep. Wilson).

interpretation. The House, adopting Hazelton's minority view, ultimately concluded that the August election was valid and voted 134–82–70 to seat Davis and 115–75–97 to seat Hagans.[322]

2. Iowa (1878). The House relied on the independent state legislature doctrine again only a few years later to resolve a similar dispute concerning two districts' results in Iowa's 1878 congressional elections.[323] A federal law that Congress enacted in 1872, which entered into effect in 1876, generally required states to hold congressional elections in November.[324] The Governor of Iowa, however, believed the state fell within an exception in the statute and held the election in October instead.[325] Approximately 30,000 votes were cast in each of the two contested districts, with Cyrus C. Carpenter and William F. Sapp receiving the most votes in their respective races.[326] Residents of several towns within those districts disagreed with the governor's interpretation of federal law and believed that congressional elections had to be held in November.[327] They held their own private elections, with no involvement from any "regularly-appointed" governmental officials besides one town clerk.[328] A few hundred votes were cast between the two districts, and J.C. Holmes and John J. Wilson prevailed.[329]

The majority of the House Committee on Elections began by determining when Iowa law required elections be held.[330] It relied solely on state law, expressly ignoring state constitutional provisions governing the timing of congressional elections.[331] The Committee explained that the Elections Clause gives state legislatures the power to determine the "time" of congressional elections, and a state constitution "cannot take this power from the

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[322] *Id.* at 963–64.

[323] IOWA CONTESTED ELECTIONS CASES, H.R. REP. NO. 46-19, at 1–18 (1880) (majority report), *resolutions proposed by committee report adopted*, 11 CONG. REC. 1074 (1881).

[324] Act of Feb. 2, 1872, ch. 11, §§ 3–4, 17 Stat. 28, 28–29; *see also* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 198–203 (2020) (discussing the statute's legislative history).

[325] H.R. REP. NO. 46-19, at 8.

[326] *Id.* at 1–2, 4, 7.

[327] *Id.* at 3–5.

[328] *Id.* at 4–6.

[329] *Id.* at 5–7.

[330] *Id.* at 17–18.

[331] *Id.* at 18.

legislature of a State . . . ."[332] Consequently, the Committee "disregard[ed] altogether the provision for the election of members of Congress found in . . . the constitution of Iowa."[333] Regardless of the intent underlying the state constitution, "the time of electing members of Congress cannot be prescribed by the *constitution* of a State."[334] The Committee agreed with the governor's conclusion that state law required congressional elections to be held in October and that federal law did not mandate a different date.[335] The House seated Sapp and Carpenter in accordance with the Committee's recommendation by voice vote without debate.[336]

C. SELECTING U.S. SENATORS

During the nineteenth century, the U.S. Senate similarly applied the independent state legislature doctrine to the other type of congressional "election" mandated by the Constitution at the time: direct appointment of U.S. Senators by state legislatures.[337] The Elections Clause's grant of authority to state legislatures to determine the time, place, and manner of congressional elections extended to a legislature's own selection of U.S. Senators.[338] Thus, the Constitution specifically empowered the legislature itself—rather than the state as a whole—to both elect the state's U.S. Senators and determine the manner in which it would go about such elections. The state constitution could not limit the substantive scope of that authority.

In 1887, one of West Virginia's seats in the U.S. Senate became vacant because the legislature had not agreed upon a new senator by the time the sitting senator's term expired.[339] The governor appointed Daniel B. Lucas to serve as senator until the legislature

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[332] *Id.* at 9.

[333] *Id.* at 18.

[334] *Id.*

[335] *Id.* at 17–18.

[336] 11 CONG. REC. 1074 (1881).

[337] U.S. CONST. art. I, § 3, cl. 1. The Seventeenth Amendment, allowing the people to elect U.S. Senators, was not adopted until the early twentieth century. *Id.* amend. XVII.

[338] *Id.* art. I, § 4, cl. 1.

[339] S. REP. NO. 50-1, at 2 (1887), *resolutions proposed by committee report adopted without debate*, 19 CONG. REC. 54 (1887).

appointed a replacement.[340] The governor separately called a special session of the legislature to deal with eleven specified issues, none of which included filling the U.S. Senate seat.[341] The West Virginia Constitution specified that, when the governor convenes a special session of the legislature, "it shall enter upon no business, except that stated in the proclamation by which it was called together."[342] During the special session, the legislature nevertheless voted to elect Charles J. Faulkner to the seat.[343]

Even though the West Virginia legislature's election of Faulkner during a special session violated the state constitution, the Senate Committee on Privileges and Elections sided with him.[344] The Committee concluded the state constitution's requirement that special legislative sessions adhere to the issues identified in the governor's proclamation applied only to "business to be transacted under authority of the State constitution."[345] State constitutional restrictions did not apply to the legislature's "performance of duties imposed upon it by the supreme authority of the Constitution of the United States."[346] The Senate unanimously adopted the resolutions proposed by the Committee without debate.[347]

New Jersey's attempted appointment of John Stockton to the U.S. Senate in 1865 provides even stronger support for the independent state legislature doctrine because senators on both

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[340] 19 CONG. REC. 1 (1887) (statement of President Pro Tempore).

[341] *Id.*

[342] W. VA. CONST. of 1872, art. VII, § 7.

[343] 19 CONG. REC. 1 (1887).

[344] S. REP. NO. 50-1, at 3–4.

[345] *Id.* at 3.

[346] *Id.* at 3–4.

[347] 19 CONG. REC. 54 (1887). Oregon's attempts to elect U.S. Senators by popular vote prior to the Seventeenth Amendment suggest that states were similarly unable to limit the authority that the U.S. Constitution granted to legislatures over senatorial appointments. The Oregon legislature enacted a law in 1908 requiring its members to pledge to vote to appoint whichever U.S. Senate candidate won the state's senate preference primary. Muller, *supra* note 29, at 723 (quoting ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON 169 n.22 (1912)). Contemporaneous commentary called the measure "unconstitutional." *Id.* (quoting EATON, *supra* at 96). Although no lawsuit was ever brought, some legislators simply ignored the law in 1913 by voting for a U.S. Senate candidate who did not win the popular vote. *Id.* at 724.

sides of the dispute relied upon it.[348] Both the New Jersey Constitution and a New Jersey statute required the two chambers of the state's legislature to meet together in joint session to appoint U.S. Senators.[349] While sitting in joint session, the legislature adopted a rule providing that a plurality of votes would be sufficient to select a senator.[350] John P. Stockton won a plurality with forty out of eighty-one votes cast; the next highest candidate had only thirty-seven votes.[351] An election contest was filed, contesting the validity of Stockton's election on the grounds that he had not received a majority of votes in the joint session.[352]

The Senate Judiciary Committee's report began by expressly endorsing the independent state legislature doctrine. It declared, "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 . . . ."[353] The Committee then explained that, while the legislature had enacted a law requiring it to select senators in joint session, that statute did "not prescribe any rules for the government of [that] joint meeting."[354] The Committee concluded that, because the "laws of New Jersey . . . authorize a joint meeting of the two houses of the legislature to appoint a senator," the legislature had implicitly authorized that joint meeting to decide for itself whether to elect senators by a plurality vote.[355] Consequently, the Committee recommended seating Stockton.[356]

At the end of the report, the Committee noted an alternate "plausib[le]" basis for its ruling: the joint session had power to determine its own rules because the New Jersey constitution

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[348] *See generally* S. REP. NO. 39-4 (1866), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 1601–02 (1866), *reconsideration granted and resolution rejected*, *id*. at 1677, 1679.

[349] *Id.* at 1; *accord id.* at 5–7 (reprinting Letter from N.J. Sen. W.W. Ware et al., to the U.S. Senate (Mar. 20, 1865)).

[350] *Id.* at 2.

[351] *Id.*

[352] *Id.* at 1.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 3.

[356] *Id.* at 4.

recognized it as the "legislature" for purposes of the Elections Clause.[357] The Committee expressly declined to accept that rationale, however.[358] Moreover, this reasoning does not imply that a state constitution may designate some entity outside of, and unrelated to, the institutional legislature as the "Legislature" for purposes of the Elections Clause. Elsewhere, the report emphasizes, "The right to choose United States senators in a joint meeting of the two houses which compose the legislature of a State has been too long and too frequently exercised to be now brought in question. This has been the manner of election in some States from the beginning . . . ."[359] Thus, this proposed alternate rationale—which the Committee itself did not even adopt—may be construed as recognizing that a state constitution has some latitude in specifying which configuration of an institutional state legislature's chambers qualifies as the "legislature" for purposes of the U.S. Constitution. Regardless, the Committee recognized that a state constitution cannot impose substantive constraints upon whatever entity qualifies as the legislature concerning the manner of selecting U.S. Senators.[360]

The precedential value of the *Stockton* report is muddied by its subsequent history. Initially, the Senate voted twenty-two to twenty-one to adopt the report and seat Stockton.[361] A few days later, though, a senator objected that the vote was invalid because Stockton himself had participated.[362] The Senate voted again on the matter, rejecting Stockton by a vote of twenty to twenty-three.[363] Even Stockton's opponents, however, framed their arguments in terms of the independent state legislature doctrine. Senator Sherman, for example, declared that while the Elections Clause allows a legislature to "prescribe a plurality rule in the election of a Senator, a joint convention of the Legislature in the exercise of the law cannot do it."[364] Most senators who participated in the debates

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[357] *Id.*

[358] *Id.*

[359] *Id.* at 3.

[360] *See supra* note 353 and accompanying text.

[361] CONG. GLOBE, 39th Cong., 1st Sess. 1602 (1866).

[362] *Id.* at 1635 (statement of Sen. Sumner).

[363] *Id.* at 1677, 1679.

[364] *Id.* at 1677 (statement of Sen. Sherman); *see also id.* at 1668 (statement of Sen. Howard) (emphasizing that the Elections Clause delegates power to determine the manner of Senate

generally agreed that the Elections Clause allowed only the "Legislature" to determine the manner in which Senators would be appointed; they differed primarily on whether a joint session of the New Jersey Legislature could qualify as such.[365]

D. REFORMING THE ELECTORAL COLLEGE

The nineteenth century Senate also expressed support for the independent state legislature doctrine outside the context of election contests. In 1874, the U.S. Senate Committee on Privileges and Elections considered a potential constitutional amendment to require states to elect their presidential electors from electoral districts.[366] The report explained that state legislatures already could adopt this system, despite any restrictions in their state constitutions.[367] It stated that, under the Presidential Electors Clause, "[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states."[368] This authority "cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States."[369] The Committee further emphasized, "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."[370] The U.S. Supreme Court quoted the report approvingly in support of the independent state legislature doctrine in its 1892 ruling in *McPherson v. Blacker*.[371]

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elections to the institutional legislature, which is a different entity from the chambers of the legislature sitting in joint session).

[365] *See id.* at 1668–79.

[366] S. REP. NO. 43-395, at 2 (1874) (outlining the proposed amendment).

[367] *See id.* at 9.

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] 146 U.S. 1, 34–35 (1892).

E. LIMITS OF THE DOCTRINE: DISPUTES OVER VOTER QUALIFICATIONS

Congressional election contests throughout the nineteenth century also confirm one of the major limitations of the independent state legislature doctrine: state constitutions *may* limit a legislature's authority over voter qualifications for congressional elections.[372] As explained earlier, the independent state legislature doctrine arises for congressional elections from the Elections Clause,[373] which allows the "Legislature" of each state to determine their "Times, Places and Manner."[374] Separate constitutional provisions—the Voter Qualifications Clause[375] and the Seventeenth Amendment[376]—specify that anyone entitled to vote for the more populous branch of the state legislature is also eligible to vote in congressional elections.

Thus, the Elections Clause does not empower either Congress or state legislatures to directly set the qualifications that voters must possess to be eligible to vote in congressional elections.[377] Rather, the U.S. Constitution ties eligibility to vote in congressional elections to voting eligibility for state legislative races.[378] Because the U.S. Constitution does not grant the legislature exclusive authority to set voter qualifications in state legislative elections, the matter is left to the inherent control of the states themselves, as entities.[379] Consequently, state constitutions may establish voter qualifications for state legislative elections (and, by extension,

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[372] *See supra* note 62.

[373] *See supra* notes 43–47 and accompanying text.

[374] U.S. CONST. art. I, § 4, cl. 1.

[375] *Id.* 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.").

[376] *Id.* amend. XVII.

[377] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16–17 (2013) (holding that authority to "[p]rescrib[e] voter qualifications" is neither "'conferred upon the national government' by the Elections Clause," nor "plac[ed] . . . within the unfettered discretion of state legislatures" (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton)); *see also* Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) (declaring that the Constitution does not "lend[] itself to the view that voting qualifications in federal elections are to be set by Congress").

[378] *See supra* notes 375–376 and accompanying text.

[379] *See Inter Tribal Council*, 570 U.S. at 17 (stating that neither the federal nor state franchise are "within the unfettered discretion of state legislatures").

congressional elections), and any state laws that conflict with such provisions are invalid and unenforceable.[380]

During the nineteenth century, the chambers of Congress observed this limitation on the independent state legislature doctrine. For example, in *Johnston v. Stokes*, the House Elections Committee concluded that South Carolina's voter registration statute violated the state constitution by impermissibly adding new voter qualifications.[381] Agreeing with this conclusion, the House concluded that the election was invalid and refused to seat any of the candidates.[382]

Curtin v. Yocum was a contest in which the House ultimately adopted the Election Committee's minority report, which recognized and enforced this restriction on the independent state legislature doctrine.[383] The Pennsylvania Constitution authorized the legislature to enact voter registration laws, but provided that "no elector shall be deprived of the privilege of voting by reason of his *name not being registered*."[384] Pennsylvania law provided that an unregistered person could still vote if he presented affidavits from both the voter himself and another registered voter attesting to his eligibility.[385] A person who neither registered nor provided the required affidavits could not vote.

Despite this statute, election officials allowed several hundred people who neither registered nor provided the statutorily required affidavits to vote.[386] The Election Committee's majority report concluded that, because election officials had accepted votes that were invalid under the state constitution and state law, the election

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[380] *See supra* note 62.

[381] THOMAS B. JOHNSTON V. J. WILLIAM STOKES, H.R. REP. NO. 54-1229, at 14 (1896) (majority report) ("[T]he committee agree[s] that a part of the law is unconstitutional, being in violation of the constitution of the State of South Carolina."), *resolution proposed by committee report amended and adopted*, 28 CONG. REC. 5952 (1896); *id.* at 14 (statement of Rep. McCall, concurring) ("This provision is clearly repugnant to the constitution of South Carolina, which under the pretense of regulating suffrage imposes a new qualification upon it, and is therefore unconstitutional.").

[382] 28 CONG. REC. 5952 (1896).

[383] *See* CURTIN VS. YOCUM, H.R. REP. NO. 46-345, at 11–19 (1880) (submitting views of the minority), *resolution proposed by minority report adopted*, 10 CONG. REC. 3250–51 (1880).

[384] *Id.* at 2 (majority report).

[385] *Id.* at 4.

[386] *Id.* at 2.

results had to be discarded.[387] During floor debates, the majority report's primary proponent, Representative Beltzhoover, explained that the majority did not seek to act contrary to the state constitution by disenfranchising voters for failing to register.[388] Rather, the majority had concluded that the challenged votes were invalid because the unregistered voters had failed to provide the affidavits that state law permitted as an alternative to registration.[389]

The minority, in contrast, argued that the state constitution imposed "a limitation on the power of the legislature of the State."[390] Prohibiting people from voting because they were unregistered would violate the state constitution, even though state law allowed such voters to establish their eligibility through other means.[391] To avoid this constitutional infirmity, the minority construed state law as requiring election officials to count all votes except those from people who had been specifically asked to provide the required proof of eligibility and failed to do so.[392]

The minority report's author, Representative Calkins, explained during the floor debate that refusing to count the votes of people who had neither registered nor provided affidavits confirming their eligibility treated those requirements as voter qualifications.[393] The state legislature was prohibited, however, from adopting new voter qualifications beyond those set forth in the state constitution.[394] Calkins explained, "[W]herever a constitution declares the qualifications of electors, and a registry law add[s] additional tests to those qualifications, the registry law [is] null and void . . . ."[395]

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[387] *Id.* at 10 (concluding that "the true result of the election" was unknown and recommending "that the election be declared void").

[388] 10 CONG. REC. 3145–46 (1880) (statement of Rep. Beltzhoover).

[389] *Id.*

[390] H.R. REP. NO. 46-345, at 13 (views of the minority).

[391] *Id.* at 14 (explaining that, so far as state law "restricts [a person's] right to vote, if he is otherwise qualified, [it] is an additional test of his right to vote, [and] is repugnant to that sacred privilege reserved to each citizen . . . in the very words of the constitution").

[392] *Id.* at 15 ("[I]f he is allowed to vote without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one.").

[393] 10 CONG. REC. 3184 (1880) (statement of Rep. Calkins).

[394] *Id.* ("[T]he very purpose of this constitutional provision . . . was to prevent the Legislature . . . [from] making a registry law that would be an additional test to the qualifications of the voter.").

[395] *Id.*

Representative Stevenson echoed these sentiments.[396] He reaffirmed "that it is the province of the Legislature to indicate the manner in which the voter is to exercise his privilege. The time, manner, and place fall within the legislative prerogative."[397] Voter qualifications fell outside the scope of that power, however, and Stevenson wished to ensure that "the rights of the legally qualified elector[s] shall not be imperiled."[398] Following extensive debates, the House ultimately adopted the minority report.[399] Thus, the distinction between a state's authority over voter qualifications and the legislature's power over the time, place, and manner of congressional elections was recognized and enforced.

In short, throughout the nineteenth century, whenever the independent state legislature doctrine was raised in an election contest before a chamber of Congress, it was consistently embraced and applied.

V. THE DOCTRINE IN THE U.S. SUPREME COURT

The U.S. Supreme Court's attitude toward the independent state legislature doctrine has vacillated over the past century and a quarter. For every case embracing the doctrine throughout that time, another has questioned or even rejected it. This Part traces the doctrine's history before the Court. Though some tension exists among the Court's early cases, they can reasonably be read together as concluding that a state constitution cannot impose *substantive* limits on the scope of the state legislature's authority to regulate the time, place, and manner of federal elections, but the legislature must follow the lawmaking *process* set forth in the state constitution when doing so. In 2015, however, a bare majority of the Court flatly rejected all aspects of the doctrine, albeit arguably in *dicta*, with almost no attention to its rich history of application throughout the nineteenth century. This Part concludes by analyzing various ways in which the doctrine could be reincorporated into modern constitutional law.

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[396] *Id.* at 3179–81 (statement of Rep. Stevenson).

[397] *Id.* at 3180.

[398] *Id.*

[399] *Id.* at 3250–51.

A. DEVELOPING A PROCEDURE/SUBSTANCE DICHOTOMY: THE EARLY YEARS

The Court first discussed the independent state legislature doctrine in its 1892 ruling in *McPherson v. Blacker*, which enthusiastically endorsed it, although primarily in dicta.[400] The plaintiffs in *McPherson* challenged the constitutionality of a Michigan law requiring presidential electors to be elected by district.[401] The opinion begins by recognizing that the U.S. Constitution "frequently refers to the State as a political community."[402] When acting under such provisions, the state must exercise its "legislative power under state constitutions as they exist."[403] The Presidential Electors Clause, in contrast, provides that a state shall select its presidential electors "in such manner as the legislature thereof may direct."[404] That express delegation of authority specifically to the legislature "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power . . . ."[405] In other words, a state may not restrict the authority that its legislature receives from the Presidential Electors Clause.

The Court went on to emphasize that the Presidential Electors Clause grants the legislature "plenary authority to direct the manner of [its electors'] appointment."[406] A legislature is not required to use any particular method of appointing electors "in the absence of an amendment to the [U.S.] Constitution."[407] It may therefore choose to appoint electors based on the results of separate elections held within each congressional district.[408]

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[400] 146 U.S. 1, 34–35 (1892).

[401] *Id.* at 24–25.

[402] *Id.* at 25.

[403] *Id.*

[404] *Id.* (quoting U.S. CONST. art. II, § 1, cl. 2); *see also id.* at 27 (declaring that the Constitution "leaves it to the legislature exclusively to define the method" of choosing electors).

[405] *Id.* at 25.

[406] *Id.*; *see also id.* at 35 ("[T]he practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

[407] *Id.* at 29.

[408] *See id.* at 25–26 ("[I]t is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts.

The Court also quoted approvingly from a report that the Senate Committee on Privileges and Elections issued in 1874.[409] The report accompanied a proposed amendment to the U.S. Constitution that would have required states to create electoral districts and appoint presidential electors based on whichever candidate won a majority of the popular vote in each district.[410] As discussed earlier,[411] the Committee report stated that, under the Presidential Electors Clause:

> [t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. . . . 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 to resume the power at any time, for it can neither be taken away nor abdicated.[412]

Thus, the Court endorsed the notion that a state constitution could not limit the scope of a legislature's authority to regulate presidential elections under the Presidential Electors Clause. It concluded that the Michigan legislature was free to choose presidential electors based on the popular vote within each district.[413]

The Court's next major rulings touching on the doctrine, issued in the early twentieth century, suggest that the Court may have harbored some degree of skepticism towards it; nevertheless, they remain fully consistent with the doctrine. In the 1916 case *Ohio* ex

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In other words, the act of appointment is none the less the act of the State in its entirety because arrived at by districts . . . .").

[409] *Id.* at 34–35 (citing S. REP. NO. 43-395 (1874)).

[410] *Id.* at 34.

[411] *See supra* Section IV.D.

[412] *McPherson*, 146 U.S. at 34–35 (emphasis added) (quoting S. REP. NO. 43-395 (1874)).

[413] *See id.* at 42.

rel. *Davis v. Hildebrant*, the Ohio Constitution allowed the public to vote to nullify any law enacted by the institutional state legislature.[414] Using this referendum process, the people rejected a state law adopting new congressional districts.[415] A group of voters had sought a writ of mandamus from the state supreme court to compel election officials to hold elections based on those rejected maps.[416] They argued that, since the Elections Clause granted power to regulate congressional elections specifically to the institutional state legislature, a referendum could not be used to reject or displace state election laws.[417]

The U.S. Supreme Court rejected this argument.[418] It began by noting that a recently enacted federal statute allowed states to incorporate a public referendum into the process for creating congressional districts if the state constitution or state law treated the referendum procedure "as part of the [state's] legislative power."[419] The Court then mentioned the plaintiffs' argument that, under the Elections Clause, the term "legislature" cannot include a referendum.[420] The Court did not address the merits of the plaintiffs' Elections Clause claim, however, but rather transmuted it into an argument under the Guarantee Clause.[421] The Court declared:

> [The plaintiffs' argument] 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

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[414] 241 U.S. 565, 566 (1916) (noting that the state constitution granted the people "a right . . . by way of referendum to approve or disapprove" of any state statute).

[415] *Id.*

[416] *Id.* at 566–67.

[417] *Id.* at 567.

[418] *Id.* at 569.

[419] *Id.* at 568.

[420] *Id.* at 569.

[421] U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

> such condition exists to be not republican in form in violation of the guarantee of the Constitution.[422]

Thus, the Court never addressed the meaning of the term "legislature" as used in the Elections Clause. Rather, it replaced that term with the phrase "legislative power," and then considered whether including a referendum process as part of a state's "legislative power" deprives that state of a republican form of government. The Court declined to reach the merits of that alternate constitutional issue on the grounds that Guarantee Clause claims are non-justiciable.[423]

Subsequent cases and commentators have read *Davis* much more broadly than its actual holding warrants.[424] First, although *Davis* is often characterized as an Elections Clause case, the Court did not address the Elections Clause question, but rather recharacterized it as a nonjusticiable Guarantee Clause issue.[425] Second, the Court simply held that a state could incorporate a public referendum into its legislative process to allow voters to disapprove a redistricting scheme enacted by the institutional legislature.[426] The referendum process that *Davis* upheld was comparable to a gubernatorial veto. *Davis* does not state, however, that a referendum or other such process may be used to affirmatively adopt congressional districts or other rules for congressional elections.[427]

Third, *Davis* does not suggest that a state may completely exclude its institutional legislature from either participating in the congressional redistricting process or regulating congressional elections more broadly. Finally, although *Davis* allows a state to determine the entities or processes that comprise its "legislative power,"[428] the ruling is silent on the separate issue of whether the state constitution may impose substantive limits on the ability to

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[422] *Davis*, 241 U.S. at 569 (citing U.S. CONST. art. IV, § 4).

[423] *Id.* ("[T]he question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy . . . .").

[424] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 805 (2015) (stating that *Davis* established that the term "'the Legislature' . . . encompassed a veto power lodged in the people").

[425] *See Davis*, 241 U.S. at 569.

[426] *See id.*

[427] *Id.* at 569–70.

[428] *Id.* at 568.

regulate federal elections of whatever entities or processes are included within the state's "legislative power." In other words, *Davis* allows a state constitution to specify what entity or processes count as the "Legislature" for purposes of the Elections Clause. It does not suggest, however, that a state constitution may limit the scope of the power that the Elections Clause confers upon that legislature. Thus, *Davis* is generally consistent with the independent state legislature doctrine.

Over the next decade, a pair of rulings fully applied the doctrine in construing Article V's delegation of power to state legislatures to ratify proposed constitutional amendments.[429] The Court's 1920 ruling in *Hawke v. Smith* held—notwithstanding *Davis*—that a state constitution could not make a state legislature's ratification of a federal constitutional amendment contingent upon a public referendum.[430] In 1917, Congress proposed the Eighteenth Amendment, establishing Prohibition, and transmitted it to the states for ratification.[431] The Ohio legislature enacted a resolution ratifying the amendment.[432] The state constitution, however, allowed the people to hold referenda on the legislature's ratification of amendments to the U.S. Constitution.[433] Some Ohio citizens sued to enjoin the Ohio Secretary of State from holding a referendum on the legislature's ratification of the Eighteenth Amendment.[434] They argued that Article V of the U.S. Constitution granted the power to ratify federal constitutional amendments solely to the legislature.[435]

The Court agreed with their argument.[436] Invoking the independent state legislature doctrine, it declared that "the power

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[429] U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, . . . which, . . . 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 . . . .").

[430] 253 U.S. 221 (1920).

[431] S.J. Res. 17, 65th Cong., 40 Stat. 1050 (1917) (proposing the Eighteenth Amendment to the U.S. Constitution).

[432] *Hawke*, 253 U.S. at 225. For further details concerning *Hawke*'s procedural history, see Amar, *The People Made Me Do It*, *supra* note 31, at 1076–80.

[433] *Hawke*, 253 U.S. at 225 (discussing a state constitutional provision granting the people "the legislative power of the referendum" over amendments to the U.S. Constitution).

[434] *Id.* at 224.

[435] *Id.*

[436] *Id.* at 230–31.

to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution."[437] *Hawke* emphasized that the term "Legislature" as used in Article V is "not a term of uncertain meaning when incorporated into the Constitution."[438] It refers to "the representative body which made the laws of the people."[439] The Court observed, "The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."[440]

The Court went on to note that the term "Legislature" appears to carry the same meaning wherever it appears in the Constitution.[441] Moreover, as originally adopted, the Constitution empowered the "Legislature" of each state to appoint U.S. Senators.[442] If the term could include referenda by the general public, there would have been no need to adopt the Seventeenth Amendment[443] to allow popular election of Senators.[444]

Hawke concluded by distinguishing *Davis* on the grounds that ratification of a constitutional amendment is distinct from enactment of a state law.[445] Although the Elections Clause empowers the state legislature to enact laws regulating federal elections, *Hawke* explained, it does not excuse the legislature from following the legislative procedure set forth in the state constitution.[446] When a state constitution includes a public referendum "as part of the legislative authority of the state," as in *Davis*, state laws governing federal elections are subject to public

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[437] *Id.* at 230.

[438] *Id.* at 227.

[439] *Id.*; *see also id.* (defining "legislature" as a "deliberative assemblage[] representative of the people").

[440] *Id.*

[441] *Id.* ("The term is often used in the Constitution with this evident meaning."); *see also id.* at 228 ("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.").

[442] *Id.* at 227–28 (citing U.S. CONST. art. I, § 3).

[443] U.S. CONST. amend. XVII.

[444] *Hawke*, 253 U.S. at 228 ("The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.").

[445] *Id.* at 230–31 (stating that *Davis*'s holding is "inapposite").

[446] *Id.* at 231.

referenda.[447] Ratification of a federal constitutional amendment, however, is not an exercise of the ordinary state lawmaking process.[448] A state constitution therefore may not impose such procedural constraints on a legislature's ability to "express[] . . . assent or dissent to a proposed amendment to the Constitution."[449]

Although *Hawke*'s ultimate conclusion was correct, it over-read *Davis* and endorsed that Court's erroneous conflation of the term "Legislature" in the Elections Clause with the broader phrase "legislative authority of the state."[450] *Hawke*'s reasoning has also contributed to the remarkable notion that the term "Legislature" might mean something different under the Elections Clause (and, by extension, the Presidential Electors Clause) than throughout the rest of the Constitution. Nevertheless, *Hawke* applied the independent state legislature doctrine, enforcing the constitutional prerogatives of institutional legislatures under the Article V Amendments Clause.[451]

A few years later, in *Leser v. Garnett*, the Court went even further in applying the doctrine to the Amendments Clause.[452] It held that the Nineteenth Amendment,[453] prohibiting gender discrimination in voting, had been validly ratified.[454] The plaintiffs argued that several states' ratifications were invalid because their state constitutions prohibited their legislatures from ratifying federal constitutional amendments extending voting rights to women.[455] Rejecting that claim, the Court held that ratification of amendments to the U.S. Constitution "is a federal function derived from the Federal Constitution; and it transcends any limitations

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[447] *Id.* at 230–31.

[448] *Id.* at 229 ("[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word.").

[449] *Id.* at 231.

[450] *Id.* at 230.

[451] *See also* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.").

[452] 258 U.S. 130 (1922).

[453] U.S. CONST. amend. XIX.

[454] *Leser*, 258 U.S. at 137.

[455] *Id.* at 136–37 (discussing the plaintiffs' argument that the constitutions of several states that had ratified the Nineteenth Amendment contain "provisions which render inoperative the alleged ratifications by their legislatures," and "by reason of these specific provisions the legislatures were without power to ratify").

sought to be imposed by the people of a State."[456] Thus, *Leser* squarely held that a state constitution may not impose substantive restrictions on the scope of authority that Article V confers directly on state legislatures to ratify amendments to the U.S. Constitution.

Though the Court's subsequent rulings focus much more heavily on *Hawke*, *Leser* is actually the more important holding. *Hawke* dealt with the definition of "Legislature" in Article V and the inability of state constitutions to add procedural requirements to the ratification process.[457] *Leser* confirms that a state constitution cannot prohibit state legislatures from ratifying certain types of federal constitutional amendments based on their substantive content.[458] Such reasoning would seem to apply with full force to the Elections Clause and Presidential Electors Clause. *Leser* strongly suggests that state constitutions are incapable of imposing substantive limits or restrictions on the power that the U.S. Constitution grants state legislatures to pass laws regulating congressional and presidential elections.

The Court's ruling a decade later in *Smiley v. Holm* was largely agnostic on the independent state legislature doctrine.[459] *Smiley* explained that, although the Elections Clause grants the legislature power to enact laws governing federal elections, the legislature's "exercise of th[at] authority must be in accordance with the method which the State has prescribed for legislative enactments."[460] When a state constitution incorporates a gubernatorial veto into the lawmaking process, it can be applied to bills concerning

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[456] *Id.* at 137. Professor Amar rejects this conclusion. Amar, *The People Made Me Do It*, *supra* note 31, at 1054. He argues that the people of a state should be free to restrict the legislature's ability to ratify amendments to the U.S. Constitution, in order to prevent legislators from engaging in self-dealing by either enlarging their powers or entrenching their authority at the expense of the people. *Id.*

[457] Hawke v. Smith, 253 U.S. 221, 227, 230–31 (1920).

[458] *Leser*, 258 U.S. at 137.

[459] 285 U.S. 355 (1932); *accord* Koenig v. Flynn, 285 U.S. 375, 379 (1932) (affirming "[f]or the reasons stated in the opinion in *Smiley v. Holm*"); *see also* State *ex rel.* Carroll v. Becker, 45 S.W.2d 533, 536–37 (Mo. 1932) (refusing to recognize congressional districts enacted by the legislature but vetoed by the governor).

[460] *Smiley*, 285 U.S. at 367; *see also id.* at 368 (holding that the Elections Clause does not grant the legislature "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted").

congressional elections.[461] *Smiley* distinguished *Hawke* on the grounds that ratifying a constitutional amendment is not a traditional act of lawmaking, and therefore is not subject to the ordinary legislative process set forth in the state constitution.[462]

Thus, *Smiley* reaffirms a legislature's obligation to follow the legislative process set forth in its state constitution when regulating federal elections. The opinion does not address, however, whether a state constitution may impose substantive limits on the content of measures the legislature may adopt. Moreover, *Smiley* hews closely to the text of the Elections Clause, acknowledging that there is no doubt as to the "body" to which the term "Legislature" refers,[463] rather than more broadly considering the nature or locus of the state's "legislative power," as in *Davis*.[464] In other words, *Smiley*'s reasoning does not allow state constitutions to redefine the meaning of the term "Legislature."

B. FROM DISPUTED PRESIDENTIAL ELECTIONS TO CONGRESSIONAL REDISTRICTING: THE MODERN CASES

Despite a few allusions to the Elections Clause and Presidential Electors Clause over the decades that followed,[465] the Court did not revisit the independent state legislature doctrine until seemingly endorsing it during the dispute over the 2000 presidential election. The Court's rulings focused on whether the Presidential Electors Clause's delegation of power specifically to state legislatures

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[461] *Id.* at 372–73 ("[T]here is nothing in Article I, section 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.").

[462] *Id.* at 365–66.

[463] *Id.* at 365.

[464] *Cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 567–68 (1916) (holding that the state constitution made the referendum "part of the legislative power").

[465] *See, e.g.*, Ray v. Blair, 343 U.S. 214, 225 (1952) ("Neither the language of [the Presidential Electors Clause], nor that of the Twelfth Amendment forbids a [political] party to require from candidates in its primary a pledge of political conformity with the aims of the party."); *see also* Grills v. Branigin, 284 F. Supp. 176, 180 (S.D. Ind. 1968) (three-judge court) (per curiam) (holding that the Elections Clause "clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts"), *aff'd sub nom.* Branigin v. Duddleston, 391 U.S. 364 (1968) (mem.).

precludes state courts from considering state constitutions when determining the rules governing presidential elections.

In mid-November 2000, the Florida Supreme Court ruled that state law allowed certain counties to conduct complete manual recounts of ballots cast in the presidential election, because their "sample manual recount[s]" revealed that their automatic tabulation machines had failed to count some ballots.[466] The court reached this conclusion based on the "plain language" of the relevant statute, as well as various other state laws governing recounts.[467]

It further held that the Secretary of State was required to accept the results from such manual recounts, even if they were not available until after the statutory deadline for submitting them, unless allowing such late updates would preclude either "a candidate from contesting the certification" or "Florida's voters from participating fully in the federal electoral process."[468] The court based this conclusion on various canons of statutory construction, numerous state constitutional provisions concerning the right to vote, and the court's own precedents.[469] It later emphasized that its interpretation of the Election Code rested at least partly on the fact that "the right to vote is the preeminent right in the Declaration of Rights of the Florida Constitution."[470]

The U.S. Supreme Court granted certiorari on two questions: (i) whether the Florida Supreme Court's ruling violated the Due Process Clause or 3 U.S.C. § 5 by "changing the State's elector appointment procedures after election day," and (ii) whether that decision violated the Presidential Electors Clause by "chang[ing] the manner in which the State's electors are to be selected."[471]

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[466] Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1225, 1229–30 (Fla. 2000) (holding that "the plain language of [the statute]" allows county canvassing boards "to order countywide manual recounts"), *rev'd sub nom*. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam).

[467] *Id.* at 1229–30.

[468] *Id.* at 1239. Applying that holding, the court directed the Secretary to accept any updated vote tallies filed by Sunday, November 26, 2000. *Id.* at 1240.

[469] *Id.* at 1235–37.

[470] *Id.* at 1239.

[471] Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 73 (2000) (per curiam).

In *Bush v. Palm Beach County Canvassing Board*, the U.S. Supreme Court unanimously reversed and remanded the matter.[472] It recognized that, in general, it must "defer[] to a state court's interpretation of a state statute."[473] When a legislature enacts a law that applies to both elections for state office and presidential elections, however, 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 made under [the Presidential Electors Clause]."[474] Quoting *McPherson v. Blacker*, the Court stated that the Clause's delegation of authority specifically to the legislature prohibits any attempts by states to "circumscribe the legislative power."[475]

Certain parts of the Florida Supreme Court's opinion, the Court observed, suggested that the Florida Constitution might limit the legislature's authority to regulate presidential elections.[476] It appeared that the Florida Supreme Court had not considered "the extent to which the Florida Constitution could, consistent with [the Presidential Electors Clause], 'circumscribe the legislative power.'"[477] The Court also expressed concern that Congress might construe the state supreme court's ruling as a "change in the law" that would prevent Florida from invoking the Electoral Count Act's "safe harbor" to ensure that Congress counts its electoral votes.[478] Because the Court had "considerable uncertainty" about the Florida Supreme Court's reasoning, it "decline[d] at [that] time to review the federal questions" on which it had granted certiorari.[479] Instead, the Court remanded the case to give the Florida Supreme Court an opportunity to clarify its analysis.[480] In doing so, the Court reiterated, "[W]e are unclear as to the extent to which the Florida

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[472] *Id.* at 78.

[473] *Id.* at 76.

[474] *Id.*

[475] *Id.* (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

[476] *Id.* at 77; *see also id.* at 78 (providing examples from the Florida Supreme Court's opinion).

[477] *Id.* (citation omitted).

[478] *Id.* at 77–78 (quoting 3 U.S.C. § 5).

[479] *Id.* at 78 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 555 (1940)).

[480] *Id.* On remand, the state supreme court reached the same conclusion as in its earlier ruling, with essentially the same reasoning, except its opinion omitted references to the state constitution. *See generally* Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).

Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under [the Presidential Electors Clause]."[481]

Palm Beach County Canvassing Board appears to be an endorsement of the independent state legislature doctrine for several reasons. First, the Court uncritically quoted the language from *McPherson*—which had likely been dicta in that opinion—asserting that states may not "circumscribe" a legislature's authority under the Presidential Electors Clause.[482] Second, the Court strongly implied that, since the case involved a state law enacted under the Presidential Electors Clause, the "general rule" requiring federal courts to defer to state courts' interpretations of state law may not fully apply.[483]

Third, and perhaps most persuasively, the Court's decision to remand the case seems to implicitly assume the validity of the independent state legislature doctrine. The Florida Supreme Court's conclusions about state law were clear. The U.S. Supreme Court repeatedly emphasized that it was uncertain about whether, in reaching those conclusions, the Florida Supreme Court had assumed that a state constitution could limit the state legislature's authority over federal elections.[484] If the U.S. Supreme Court were simply bound to accept the Florida Supreme Court's interpretation of state law, the precise basis for the lower court's reasoning would seem to be of limited relevance—particularly in the time-sensitive context of litigation concerning the outcome of a presidential election. The most natural implication of the Court's decision to remand the case was that it may have been problematic for the state supreme court to allow its interpretation of state laws concerning presidential elections to be influenced by the state constitution. That explanation appears to be most consistent with the Court's quotation from *McPherson*, its suggestion that state laws enacted under the Presidential Electors Clause differ from state laws enacted under state constitutions,[485] and its repeated emphasis on

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[481] *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 78 (citation omitted).

[482] *See supra* note 475 and accompanying text.

[483] *See supra* note 473–474 and accompanying text.

[484] *See supra* notes 477 & 481 and accompanying text.

[485] The Court distinguished laws enacted under the Presidential Electors Clause from laws passed "solely under the authority given [to the legislature] by the people of the State." *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 76.

whether the Florida Supreme Court had allowed the state constitution to influence its interpretation of the state laws at issue. To be sure, the U.S. Supreme Court expressly declined to rule on the constitutional and statutory issues on which it had granted certiorari.[486] But its decision to remand still seems to have been based on its interpretation of the Presidential Electors Clause.

In a separate ruling, the Florida Supreme Court ordered a statewide manual recount of all ballots that had been rejected by automated tallying machines.[487] In *Bush v. Gore*, a divided U.S. Supreme Court again reversed.[488] It noted that the Presidential Electors Clause gives the state legislature "plenary" power "to select the manner for appointing electors."[489] It continued, "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 . . . ."[490] Accordingly, the Equal Protection Clause requires states to "avoid arbitrary and disparate treatment" of voters.[491] A statewide manual recount would violate the Equal Protection Clause because no standards existed for determining which of the incorrectly marked ballots that automated tallying machines had rejected should be counted as valid votes.[492] Since there was insufficient time to create uniform standards and conduct a statewide manual recount by the federal safe-harbor deadline for selecting electors, the Court ended the recount.[493]

A three-Justice concurring opinion, authored by Chief Justice Rehnquist and joined by Justices Scalia and Thomas, placed much greater emphasis on the independent state legislature doctrine.[494] The concurrence noted that, "in ordinary cases, the distribution of powers among the branches of a State's government raises no

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[486] *See supra* note 479 and accompanying text.

[487] Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[488] 531 U.S. at 110–11.

[489] *Id.* at 104.

[490] *Id.*

[491] *Id.* at 105.

[492] *Id.* at 106–07 (contrasting the various methods that counties used to determine whether particular markings on a ballot should count as a valid vote).

[493] *Id.* at 110–11.

[494] *Id.* at 111 (Rehnquist, C.J., concurring).

questions of federal constitutional law."[495] The Presidential Electors Clause, however, is an "exceptional case[] in which the Constitution . . . confers a power on a particular branch of a State's government": the state legislature.[496] Under the clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[497] The Presidential Electors Clause prohibits a state court, under the guise of statutory interpretation, from "significant[ly] depart[ing]" from the plain text of the laws enacted by the legislature.[498] The Florida Supreme Court's order for a statewide recount that would extend past the federal safe harbor deadline substantially departed from both past practice as well as the plain meaning of the state election code, and was therefore invalid.[499]

Justice Stevens's dissent largely rejected the doctrine. When the Presidential Electors Clause confers power on state legislatures, he reasoned, it "takes them as they come—as creatures born of, and constrained by, their state constitutions."[500] Justice Stevens quoted language from *McPherson* stating 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."[501] He concluded that, because the Presidential Electors Clause does not "free[] the state legislature from the constraints in the State Constitution that created it," state courts may interpret state laws governing presidential elections the same way they would any other state statutes.[502]

Justice Stevens's dissent flatly misreads *McPherson*. As Justice Stevens contends, *McPherson* recognizes that a state constitution generally may limit the authority that a state's citizens confer on their legislature.[503] *McPherson* goes on to note that the U.S. Constitution frequently imposes powers and duties on "the State as

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[495] *Id.* at 112.

[496] *Id.*

[497] *Id.* at 113.

[498] *Id.* (citing McPherson v. Blacker, 146 U.S. 1, 27 (1892)).

[499] *Id.* at 122.

[500] *Id.* at 123 (Stevens, J., dissenting).

[501] *Id.* (alteration in original) (quoting *McPherson*, 146 U.S. at 25).

[502] *Id.* at 124.

[503] *McPherson*, 146 U.S. at 25.

a political community."[504] When the U.S. Constitution forbids or requires "a State" as an entity to do something, the state's legislative power must be exercised "under state constitutions as they exist."[505] In such cases, the legislature is constrained by the state constitution's substantive restrictions. Stevens's analysis of *McPherson* ends there.

Crucially, however, *McPherson* emphasizes that the "insertion of those words"—specifically referring to the Presidential Electors Clause's use of the term "legislature"—changes this analysis.[506] The clause's grant of federal constitutional power specifically to the state legislature "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power," including through the state constitution.[507] *McPherson* explained that the analysis would be different if the Presidential Electors Clause had instead granted power to the "States," rather than conferring authority specifically on state legislatures.[508] Had the Constitution been drafted differently, state constitutions would have been able to constrain legislatures' power over the appointment of electors. Thus, Justice Stevens's *Bush v. Gore* dissent rips a single sentence from *McPherson* out of context, overlooks the parts of the paragraph in *McPherson* that explicitly reaffirm the independent state legislature doctrine, and ignores the key distinction that *McPherson* draws between the state as an entity and the legislature.

Justice Stevens's dissent is all the more remarkable because he had issued another dissenting opinion just six months prior in *California Democratic Party v. Jones*, questioning whether a state's citizens could amend state laws concerning federal elections through an initiative process.[509] His *Jones* dissent pointed out that the Elections Clause confers power to regulate congressional elections specifically on the state legislature, rather than the state as an entity.[510] He added that, under the independent state legislature doctrine, "California's classification of voter-approved

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[504] *Id.*

[505] *Id.*

[506] *Id.*

[507] *Id.*

[508] *Id.*

[509] 530 U.S. 567, 590 (2000) (Stevens, J., dissenting).

[510] *Id.* at 603.

initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause."[511] Thus, even Justice Stevens was willing to attribute at least some significance to the U.S. Constitution's delegations of authority specifically to state legislatures.

Justice Breyer's separate dissent in *Bush v. Gore* rejected the independent state legislature doctrine in a conclusory fashion, without providing any reasoning or analysis.[512] Justice Ginsburg's dissent likewise summarily rejects the doctrine, emphasizing that federal courts are bound by state courts' interpretations of state laws, including those governing federal elections.[513] Justice Souter's dissent, in contrast, was somewhat more sympathetic to the doctrine. Recognizing that the Presidential Electors Clause grants authority specifically to the legislature, Justice Souter wrote, "The issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature . . . ?"[514]

Justice Souter opined that state courts were entitled to broad deference when construing state laws, including those enacted under the Presidential Electors Clause.[515] The Clause required the U.S. Supreme Court to determine whether the Florida Supreme Court's interpretation of state law "was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question."[516] Thus, unlike the other dissenting Justices, Justice Souter was willing to recognize that the Presidential Electors Clause imposes at least some outer limit on a

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[511] *Id.* His dissent did not mention *McPherson* or any other U.S. Supreme Court cases discussing the doctrine.

[512] Bush v. Gore, 531 U.S. 98, 148 (2000) (Breyer, J., dissenting) ("[N]either the text of Article II itself nor [*McPherson*] leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors.").

[513] *Id.* at 141 (Ginsburg, J., dissenting) ("Article II can hardly be read to invite this Court to disrupt a State's republican regime.").

[514] *Id.* at 130 (Souter, J., dissenting).

[515] *Cf. id.* at 131 ("None of the state court's interpretations is unreasonable to the point of displacing the legislative enactment . . . . [T]he law as declared is consistent with Article II.").

[516] *Id.*

state court's power to interpret state laws governing federal elections.

Bush v. Palm Beach County Canvassing Board is perhaps the most important ruling stemming from the 2000 election concerning the independent state legislature doctrine. The Court in that case unanimously remanded the Florida Supreme Court's ruling to clarify its reasoning—apparently, to confirm that the court was applying *only* state statutes and not the state constitution.[517] *Palm Beach County Canvassing Board*'s seeming refusal to allow courts to consider the state constitution when interpreting state laws governing federal elections strongly suggests that state constitutions may not limit legislatures' authority regarding such elections.

The dissenting opinions in *Bush v. Gore* a few days later detract from the power of that unanimous opinion. Justice Stevens's rejection of the doctrine was based primarily on a misreading of *McPherson*;[518] moreover, he had embraced the doctrine six months earlier in *Jones*.[519] Furthermore, both the concurring opinion in *Bush* and, to a much lesser extent, the Court's per curiam opinion in that case reaffirmed the doctrine. And Justice Souter's dissent was not entirely hostile to the doctrine either.

A few years later, the Court denied certiorari in another Elections Clause case, *Colorado General Assembly v. Salazar*, over a strong three-Justice dissent.[520] In 2003, the Colorado legislature had adopted a new congressional district map to replace a court-drawn plan.[521] The Colorado Supreme Court invalidated the new map on the grounds that it violated the state constitution's prohibition on redistricting more than once per decade.[522] The court further held that the Elections Clause did not allow the state legislature to evade that restriction from the state constitution.[523]

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[517] 531 U.S. 70, 78 (2000) (per curiam).

[518] *See supra* notes 501–508 and accompanying text.

[519] *See supra* notes 509–511 and accompanying text.

[520] 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from denial of certiorari).

[521] *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1224 (Colo. 2003), *cert. denied sub nom.* Colo. Gen. Assembly v. Salazar, 541 U.S. 1093 (2004).

[522] *Id.* at 1237–40.

[523] *Id.* at 1232.

The U.S. Supreme Court denied certiorari.[524] Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—the authors of the concurrence in *Bush v. Gore* which embraced the independent state legislature doctrine[525]—dissented, arguing that the Court should have heard the Elections Clause issue.[526] The dissenters reasoned that, by preventing the institutional legislature from replacing the state court's congressional map, the Colorado Supreme Court impermissibly treated the state court as part of the "Legislature" for purposes of the Elections Clause.[527] They declared, "[T]here must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts."[528]

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[524] *Salazar*, 541 U.S. at 1093.

[525] 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring).

[526] *Salazar*, 541 U.S. at 1093 (Rehnquist, C.J., dissenting from denial of certiorari).

[527] *Id.* at 1094–95.

[528] *Id.* at 1095. That ruling did not end the matter, however. Following the Court's denial of certiorari, a group of Colorado voters filed a new federal lawsuit, contending that the Elections Clause entitled them to vote in the districts adopted by the institutional legislature. *See* Lance v. Davidson, 379 F. Supp. 2d 1117, 1122 (D. Colo. 2005) (three-judge court), *vacated and remanded sub nom.* Lance v. Dennis, 546 U.S. 459 (2006) (per curiam). A three-judge district court initially denied relief under the *Rooker-Feldman* doctrine, holding that the lawsuit was an impermissible attempt to contest the Colorado Supreme Court's ruling in *Salazar*. *Id.* at 1127, 1132; *see* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983) (holding that a state court's final judgment may be challenged only in the U.S. Supreme Court, not in lower federal courts); Rooker v. Fidelity Tr. Co., 263 U.S. 413, 416 (1923) (noting that, following a final state court adjudication, "[u]nder the legislation of Congress, no court of the United States other than [the U.S. Supreme Court] could entertain a proceeding to reverse or modify the judgment"). The U.S. Supreme Court vacated the three-judge district court ruling and remanded for further proceedings, because the voter plaintiffs had not been involved in the earlier *Salazar* litigation. *See Dennis*, 546 U.S. at 466.

On remand, the district court concluded that the plaintiffs were collaterally estopped from maintaining their Elections Clause claims because they were "in privity" with the plaintiffs in *Salazar*. Lance v. Dennis, 444 F. Supp. 2d 1149, 1161 (D. Colo. 2006) (three-judge court), *vacated in part and remanded sub nom*. Lance v. Coffman, 549 U.S. 437 (2007) (per curiam). The Court again heard the case but, in a unanimous per curiam ruling, determined that the plaintiffs lacked standing to pursue their Elections Clause claims under the generalized grievance doctrine. *Coffman*, 549 U.S. at 441–42.

The other case in which the Court touched on the Elections Clause during this interregnum did not implicate the independent state legislature doctrine. *See* Branch v. Smith, 538 U.S. 254, 280 (2003) (plurality opinion) (suggesting that the anti-commandeering doctrine does not apply in the context of federal elections, because "the state legislature's obligation to prescribe the 'Times, Places and Manner' of holding congressional elections is grounded in [the Elections Clause] of the Constitution itself and not any mere statutory requirement").

Most recently, in 2015, the Court's 5–4 ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*) summarily rejected the doctrine, albeit arguably in dicta.[529] The citizens of Arizona had passed an initiative that amended their state constitution to strip the institutional legislature of authority over congressional redistricting and reassign it to an independent commission.[530] The Legislature argued that this violated the Elections Clause, which confers authority to regulate congressional elections—including the power to draw districts—specifically on the "Legislature."[531] The majority rejected the legislature's claim and upheld the constitutionality of the independent commission.[532]

The majority began by reiterating that a legislature must exercise its power under the Elections Clause "in accordance with the State's prescriptions for lawmaking . . . ."[533] Thus, there was no procedural problem with the fact that the state's independent commission had been created through an initiative rather than by the institutional legislature.[534] Prior cases supported the principle that an institutional legislature's enactments concerning federal elections are subject to the legislative process set forth in the state constitution, potentially including a veto either by the Governor[535] or through a public referendum process.[536] *AIRC* transmutes that principle into the dubious notion that a state constitution may redefine the term "Legislature" to allow federal elections to be regulated through a distinct lawmaking process, such as a public initiative, that completely excludes the institutional legislature.[537] The Court did not acknowledge that its conclusion was a dramatic expansion of *Davis* in particular, which had avoided the Elections Clause issue and, at most, allowed a public referendum to be

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[529] 576 U.S. 787, 824 (2015).

[530] *Id.* at 792.

[531] *Id.*

[532] *Id.* at 824.

[533] *Id.* at 808.

[534] *Id.* 808–09 ("[W]e see no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking.").

[535] *See supra* notes 459–462 and accompanying text.

[536] *See supra* notes 414–428 and accompanying text.

[537] *AIRC*, 576 U.S. at 808–09.

included as a step in the institutional legislature's own lawmaking process.[538]

Moving past the manner in which the commission was created, the Court further held that there was no substantive problem with prohibiting the institutional legislature from drawing congressional district lines and transferring such authority to a different entity.[539] It held that the purpose of the Elections Clause "was to empower Congress to override state election rules, not to restrict the way States enact legislation."[540] The Court later summarily declared that the Elections Clause does not permit a state legislature to "prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[541] The Court ignored its statements to the contrary in *McPherson* and *Leser*. It noted that the House of Representatives had reached the opposite conclusion in resolving the election contest in *Baldwin v. Trowbridge*,[542] but dismissed that precedent as politically motivated.[543] It did not consider any other congressional or state supreme court precedents applying the independent state legislature doctrine. Chief Justice Roberts wrote a four-Justice dissent, contending that the majority's ruling "erase[s] the words 'by the Legislature thereof' from the Elections Clause."[544]

Thus, the Court has gone from enthusiastically embracing the independent state legislature doctrine to rejecting it in a hotly contested 5–4 ruling. The *AIRC* majority treated the doctrine as anomalous dicta from a century-old U.S. Supreme Court ruling, bolstered only by a single, politically motivated House precedent. To the contrary, the doctrine not only is solidly grounded in the Constitution's plain text, but also reflects the predominant

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[538] *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

[539] *AIRC,* 576 U.S. at 813 ("[T]he Elections Clause permits the people of Arizona to provide for redistricting by independent commission."); *id.* at 814 ("[T]he people may delegate their legislative authority over redistricting to an independent commission . . . .").

[540] *Id.* at 814–15.

[541] *Id.* at 817–18.

[542] H.R. REP. NO. 39-13 (1866), *resolution proposed by committee report adopted*, CONG. GLOBE, 39th Cong., 1st Sess. 845 (1866).

[543] *AIRC*, 576 U.S. at 818 ("[I]t 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.").

[544] *Id.* at 842 (Roberts, C.J., dissenting) (quoting U.S. CONST. art. I, § 4, cl. 1).

interpretation of the Elections Clause and Presidential Electors Clause in the state courts as well as both chambers of Congress throughout the nineteenth century.

C. IMPLEMENTING THE DOCTRINE IN THE TWENTY-FIRST CENTURY

A U.S. Supreme Court committed to textualism, historical practice, or structuralism has at least three different options for integrating the independent state legislature doctrine into modern law. The most extreme approach would be to construe the term "Legislature" in the Elections Clause and Presidential Electors Clause literally, thereby implementing the independent state legislature doctrine to the fullest possible extent. Under such an approach, *only* a state's institutional legislature may regulate federal elections—no other entities or processes (e.g., public initiatives or referenda) may be involved—and the state constitution may not impose substantive restrictions on the scope of the legislature's authority. That is how the Court approached the Article V Amendments Clause in *Hawke* and *Leser*.[545] This extreme approach would require overturning *Davis* (the referendum case), *Smiley* (the gubernatorial veto case), and *AIRC* (the independent redistricting commission case). It would also invalidate the independent redistricting commissions that states have created to draw congressional district lines,[546] as well as the substantive prohibitions that a few other state constitutions impose against political gerrymanders in congressional redistricting.[547]

Professor Persily identifies numerous state laws regulating federal elections that were enacted via public referendum or initiative that he cautions could also be challenged if the Court adopted this extreme approach to the independent state legislature doctrine.[548] Such potential consequences are less concerning, however, because state legislatures remain free to immediately reenact such provisions. Additionally, should the Court adopt this version of the doctrine, it could apply its holding prospectively,

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[545] *See supra* Section V.A.

[546] *See supra* note 13.

[547] *See supra* note 11.

[548] *See* Persily et al., *supra* note 32, at 715–18.

refusing to invalidate existing laws solely on the grounds they were enacted through an incorrect procedure.

Professor Persily also notes that many state constitutions contain various rules governing the electoral process, including requirements that elections be conducted by ballot, voters be registered, candidates receive a plurality of votes to win, and absentee voting be permitted.[549] Invalidating these generally uncontroversial provisions would be largely inconsequential, however, since most states invariably have separate statutes implementing identical rules, and legislatures would be free to enact them as necessary. Moreover, many state constitutions' election-related provisions simply reiterate protections already established under the U.S. Constitution that would remain in force. Thus, Professor Persily's prudential argument against the independent state legislature doctrine is drastically overstated. The primary immediate consequence of implementing this doctrine would be to invalidate independent congressional redistricting commissions and state constitutional limits on political gerrymandering in congressional elections. Even then, both state legislatures and Congress remain free to enact laws prohibiting political gerrymanders or requiring that independent commissions draw district lines.

Other methods of implementing the independent state legislature doctrine would require fewer adjustments. The least radical alternative would be for the Court to conclude that the doctrine allows the state constitution to define what processes and entities constitute the state "Legislature" for purposes of the Elections Clause and Presidential Electors Clause, while preventing the state constitution from imposing substantive restrictions on that legislature's authority to regulate federal elections. This interpretation would be consistent with the holdings of *Davis*, *Smiley*, *Leser*, and *AIRC*; leave *Hawke* limited to the context of the Article V Amendments Clause; and require rejection only of some language in *AIRC* that likely amounts to dicta.[550]

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[549] *Id.* at 720–22.

[550] *See* Ariz. State Legislature v. Ariz. 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 provisions of the State's constitution.").

Under this approach, the institutional legislature could be completely excluded from regulating federal elections, but *some* entity within the state would retain plenary power over the field, free of any substantive restrictions in the state constitution.

Perhaps the best compromise approach—which is consistent with nineteenth century precedent—would be for the Court to conclude: (i) the term "Legislature" in the Elections Clause and Presidential Electors Clause refers only to the institutional state legislature, (ii) state constitutions and statutes cannot impose *substantive* limits on the scope of the institutional legislature's authority over federal elections, and (iii) when the institutional legislature exercises that authority by passing laws that apply to presidential or congressional elections, it remains subject to whatever *procedures* the state constitution contains for the enactment of legislation. This approach is consistent with *Davis*, *Smiley*, and *Leser*, and would leave *Hawke*'s holding limited to the Article V Amendments Clause. The only ruling that would require reversal is the Court's recent 5–4 decision in *AIRC*, which was partially premised on an erroneous understanding of the independent state legislature doctrine's history.[551]

Under this approach, state constitutions or statutes may establish independent redistricting commissions to promulgate congressional district maps. Those maps would be binding unless the legislature exercised its inalienable authority granted by the U.S. Constitution to adopt its own congressional districts, instead. Congress, of course, could go even further by requiring independent commissions to draw all congressional district maps, completely excluding the institutional legislature.

This compromise interpretation has much to recommend it. First, it respects precedent, requiring reversal of only one recent, incorrectly reasoned 5–4 case that has not yet generated substantial

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[551] *See supra* Section V.B. The Court could even adopt *Baldwin v. Trowbridge*'s concession that a state constitutional convention might qualify as a legislature. *See supra* note 266 and accompanying text. Under *Baldwin*, state constitutional provisions may presumptively govern federal elections unless and until the institutional state legislature decides to displace or act contrary to them. *See id.*

reliance.[552] Second, it coheres with the normative justifications for the independent state legislature doctrine,[553] the text and structure of the Elections Clause and Presidential Electors Clause, and the prevailing understanding of those provisions throughout the nineteenth century. Finally, this compromise interpretation does not completely eliminate the possibility of using independent redistricting commissions to combat political gerrymandering. In short, this modern variation of the independent state legislature doctrine provides the best overall "fit" with the fabric of constitutional law.

VI. CONCLUSION

The independent state legislature doctrine provides that a state constitution may not impose substantive restrictions on an institutional state legislature's authority to regulate federal elections. State constitutional provisions that specifically regulate redistricting, including prohibitions on partisan gerrymandering, are unenforceable in the context of congressional elections, though they are enforceable with regard to state legislative elections. Even under the doctrine, however, both the U.S. Constitution and federal law limit a state legislature's authority over federal elections. The independent state legislature doctrine is faithful to both the text and structure of the U.S. Constitution, furthers many of the Framers' goals concerning federal elections, and reflects the prevailing understanding of states, Congress, and other authorities throughout the nineteenth century.

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[552] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018) ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent.").

[553] *See supra* Section II.D.