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# Constitutional Text, Founding Era History, and the Independent-State-Legislature Theory

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## Cover Page Footnote

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# CONSTITUTIONAL TEXT, FOUNDING-ERA HISTORY, AND THE INDEPENDENT-STATE-LEGISLATURE THEORY

*Dan T. Coenen*[*]

*One question raised by proponents of the so-called independent-state-legislature theory concerns the extent to which state courts can apply state constitutional requirements to invalidate state laws that regulate federal elections. According to one proposed application of the theory, state courts can never subject such laws to state-constitution-based judicial review. According to another application, federal courts can broadly, though not invariably, foreclose state courts from drawing on state constitutions to invalidate federal-election-related state legislation. This Article evaluates whether either position comports with the original meaning of the Constitution. Given the Article's focus on the originalist methodology, it directs attention only to the text of the Constitution and the context in which that text was drafted and evaluated in 1787 and 1788. This study of the relevant text and framing-era history—particularly as that history is disclosed by the* Federalist Papers*—casts a long shadow over the independent-state-legislature theory. At the least, it indicates that, as an originalist matter, there is no sound basis for broadly empowering federal courts to constrict state-court judicial review of federal-election-related laws under state constitutions, far less for precluding such judicial review altogether.*

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## I. INTRODUCTION

The Supreme Court recently has signaled its intention to examine the doctrinal implications of the so-called independent-state-legislature theory.[1] In a spate of recent writings, legal scholars have grappled with this theory, with most of them casting it in a negative light.[2] This literature covers many points, but much of it

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[1] Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022).

[2] *See, e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 2 (2022) (arguing that there are multiple reasons why the independent-state-legislature theory fails); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 76–79 (2021) (describing the case for the independent-state-legislature doctrine as based on a "bold claim" that federal courts are "in a better position" than state courts to interpret state law and that the theory "concerningly" is part of a broader trend in Supreme Court jurisprudence that affords "undue deference to state legislatures" in establishing election rules); Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091, 1098–99 (2022) (offering an extended originalist argument that empowerment of the "the Legislature" in Article I, Section Four did not preclude legislative delegations of its thus-granted power; adding that the historical evidence supportive of this conclusion also might, more generally, "undercut the view that legislative power over federal elections was sacrosanct"); Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1059 (2021) (contending that the independent-state-legislature theory raises both "disruptive practical consequences" and a deep "philosophical quandary" rooted in the fact that "[a] state legislature acting in its legislative capacity derives its existence and shape from its state constitution"); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1237 (offering an extended critique of the independent-state-legislature theory based in part on the contention that the theory is "fatally inconsistent with basic principles of both federalism and the separation of powers"); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 571 (arguing that the independent-state-legislature theory is flawed in a variety of ways); Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 59–60 (2021) (arguing that the grant of power to the state legislature in the Electors Clause concerning presidential selection does not preclude states from allowing governors to veto resulting legislation and that "assigning legislatures an unusually privileged role" in this field "would be inconsistent with states' longstanding practice since the founding"); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1752 (2021) (observing, among other things, that "[s]cholars after *Bush v. Gore* were generally critical of the idea of an independent state legislature doctrine"); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 137 (2022) (arguing that the independent-state-legislature doctrine is "unprecedented, unconstitutional, and potentially chaos-inducing"); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 454–57 (2022) [hereinafter Smith, *Revisiting the*

concerns the implications of post-ratification legislative and judicial actions, including Supreme Court decisions issued during the past century-and-a-half.[3] This Article takes a different tack. It focuses

*History*] (providing an expansive history-based critique of the independent-state-legislature doctrine); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 737–39 (2001) [hereinafter Smith, *History*] (finding that wide-ranging historical evidence, including evidence concerning accepted practice under the Articles of Confederation, undermines any argument for the independent-state-legislature doctrine); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135, 135 (2023) (applying the analytical framework of "constitutional liquidation," based in part on longstanding historical practice, in challenging the independent-state-legislature theory); *see also* Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690 (2016) (concluding that any broad application of the independent-state-legislature doctrine "would be both bizarre and disastrous"); Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 126 (2021) (raising concerns as to whether several doctrines, including the independent-state-legislature doctrine, might "impinge on the right to vote"). The principal academic defender of the theory is Professor Morley. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 505 (2021) [hereinafter Morley 1] (discussing the independent-state-legislature doctrine and its implications); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8 (2020) [hereinafter Morley 2] (concluding, among other things, that, while "state constitution[s] may validly restrict states' power to politically gerrymander state and local legislative districts," an independent-state-legislature doctrine limits the extent to which state constitutions can limit state power to gerrymander federal congressional districts); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 134 (2015) [hereinafter Morley 3] (concluding, based on an "intratextual" approach, that the plain meaning of the term "legislature" supports endorsement of the independent-state-legislature theory). Focused defenses of constrained applications of the independent-state-legislature theory also surfaced in the wake of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). *See* Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v Gore Defended,* 68 U. CHI. L. REV. 613, 614 (2001) (defending *Bush v. Gore* as reflecting the proper result under the Electors Clause based on fact-specific concerns about unjustifiable actions by the state judiciary in ignoring the clear meaning of duly enacted state statutory law); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v Gore*, 68 U. CHI. L. REV. 657, 661 (2001) (same). For other treatments of the intersection of the theory and that case, see RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 155–56 (2001); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 691–92 (2001); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 662 (2001).

[3] *See, e.g.*, Amar & Amar, *supra* note 2, at 14–36 (discussing, among other things, the Supreme Court's ruling in *McPherson v. Blacker*, 146 U.S. 1 (1892)); Shapiro, *supra* note 2, at 155 ("[T]he pre-2000 history demonstrates that from the Founding, Congress, drafters of state constitutions, state legislatures, and state courts have all repeatedly either rejected the [independent-state-legislature theory] outright or proceeded on the understanding that it did

squarely on the constitutional text and on ratification-era writings, with a particular emphasis on the *Federalist Papers*. In other words, the treatment offered here examines the independent-state-legislature theory from, and only from, an originalist perspective.[4] And the conclusion that emerges from this analysis is that this theory, at least in any highly federal-court-empowering form, does not comport with a proper reading of the Constitution.[5]

More specifically, the analysis offered here challenges a key argument made by the leading academic defender of the independent-state-legislature theory—namely, that it "is consistent . . . with . . . the structure and political theory underlying the Constitution."[6] Indeed, the ensuing discussion undertakes to show not only that this line of argument is in error, but also that it has things exactly backwards. In sum, this Article makes the case that both "the structure" of the Constitution and the "political theory" underlying it cut sharply against the idea that state legislatures are somehow exempt, when they enact laws regarding federal elections, from the generally applicable and deep-rooted principle that those

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not exist."); Weingartner, *supra* note 2, at 171–72, 180–219 (discussing the post-ratification history of the Elections and Electors Clauses in detail).

[4] To say the least, the legal literature contains many jurisprudential treatments of how legal analysts should think about and apply the originalist methodology. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613–14 (1999) (discussing the so-called new originalism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (noting the then-increasing emphasis on "the role of *original* intent in constitutional interpretation" while adding that "[o]riginalists have various shades of belief . . . about how to define 'intent'"); *see generally* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 376 (2013) (detailing the rise in originalist thinking beginning in the 1980s). This Article leaves the exploration of such questions to others. Instead, it offers an analysis meant to map onto how the Supreme Court in practice makes use of the originalist methodology—in particular, by focusing carefully on the words of the constitutional text and their most sensible reading in light of informative founding-era historical materials.

[5] This review is informed by my earlier study of the *Federalist Papers*—which is an "earlier study" in part in the significant (at least for me) sense that my examination of the key ideas informing the ratification process, as revealed in those founding-era essays, preceded my giving any serious thought to the independent-state-legislature theory. *See generally* DAN T. COENEN, THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA (2007).

[6] Morley 2, *supra* note 2, at 14; *see also id.* at 35 (describing the theory, including insofar as it operates to bar in a sweeping, if not complete, way state judicial review of state laws under state constitutions, as "most faithful to the Constitution's underlying logic and structure").

legislatures must comply with their own state's constitution as interpreted by their own state's courts.

## II. UNDERSTANDING THE INDEPENDENT-STATE-LEGISLATURE THEORY

The independent-state-legislature theory has given rise to much confusion, in part because different analysts have invoked the theory in defending a variety of different doctrinal positions.[7] Particularly prominent accounts of the theory, however, focus on a core idea—namely, that ordinary governing principles, under which state courts can and do review the legality of state laws under state constitutions, do not apply to state legislation concerning federal elections.[8] It is this aspect of the theory that is at issue in *Moore v. Harper*, which is pending before the Supreme Court as this Article goes to press.[9] In that case, the North Carolina Supreme Court held that the North Carolina constitution prohibited the state legislature from putting in place a congressional-voting-district map drawn to carry out a highly aggressive form of partisan gerrymandering.[10]

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[7] For example, according to one proposed doctrinal build-out of the theory, state legislatures must act "independently" in the sense that there are strong limits on their ability to delegate rulemaking authority to other decision-makers with regard to the times, places, and manner of federal elections. Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 718–19 (2016). *But see, e.g.*, Krass, *supra* note 2, at 1095 ("Elections Clause delegations are entirely permissible."); Douglas, *supra* note 2, at 84 (same). A particularly extreme view of the theory suggests that a state legislature is so "independent" that it may overturn even the otherwise-settled results of federal elections that already have occurred. *See* J. Michael Luttig, *The Republican Blueprint to Steal the 2024 Election*, CNN: OP. (Apr. 27, 2022, 9:09 AM), https://www.cnn.com/2022/04/27/opinions/gop-blueprint-to-steal-the-2024-election-luttig/index.html (identifying and vigorously challenging this view). This view, however, raises such a serious set of constitutional problems that many observers view it as highly unlikely to gain the support of the federal judiciary. *See, e.g.*, Ned Foley, *One Point About Judge Luttig's New CNN Piece*, ELECTION L. BLOG: ELECTION SUBVERSION RISK (Apr. 27, 2022, 11:19 AM), https://electionlawblog.org/?p=129026 (discussing Judge Luttig's analysis).

[8] *See, e.g.,* Morley 1, *supra* note 2, at 515 (arguing that the federal Constitution at least bars state judges from applying "substantive" limits imposed by state constitutions to invalidate state legislation concerning the times, places and manner of elections of federal Senators and House members).

[9] *See supra* note 1.

[10] *See* Harper v. Hall, 868 S.E.2d 499, 559 (N.C. 2022) ("[W]e hold that the General Assembly infringes upon voters' fundamental rights when, on the basis of partisan affiliation,

Following the issuance of that decision, the U.S. Supreme Court declined to stay the state court's judgment pending full briefing and argument in the case.[11] Three Justices, however, voted to grant the requested stay because they thought it likely that this application of the North Carolina constitution by the North Carolina Supreme Court ran afoul of the independent-state-legislature theory as enshrined in the U.S. Constitution.[12]

The *Moore* case raises two main questions. The first concerns whether state courts, when dealing with state laws insofar as they apply to federal elections, are wholly foreclosed from exercising a key component of their long-accepted judicial-review power—that is, the power to assess whether a challenged state law exceeds the limits imposed by the state constitution.[13] The second question is closely related to the first. It concerns whether, even if some measure of state-court judicial-review authority with respect to

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it deprives a voter of his or her right to substantially equal voting power, as established by the free elections clause and the equal protection clause in our Declaration of Rights.").

[11] Moore v. Harper, 142 S. Ct. 1089 (2022).

[12] Justice Alito, joined by Justices Thomas and Gorsuch, dissented from the denial of an application for a stay. *See id.* at 1089–91 (Alito, J., dissenting) ("[The Elections Clause's] language specifies a particular organ of a state government, and we must take that language seriously."). In a separate opinion, Justice Kavanaugh, while concluding that a stay should not issue due to timing considerations, noted that in his view "both parties' sides have advanced serious arguments on the merits." *Id.* at 1089 (Kavanaugh, J., concurring).

[13] One variant of this idea posits that state courts can overturn state legislative action concerning federal elections only to the extent that the legislation runs afoul of state constitutional laws that impose "procedural," rather than "substantive," constraints on the state legislatures. *See* Morley 2, *supra* note 2, at 24 (advancing an argument for eliminating all state-court constitutional review of federal-election-related laws but in the end opting for the more limited rule, distinguishing between substantive and procedural constraints, in part based on earlier Supreme Court rulings that specifically authorized state-constitution-authorized review of restrictions potentially characterized as "procedural"); *see also* James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) (viewing governing judicial precedents as properly read to support the distinction between procedural and substantive limits on state legislative action). For a treatment of the independent-state-legislature theory that directly targets this proposed distinction, see Smith, *Revisiting the History*, *supra* note 2, at 463–64. Because the analysis offered in this Article challenges the elimination of state-court review of state laws concerning federal elections under state constitutions as a general matter, it necessarily rejects any effort to distinguish in this regard between so-called procedural and substantive state constitutional constraints. Put another way, all the arguments offered here for rejecting a totally categorical ban on state-court judicial review of state-made federal-election laws support with no less vigor a rejection of an all-but-categorical ban on such state-court judicial review said to apply "only" to the invocation of substantive state constitutional restrictions.

these laws remains in place, federal courts nonetheless possess a broad power to overturn some, though not all, otherwise-authoritative state-court pronouncements that such laws do not comport with state constitutional directives. The ensuing discussion makes the case that the answer to both questions should be "no." The first proposed build-out of the independent-state-legislature theory, which would strip state courts of any power of state-constitution-based judicial review in cases involving federal elections, is the focal point of Part III. The second proposed build-out, which would broadly empower federal courts to overturn otherwise-binding state-court interpretations of state law in many (though not all) federal-election-related cases, is the subject of Part IV.

Another foundational point about the independent-state-legislature theory concerns the sorts of laws to which it applies. In particular, the theory has potential application to two different types of state laws concerning federal elections: (1) laws that deal with federal-legislator elections, a subject dealt with in the Elections Clause of Article I, Section Four; and (2) laws that deal with presidential elections, a subject dealt with in the Electors Clause of Article II, Section One.[14] Academic commentators tend to agree that the same federal constitutional rules regarding the operation, or non-operation, of the independent-state-legislature theory should apply to both types of state legislation.[15] In particular, critics of the theory have suggested that it is marked by flaws that apply in equal measure in both settings.[16] Even so, much of the existing commentary focuses on the Electors Clause, in part because three Justices relied on the independent-state-legislature theory in

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[14] *See* U.S. CONST. art. I, § 4 (addressing "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives"); *id.* art. II, § 1 (establishing procedures for presidential elections).

[15] *See, e.g.*, Levitt, *supra* note 2, at 1062 ("What is true of the delegation to the 'Legislature' for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors."); Marisam, *supra* note 2, at 576 ("While their precise language differs, the two [election-related] clauses are conceptually similar and are governed by the same precedent."); Weingartner, *supra* note 2, at 140 ("Both Clauses refer to state legislatures using identical language, suggesting each confers authority in the same manner and with the same effect—if any—on the power of state constitutions to constrain state legislatures.").

[16] *See, e.g.*, Amar & Amar, *supra* note 2, at 26–30 (contending that the requirement of adherence to state constitutional law in state lawmaking is not displaced by either Article I, Section Four or Article II, Section One).

voting to overturn the state-law-based action of the Florida Supreme Court in the presidential-election case of *Bush v. Gore*.[17] Again, however, this essay moves in another direction. Here, the focus is on House and Senate elections and the treatment of those elections in Article I, Section Four.

## III. THE PROPRIETY OF STATE-COURT JUDICIAL REVIEW OF STATE LEGISLATION REGARDING FEDERAL ELECTIONS UNDER STATE CONSTITUTIONS

### A. THE CONSTITUTIONAL TEXT AND BACKGROUND UNDERSTANDINGS

The text of the Constitution provides the proper place to begin in identifying the rules it establishes—a point that lies at the heart of the originalist interpretive methodology.[18] In pertinent part, Article I, Section Four states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[19] The independent-state-legislature theory, insofar as it applies to the elections of federal legislators, is founded on the Framers' use of the term "the Legislature thereof"—that is, the legislature of "each State"—in this clause.[20]

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[17] *See* 531 U.S. 98, 120 (2000) (Rehnquist, C.J., joined by Scalia and Thomas, JJ.) (relying, with regard to the operation of governing state statutes, on the posited federal constitutional principle that "in a Presidential election the clearly expressed intent of the legislature must prevail" even if inconsistent with the interpretation provided by state's highest court). The tendency to focus on presidential elections is illustrated by a recently published critique of the independent-state-legislature theory, the title of which specifically references "The *Article II* Independent-State-Legislature Notion." Amar & Amar, *supra* note 2, at 1 (emphasis added).

[18] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 56 (2012) (setting forth the "Supremacy-of-Text Principle").

[19] U.S. CONST. art. I, § 4.

[20] *See* Morley 1, *supra* note 2, at 508 ("The independent state legislature doctrine arises from the fact that the Constitution grants authority to regulate the 'Manner' of conducting congressional elections and appointing presidential electors specifically to the 'Legislature' of each state rather than to the state as a whole." (footnotes omitted)); *see also* Shapiro, *supra* note 2, at 145 ("Proponents of the [independent-state-legislature theory] point to the word 'legislature' in [Article I, Section Four] to argue that when state legislatures exercise their authority over federal elections, nothing that is required or prohibited by their state

Section Four's reference to "the Legislature," however, does not support the no-state-court-review aspect of the independent-state-legislature theory on a fair reading. After all, while the Section by its terms authorizes the making of a state's rules regarding federal elections by "the Legislature thereof," nothing in the Section indicates that "the Legislature," when it does make such rules, can wholly disregard the state constitution as interpreted by the state courts.[21] In other words, the text of Section Four simply does not state, or otherwise signal, that "the Legislature" of a state, when it passes state laws regarding House and Senate elections, may do so in a way that is directly at odds with the way in which "the Legislature" normally acts, because it must so act, in doing its work.[22] To be sure, Section Four would bar (at least in the absence of legislative approval or acquiescence) a state constitutional provision that strips the "the Legislature" of all power to enact legislation on this subject—for example, by granting the governor sole authority to establish federal-election rules.[23] But recognizing this textual point is entirely different from concluding that the state "Legislature," in the context of making laws concerning federal elections pursuant to ordinary state-lawmaking processes, can put in place whatever rules it wants, wholly irrespective of generally applicable state constitutional restrictions. The text of Section Four simply does not dictate that result.[24] Even more important, the most

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constitutions is relevant."); Marisam, *supra* note 2, at 576 ("The Independent State Legislature Theory starts with the text of the Elections and Electors clauses and homes in on their references to state legislatures.").

[21] *See* Amar & Amar, *supra* note 2, at 22 (pointing to the lack of any justification for concluding that the federal Constitution was meant to override the states' choice about how to limit state legislative powers, including by subjecting state laws—including state laws concerning federal elections—to state-constitution-based judicial review).

[22] *See* Smith, *Revisiting the History*, *supra* note 2, at 453 (challenging the independent-state-legislature doctrine on the ground it produces the "extraordinary" result of rendering state legislatures "free from constitutional restraints . . . that would ordinarily apply"); *see generally infra* notes 25–35 and accompanying text (detailing the operation and framing-era endorsement of judicial review, including within state systems).

[23] *See infra* note 45 (noting some of the actors that qualify as "the Legislature" for purposes of the Elections Clause); *see also supra* note 7 (noting the ability of "the Legislature" itself to involve others, such as administrative agencies, in the formulation of election rules).

[24] *Accord, e.g.*, Ariz. State Leg. 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."); *see also* Weingartner, *supra*

natural reading of Section Four is one that points to a simple and unsurprising conclusion—namely, that, as usual, state legislatures, in their actions as state lawmakers, do have to comply with state constitutional rules as laid down by state courts. This reading of the Elections Clause makes sense because the Framers and the ratifiers well understood that this is how state legislatures had operated in the past, and would continue to operate in the future, as an accepted—and, indeed, foundational—feature of the American system of republicanism.[25]

In the *Federalist No. 78*, for example, Alexander Hamilton famously explained why there exists a "natural presumption" that stands against the idea "that the legislative body are themselves the constitutional judges of their own powers."[26] This presumption arose because "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[27] Of particular importance with regard to the

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note 2, at 139–40 (offering an illustrative scholarly assessment that reaches the same conclusion).

[25] *See, e.g.*, Weingartner, *supra* note 2, at 151–52 ("[S]tate legislatures . . . *are* constrained by state constitutions when they enact election laws and have been since the Founding."). Consider, for example, the possibility that the Framers might have included the following clause in the U.S. Constitution: "In keeping with principles of republican government, the Times, Places and Manner of proper behavior of individuals shall be prescribed within each State by the Legislature thereof." Would anyone imagine that the use of the term "the Legislature" in this provision would operate without more to negate the authority of state courts to review the legality under state constitutions of laws enacted by "the Legislature" of each state to regulate individual behavior? For the same reason that the answer to this question is "no," there is no solid textual basis for similarly deriving from the mere use of the words "the Legislature" in Article I, Section 4 an implicit preclusion of state-constitution-based judicial review of state legislative action concerning federal elections.

[26] THE FEDERALIST NO. 78, at 524–25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[27] *Id.* at 525; *see id.* ("A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."); *id.* at 526 ("[T]he courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments . . . ."); *id.* at 528 (citing the role of judges as "faithful guardians of the constitution"); *see also* THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number."). Moreover, this understanding of the centrality of judicial review reflected very basic understandings of the nature of popular sovereignty, the core organizing principle upon which our nation's distinctive vision of constitutional republicanism was built. *See, e.g.*, Larry D. Kramer, *The Supreme Court in Politics*, *in* THE UNFINISHED ELECTION OF 2000, at 105, 122

independent-state-legislature theory, Hamilton insisted that this "natural presumption" extended no less to the work of state legislatures than to the work of the federal Congress.[28] Indeed, he celebrated the fact that "the right of the courts to pronounce legislative acts void, because contrary to the constitution" has been "of great importance in *all the American constitutions*"—that is, in all the constitutions then in effect in the separate states.[29] Hamilton also made it clear that, for the Framers and the ratifiers, the power of judicial review was understood to apply not in only a sometimes-as-to-some-subjects fashion. Instead, it was to apply in such a comprehensive way that, "*whenever* a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former."[30] This was the basic and well-understood framework within which "the Legislature[s]"[31] of the states operated at the time that the Elections Clause became law.[32] The Framers' use of the term "the Legislature" thus suggested that the usual rules with respect to the exercise of state legislative power would apply pursuant to Section Four, just as they applied with regard to *all* exercises of state legislative

(Jack N. Rakove ed., 2001) (describing two ideas as "sacred to the Founders of our Republic: first, that the people of a political society could speak for themselves and did so through their constitutions; and second, that the people's voice is always superior to that of their rulers"; adding that these ideas were so transcendently important that they "led Americans to . . . declare independence" and that "[t]he notion that the Framers would have violated this principle by elevating the acts of a state legislature above the authority of a state constitution is," for this reason, "wildly implausible"); *id.* at 122–23 (adding that stripping state courts of the ability to enforce state constitutions, in keeping with the overarching principle of popular sovereignty, "would have violated the most basic principle of the American Revolution").

[28] THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[29] *Id.* at 524 (emphasis added); *see also, e.g.*, THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961) (explaining that "the State Legislatures" are subject to being checked by the states' "judiciary departments" when those legislatures "violate their respective constitutional authorities"); THE FEDERALIST NO. 81, at 544 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (offering reasons "to applaud the wisdom of those states, who have committed the judicial power in the last resort, not to a part of the legislature, but to distinct and independent bodies of men").

[30] THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

[31] U.S. CONST. art. I, § 4, cl. 1.

[32] *See* Amar & Amar, *supra* note 2, at 19 (noting how "state judicial review under state constitutions in fact predated the Philadelphia Convention" and that state courts enforced the state's "higher laws against the state legislatures themselves" at that time).

powers.[33] Put another way, there is no sound basis for concluding that the Framers' use of the term "the Legislature," without more, would have signaled to readers of the Constitution in 1787 and 1788 an unstated plan—incompatible with basic postulates of popular sovereignty[34]—to provide state legislators with a newfangled immunity from the governing principle pursuant to which state courts assess the constitutionality of state legislation under state constitutions.[35]

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[33] *See, e.g.*, *In re* Op. of the Justs., 107 A. 705, 706 (Me. 1919) (indicating that, in making laws as to the selection of presidential electors, "the state shall" act, "as it must, of necessity, through its law-making body" and thus "in accordance with and in subjection to the Constitution of the state, like [it does in promulgating] all other acts and resolves having the force of law"); Douglas, *supra* note 2, at 83 (reasoning that the Framers' use of the term "legislature" indicated that the state legislature would be subject to "the normal limits on its lawmaking authority"); Pildes, *supra* note 2, at 727–28 ("[S]tate 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* Shapiro, *supra* note 2, at 177–78 ("That state constitutions apply to *all* state election law is, to put it mildly, a widespread baseline assumption."); *see generally* SCALIA & GARNER, *supra* note 18, at 318 (noting that "[a] fair construction ordinarily disfavors implied change," so that a "statute[] will not be interpreted as changing" background principles embodied in "the common law" unless the lawgiver signals its intent to effectuate such a change "with clarity").

[34] *See supra* note 27 (discussing prevailing understandings of popular sovereignty at the time of ratification).

[35] *See, e.g.*, Weingartner, *supra* note 2, at 168 ("The Constitution was drafted and ratified against a backdrop of state constitutions that empowered and constrained state legislatures, and there is no indication the Framers sought to upset the balance of power within states." (footnote omitted)); *see also* Schapiro, *supra* note 2, at 665 (asserting that the Electors Clause "indicates that the determination of the method of selecting presidential electors shall be governed by state law, as state law is commonly made in the state," thus supporting the conclusion that the clause "does not endow the state legislature with a special role"; concluding for this reason that "the state legislature would act in this area of lawmaking as it does in all others, subject to the constraints of the state constitution and to the interpretive authority of the state courts"). Another fact concerning the Framers' and ratifiers' background understandings supports this same conclusion: These lawgivers recognized that states would, as they had in the past, conduct state and federal elections at the same times and in the same places pursuant to the same manner-of-election procedural rules as a common, if not routine, matter. *See* THE FEDERALIST NO. 61, at 414 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting "the convenience" that came about due to state authorities' conducting together "elections for their own governments, and for the National Government"). Given this state of affairs, it would inevitably present significant administrative problems for state election officials to have to apply one set of rules as to the manner of elections—concerning, for example, voter identification laws or ballot-marking laws or drop-box-delivery laws—to state-officer elections, but not to federal-officer elections, in the context of a single and unitary election process. Yet that is precisely the result that would occur if federal courts could negate

Why, then, did the Framers reference "the Legislature" as the recipient of the granted power to prescribe "Regulations" as to the time, place and manner of congressional elections as opposed, for example, to granting that power to "the State" as a whole? The answer is simple: The Framers referenced "the Legislature" of the state in Section Four for exactly the same reason they also referenced "the Congress" only a few words later—that is, because "the Legislature" is both the natural and the ordinary repository of the power to make laws, including election laws, as opposed to the power to enforce or interpret the laws.[36] Put another way, the Framers' chosen phrasing served the straightforward purpose of clarifying that state legislators, rather than federal legislators, were vested with the power to promulgate laws regarding the election of

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the operation of state-constitution-based legal mandates, as established by state courts, in their application to federal—but not state—elections pursuant to the independent-state-legislature theory. *See, e.g.*, Marisam, *supra* note 2, at 577 (noting the danger that will result if state election officials have to apply different rules to state and federal elections if state constitutional rules, as interpreted by state courts, apply to state elections but not to federal elections); *id.* at 608–09 (stating that such difficulties might well often arise because "federal and state elections are held on the same day and the candidates typically appear on the same ballot," adding that "the election administration costs of maintaining two sets of ballots and two sets of rules for casting and counting those ballots (one for state races and the other for federal) would be severe"); Shapiro, *supra* note 2, at 185–86 (emphasizing the complexities that inevitably would arise from the application of different legal rules to state and federal elections that are conducted simultaneously); *id.* at 191 (adding that such "a two-tier election system . . . could be confusing to voters and difficult or even impossible to implement"). To be sure, the Framers *expressly* dictated that Congress itself could provide for some such differential treatment (assuming that state lawmakers did not go along with congressionally stipulated federal-election rules for purposes of their own state-officer elections). *See* U.S. CONST. art. I, § 4, cl. 1 ("[B]ut the Congress may at any time by Law make or alter such Regulations . . . ."). There is, however, no indication that the Framers meant to go a very long step further in the direction of fostering administrative disharmony and potential voter confusion by also—and only implicitly—authorizing federal courts to disable state courts from applying the same rules applicable to elections for state officeholders to elections for federal officeholders as well.

[36] *See* THE FEDERALIST NO. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society."); *see also* THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."); *see generally* Kramer, *supra* note 27, at 123 (reasoning that the Framers, in formulating the Electors Clause, "naturally assumed that election laws would normally be fashioned in the legislature").

federal legislators "in the first instance."[37] But honoring that purpose in no way requires so dramatically energizing the state legislature's authority that it can ignore, contrary to the rules that apply to state legislation in every other context, the commands of its state constitution when it enacts laws governing the election of congresspersons and senators.

One argument offered in favor of the independent-state-legislature theory pivots on the point that the Framers assigned some powers to "the State" as a whole, as opposed to only "the Legislature thereof."[38] The suggestion seems to be that the Framers would have referred to "the State," rather than to "the Legislature thereof," had they meant to leave in place a power in state courts to engage in judicial review under state constitutions.[39] This argument misses the mark, however, because it misunderstands the balance that the Framers struck in the Elections Clause—a balance that did channel specialized federal-election-law authority to each state

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[37] THE FEDERALIST NO. 59, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see id.* (describing the division of legislative labor effectuated by Section Four as one under which the election-law legislative power was assigned "primarily" to the state legislatures, although "ultimately" to Congress—thus giving to state legislatures the predominant share of legislative power in this field because Congress could be expected to exert its own legislative power only in "extraordinary circumstances").

[38] *See* Morley 2, *supra* note 2, at 15 (stating that "the Constitution does not grant authority over federal elections to states as entities" because 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"); *see also supra* note 20 and accompanying text (referencing Professor Morley's reliance on this argument from textual contrast). In *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), for example, the dissenting judges found support in this textual contrast for one iteration (albeit a narrow one) of the independent-state-legislature doctrine. As they wrote: "The Founders knew how to distinguish between state legislatures and the State governments as a whole. They did so repeatedly throughout the Constitution. *See, e.g.*, U.S. CONST. art. 1, § 2 (distinguishing between 'State' and 'State Legislature')." *Id.* at 112 (Wilkinson & Agee, JJ., dissenting); *see also* Moore v. Harper, 142 S. Ct. 1089, 1090 (2022) (Alito, J. dissenting) (finding the challenger of the state-court constitutional ruling "likely [to] prevail on the merits" in part because: "[Section Four] could have said that these rules are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power, as States are generally free to allocate state power as they choose. But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously.").

[39] *See, e.g.*, Morley 1, *supra* note 2, at 503 ("[O]ne might say that the Elections Clause and Presidential Electors Clause 'pierce the veil' of statehood, conferring certain powers on a particular organ of state government rather than the state as an entity.").

"Legislature," as opposed to each "State" as a whole, while nonetheless leaving undisturbed the accepted power of state courts to assess whether resulting election laws violate the state constitution. Put another way, this judicial-review-preserving, background-understanding-based interpretation of the term "the Legislature" does not render that term "meaningless," or even come near to doing so.[40] To the contrary, the Framers' assignment of the Section Four lawmaking power to the state "Legislature" had, and continues to have, three highly consequential effects.

First, as noted earlier, the phrasing of the Elections Clause signals the Framers' plan that each state's legislature would be the initial actor in formulating federal-officer election laws.[41] In other words, absent congressional intervention, any law governing such elections enacted by the state legislature is the controlling law regarding federal elections unless and until a court (whether state or federal) engages in the exceptional act of invalidating that law pursuant to its power of judicial review.[42] Second, even when a state court invalidates a state statute concerning federal elections, the underlying lawmaking power of "the Legislature" remains unaltered. As a result, the state legislature is free to respond to any such judicial ruling (and otherwise to tinker with "Times, Places

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[40] Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (Statement of Justice Alito, with whom Justice Thomas and Justice Gorsuch join) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be *meaningless* if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." (emphasis added)); *see also Wise*, 978 F.3d at 112 (Wilkinson & Agee, JJ., dissenting) ("[T]he only plausible inference from the constitutional text is that the term 'legislature' unambiguously excludes the power to regulate federal elections from state courts and executive-branch officials."); *cf. Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting) ("[I]f the language of the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections.").

[41] *See supra* note 37 and accompanying text (referring to Alexander Hamilton's making of this point in the *Federalist Papers*).

[42] It merits mention that the invalidation of state laws under state constitutions at the time of the founding was uncommon, thus removing any reason to believe that the Framers and the ratifiers somehow were of the view—and particularly of the wholly unstated view—that there was a special need, somehow reified in Section Four, to squelch judicial activism with regard to state laws concerning federal elections. *See, e.g.*, *infra* notes 114–116 and accompanying text (noting, among other things, Hamilton's reference in the *Federalist Papers* to the strong pressures on state courts to avoid the invalidation of state legislation).

and Manner" rules) by reformulating state election law however it might like, so long as it acts, as it must act in every other lawmaking context, in compliance with state constitutional (as well as federal-law) commands.[43] Third, the Framers' phrasing of the Elections Clause vests the "the Legislature" with one wholly irreducible role with regard to promulgating state laws concerning federal elections. Section Four operates in this way by clarifying that no state constitution or other component of state law can assign the underlying power to promulgate federal election laws to anyone (for example, a specialized administrative body) other than the state "Legislature" itself, at least without the legislature's own agreement.[44] Nor is this limiting principle an insignificant matter—a point revealed in dramatic fashion by the Court's vigorous disagreement over the principle's proper application to initiative-based lawmaking in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[45]

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[43] Put another way, the assignment of state lawmaking power by Section Four remains far-reaching for the same reason that the assignment of federal lawmaking powers to Congress is far-reaching notwithstanding the existence of the institution of judicial review. When, for example, the Supreme Court invalidates a federal law enacted under its naturalization power because that law violates equal-protection principles, no one would suggest that such a ruling renders the naturalization power an empty vessel. Why? Because Congress remains entirely free to enact many other laws pursuant to its naturalization power and even to address the very same subject matter dealt with in the invalidated legislation so long as it conforms any new law to governing constitutional strictures. The key point is that this same allocation of governing authority—that is, an allocation under which state legislative authority to enact laws is general and broad, while judicial authority to review such laws is fact-bound and episodic—exists with regard to the making and operation of state laws concerning the times, places, and manner of federal elections. And this is the case without any need to distill by inference from Section Four a basic rearrangement of state-constitution-based allocations of governing state powers pursuant to the independent-state-legislature theory.

[44] *See, e.g.*, David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) ("[A] state constitution may not itself direct how electors are chosen, at least if the constitution is not the work of the legislature.").

[45] 576 U.S. 787 (2015). There, the Court—in a five-to-four ruling—upheld the challenged law on the theory that the voting-eligible citizenry of the state can qualify as "the Legislature thereof" for Election Clause purposes when authorized to adopt laws by way of an initiative process—a result that was supported by two current members of the Court but rejected by three now-sitting Justices. *Id*. at 813. Notably, the matter at issue in the *Arizona State Legislature* case is entirely different from the issue presented in *Moore*. This is so because, in *Arizona State Legislature*, members of the Court vigorously disagreed about the meaning of the term "the Legislature"—and, in particular, whether that term was properly understood to reference only the state's then-sitting, representative legislative body. *Id*. at 793. In *Moore*, however, the challenged redistricting law was, without question, enacted by that body, so

These points establish that the assignment of power to each state "Legislature" in the Elections Clause has important consequences, including within the long-taken-for-granted legal environment in which state courts engage in state-constitution-based judicial review. Specifically, they reveal that the contrast between the term "the State" (as used in some constitutional provisions) and "the Legislature" (as used in Section Four) does not signal a plan to wipe out such state-court review authority in cases involving challenges to state-made federal-election-related laws. The difficulty with any such argument based on textual contrast is that these two different terms *do* have two different meanings—indeed, two very different meanings—even if the state courts can (as usual) invalidate state-legislature-made federal-election laws that abridge the state constitution. To repeat, it is only because the term "the Legislature" is used in Section Four that (1) the Section establishes a governing "default provision" under which, absent the exceptional event of judicial or congressional intervention, all laws enacted by the state's *legislature* regarding federal elections are wholly controlling;[46] (2) even when a state court strikes down a state law as applied to federal elections, the state *legislature* retains its power to respond to that ruling by enacting a new (albeit constitutionally permissible) law;[47] and (3) while states can establish constitutional rules that put some limits on the state legislature's power to enact federal-election laws—for example, by blocking legislative enactments that violate either generalized or voting-related equal-protection-related rights—they cannot assign the underlying power to adopt federal-

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that no interpretive dispute about the meaning of the term "the Legislature" is in the picture. Put differently, the issue in *Moore* does not have to do with the intrinsic meaning of the term "the Legislature" as established by dictionaries or other touchstones of determining textual meaning. Instead, the question has to do with whether federal courts should *extrapolate* from the assignment of a power to "the Legislature" of a state, in contrast to Congress, a founding-era design to extirpate in this context the generally recognized power of state-constitution-based state-court judicial review. Harper v. Hall, 868 S.E.2d 499, 529 (N.C. 2022), *cert. granted sub nom*. Moore v. Harper, 142 S. Ct 2901 (2022). As to this question, there is no dictionary-definition answer. Instead, the interpreter of the text must consider other signals of original meaning, including basic background understandings as to how legislatures and courts were understood to operate as an ordinary matter within the American republican system.

[46] Foster v. Love, 522 U.S. 67, 69 (1997) ("The [Elections] Clause is a default provision: it invests the States with responsibility for the mechanics of congressional elections . . . but only so far as Congress declines to pre-empt state legislative choices . . . .").

[47] *See supra* note 43 and accompanying text.

election "Regulations" to anybody or any body other than the state *legislature* itself.[48] These powers of the state legislature are significant, and not one of them would be enshrined in the U.S. Constitution had Section Four channeled the authority to craft time, place and manner rules to "the State" as a whole, thus authorizing state constitution-makers to assign that power to whatever arms or agencies of the state government it might like, regardless of the state legislature's wishes. Accordingly, there is no sound basis for the argument that federal courts must endorse the independent-state-legislature theory, especially in its most extreme forms, to render meaningful the Framers' choice to use the term "the Legislature," rather than the term "the State," in the Elections Clause.[49]

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[48] *See supra* notes 44–45 and accompanying text. In other words, these points show why the Framers *did* mean to assign the lawmaking power regarding the conduct of federal elections to the state legislature and *not* to the state as a whole. But the Framers' making of that decision does not mean that they *also* meant to declare that this thus-assigned state legislative power could be wielded in such a dramatically unchecked way that it would not be subject to the normal lawmaking constraints imposed by state law as set forth in the state constitution.

[49] Professor Morley also seems to argue that the Constitution somehow immunizes state legislatures from ordinarily applicable state constitutional rules on the theory that (1) the power to regulate federal elections is, conceptually, a federal power; (2) for this reason, state legislatures should be treated like Congress (rather than like state legislatures) when they wield that power; and (3) accordingly, state legislatures should not be subject to state constitutional rules to the extent they concern federal elections because Congress would not be subject to such state constitutional rules. *See* Morley 2, *supra* note 2, at 15–37 (detailing this line of reasoning). This effort to equate state legislatures and the federal Congress suffers from many flaws. First, it overlooks the fact that state legislatures, whatever the conceptual nature of their powers, are themselves creatures of state constitutions and thus both logically and routinely viewed as subject to whatever limits those constitutions impose upon their lawmaking authority. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (Patterson, J.) (observing that legislatures are "[c]reatures of the Constitution" and "owe their existence to" it, so "all their acts must be conformable to it, or else they will be void"); Seifter, *supra* note 2, at 1797 (asserting that "there is no such thing as a free-floating state legislature, un-moored from its constitution"; rather, in their very nature "state constitutions create, limit, and define state legislatures"); Douglas, *supra* note 2, at 83 ("[Because] state constitutions create state legislatures, . . . one would think that state legislatures cannot act outside of the state constitution's mandates."). Second, any underlying theory that the power to regulate federal elections is entirely national in character is itself controversial even as a conceptual matter—so much so that it was flatly rejected by four members of the Court (including one current member of the Court) in *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). *See id.* 850–65 (Thomas, J., dissenting) (concluding that the "States enjoy reserved powers over congressional elections."). Third, whatever one concludes about the conceptual nature of the power to regulate the times, places

The foregoing discussion shows that there is not a sound textual basis for concluding that Section Four was understood at the time of the founding to eliminate the standard practice under which state courts can and do evaluate the conformance of state laws with state constitutions. What is more, there exists a strong textual basis for reaching the opposite conclusion—namely, that we would not expect the Framers to "hide elephants in mouseholes" [50] by casting aside, through use of nothing more than the term "the Legislature," the foundational principle of American republicanism that state legislation must comport with state constitutions as expounded by state courts. In other words, if the Framers had wished to effectuate such a radical inversion of basic structural postulates, both common practice and common sense suggest that they would have done so in a more straightforward and transparent way than by burying the governing principle in the two spare words on which the case offered in support of that result depends.[51]

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and manner of federal elections, the founding generation proceeded from the real-world understanding that state legislatures would wield that power. *See infra* note 91. And because the Framers and ratifiers understood that state legislators would have this power, there is every reason to believe that they also understood that, as usual, resulting exercises of this state legislative power would be subject to state constitutional controls. Finally, the assertion that the state legislature's exercise of the times-places-and-manner power must parallel precisely congressional exertions of that same power is wrong as a simple factual matter. For example, when Congress wields its Section Four power, its actions are subject to presidential veto. But no one argues that, because state legislative action is rightly seen as paralleling the congressional power to regulate federal elections, such state action is likewise subject to a veto by the President of the United States. Viewed from a wide angle, Professor Morley's argument—which is based on a series of inferences that proceed from the premise that the Elections Clause power is conceptually national in nature—falters because it subordinates real-world understandings to an abstract line of theoretical argument (and a very disputable line of theoretical argument at that). *See* THE FEDERALIST NO. 12, at 74 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (expressing concern that arguments built on "too great abstraction and refinement" can "lead men astray from the plainest paths of reason").

[50] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

[51] *See* Smith, *Revisiting the History*, *supra* note 2, at 476 (noting that, against the backdrop of preexisting law, if the drafters "were proponents of legislative independence—it is hard to explain why they did not explicitly address the problem in their drafting"). This text-based line of analysis is bolstered by another aspect of the phrasing of Article I, Section Four—namely, its assignment to the state legislatures of the power to "prescribe[] . . . Regulations." This language made it clear that, when state legislatures act pursuant to Section Four, they are exercising a *lawmaking* power, which in turn naturally entails—absent any specification to the contrary—a susceptibility to the application of constitutional limits that routinely operate to limit lawmaking activity. *See id.* at 454 n.24 (highlighting, in similar fashion, how the terms "direct" as used in Article II and "prescribe" as used in Article I worked "in each

instance, . . . [as] a certain lawmaking verb" thus logically rendering resulting legislation subject to ordinary legal restraints applicable to legislation). This foundational point about the nature of the power grant made by Section Four reveals the error in one argument sometimes made in favor of the independent-state-legislature doctrine—namely, that state legislatures should enjoy the same measure of unchecked independence that they have been said to possess in ratifying constitutional amendments under Article V or that they originally had to elect federal senators under Article I, Section Three. *See, e.g.*, Weingartner, *supra* note 2, at 169 ("[T]he Constitution assigns state legislatures various functions in the federal system, including the selection of Senators and the ratification of constitutional amendments, most of which are not subject to state constitutional constraints. As the argument goes, the use of similar language in the Elections and Electors Clauses suggests that state legislatures' power to regulate federal elections is similarly unconstrained." (footnotes omitted)). The difficulty is that likening the Elections Clause to either the Ratification Clause or the Senate-Selection Clause mixes up apples and oranges. State legislatures, after all, do not *pass laws* when they ratify constitutional amendments or when they (as they once did) select senators. And because the power of judicial review naturally extends to legislative action in passing laws, but not necessarily to "non-legislative" actions, the effort to equate the dictates of these different constitutional provisions fails. Indeed, the Supreme Court itself already has rejected, for this very reason, an attempt to read the Election Clause as identical in this way to these other more broadly state-legislature-empowering constitutional provisions. *See* Smiley v. Holm, 285 U.S. 355, 365 (1932) (defining the relevant question in the case as whether Section Four "invests the legislature with a particular authority . . . , the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws" under state constitutions; going on to answer this question in the negative, thus validating state laws requiring approval of acts of "the Legislature" by the state governor even though that body does not "include the state's chief executive as a part thereof"); *see also id.* at 365–66 (distinguishing the rules put in place by Section Four, under which the state legislature acts as a "lawgiver" engaged in "lawmaking in its essential features," rather than as "an electoral body" or "ratifying body" pursuant to the constitutional provisions concerning the election of senators and ratification of constitutional amendments); Hawke v. Smith, 253 U.S. 221, 228–31 (1920) (describing the power assigned to state legislators to select federal senators under Article I, Section Three of the original Constitution and to ratify amendments under Article V as "entirely different" from the ordinary lawmaking power assigned to state legislatures by Article I, Section Four, so that otherwise-applicable rules regarding the gubernatorial veto cannot and do not apply in those contrasting and specialized contexts). For other analyses reflecting this same conclusion, see, for example, Kirby, *supra* note 13, at 502 (asserting that "[n]o law in the usual sense of the word results from a single legislature's ratification of a proposed amendment" as confirmed by an "early ruling that action of Congress in proposing an amendment is non-legislative in character and need not be approved by the President" (citing Hollingsworth v. Virginia, 3 U.S. 378, 379 (1798))); *id.* at 502–03 (distinguishing a state legislature's power to elect senators and to ratify constitutional amendments from the promulgation of election rules because such rules "are legislative in nature" in that they impose "a mandate, the disobedience of which would result in . . . legal consequences"); Schapiro, *supra* note 2, at 668 ("The ratification of constitutional amendments differs in many ways from designating the manner of selecting presidential electors. The latter involves the articulation of election procedures in a manner generally accomplished by legislative activity. Promulgating an

Section Four's text supports this conclusion for another reason, too: Its internal architecture provides telling evidence that state constitutional rules do bind state legislatures when they exercise their Section Four powers. This is the case because Section Four does not deal only with state legislatures. It also provides, without any further elaboration, that "*the Congress* may at any time by Law make or alter such Regulations" as to the times, places and manner of federal-representative elections.[52] This text is significant because no one argues that Section Four's unadorned grant of power to "the Congress" permits federal legislators to ignore the federal Constitution as interpreted by federal courts in promulgating federal-election-related laws. Rather, it is universally understood that "the Congress," in promulgating such laws, must comply—as it always must comply—with federal-court pronouncements regarding the federal Constitution. The principle of applying parallel texts in parallel fashion thus steps into clear view.[53] And it signals that, just as surely as no unorthodox displacement of then-accepted judicial-review powers was understood to have been effectuated by the Framers' unadorned reference to "the Congress" in Section Four—thus creating some sort of "independent-federal-Congress" doctrine—no similarly unorthodox displacement of then-accepted judicial-review powers was understood to have been effectuated by the similarly unadorned, and directly parallel, reference to the state "Legislature" in the very same sentence.[54] In

election code, for whatever office, is a kind of function normally undertaken by the body wielding the lawmaking authority of the state.").

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

[53] *See* SCALIA & GARNER, *supra* note 18, at 195 (stating that, when words "are associated in a context suggesting that [they] have something in common, they should be assigned a permissible meaning that makes them similar").

[54] *Accord, e.g.*, Levitt, *supra* note 2, at 1063 n.39 (reasoning that the logical inference is that in both contexts the lawmaker is subject to "normal constraints," including "substantive constitutional requirements"); Weingartner, *supra* note 2, at 170 ("The Elections and Electors Clauses grant authority to Congress as well as state legislatures, but Congress's power under the Clauses is clearly subject to the usual constitutional constraints."); *see also* Rubin, *supra* note 2, at 66–67 (reasoning that the assumption that state courts act subject to the state court's judicial review power also finds support in the delegation of many powers to Congress, all of which are subject to the federal judicial review power even though no such textual grant of power expressly provides for that result). Indeed, in *Wesberry v. Sanders*, the Court specifically focused on the argument that Article IV—by textually allocating to "the Congress" the power to make laws regarding federal elections—thereby removed the traditional power of judges to assess the constitutionality of such exercises of state lawmaking authority. 376

sum, the no-state-constitutional-review version of the independent-state-legislature theory not only clashes with the founding generation's basic understanding of how "the Legislature" routinely operates within republican systems,[55] but it also assigns cognate textual passages oddly discordant meanings.[56] Accordingly, as a

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U.S. 1, 6 (1964). The Court firmly rejected this line of analysis in words that are illuminating here: "[N]othing in the language of [Article I, Section Four] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction . . . ." *Id.* The same essential rationale applies to laws made by state legislatures and challenged under *state* constitutions. That is, there is simply "nothing" in the phrasing of Article IV that negates "the power of courts"—whether state or federal—"to protect the constitutional rights"—whether state or federal—"of individuals from legislative destruction." *Id.*

[55] See *supra* notes 25–35 and accompanying text.

[56] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 836 (2015) (Roberts, C.J., dissenting) (emphasizing the need, in interpreting Section Four, to take account—in keeping with the section's original phrasing—of "the parallel between 'the legislature of each state' and 'the legislature of the United States'"); *see also* Smiley v. Holm, 285 U.S. 355, 367–68 (1932) (reasoning that, because of the parallel vesting of state legislative and congressional power under Section Four, the clause is properly read as authorizing state gubernatorial vetoes of state laws enacted under the clause pursuant to state constitutions just as it allows presidential vetoes of federal laws enacted under that same provision). A separate argument from textual parallelism—and one that bears directly on the original meaning of Section Four—focuses on comparing the text of Article I, Section Four with its predecessor text in the Articles of Confederation. In earlier work, Professor Smith has set forth this argument in detail. *See* Smith, *Revisiting the History*, *supra* note 2, at 465 ("Article V of the Articles of Confederation provided that 'delegates [to Congress] shall be annually appointed in such manner as the legislature of each State shall direct.' The intent and experience under the Articles of Confederation was that 'legislatures' referred to in that clause would be defined by, and subject to, their state constitutions." (footnote omitted) (quoting ARTICLES OF CONFEDERATION of 1781, art. V)). His argument stems from the fact that the Articles of Confederation—which included language that empowered state legislatures in a way that later was closely tracked by Section Four—did not operate to free those state legislatures from state constitutional restraints when they established rules concerning the election of federal representatives. *See id.* at 463–76 (discussing how the Articles of Confederation shaped the Framers' intentions and expectations regarding substantive limitations on "legislatures"). Building on this fact, Professor Smith has made the key point in these terms: "Assume for a moment that by 1787, in a departure from the past, legislative 'independence' had become a concept that the Framers wanted to enshrine in the new constitution. If that were the case, it is simply inconceivable that they would have attempted to incorporate this novel concept into the new constitution by using language so closely resembling that of the old constitution, under which—as they knew very well—'legislatures' had been decidedly non-independent." *Id.* at 483–84 (footnote omitted). Because Professor Smith has painstakingly laid out this argument in his earlier work, a more expansive account of it is not offered here.

textual matter, that approach to the Election Clause should be rejected.[57]

### B. PRE-RATIFICATION HISTORY AND UNDERLYING CONSTITUTIONAL THEORY

The foregoing discussion demonstrates why the controlling text of Section Four, when read in light of widely shared assumptions about state-court judicial review of state laws under state constitutions, undermines the suggestion that the members of the founding generation would have understood that Section to free state legislators from state constitutional restrictions when they enact federal-election laws. Might it nonetheless be that courts could find a way to interpret Section Four to prohibit state-court review of state legislative actions concerning federal elections? Perhaps some judges would endorse this interpretive position if they could point to historical materials indicating that the Framers and ratifiers intended to support this exception-to-the-ordinary-rule approach.[58] As it turns out, however, there is "no evidence" that the Framers and ratifiers made any such choice or meant to take any such action.[59] Indeed, even the leading academic proponent of the

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[57] *See* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring) (highlighting and relying on "the authority of state courts to apply their own constitutions to election regulations" in declining to agree to inject the Supreme Court into a state-law election dispute).

[58] Even in these circumstances, other judges might well find that the text of Section Four is sufficiently clear that such evidence could not support displacing the meaning of the Constitution as established by that text. And this would be particularly true if only a small number of decision-makers expressed such a view and/or they recorded that position primarily in non-public settings. *See generally* SCALIA & GARNER, *supra* note 18, at 69–77 (discussing the primacy of the "ordinary-meaning canon" of interpretation).

[59] Smith, *Revisiting the History*, *supra* note 2, at 455; *see also id.* at 457 (emphasizing, in particular, with regard to the availability of state-court judicial review, that "[the Founding generation] did not perceive anything special or unique" about state legislative enactments regarding federal elections); *id.* at 459 (noting that "nothing" in the work of the Framers and ratifiers suggested "an intent to create independent 'legislatures'" with regard to the enactment of election laws); *id.* at 464 ("[T]he historical record contradicts the notion that the Founding generation saw any reason to treat these 'legislatures' with unusual deference [when enacting federal-election-related laws]—that is, allow these 'legislatures' to operate 'independently . . . .'"); Kirby, *supra* note 13, at 501 (indicating, with regard to presidential selection, that "[t]he framers were never concerned with limitations which might be imposed by the states upon their legislatures' power"); Kramer, *supra* note 27, at 122 (noting the lack of historical evidence supporting the independent-state-legislature theory); Pildes, *supra* note

independent-state-legislature theory recognizes that "[t]he history of the Elections Clause . . . is *silent* on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections."[60] This history, even standing alone, is of critical importance for a straightforward reason: It indicates that there is no reason to read the words of Section Four in anything other than their natural sense. And, as we have seen, their natural sense is that the ordinary practice of subjecting state laws to state-court judicial review to ensure their compliance with state constitutions would be left undisturbed.[61] To be sure, the Elections Clause did not specify in terms that state courts could continue to exercise this well-recognized power in dealing with state laws concerning federal elections. But especially given the dearth of historical evidence affirmatively indicating a plan to do away in this context with otherwise-operative rules regarding the availability of

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2, at 727–28 (asserting that there is "no evidence from the Constitutional Convention or the state ratifying conventions that any thought was given, one way or the other, as to whether the word 'legislature' in [the Electors Clause] was designed to impose distinct and special constraints on state court interpretation of presidential elector laws" and that "the absence in the *Bush v. Gore* concurrence or academic commentary" of any citations to framing-era materials at odds with Professor Smith's assessment of "original purposes" and "historical practices" should preclude stripping state courts of their traditional powers to assess whether state laws concerning federal elections comport with state constitutions).

[60] Morley 2, *supra* note 2, at 27 (emphasis added); *accord* Morley 1, *supra* note 2, at 503 (acknowledging that the Framers never "expressly considered" the independent-state-legislature theory and in particular did not "address[] the potential significance of their use of the term 'legislature'" in Article I, Section Four); *see also* Shapiro, *supra* note 2, at 147 (noting that Professor Morley "admits . . . that there is no evidence that the Framers expressly considered the issue"); McConnell, *supra* note 2, at 661 (agreeing, in the process of endorsing a focused version of the independent-state-legislature doctrine, that "[t]here is no relevant legislative history"); Weingartner, *supra* note 2, at 172–73 (noting that, at both the Philadelphia Convention and in the state ratifying conventions, "the Elections Clause proved controversial" because of its "allocation of authority between States and Congress" but that its supposed "allocation of power *within* a state, including the role of state constitutions, was not addressed").

[61] *See supra* notes 25–35 and accompanying text; Kramer, *supra* note 27, at 122 (observing with regard to the Electors Clause: "Certainly we would find lots of evidence on the subject had [the Founders] purported to [negate state-constitution-based judicial review], for so controversial a step would have evoked intense discussion. Instead, there is nary a word, because in context everyone understood this clause as a simple delegation to states of power to choose electors pursuant to their ordinary legal process"); *see also* Pildes, *supra* note 2, at 727–28 (adding that, "as a matter of historical practice, state legislatures were not understood at the time [of the founding] to be more 'independent' by virtue of [the Electors Clause] than they were when acting pursuant to any other source of authority").

judicial review, that point is without consequence. The governing principle, as Alexander Hamilton articulated it in *Federalist No. 83*, is that one cannot "surmise that a thing, which is only *not provided for*, is entirely *abolished*."[62]

In sum, the text of Section Four—especially given the lack of a historical record indicating that the founding generation had some other view of the matter—indicates that state courts remain able to exercise their ordinary state-law-based judicial review powers in assessing the constitutionality of state legislation concerning federal elections. Let us assume for the sake of argument, however, that this conclusion is at least debatable. It is on this basis that Professor Morley appeals to the "political theory underlying the Constitution" in arguing that federal courts must endorse the independent-state-legislature theory—and, indeed do so in such an aggressive way as to foreclose state-constitution-based judicial review of state laws concerning federal elections, at least in nearly all cases.[63] In fact, however, the political theory that lay behind the U.S. Constitution supports exactly the opposite conclusion. And so, too, do the animating purposes that gave rise to Section Four itself.

*1. Basic Constitutional Theory and the Independent-State-Legislature Doctrine*. What was the underlying theory that gave rise to the American Constitution? However one might answer that question in a lengthy tract, there are core features of the theory that were well understood at the time of the founding. Moreover, these features work in harmony in counseling rejection of the independent-state-legislature theory, at least in its strongest forms.

To begin with, the makers of the American Constitution did not—to say the least—believe that legislative bodies should be independent.[64] Instead, they believed that legislatures must be

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[62] THE FEDERALIST NO. 83, at 558 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see id.* (going on to describe the argument to the contrary as "almost too contemptible for refutation" because "[e]very man of discernment must at once perceive the wide difference between *silence* and *abolition*").

[63] *See supra* note 6 and accompanying text.

[64] *See, e.g.*, THE FEDERALIST NO. 73, at 495 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting, in discussing the proposed presidential veto power, that "[t]he oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest"); *see also* THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (observing that the existence of a judicial check "not only serves to moderate the

subject to a multiplicity of checks and balances within a system of separated government powers.[65] Of overarching significance in this regard, the Framers and ratifiers viewed the legislature as the *most dangerous* branch within the specialized form of republican government that emerged in post-revolutionary America.[66] Accordingly, in the view of leaders of the time—however much that view might differ from common opinions of today—it was the legislative branch that was most in need of being subjected to checks imposed by other governmental bodies and processes.[67] The authors

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immediate mischiefs of those [laws] which may have been passed, but it operates as a check upon the legislative body in passing them" in the first place based on "motives of . . . injustice").

[65] *See, e.g.*, THE FEDERALIST NO. 51, at 347–48 (James Madison) (Jacob E. Cooke ed., 1961) ("To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that . . . the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."); *see also* Smith, *Revisiting the History*, *supra* note 2, at 456–57 (describing the independent-state-legislature theory as clashing with the view of "the Founding generation" as to the "normal checks and balances of state government").

[66] *See* COENEN, *supra* note 5, at 123 (detailing this point in a chapter entitled "The Most Dangerous Branch," including by observing that "[i]n the view of Hamilton and Madison, … the primary risk of abused power came from legislative officials"); *see generally infra* notes 67–72.

[67] Of significance in this regard was the radical reformulation of the meaning of republicanism worked by American constitution-makers at both the state and federal levels. The key move made by the architects of these new governments was to repudiate the British model of a *partial* republican system and to embrace instead the idea of implementing *wholly* republican governmental systems. *See* COENEN, *supra* note 5, at 96 (distinguishing the new American form of government from the British model). More specifically, within the British model, the executive branch in the form of the monarch was especially to be feared because the monarch was not accountable to the people as a whole (for example, by way of electoral removal) or to the House of Commons (for example, by way of impeachment). *Id.* Within the republican systems that emerged in the U.S., however, all the branches were republican in character, in the sense that each branch was accountable to the people either directly (by way of electoral control) or indirectly (because of important checking functions assigned to the people's elected representatives). *See id.* at 96–98 (noting, among other things, that each of the branches was "firmly rooted in the soil of popular representation"). And within this new system of republicanism, the Federalist creators of the Constitution agreed, the legislative branch posed the greatest measure of danger both because of its unusually "extensive" powers and because of the distinctly built-in danger it posed of becoming the vehicle of tyrannical majoritarian action. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961); *see also* COENEN, *supra* note 5, at 82–83 (detailing the far-reaching "problems that factions were breeding in the states" by way of "nefarious" legislative action even in the face

of the *Federalist Papers* made this point time and again, emphasizing that "[i]n republican government the legislative authority, necessarily, predominates."[68] Thus, as they explained, "the tendency of republican governments is to an aggrandizement of the legislative, at the expence of the other departments,"[69] so that it is "against the enterprising ambition of this department, that the people ought to . . . exhaust all their precautions."[70] In short, the

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of such protective "devices as bicameral legislatures, judicial review, the veto power, and the like"); *see generally* THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961) ("[The Framers of the State Constitutions] seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."); *id.* at 333–34 (observing that the heightened dangers posed by the legislature within a wholly "representative republic" arise because such a republic operates very differently from a government in which "numerous and extensive prerogatives are placed in the hands of a hereditary monarch," thus rendering the executive branch, within monarchical regimes, "the source of danger [to be] watched with all the jealousy which a zeal for liberty ought to inspire"; adding that, within American republics, the same "jealously" and resulting "precautions" need to be directed at "the legislative power" because it "is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions").

[68] THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1961); *see* THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.").

[69] THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 73, at 494 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[There is a] propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments . . . .").

[70] THE FEDERALIST NO. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 71, at 483–84 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The tendency of the legislative authority [is] to absorb every other . . . . In governments purely republican, this tendency is almost irresistable. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves; and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity."); THE FEDERALIST NO. 49, at 341–42 (James Madison) (Jacob E. Cooke ed., 1961) ("The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influencial part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that [in a contest for power] the adverse party would have an equal chance for a favorable issue."); THE FEDERALIST NO. 66, at 448 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he most

Framers and ratifiers came at their work with a fundamental understanding that the gravest dangers of abuse within republican systems were posed by legislative bodies.[71] And, given this basic understanding, there is no good reason to suppose that they would have viewed the text of the Constitution as removing, solely by way of Section Four's passing reference to "the Legislature," a key (if not *the* key) separation-of-powers-based check on state legislative action.[72]

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*popular* branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member of the government."); THE FEDERALIST NO. 71, at 484 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[Legislators] often appear disposed to exert an imperious controul over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.").

[71] *See* THE FEDERALIST NO. 55, at 374 (James Madison) (Jacob E. Cooke ed., 1961) ("In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason."); THE FEDERALIST NO. 58, at 395–96 (James Madison) (Jacob E. Cooke ed., 1961) (noting the occurrence in large assemblies of the "the ascendancy of passion over reason"); *see also* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 214 (2016) (detailing how "most of the delegates" to the Philadelphia Convention perceived a need to invigorate the executive branch to counter the dangers, revealed by recent history, of legislative-branch overreaching).

[72] The Framers' and ratifiers' focused concern about factional abuses within the legislative branch had its roots in their study of history, which the authors of the *Federalist Papers* viewed as "that best oracle of wisdom." THE FEDERALIST NO. 15, at 96 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *accord, e.g.*, THE FEDERALIST NO. 20, at 128 (James Madison) (Jacob E. Cooke ed., 1961) ("Experience is the oracle of truth . . . ."); THE FEDERALIST NO. 72, at 489–90 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("That experience is the parent of wisdom is an adage, the truth of which is recognized by the wisest as well as the simplest of mankind."). That history disclosed how popular legislatures, over and over again, had acted in accordance with the same qualities of self-interest, passion, and short-sightedness that are deep-seated features of human nature. *See, e.g.*, THE FEDERALIST NO. 42, at 283 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies . . . by the clamours of an impatient avidity for immediate and immoderate gain."); THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961) ("If the impulse and the opportunity [of a majority faction] be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control."); THE FEDERALIST NO. 6, at 32 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals, in whom they place confidence, and are of course liable to be tinctured by the passions and views of those individuals?"); THE FEDERALIST NO. 62, at 418 (James Madison) (Jacob E. Cooke ed., 1961) (highlighting "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by

Of no less importance, the entire constitutional project was driven forward by the Framers' perception that *state* legislatures (in contrast to the federal Congress) were particularly dangerous agencies of government because of their built-in tendency to mistreat "the minor party."[73] Indeed, a recognition that state legislatures were distinctly susceptible to engaging in oppressive actions—and thus as being most in need of oversight by other arms and processes of government—lay at the very root of the constitutional plan.[74] Nor did the Framers' focused fears of state legislatures have their origins in only theoretical musings. Rather,

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factious leaders, into intemperate and pernicious resolutions"; adding that "[e]xamples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations"). These tendencies in turn dictated the wisdom of restricting legislative authority by constructing counterposed institutions prepared to vindicate enduring constitutional rights lest those rights end up serving as nothing more than "fine declarations." THE FEDERALIST NO. 84, at 580 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see, e.g.*, THE FEDERALIST NO. 15, at 96 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he passions of men will not conform to the dictates of reason and justice, without constraint."). And the most well-suited institution to guard against these abuses—rooted, as those abuses inevitably are, in a failure to take reasoned account of the society's longer-term interests—lay in empowering the judicial branch, schooled in the importance of ensuring the protection of enduring constitutional principles, to check legislative excesses.

[73] THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961); *see* THE FEDERALIST NO. 60, at 407 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (citing the lesser likelihood "that any decided partiality should prevail in the councils of the union than in those of any of its members")*; see generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 438–53 (1969); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1004 (2021) ("[D]istrust of state lawmakers . . . permeated the final Constitution.").

[74] *See* THE FEDERALIST NO. 10, at 60–62, 64 (James Madison) (Jacob E. Cooke ed., 1961) (asserting that "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens" and that the risk that the citizenry's "chosen body" of legislative "Representatives" will act in this way is particularly acute "within [the] particular States"); THE FEDERALIST NO. 27, at 172 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[O]ccasional ill humors or temporary prejudices and propensities . . . in smaller societies frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes, which though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction and disgust."); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (1989) (Scalia, J., concurring) (citing *The Federalist No. 10* in observing that "[a]n acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history," so that the emergence of modern-day evidence of heightened dangers of oppression "at the state and local" level, as opposed to "the federal level," should "come as no surprise").

those fears grew out of the Framers' and ratifiers' own lived experiences—lived experiences that revealed, in their eyes, an all-but-relentless stream of short-sighted abuses engaged in by state legislative assemblies in the post-revolutionary period.[75] In sum, the Federalists of 1787 and 1788, unlike their Antifederalist adversaries who failed to thwart the Constitution's ratification, proceeded from the premise that the need for structural checks on the legislative body was distinctly strong in "the small Republic"—that is, in "the States."[76] The Framers and ratifiers also

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[75] *See* THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961) ("Complaints are every where heard from our most considerate and virtuous citizens . . . that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority."); THE FEDERALIST NO. 14, at 83 (James Madison) (Jacob E. Cooke ed., 1961) (citing "the diseases of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own"); THE FEDERALIST NO. 48, at 334–35 (James Madison) (Jacob E. Cooke ed., 1961) (finding that "proofs" of past state legislative wrongdoing "might be multiplied without end" and disclosed "in abundance from the records and archives [*sic*] of every State in the Union"); *id.* at 336 (going on to discuss the findings of "the council of censors," which examined the Pennsylvania legislature in 1783–84, finding in the end that the state's "Constitution had been flagrantly violated by the Legislature in a variety of important instances"); THE FEDERALIST NO. 80, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[F]raudulent laws . . . have been passed in too many of the states."); THE FEDERALIST NO. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961) (decrying the "iniquitous measures" recently adopted by Rhode Island legislators notwithstanding their susceptibility to electoral removal from office every six months).

[76] THE FEDERALIST NO. 10, at 63–64 (James Madison) (Jacob E. Cooke ed., 1961). Indeed, in justifying other features of the Constitution, the authors of the *Federalist Papers* identified additional reasons—that is, reasons that reached beyond the elevated danger of factional legislative abuse in a small republic—for concluding that the need for judicial review of legislative action was especially acute within the states. Madison, for example, emphasized the salutary role that would be played in the federal government by long-serving federal senators in checking short-sighted action by House members who would stand for election every other year. *See* THE FEDERALIST NO. 62, at 418–19 (James Madison) (Jacob E. Cooke ed., 1961) (discussing how giving senators "authority by a tenure of considerable duration" would protect the people from "impulse of sudden and violent passions"). At the time the Constitution was drafted and ratified, however, not a single state had in place a six-year term for senators; indeed, only one state, Maryland, even provided for a five-year senatorial term. *See* THE FEDERALIST NO. 63, at 429–30 (James Madison) (Jacob E. Cooke ed., 1961) (discussing the Maryland Senate). In a similar fashion, Madison highlighted that within state systems the risk of unchecked legislative dominance was heightened because state judges (in contrast to federal judges under the proposed Constitution) might well lack protection against legislative retaliation by way of judicial salary reductions. *See* THE FEDERALIST NO. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961) ("As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all,

recognized—and, again, not just in the abstract—that a critical safeguard against state legislative malfeasance came in the form of judicial review undertaken by state courts to test whether state laws conformed with state constitutional constraints.[77] Indeed, as Hamilton pointedly explained in discussing the value of judicial review, "[t]he benefits of the integrity and moderation of the judiciary have already been felt in more *states* than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested."[78] Given this outlook, it would be misguided—and, indeed, anomalous—to conclude that, by referring without more to "the Legislature" in the Elections Clause, the Framers meant to put in place an independent-state-legislature doctrine that would nullify the check provided by "the firmness of the judicial magistracy" in "confining the operation of . . . laws" enacted by state legislators.[79]

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a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former."); *see also id.* at 337 (noting that "[t]he salaries of the Judges, which the [Pennsylvania] Consitution expressly requires to be fixed, had been occasionally varied" by the state legislature). These points reinforce the conclusion that there is no reason to believe that the Framers and ratifiers would have meant, by way of Section Four, to augment significantly the power of already-dominant and greatly feared state legislative bodies by freeing them from state-court constitutional review in dealing with an important category of state legislation.

[77] *See supra* notes 22–35 and accompanying text.

[78] THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

[79] *Id.*; *see also* Schapiro, *supra* note 2, at 672 (drawing on these considerations in concluding that the history of the founding does not support "the idea that [the Electors Clause] lifts the state legislature out of the usual state governmental framework" so as to render it exempt from ordinary principles of state-court oversight). In particular, these considerations render untenable Professor Morley's claim that the Framers somehow made "a fundamental structural decision" to repudiate state-court judicial review of federal election laws by placing the subject of such elections "under the *ultimate* control of the political—and politically accountable—entities" that are the "representative legislative assemblies." Morley 2, *supra* note 2, at 33–34 (emphasis added). After all, as this discussion reveals, the Federalist thinkers who won the battle for ratification were intensely skeptical of "representative legislative assemblies," especially within state systems, precisely because they were "politically accountable" to factional majorities. *See supra* notes 65–76 and accompanying text. In addition, the underlying premise of Professor Morley's assertion is erroneous because "representative legislative assemblies" were not given "ultimate control" over decisions as to the times, places and manner of federal elections by the Constitution—at least in the relevant sense that the actions of those assemblies could never be overturned by anyone else. Morley

*2. The Independent-State-Legislature Theory and the Purposes of Section Four.* The foregoing discussion establishes two key points. First, it reveals that independent-state-legislature theory, insofar as it would block state courts from evaluating state legislative action under state constitutions, stands in stark tension with the most natural reading of the constitutional text. Second, it shows that the independent-state-legislature theory also clashes with core ideas about how American systems of checked-and-balanced government were understood to operate—core ideas that the Framers and ratifiers openly discussed, firmly held, and built upon in creating our nation's founding charter. Perhaps some proponents of the independent-state-legislature theory would respond that this background-thinking-based account of Section Four misses nuances in the Framers' understanding of how that particular constitutional provision would operate.[80] They might posit, for example, that there is something special about the making of state laws concerning federal elections that mitigated in this context the Framers' and ratifiers' general concern about the risk of tyrannical majoritarian action undertaken by state legislative bodies. But common sense suggests that just the opposite is true. Why? Because factional partisans are especially likely to oppress their political rivals in the context of framing laws that fundamentally shape who holds the levers of government power—that is, by enacting self-serving laws that determine access to, and the impact of, the vote.[81] Nor is this extrapolation supported only by common sense. Rather, as we soon

2, *supra* note 2, at 33–34. In particular, no one doubts that laws on this subject enacted by the "representative legislative assembl[y]" that is Congress were and are subject not only to presidential veto but also to judicial review at the hands of federal courts. *See supra* note 49. The legislature-centric, ultimate-control-based rationale advanced by Professor Morley thus rests on an unsteady foundation.

[80] For one such attempted, but unavailing, conceptualization of Section Four, based on the supposed distinction between "procedural" and "substantive" limits on state legislative action, see *supra* note 13.

[81] *See* THE FEDERALIST NO. 61, at 413 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (identifying specifically the danger that "a predominant faction in a single State, should, in order to maintain its superiority, incline to a preference of a particular class of electors"). This real-world tendency of political decision-makers is widely recognized by social scientists and constituional scholars; indeed, it has long influenced decision-making in the election-law context by the U.S. Supreme Court. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648, 650 (1998) (discussing how "partisan forces have manipulated" election rules because "existing holders of political power" often "seek to perpetuate their political control").

will see, this very concern weighed heavily on the minds of the Framers and ratifiers as they crafted and evaluated Section Four itself.[82]

Faced with this difficulty, adherents of the independent-state-legislature theory might offer in its support another line of defense. Their claim would not be that the Framers decided that state legislatures, for some reason, should be viewed as distinctly trustworthy when they enact federal-legislator-election laws. Instead, their argument would be that the Framers chose to establish a uniquely specialized system of federal-government-only checking of state legislatures when those legislatures wield their power to enact such laws. According to this reasoning, the Framers and ratifiers meant to say that, when state legislatures pass laws concerning federal elections, the *only* check on their authority could come by way of the Congress's invocation of its power to "by Law make or alter such Regulations."[83]

The first problem with this argument is that the text does not support it. This is so because it does not follow from the proposition that Congress may displace state laws addressing the election of federal representatives as a matter of legislative policymaking that state courts cannot discharge their entirely separate function of assessing whether those laws abridge the foundational and enduring principles established by the state's charter of government.[84] Indeed, long-accepted features of federal preemption law undermine any such state-court-disempowering view of congressional exclusivity in the checking of state legislative action.[85]

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[82] *See infra* notes 90–91 and accompanying text.

[83] U.S. CONST. art. I, § 4, cl. 1; *cf.* Wise v. Circosta, 978 F.3d 93, 112 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (reasoning, albeit in endorsing only a limited form of the independent-state-legislature theory, that Section Four "establish[es] a check on the power of the state legislature" by establishing a "power . . . given to one institution: the United States Congress," whereas no such power is expressly "given to the state courts").

[84] *Accord, e.g.*, Weingartner, *supra* note 2, at 177 (concluding that the Framers, by granting the Section Four federal legislative power to Congress, meant "to impose additional checks on state legislatures, not to remove existing ones" in the form of state-court judicial review).

[85] This is the case because the federal Constitution, as a general matter, vests Congress with the power to preempt many forms of state legislative action without, in so doing, negating the state courts' traditional and freestanding authority to adjudge whether state laws run afoul of state constitutions. In other words, the no-state-court-judicial-review iteration of the independent-state-legislature theory both oddly and dramatically departs

A second difficulty with this congressional-check-only reading of Section Four is that, as explained earlier, nothing in the historical record indicates that the Section was meant to exempt state legislatures from the usual requirement of having to act in accordance with state constitutional limits.[86] This lack of evidence is important because it confirms that Section Four should be read as carrying forward traditional and accepted practice—that is, the practice under which state courts can and do assess whether state laws enacted by state legislatures comport with state constitutions.[87] As it turns out, however, the historical record is telling in another way, too: It discloses the purposes that *did* underlie the decision to grant to Congress its Section Four revisionary power. Moreover, a proper understanding of those purposes directly undermines the independent-state-legislature theory.

Two concerns drove the decision of the Philadelphia Convention to give to Congress its Section Four power. First, the Framers perceived a need to install a curative mechanism for dealing with state legislators who might prove to be so "sinister" that they would disrupt the very ability of federal government to function—most notably, by refusing to provide for any election of federal legislators at all.[88] Advancing that purpose, however, in no way supports the

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from ordinary principles of constitutional preemption law by declaring that Congress has an *exclusive* power to overturn state legislative actions concerning, but only concerning, state-made federal-election-related laws. Nothing in the text or history of the Constitution, however, suggests a design to provide for this one-context-only, state-court-disempowering result. In addition, the Framers could have easily specified in Section Four that congressional intervention would henceforth constitute the only check on the power of state legislatures to enact federal-election laws if they had meant to provide for that result. That the drafters of the Constitution declined to do so (and, from all appearances, even to consider the possibility that such a drafting tweak might serve some useful purpose) signals an underlying design to leave undisturbed the ordinary principle under which laws enacted by state legislatures are subject to state-constitution-based judicial review by state courts. Indeed, this is especially true because, in other constitutional provisions, the Framers made it textually clear that granted powers are "sole" or "exclusive" in the sense that they foreclose action by other arms of government. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 6 (providing that the Senate has the "sole Power to try all Impeachments"); *id.* art. I, § 8, cl. 17 (granting to Congress the power "[t]o exercise exclusive Legislation" with regard to the District of Columbia).

[86] *See supra* notes 59–60 and accompanying text.

[87] *See supra* note 61 and accompanying text.

[88] THE FEDERALIST NO. 59, at 401 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 836–37 (2015) (Roberts, C.J., dissenting) (noting that "Alexander Hamilton and others" justified the empowerment of

extrapolation of a federal constitutional rule that exempts state legislators from complying with state constitutional law when they *do* pass laws providing for federal elections. To the contrary, the underlying thinking that gave rise to this concern—namely, that state legislators tend too often to act in wrongful ways—aligns with the sensibility of leaving in place the ability of state courts to check the misdeeds of state legislatures by continuing to wield the already-recognized power of judicial review.[89]

No less important, the historical record shows that the Founders' goals in fashioning the Elections Clause reached beyond simply ensuring that the federal government could operate in the face of state legislative obstructionism. The Framers also undertook to address the risk that state legislatures would engage in self-interested malfeasance in any number of ways as they exercised their Section Four power—including, for example, by configuring electoral districts to discriminate against political outsiders or to erect other obstacles to voting by disfavored groups.[90] In short, the

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Congress in Section Four on the ground that it provided a mechanism for addressing "the specter of state legislatures . . . deciding to 'annihilate' the Federal Government by 'neglecting to provide for the choice of persons to administer its affairs'" (quoting THE FEDERALIST NO. 59, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))); *accord* THE FEDERALIST NO. 59, at 402 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (expressing concern that states might engage in a "conspiracy to prevent an election" of federal officials and noting that this danger needed to be dealt with in part because it would arise every two years); *see id.* at 402–03 (adding that state leaders might accede to "the temptation" to "seiz[e] the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited) to discontinue the choice of members for the Fœderal House of Representatives"); *see also* Sweren-Becker & Waldman, *supra* note 73, at 1006 (noting that this "fear was not far-fetched," thus creating "a risk the whole experiment could collapse," because key Antifederalists, such as Patrick Henry in Virginia and George Clinton in New York, were deeply opposed to the Constitution's empowerment of the federal government and "held sway" to a far-reaching degree within their own states' legislatures).

[89] *See* THE FEDERALIST NO. 59, at 402 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (pointing to Section Four's underlying focus on addressing the threat posed by the emergence of a "strong faction" in a state bent on undermining federal authority and the resulting "abuse of a power over . . . elections in the hands of the State Legislatures").

[90] *See Ariz. State Legis.*, 576 U.S. at 815 ("The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."). James Madison made this key point at the Constitutional Convention itself. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240–41 (Max Farrand ed., 1911) (defending the Elections Clause against efforts to further empower state legislatures, at the expense of Congress, based on concerns that "the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices," that "[i]t was

Framers and ratifiers granted to Congress its Section Four revisionary power to provide a counterweight against state legislative wrongdoing, and this goal of checking state *legislatures* in no way aligned with installing a wholly separate check on state *courts*. Rather, just the opposite is true. Because the leaders who forged and endorsed Section Four meant in doing so to stymy self-interested state legislative abuse, there is no reason to believe that they meant to abrogate the ability of state courts to guard against exactly this same danger by wielding their traditional power to subject state-made federal election laws to state-constitution-based judicial review.[91]

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impossible to foresee all the abuses that might be made of the [state legislatures'] discretionary power," and that "the State Legislatures . . . would take care so to mould their regulations as to favor the candidates they wished to succeed" (quoting James Madison)); s*ee also* Sweren-Becker & Waldman, *supra* note 73, at 1002 (noting that the Framers' motives in the structuring of the Elections Clause as they did included "a distrust of state lawmakers" in light of the "tactics that could be used by incumbent factions and parties to blunt representation and exclude voters"); *id*. at 1007 (explaining that this decision was rooted in concerns, articulated in particular by James Madison, that "state lawmakers would abuse their power in ways that were impossible to predict at the time" so that the need existed to "prevent self-interested partisans from twisting election rules to benefit their faction"); *id*. at 999 (noting that the Elections Clause reflected the Framers' "clear-eyed sense of the risk of political abuse by state lawmakers" and that "suspicion of those very legislators suffuses the purpose and history of the Clause"). Nor did the expression of these concerns escape attention as debates over the Constitution, and Section Four in particular, unfolded. *See id.* at 1008–12 (recounting the recurring expressions of concern about the dangers of state legislative abuses in discussions of Section Four in the course of the ratification process; focusing on "denunciation of the likely machinations of self-interested state politicians," the "unvarnished distrust of state legislatures," and fears of "voter suppression tactics by state lawmakers"); *see also id*. at 1009 n.56 (noting, in particular, that such concerns were voiced in the state ratification conventions, particularly the critical conventions in Massachusetts, Virginia, and New York, and referencing in particular the argument made by a delegate at the Maryland Convention that "we may easily suppose improper regulations [of federal elections] to take place in a state assembly, from the prevalence and sinister views of a party"); Weingartner, *supra* note 2, at 175 (noting, with regard to debates over ultimate federal or state control under the Elections Clause, that the "Federalists . . . saw state legislatures as the greater threat" with regard to the danger of promoting unfair elections).

[91] *See* Weingartner, *supra* note 2, at 177 (explaining why the recognized "purposes" of the Election Clause pointed to in the ratification debates "reveal an overriding concern with unchecked authority over elections and a distrust of state legislatures in particular," so that "it is hard to imagine the Framers intended the Elections Clause to eliminate" judicial review of state election laws under state constitutions). A related point concerns the ratification-period debate between Federalists and Antifederalists about the proper scope of Congress's Section Four revisionary power. This story begins with the fact that, as the ratification

process got underway, there was a starting-point agreement between the Federalist and Antifederalist camps that state legislatures should be and would be empowered to regulate the times, places and manner of holding federal elections. (After all, the text of the Constitution, defended by the Federalists, provided for that result, and the Antifederalists both endorsed that authority and sought to expand upon it.) A question thus arises: What if this grant of state legislative power had been both the beginning and the end of the matter, so that *no* power had been vested in Congress to alter state laws regulating the "Times, Places and Manner" of such elections? U.S. CONST. art. I, § 4, cl. 1. If this had been the outcome of the contest over ratification, there would be no basis for foreclosing state-court review of state-made federal-election laws, based on the theory of an impliedly exclusive congressional review power, because no congressional review of any kind would have even existed. *See, e.g.*, Sweren-Becker & Waldman, *supra* note 73, at 1006 (describing a motion at the Constitutional Convention "to strike from the Elections Clause the phrase, 'but their provisions concerning them may at any time be altered by the Legislature of the United States'"). Moreover, as it turns out, just such an outcome almost occurred because the Antifederalists directed particularly intense and focused objections against the power granted to Congress by Section Four to displace state laws concerning federal elections. *See, e.g.*, *id.* at 1005–06 (discussing debates related to the Elections Clause the Constitutional Convention). More specifically, the Antifederalists sought to hoist their Federalist opponents on their own petard in challenging the across-the-board nature of the clause's grant of congressional authority. *See, e.g.*, *id.* at 1013–15 (detailing this aspect of the Antifederalists' critique of Section Four). The root of the Antifederalists' argument lay in the point, noted earlier, that the Federalists had in large part justified the inclusion of the grant of this congressional power in Section Four on the ground that it was needed to deal with the danger that state legislatures in the future would fail to provide for *any* federal elections, thus threatening the ability of the federal government to operate at all. *See supra* note 88 and accompanying text. But—so the Antifederalists argued—if this were genuinely the purpose of the congressional power grant, it did not make sense to give Congress a full-bore authority to regulate federal elections in any way whatsoever. *See, e.g.*, Sweren-Becker & Waldman, *supra* note 73, at 1013 (noting Antifederalist fears of "mak[ing] Congress omnipotent" in this way). Rather, a proper drafting of Section Four would have authorized Congress to address only wholesale state failures to conduct federal elections. *See id.* at 1014–15 (recounting the Antifederalists' resulting argument for thus limiting congressional authority even if not removing it altogether). Indeed, the Antifederalists were sufficiently successful in pushing forward this contention that some state ratifying conventions specifically proposed that, following ratification, Congress should include in its proposal of follow-up amendments to be sent to the states (that is, in what later became the Bill of Rights) a provision that limited Congress's Section Four power in exactly this way. *See, e.g.*, *id.* (noting that "[m]any [state-convention delegates] proposed that Congress's power to regulate should only be triggered by a state's complete failure to enact federal election regulations" and that several states ultimately proposed amendments that would have "limit[ed] Congress's power to occasions of state default"). To be sure, such an amendment was never adopted. *See id.* at 1015 (noting this fact). But the critical point here is that no one even hinted at the idea that the presence or absence of the state judiciary's power to review state legislative enactments for compliance with state constitutions hinged on whether any of the Antifederalists' proposed amendments of the Elections Clause were or were not ultimately put in place. *See id.* at 1009–17 (detailing the proposed revisions of Section Four advanced by the Antifederalists without any mention of

An example might help to illustrate this key point. Assume that in, say, 1820 most Catholic voters in New Jersey lived in a small area in the southern part of the state. Assume also that the Protestant-dominated legislature had made it extremely difficult for those Catholics to vote by passing a law that located their polling place for federal elections far away from the area in which they resided. If the New Jersey constitution at the time prohibited abridgment of the right to participate freely in elections, could it really be the case that the state courts would be barred from applying this provision to protect those voters by invalidating the state legislature's poll-location law?[92] Could it really be, in other words, that the Framers and ratifiers of the U.S. Constitution meant to remove the pre-constitutional power of state courts to invalidate such short-sighted, faction-based, oppressive, and discriminatory measures?[93] To be sure, the federal Congress could, in theory, step in to alter the location of the problematic polling place. But could the federal Congress really be counted on to direct its attention to such a highly specialized and localized law and—in a world in which Catholics might well be an even smaller minority nationwide than in New Jersey—what reason is there to believe that Congress would remedy the injustice even if the matter came to its attention? Again, perhaps the federal courts could rightly read Section Four to foreclose remedial intervention by the state courts in these sorts of circumstances if the historical evidence revealed that the Framers and ratifiers meant to endorse that surprising

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any suggestion that such revisions would have affected in any way the availability of state-constitution-based judicial review). And this was the case for a simple reason: At bottom, the scope of Congress's lawmaking power under Section Four concerns a subject entirely different from the scope of state courts' power to assess the legality of state laws under state constitutions pursuant to the doctrine of judicial review. Thus, as the history of Section Four indicates, the state courts' judicial-review authority was meant to be equally available whether Congress, in the end, had the power to displace no state laws, some state laws, or all state laws concerning the times, places and manner of federal elections.

[92] *See supra* note 25 and accompanying text (highlighting the long-accepted character of the state court's powers to invalidate state laws concerning federal elections under state constitutions).

[93] *See, e.g.*, *supra* note 88–90 and accompanying text (demonstrating why reaching such a conclusion would contravene in particular the Framers' purposes in crafting Section Four itself).

result. But, as we have seen, there is "no evidence" in the historical record that any such plan was on their minds.[94]

For some observers, there may be a temptation to dismiss concerns raised by this kind of case based on the idea that the federal Constitution often provides correctives for state legislative wrongdoing in fashioning federal-representative-election laws, irrespective of state constitutional constraints.[95] Any reliance on this line of thinking, however, is incompatible with the quest to identify the *original* understanding of Section Four's operation. The

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[94] *See supra* note 59 and accompanying text (quoting Professor Smith and setting forth additional supportive authority). One might respond to this posited case by observing that, had the Framers been concerned about these sorts of legislative misdeeds, they would have included in the Constitution (or at least in the Bill of Rights) federal-law protections against them. *See, e.g.*, Sweren-Becker & Waldman, *supra* note 73, at 1011 (describing the Framers' awareness of potential electoral "abuse"). This line of reasoning, however, fails to account for the basic architecture of the original Constitution, which focused on defining the relations between citizens and the U.S. government, and not between citizens and their own state governments. *See infra* note 97 (noting the Court's ruling in *Barron v. Baltimore*, 32 U.S. 243 (1833)). It also neglects the point that one reason the Framers would not have included extensive rights-based protections of citizens against misconduct by their own state legislatures in the U.S. Constitution is that states could—as many of them did—incorporate such protections into their own constitutions. *See, e.g.*, THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that there existed a lessened justification for establishing individual rights in the federal constitution, which assigns to federal authorities only limited powers, than in the constitutions of the states, which deal with "the regulation of every species of personal and private concerns"). And that point, in turn, signals that the Framers understood that these state-constitution-based protections of rights should be enforceable, including in the federal election-law context. It bears noting that one might build out this hypothetical case discussed in the text in other ways. Perhaps, for example, the New Jersey constitution that was in place in 1820 also included a protection of the free exercise of religion, which had been interpreted to protect members of particular religious communities from intentional legislative discrimination. Could the state courts have invoked the state constitution's Free Exercise Clause to protect the disadvantaged Catholic voters? Not according to the iteration of the independent-state-legislature theory that would prohibit all state-constitution-based state court judicial review of federal-election-regulating measures. *See, e.g.*, Morley 2, *supra* note 2, at 34 (arguing that "state constitutions [cannot] limit their respective state legislatures' authority over federal elections" and thus dismissing the role of state courts "in overseeing such elections").

[95] *Cf.* Morley 2, *supra* note 2, at 16 (responding to critiques of the independent-state-legislature doctrine in part by observing that "[e]ven under [it], legislatures' authority to regulate federal elections would remain subject to numerous important constraints"); *id.* at 20–21 (asserting, in particular, that "while the Elections Clause and Presidential Electors Clause permit state legislatures to regulate federal elections without state constitutional constraints, state legislatures remain bound by a wide range of explicit and implicit limitations stemming from both the U.S. Constitution and Congress").

reason why is that the imposition of meaningful federal constitutional restrictions on state action—including restrictions that protect discriminated-against voters (and religious or other minorities more generally)—did not take hold until the Fourteenth Amendment was ratified in 1868.[96] Put another way, the original meaning of Section Four, which came into being in 1788, must be determined in light of background legal structures, and resulting presuppositions, that existed in the world of that time. And that world was one in which state infringements of individual constitutional rights were to be guarded against, if at all, by state courts applying state constitutions; indeed, there existed no other way for courts to protect individual rights against the actions of state legislators because the federal Constitution, except in rare cases, simply did not speak to that matter.[97] In sum, any argument that the existence of judicially enforceable federal constitutional restraints on the actions of state legislatures might lend support to the independent-state-legislature theory by reducing the need for judicially enforceable state constitutional restraints is, from an originalist perspective, wholly without force.[98]

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[96] See DAN T. COENEN & MICHAEL COENEN, PRINCIPLES OF CONSTITUTIONAL STRUCTURE 296 (2022) (noting that "the Bill of Rights . . . originally targeted only federal action" and that it was only "by virtue of the Fourteenth Amendment" that "key procedural protections . . . and substantive protections" of individual rights were made applicable to "state authorities" as opposed to "their federal counterparts").

[97] *See* Barron v. Baltimore, 32 U.S. 243, 250–51 (1833) (holding that even the protections afforded by the later-adopted Bill of Rights applied only to actions taken by the federal government, and not to actions taken by the states).

[98] There is another point, too. On the better view, considering the rights-related limits imposed by the Fourteenth Amendment might be seen as helping to clarify why federal courts should reject any rule that would foreclose state courts from applying state constitutional limits to state laws regarding voting rights in federal elections. The reason why is that, because of the operation of the Fourteenth Amendment, claimants of rights—such as the right to free speech (including speech that criticizes the federal government)—can routinely appeal to two separate sources of law in challenging state legislative action. They can invoke the federal Constitution, and they can also invoke their own state constitution even if they cannot succeed on their federal-law constitutional claim. If state courts cannot invoke state constitutions in the context of assessing state laws that concern federal elections, however, then the right to vote will have its source of judicial protection in such cases *only* in federal constitutional law, thus rendering it a distinctly enfeebled, de facto second-class right. In addition, singling out the right to vote for such junior-varsity treatment is odd, if not anomalous, because the Court often has described voting rights as especially fundamental on the ground that they tend to be "preservative of all rights." Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

*3. State Courts, State Legislatures, and the Independent-State-Legislature Theory*. What, then, is left to be said for the independent-state-legislature theory? Some analysts might reason that, had the Framers focused on the matter, they would have concluded that allowing state courts to review the constitutionality of state laws regarding federal elections was a bad idea. Perhaps, so the argument would go, the Framers would have found that state court judges might too often overreach in wielding this authority, including by issuing rulings close in time to election-day voting, thus trenching in disruptive ways on choices made by the people's elected representatives. Any such argument, however, is marked by a plethora of weaknesses.

First, this argument rests on wholly speculative assertions about what the Framers and ratifiers would have decided had they thought about this issue. What is more, according to the most prominent forms of originalism-based interpretation, even the *actual* intentions of the Framers, if internally held and not shared with others, should not count in the process of deciphering the Constitution's meaning.[99] Accordingly, it should follow *a fortiori* that claims about what the Framers and ratifiers *would have decided* had they thought about a matter should not count either—at least when the decision they supposedly would have made is one that conflicts with what the constitutional text dictates in light of

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To be sure, some observers have challenged the idea that certain constitutional rights should be viewed as more fundamental than others. But even if one fully embraces this position, there is no good reason to afford voting rights *less* protection against state infringement than is afforded to all other rights, which is precisely what the independent-state-legislature theory, if given doctrinal effect, would do. *Accord* Marisam, *supra* note 2, at 573 (reasoning that removing state-court power to strike down state election laws as violative of state constitutional law would improperly "make voting rights the least protected civil right"); *id.* at 607–08 (reasoning that judicial endorsement of "[t]he Independent State Legislature Theory would create a system where voting rights are the only civil rights that do not have the double protections of federal and state constitutional law" and that "[t]he fundamental right to vote would, in this way, be the least protected civil right").

[99] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (stating that "the original meaning of the text, not what the original draftsmen intended," controls when interpreting the Constitution); *see also* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) ("[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people . . . ." (footnote omitted)).

widely shared background assumptions about how American republican governments function.[100]

Another problem is that any argument for the independent-state-legislature doctrine rooted in fears of judicial abuse in applying state constitutions in this context proves too much. This difficulty arises because the risk of such abuse applies to all state laws—not just laws concerning the times, places and manner of federal elections.[101] No one would argue, however, that this risk justifies the abandonment of state-constitution-based judicial review as a general matter. Moreover, it is well-understood that the state courts' power to invalidate state laws because they violate state constitutions extends to many such laws that concern important federal interests (laws concerning, for example, whether persons convicted of a crime can vote for federal legislative officers at all) and any number of highly time-sensitive matters (such as in cases involving the so-called right to die).[102] The fear-of-judicial-abuse-based argument also runs up against the terms and structure of Section Four itself. After all, that Section empowers Congress to check, and prophylactically guard against, not only perceived state legislative abuses in the enactment of statutes but also perceived state judicial abuses in interpreting state laws, including state constitutions.[103] Especially given the Framers' installation of this textually express congressional check on state judicial excesses, it is hard to justify the extrapolation of a further—and textually non-express—federal judicial check on the state courts' power of judicial review when, as here, such an extrapolation runs against the grain of the most natural reading of the operative constitutional text.

Finally, allowing state legislatures to escape state-court review of federal-election-related laws would contravene the founding

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[100] *See supra* notes 25–35 and accompanying text.

[101] *Accord* Marisam, *supra* note 2, at 589–90.

[102] *See generally id.* at 590–91 (asserting that arguments for the independent-state-legislature doctrine based on the risk of state-court overreaching cannot be squared with the acceptance of state court judicial review in every other context; reasoning in particular that safeguarding "[p]olitical accountability does not make sense as an answer here because the biases that plague legislative processes are at least as strong, if not stronger, in the election context").

[103] This is so because Congress has the authority in all cases to "make . . . such Regulations," regarding "[t]he Times, Places and Manner" of federal-legislator elections as it wishes, regardless of whether it does so in response to state legislative or judicial action. U.S. CONST. art. I, § 4, cl. 1.

generation's *actual* thinking about the *comparative* dangers posed within republican systems by judicial and legislative bodies. The writings of the period are particularly clear on this score—so much so that Hamilton observed, in response to Antifederalist handwringing about judicial review, that "the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom."[104] This understanding stemmed in part from the Framers' and ratifiers' perception that (as already noted) the legislative branch was the arm of government most to be feared, especially because of its built-in susceptibility to factional majority capture.[105] In addition (and also as already noted), this focused worry about legislatures was at its highest ebb when it came to *state* legislatures,[106] and it included, in particular, openly expressed fears among leading Federalists that state legislatures would misuse their powers in establishing governing rules for federal elections.[107] At the same time, the framing generation unmistakably saw the judiciary as the "least dangerous" branch[108]—indeed, "beyond comparison the weakest of the three departments of power."[109] Nor was this outlook in any way controversial, at least among the Federalists whose views won out when the Constitution became law. Rather, it directly tracked the thinking of Montesquieu, the great theoretician of separated powers, whose work was well known to informed observers of the time.[110]

The judiciary's perceived weakness sprang from both the "nature of its functions"[111] and its exposure to checks on its authority that did not apply to state legislatures.[112] Among other things, the power of the judiciary was seen as intrinsically limited because it focused

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[104] THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[105] *See supra* notes 64–71 and accompanying text.

[106] *See supra* notes 73–76 and accompanying text.

[107] *See supra* notes 88–91 and accompanying text.

[108] THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[109] *Id.* at 523.

[110] *See id.* at 523 n.* (citing Montesquieu for the proposition that "of the three powers above mentioned, the judiciary is next to nothing" (quoting 1 Spirit of Laws 186)).

[111] *Id.* at 522.

[112] *See id.* at 522–23 (citing "the natural feebleness" of the judiciary and asserting that "the judiciary . . . will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them" and that, as a result, the real danger in republican systems is that the judiciary will be "overpowered, awed or influenced by its coordinate branches," especially "the representative body").

on resolving discrete issues in litigated cases by applying preexisting texts in reasoned fashion in response to counterpoised arguments made by legal specialists.[113] In addition, at the time of the framing, state judges faced risks of far-reaching legislative reprisals, including by way of state budgetary decision-making.[114] What all of this meant, at the time the Constitution came into being, was that it would "require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution," whatever might be the subject that a challenged statute concerned.[115] In other words, just as surely as the Framers saw heightened reasons to fear the abuse of power by state legislatures, they also could and did point to special reasons to worry that state-court judges would wield their own rightful authority with undue timidity.[116] Against this backdrop, to disable state courts from policing state legislatures under state constitutions, based on concerns about state judicial misbehavior in reviewing state legislation concerning federal elections, is to stand on its head the Framers' and ratifiers' actual view of the dominant conditions of their time—a view that saw legislatures (especially state legislatures) as worrisomely strong and judges (especially state courts) as worrisomely weak.

Nothing in this assessment of the comparative dangers posed by state courts and state legislatures is meant to suggest that state judges always act in simon-pure ways, wholly free of error or unworthy motivations. Indeed, even while extolling the institution of judicial review, Hamilton acknowledged that "individual

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[113] *See, e.g.*, *id.* at 529 (emphasizing that discharging the judicial function will require extensive learning of judicial precedents, which "must demand long and laborious study to acquire a competent knowledge of them"); *see also* THE FEDERALIST NO. 81, at 544 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges . . . .").

[114] *See supra* note 76; *cf.* Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?*, *in* ASSAULTS ON THE JUDICIARY: ATTACKING "THE GREAT BULWARK OF PUBLIC LIBERTY," REPORT OF THE 1998 FORUM FOR STATE COURT JUDGES 49, 51 (Roscoe Pound Found. ed., 1999) ("[L]egislative reprisals . . . may . . . threaten both decisional independence and institutional independence.").

[115] THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see id.* at 523 (asserting that "the general liberty of the people can never be endangered [by the courts] . . . so long as the judiciary remains truly distinct from both the legislative and executive" and that "liberty can have nothing to fear from the judiciary alone" as long as it is constructed so as not to be placed in "union with either of the other departments").

[116] *See supra* notes 76, 114 and accompanying text.

oppression may now and then proceed from the courts of justice."[117] That, however, is precisely the point. Having recognized that some judges will sometimes improperly wield their power of judicial review, the Framers and the ratifiers saw that risk as one well worth taking because of the far greater danger posed by legislative bodies that by nature are both uniquely powerful and distinctly inclined to engage in faction-based "encroachments and oppressions."[118]

It was against the backdrop of these considerations that the founding generation forged, evaluated, and ultimately ratified the Constitution, including Article I, Section Four. And in light of this historical record, that clause cannot fairly be understood to have stripped state courts of their traditional—and, indeed, celebrated—authority to overturn state laws that violate state constitutional requirements.[119]

## IV. THE DISTINCTLY LIMITED SCOPE OF ANY POSSIBLE INDEPENDENT-STATE-LEGISLATURE DOCTRINE

A critic might respond to the analysis set forth in Part III by saying that it attacks a straw man. "I fully recognize," such a critic would declare, "that the independent-state-legislature theory does not *always* require federal courts to cast aside state-court applications of state constitutional limits to federal-election-related laws." Rather, so the critic would continue, "the independent-state-legislature doctrine only *sometimes* requires federal courts to step in in this way." In other words, so the argument goes, federal courts are required to intervene in this set of cases only when the state courts intrude *too much* on the state legislature's Elections Clause power.

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[117] THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that "particular misconstructions and contraventions of the will of the legislature may now and then happen").

[118] THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 80, at 541 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The possibility of particular mischiefs can never be viewed by a well-informed mind as a solid objection to a general principle, which is calculated to avoid general mischiefs, and to obtain general advantages.").

[119] *Accord, e.g.*, Schapiro, *supra* note 2, at 672 (concluding that the independent-state-legislature theory "does not rest on firm foundations of text, precedent, or history").

At least some judges will worry about the methodological problems posed by this sort of intrude-too-much approach.[120] Whatever one concludes about this concern, however, there are deeper difficulties with the you-are-attacking-a-straw-man critique. One problem arises because federal courts should not be able to achieve, by way of a quiet entry through the backdoor, what they cannot accomplish with a loud-and-clear right-through-the-front-door pronouncement. "[T]he Constitution," after all, "is concerned, not with form, but with substance."[121]

There is another very large problem, too. The same underlying concerns set out in Part III, all of which counsel against *prohibiting* state-court review of state legislation concerning federal elections, likewise cut sharply against *limiting or diluting* state-court review of state legislation in this context. Part III highlights, for example, (1) the unremarkable character of the use of the term "the Legislature" in Article I, Section Four to signal (and only to signal) the assignment to state lawmakers of a particular lawmaking power that otherwise might have been given solely to Congress;[122] (2) the background understanding that any exercise of lawmaking powers by state legislatures naturally carries with it a susceptibility to judicial review by state courts to ensure compliance with state constitutions;[123] (3) the absence of any indication in Section Four's drafting history that state-court judicial review was meant to be made subject to some specialized limitation with regard to federal-election laws passed by state legislatures;[124] (4) the recognition among informed observers of the time that state and federal elections would routinely take place together, thus creating the risk of serious practical problems if different legal rules had to be applied to federal and state elections;[125] (5) the existence of a deep belief

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[120] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting) (criticizing use of a constitutional test requiring courts to decide whether legislative action impairs presidential authority "too much" because of its "ad hoc, standardless" nature); *see also* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch J., concurring) (suggesting the inappropriateness of a constitutional rule that requires courts to ask whether a state "hasn't done *enough*" to protect voting rights in part because of the difficulty of gauging "how much is enough").

[121] Gasoline Prods. Co. v. Champlin Refin. Co., 283 U.S. 494, 498 (1931).

[122] *See supra* notes 17–57 and accompanying text.

[123] *See supra* notes 25–35 and accompanying text.

[124] *See supra* notes 58–62 and accompanying text.

[125] *See supra* note 35 and accompanying text.

among those same observers that the establishment of strong institutional checks on legislative action was of key importance within American republican systems to counter the dangers of majoritarian factional abuse;[126] (6) the reality that the Framers and ratifiers also perceived, based largely on their own recent lived experience, that this danger was especially acute within state governments, thus creating the highest level of need to counter the risk of such abuses by state legislatures, including through the exercise of the state courts' power of judicial review;[127] (7) historical evidence indicating that, even as they drafted and approved Section Four itself, the Framers and ratifiers focused on the perceived risk that state legislatures might well abuse their authority in promulgating federal-election laws in many different ways;[128] (8) the widely-shared belief that the comparative threat of wrongful government intervention by judges, and especially state-court judges, was dramatically less acute than was the threat of wrongful action by state legislatures, thus reinforcing the case for leaving undisturbed the judicial-review power at the state level;[129] and (9) the fact that the Framers and ratifiers relied on this balancing of judicial and legislative dangers in endorsing judicial review as a general matter, with no indication that that balance somehow should or would operate in a different way with regard to the enactment of state legislation concerning federal elections.[130]

The key point here is both apparent and important: every one of these considerations does something more than serve to undercut the argument that state courts should never be able to review the legality under state constitutions of state legislation concerning the times, places and manner of federal elections. In addition, each of these considerations signals that that power should not be significantly watered down or compromised by establishing specialized limits on the accepted state-constitution-based judicial-review power of state courts because of some supposed need, unsupported in the history of the founding, for federal judges to safeguard the "independence" of state legislatures.

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[126] *See supra* notes 62–79 and accompanying text.

[127] *See supra* notes 62–79 and accompanying text.

[128] *See supra* notes 80–91 and accompanying text.

[129] *See supra* notes 102–103 and accompanying text.

[130] *See supra* notes 104–119 and accompanying text.

The question thus arises whether Section Four imposes any limit at all on the power of state courts to invalidate state laws regarding federal elections on state constitutional grounds pursuant to the so-called independent-state-legislature theory. In part for the reasons just given (and, as we soon shall see, for additional reasons, too), one entirely plausible answer to this question is "no," at least so long as the legislature is free to respond to such an invalidation by adopting a new law on the same subject, thus ensuring that it retains the final power, freely exercisable in the long run, to make law in this field within constitutional boundaries.[131]

On another view, the answer should be "yes." This is the case, so the argument goes, because otherwise the state judiciary might effectively wield legislative, rather than judicial, power, thus usurping the state legislature's constitutionally assigned role.[132] The worry, in other words, is that state judges will make up whatever rules they want to put in place in handling federal-election cases and then pretend that those rules are constitutionally mandated. Perhaps the federal courts will in due course embrace some version of this approach. Even if they do, however, there are at least three reasons—on top of the nine reasons already noted at the outset of this discussion—why, pursuant to the originalist interpretive methodology, any such federal-court power to reevaluate state-court interpretations of state constitutional law should be wielded with the greatest measure of caution and restraint.[133]

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[131] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 840–41 (2015) (Roberts, C.J., dissenting) (explaining, for example, that the result in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)—upholding a state veto-by-public initiative process as applied to a state legislature's federal districting law—was permissible under Section Four because its effect was "to send *the Ohio Legislature* back to the drawing board"; adding that "the legislature was not displaced . . . it just had to start on a new redistricting plan"; that "[t]here is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether"; and that the case involved only "imposing some constraints" on the state legislature, as opposed to "deposing it entirely").

[132] *See, e.g.*, Schapiro, *supra* note 2, at 662–63 (viewing the concurring Justices' independent-state-legislature-based opinion in *Bush v. Gore* as reflecting the perceived "need to protect the state legislature from the state courts" in light of concerns about "unprincipled judicial activism"); *see also supra* note 59 (noting authorities supportive of this point).

[133] Notably, several commentators have reflected on what such a restrained version of the doctrine might look like. *See, e.g.*, Litman & Shaw, *supra* note 2, at 1270–71 (suggesting that a proper approach might be to overturn state-court rulings only in cases where the

First, as noted earlier, the Federalist thinkers who won the battle for ratification extolled the work of state-court jurists who had the "fortitude" to vindicate enduring constitutional values by invalidating state legislation pursuant to the doctrine of judicial review.[134] The interfere-too-much conception of the independent-state-legislature doctrine, however, sends exactly the opposite message. Indeed, it is hard to imagine any decision of a federal court more disrespectful of state-court judges than one that depicts them as taking over the role of the state "Legislature" by only purporting, and not fairly so, to discharge the judicial function in applying the state constitution.[135] Revisiting our southern New Jersey polling-place law, in light of *Moore v. Harper*, helps to illuminate this problem. To begin with, if our hypothetical New Jersey Supreme Court of 1820 were to invalidate the challenged polling-place-location law on state-constitutional grounds, in a reasoned opinion in the wake of extensive adversarial argument, it seems clear that its ruling would constitute a proper exercise of the state court's judicial-review power. But now consider the modern-day *Moore* case. In it, three Justices, by way of an opinion written by Justice Alito, concluded that the Court should have stayed the North Carolina Supreme Court's ruling—that is, its ruling that the state legislature violated the state constitution when it put in place an

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interpretation of state law is so "unforeseeable" and lacking in "any fair or substantial support" that it collides with due-process principles or that federal courts transplant into this context "the extremely rare, limited, and deferential review of state law questions that is reflected in the adequate and independent state ground doctrine"); Epstein, *supra* note 2, at 619 (endorsing an independent-state-legislature doctrine pursuant to which "[i]t must . . . be shown . . . that the state court's interpretation does not fall within the boundaries of acceptable interpretation, but rather represents what must be termed, for want of a better term, a gross deviation"); Pildes, *supra* note 2, at 708, 710 (supporting federal-court intervention to guard against case-specific state-court implementation of an "'abominable' or comparable change in law" in a way that could potentially alter election results and thus defeat reliance on preexisting law; but insisting that such intervention can occur only in cases of "patent and fundamental unfairness" (quoting Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995))); *see also* McConnell, *supra* note 2, at 663 (reasoning that, in the "unique context" of *Bush v. Gore*, there was "a constitutionally-based federal interest in ensuring that state executive and judicial branches . . . not use their interpretive and enforcement powers to change the rules after the fact").

[134] *See supra* text accompanying note 115 (quoting Alexander Hamilton in THE FEDERALIST NO. 78).

[135] *See* Shapiro, *supra* note 2, at 191 (making the case that "the [independent-state-legislature theory] is insulting to state courts and could well undermine public confidence in the state judiciary").

"intentionally and carefully designed" partisan gerrymandering scheme[136] so "extreme"[137] and "stark"[138] as to qualify as "egregious."[139] In claiming that this action of the state's highest court would probably run afoul of the independent-state-legislature theory, Justice Alito drew attention to two features of that court's analysis: (1) it relied on constitutional rights-creating provisions that did not "say[] anything about partisan gerrymandering";[140] and (2) it "change[d] course" by purportedly moving away from an earlier ruling in which the court had deemed a partisan-gerrymandering claim to present a nonjusticiable political question.[141] These circumstances, Justice Alito reasoned, indicated that the North Carolina Supreme Court's ruling bore the "hallmarks of legislation," thus rendering it likely to be subject to reversal in light of Section Four's grant of the power to make federal election laws to the state's "Legislature."[142]

Now consider how this reasoning would bear upon the anti-Catholic poll-location case discussed in Part III. According to Justice Alito's reasoning, the New Jersey Supreme Court apparently would be barred from invalidating that law if (1) the relevant state constitutional clause did not "say anything" about polling-place locations, and (2) a prior set of New Jersey Supreme Court Justices had deemed a related, though different, constitutional challenge to be nonjusticiable.[143] As to the first of these two points, however, a state court's application of a broadly phrased rights-protective constitutional rule to invalidate a state law can hardly be seen as evidencing that court's engagement in legislative, as opposed to judicial, action. After all, the U.S. Supreme Court itself has issued hundreds of decisions invalidating federal and state laws under the Equal Protection Clause, the Due Process Clauses, and other rights-protective provisions that are set forth in the federal Constitution in extremely general language.[144] Yet no one—and especially

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[136] Harper v. Hall, 868 S.E.2d 499, 522 (N.C. 2022).

[137] *Id.* at 509.

[138] *Id.* at 547.

[139] *Id.* at 510.

[140] Moore v. Harper, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting).

[141] *Id.* at 1091.

[142] *Id.*

[143] *Id.*

[144] *See, e.g.*, Bush v. Gore, 531 U.S. 98, 103 (2000) (applying the guarantee of the equal protection of the laws set forth in the Fourteenth Amendment to find a constitutional

members of the Court itself—would suggest that all of those decisions, for that reason, bore the "hallmarks of legislation."[145]

As to the second point, it is wrong to conclude that judges are taking on a legislative-type role simply because they are said to move away, to some degree, from past judicial rulings.[146] In fact, different judges routinely interpret constitutional texts (as well as non-textual rules, such as the political-question doctrine) in different ways—as illustrated by countless decisions of the U.S. Supreme Court in which different groups of Justices take pointedly different views of the proper resolution of particular constitutional issues, as well as by cases in which the Justices choose to overrule even a longstanding constitutional precedent put in place by a

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violation in a state's manner of conducting an election recount, thus effectively determining the result of a presidential election).

[145] *Moore*, 142 S. Ct. at 1091; *see also* Litman & Shaw, *supra* note 2, at 1265 (observing that "federal courts could create some sort of federal constitutional line distinguishing narrow and specific state constitutional provisions from more open-ended ones" but adding that "[t]he federal constitution makes no such distinction, and federal courts should not invent one").

[146] Notably, in *Moore* itself, Justice Alito did not claim that the North Carolina Supreme Court had overruled the relevant precedent. And rightly so because the earlier case had—as the North Carolina Supreme Court pointed out—involved a challenge under a state constitutional provision that was not relied on in the *Moore* litigation. *See* Harper v. Hall, 868 S.E.2d 499, 539 (N.C. 2022) (detailing the allegations that the "Legislative Defendants' enacted plans" violated several sections of "the Declaration of Rights"). Especially in these circumstances—which involved in essence the not uncommon judicial action of distinguishing an earlier case—the court's treatment of that earlier case cannot be fairly viewed as giving its ruling a "legislative" cast. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 209 (1962) (deeming an Equal Protection Clause challenge to state legislative-apportionment rules to be justiciable even though the Court had previously found a Guarantee Clause challenge to exactly the same practice to be nonjusticiable). Justice Alito also pointed to the fact that the relevant provisions of the North Carolina constitution had not previously been read to establish a limit on partisan gerrymandering "for 246 years." *Moore*, 142 S. Ct. at 1090–91. Again, however, this fact does not suggest that the court's ruling was "legislative" in character—as evidenced by innumerable decisions of the U.S. Supreme Court that have recognized constitutional principles of the highest importance for the first time only after long spans of time had passed following adoption of the relevant federal constitutional provision. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (rejecting racial segregation of public schools); Reynolds v. Sims, 377 U.S. 533, 558 (1964) (establishing the one-person-one-vote rule of state legislative apportionment); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (determining that the Second Amendment protects the right to possess arms for purposes unrelated to militia service); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 561 (2012) (concluding that the Commerce Clause does not support congressional establishment of so-called individual mandates); *id*. at 649–60 (Scalia, Kennedy, Thomas, & Alito, JJ. dissenting) (same).

predecessor Court.[147] The existence of such disagreements does not (to say the least) mean that one set of judges is or was engaging in action that bears "the hallmarks of legislation."[148] To repeat: In all but the rarest cases, it is both unfair to, and disrespectful of, state-court judges to cast them as acting in a nonjudicial manner when they interpret their own state's constitution to strike down a state law—and this is all the more the case when their rulings are based on methods of decision-making that directly parallel how the U.S. Supreme Court itself routinely acts when it makes decisions interpreting the U.S. Constitution.[149]

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[147] Nor is this some new phenomenon that would have surprised members of the founding generation. *See* THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("There are endless diversities in the opinions of men. We often see not only different courts, but the Judges of the same court differing from each other.").

[148] *Moore*, 142 S. Ct. at 1091.

[149] Notably, Justice Alito's analysis in the *Moore* case is not subject to challenge on only these grounds. His "hallmarks of legislation" reasoning is also subject to question because it marks a far-reaching expansion of the independent-state-legislature theory to the extent that that theory has been drawn upon in earlier cases, including by the concurring three-Justice plurality in *Bush,* 531 U.S. at 113–14 (Rehnquist, C.J., concurring). There, after all, the plurality determined that it had cause to intervene, based on the independent-state-legislature theory, only because the Florida Supreme Court's ruling operated, in their view, to "wholly change" what was set forth in the text of governing law. *Id.* at 114. Nothing in Justice Alito's "hallmarks of legislation" analysis in *Moore*, however, rests on a finding that the North Carolina Supreme Court's reading of its state constitution was one with which "[n]o reasonable person" could agree, far less that it was "absurd." *Id.* at 119; *see also id.* at 114 (acknowledging that federal courts must be "deferential" in assessing whether the state court has reasonably applied the operative legal text); *id*. at 115 (indicating that a "fair reading" of the governing text would be permissible, whereas an "impermissibl[e] broaden[ing]" of the governing text would not be); *see also* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 34 n.1, 35 (2020) (Kavanaugh, J., concurring) (concluding that, because the "the clearly expressed intent" of the lawgivers must control under the Elections Clause, state courts may not "rewrite state election laws"); Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting) (finding cause to intervene based on the conclusion that the Pennsylvania court "violated the Constitution by overriding 'the clearly expressed intent of the legislature'" in interpreting the relevant text (quoting *Bush*, 531 U.S. at 120)); Carson v. Simon, 978 F.3d 1051, 1060 (8th Cir. 2020) (concluding that a state administrative official could not settle a pending lawsuit, consistent with the Electors Clause, by establishing a rule in "direct contradiction to Minnesota election law" as set forth in the governing text); Wise v. Circosta, 978 F.3d 93, 104–05 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (declaring that non-legislative state officials cannot cause the "the work of the elected state legislatures" to be "undone" by rendering the "plain wording of [its] enactments . . . transgressed"); *id.* at 115 (indicating that federal courts can intervene to protect state-legislature prerogatives only if the state court has endorsed an interpretation of state law that departs from its "clear" commands); *id*. (precluding departures from a "clear mandate" reflected in the governing legal

A second reason exists for giving only the narrowest application to any independent-state-legislature doctrine if such a doctrine is to be recognized at all: Permitting federal courts to second-guess the interpretation of state laws by state courts raises a direct threat to core principles of constitutional federalism. More specifically, both bedrock theory and longstanding practice dictate that (1) the citizens of each state are entitled to establish their own state's constitution and (2) it is the task of state courts, which operate on behalf of the state's citizens, to interpret state law, including state constitutional law.[150] Nor can the tension between principles of constitutional federalism and the independent-state-legislature theory be brushed aside by claiming that federal courts do not interfere with federalism values when they simply "referee" whether state judges or state legislatures should have the final word on whether particular state laws will operate within the state.[151] Few doctrines pose a greater affront to principles of constitutional federalism, after all, than ones—such as the would-be independent-state-legislature doctrine—that contravene fundamental choices made by a state's own citizens concerning which government decision-makers should hold the power to address key questions that affect those state citizens' lives.[152]

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text); Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 150 (5th Cir. 2020) (Ho, J., concurring) ("It is . . . offensive to the Constitution to rewrite Texas election law by executive fiat . . . [or] judicial fiat.").

[150] *See, e.g.*, Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291, 298 (1832) ("[T]he case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court . . . ."); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."); Kansas v. Marsh, 548 U.S. 163, 184 (2006) (Scalia, J., concurring) ("When state courts erroneously invalidate actions taken by the people of a State (through initiative or through normal operation of the political branches of their state government) on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy."); *see generally* Amar & Amar, *supra* note 2, at 25 (detailing why "state courts" are viewed as providing "the last word on the meaning of state law, including state constitutions").

[151] *Cf. Bush*, 531 U.S. at 115 (suggesting, at least implicitly, that federal-court decisions overturning state court rulings regarding state federal-election-related laws raise at most a limited threat to constitutional federalism because such rulings do not "imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*").

[152] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (recognizing that a citizenry's decisions regarding "the character of those who exercise government authority" are central to how "a State defines itself as a sovereign"); Highland Farms Dairy v. Agnew, 300 U.S. 608,

To be sure, a state's citizenry could choose to fashion a state constitutional rule that blocks their state courts from applying state constitutional restraints to state legislative pronouncements about how to conduct federal elections. But it matters greatly, when it comes to principles of constitutional federalism, that the citizens of a state have made precisely the opposite choice. Put simply, it is a matter of high importance whether a state's citizens can protect themselves from short-sighted and oppressive decision-making by their own legislature in establishing how their own elections for their own federal representatives are conducted by subjecting that decision-making to judicial review by their own courts. And because the independent-state-legislature theory, to the extent it is reified in federal law, strips away from the state's citizenry this basic self-governing power, it clashes directly with core norms of constitutional federalism.

The underlying point is that a state is not an aggregation of government institutions, government offices, and government officials; rather, "[a] state . . . is a political community of free citizens"[153] who are empowered to structure their governing institutions as they see fit, so long as they operate within a "Republican Form of Government."[154] Thus, for federal courts to overturn the choice of a state's own citizens that their state courts should be able to invalidate state legislation, including state legislation concerning that state's election of that state's federal representatives, is to infringe on the autonomy of that state's self-governing people in a distinctly serious way.[155]

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612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

[153] Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1868).

[154] U.S. CONST. art. IV, § 4.

[155] *Accord, e.g.*, Litman & Shaw, *supra* note 2, at 1264 & n.170 (questioning the independent-state-legislature theory because it effectively calls for federal judicial "tinkering with the state's governance structures, including how the state chooses to allocate governing authority within state government"; citing in support of this analysis the work of Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 41 (1988), which advocates—including on the basis of the Guarantee Clause—the imposition of significant limits on the federal government's power to interfere with state-based choices concerning how to allocate state decision-making power); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1170–71 (2007) (asserting that, "when federal courts defer to a particular branch of state government at the expense of another branch, they infringe on

State sovereignty" because they "essentially dictate what state constitutional law should be," thus "nullify[ing] the power of the people within the States to define their government"). Nor do the federalism-related problems presented by the independent-state-legislature theory stop here. One additional problem raised by the "hallmarks of legislation" approach, and comparably interventionist rules, arises because the Supreme Court repeatedly has emphasized the importance of structuring federal constitutional doctrine to avoid the creation of confusion among citizens about rightful accountability, between state and federal officeholders, for the making of important government decisions. *See, e.g.*, New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."); Printz v. United States, 521 U.S. 898, 930 (1997) ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."); United States v. Lopez, 514 U.S. 549, 576–577 (1995) (Kennedy, J., concurring) (emphasizing the need for federal courts to maintain "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States"; reasoning that: "If, as Madison expected, the Federal and State Governments are to control each other, see THE FEDERALIST NO. 51, and hold each other in check by competing for the affections of the people, see THE FEDERALIST NO. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function"). The risk of blurred accountability is limited when state courts apply federal law as interpreted by the U.S. Supreme Court in deciding state-court cases because citizens broadly understand that state courts must honor the high Court's pronouncements on the meaning of federal law. Were the federal courts to endorse a strong version of the independent-state-legislature theory, however, a far more serious danger of accountability confusion would arise. Consider the unenviable position of the state supreme court justice who honestly and honorably believes that the state constitution requires Result A, but also anticipates that the U.S. Supreme Court, in applying the independent-state-legislature doctrine, is likely to find that Result A bears "the hallmarks of legislation." Such a state-court justice has two alternatives. First, the justice can embrace Result A, with the likely consequence of being reversed by the U.S. Supreme Court and depicted in the process as engaging in legislative, and thus lawless, behavior. Second, the justice can reject Result A, thus rendering a ruling on state law—and becoming exposed to "public disapproval" for rendering that ruling, *New York*, 505 U.S. at 168–69—even though the justice chooses to make that state-law ruling only because of pressures exerted by the federal Supreme Court's endorsement of the independent-state-legislature doctrine. Either way, the state-court justice becomes open to rebuke among the electorate not because of that justice's own exercise of independent judgment but because of under-the-radar pressures exerted by the federally promulgated independent-state-legislature doctrine. *See id.* (justifying endorsement of the anticommandeering doctrine based in part on the risk of unjustifiable "electoral ramifications" for "state officials" if they act as they do because of "federal coercion" and not on the basis of their own free choice). This set of facts also shines a light on a separate, but related, problem raised by the independent-state-legislature doctrine to the extent it permits federal judges to undo state-court interpretations of state constitutional law. The difficulty is that when (as is likely) state judges take the second of the two decisional pathways available to them in resolving the sort of issues presented by our hypothesized "Result A" case—that is, by under-reading state constitutional

Any rule that served to empower federal courts to set aside state-court rulings because they supposedly bear "the hallmarks of legislation" also would raise a separate, and particularly severe, federalism-related problem. The problem is that any such rule would inexorably push federal courts to deploy a *federal*-law methodology to assess whether state courts have overstepped *state*-law constitutional limits.[156] Perhaps, for example, federal judges would gravitate toward detecting "the hallmarks of legislation" in the work of any state court whose reading of state constitutional law strikes those federal judges as too loosely tethered to a specifically-phrased legal text.[157] But it may well be, as a matter of a particular state's governing law, that the absence of such a tight textual fit is not a matter of determinative importance—perhaps, for example, because that state's longstanding jurisprudence favors a more purpose-sensitive style of reading the state constitution.[158] Other

limits to avoid reversal by the U.S. Supreme Court—the intrusion on principles of constitutional federalism becomes particularly acute. Why? Because when state judges interpret their own state constitutions' provisions that bear upon state residents' voting rights, they are interpreting constitutional provisions that define voting rights not only for purposes of *federal* elections but for purposes of *state* elections as well. The consequence is that efforts to avert reversal by the Supreme Court inevitably will have significant *spillover* effects. *See* Marisam, *supra* note 2, at 608 (emphasizing that "[s]tate laws setting the rules for elections apply generally to both state and federal races"). Moreover, these spillover effects will distort state law with regard to state elections not only by diminishing the individual *voting rights* of state citizens in those state elections; they also will impair *basic state choices about the structure of self-governance* by effectively altering the rules that determine how states conduct elections for their own officeholders—including their most important officeholders—in a way that departs, perhaps significantly, from how those elections otherwise would take place. Yet any such rearrangement of basic decisions about state self-governance raises the most serious tension with principles of constitutional federalism. *See* THE FEDERALIST NO. 59, at 399–400 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that no one would have "hesitated to condemn" the inclusion in the Constitution of a provision "empowering the United States to regulate the elections" of state officers).

[156] *See* Shapiro, *supra* note 2, at 142 (noting the likelihood that recognition of an independent-state-legislature doctrine would require that "the Supreme Court . . . undertake its own textualist interpretation of state election law, de novo, without deference to state courts' . . . interpretive methodology").

[157] The point is not merely hypothetical. After all, as noted earlier, the three Justices who voted to issue a stay in *Moore v. Harper* relied in part on the state supreme court's inability to point to a state constitutional text that specifically referenced the problem of political gerrymandering. *See supra* note 140 and accompanying text.

[158] *See* Pildes, *supra* note 2, at 720–21 (distinguishing "purposive interpretation" from "textual interpretation," which tends to disallow analysis of the lawgivers' "underlying objectives"; adding that the application of these contrasting methodologies "has varied both

states, too, may favor their own interpretive approaches, such as by endorsing a representation-reinforcing style of judicial review founded on a specialized vision of the proper, and oftentimes very limited, role of the judicial branch.[159] For state courts to apply such theories of interpretation in giving meaning to state law is not wrong. Indeed, theories of this sort have guided decision-making by the U.S. Supreme Court itself in interpreting the U.S. Constitution over many years.[160] Against this backdrop, any decision by a federal

over time and between different courts within our radically decentralized system of legal authority" and that "this is not the kind of question on which the Supreme Court can impose a uniform approach on all courts").

[159] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (detailing and expanding on the process-centered representation-reinforcement theory endorsed in 1938 in footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), which guided Supreme Court decision-making in later decades to a significant degree).

[160] *See, e.g.*, Pildes, *supra* note 2, at 712 (noting, in keeping with Professor Ely's account, that "post-1938 Supreme Court jurisprudence has found constitutional intervention most readily justified when democratic institutions are potentially compromised and hence to be distrusted with respect to particular issues" and that "much of modern constitutional law treats this distrust as present when democratic institutions are potentially self-interested players in the issue at hand"). Nor is this surprising, because there exists founding-era rhetoric that may be seen as supporting the use of such methodologies by the federal courts. *See, e.g.*, THE FEDERALIST NO. 78, at 524, 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (suggesting the propriety of invalidating legislative enactments because they are contrary to the "manifest tenor" of the Constitution and commending state courts for drawing on state constitutions in issuing rulings that "mitigat[ed] the severity and confin[ed] the operation" of "unjust and partial laws"); THE FEDERALIST NO. 81, at 542–43 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (responding to arguments that federal judges will be "superior to . . . the legislature" because they will be able to engage in interpretation according to the "*spirit* of the constitution," not by asserting that courts have no such power but instead by observing that according such a power to federal judges would not "give[] them any greater latitude in this respect, than may be claimed by the courts of every state"); *id.* at 545 (discussing the potential permissibility of judicial decision-making pursuant to "the general principles of law and reason"—in particular, in support of invalidating legislative acts overturning judicial judgments); *see also* COENEN, *supra* note 5, at 181 (suggesting that, notwithstanding the availability of counterarguments, *Federalist No. 81* can be viewed as effectively rebuffing Antifederalist critiques of judicial review to the extent it is based on "the reason and spirit," as opposed to the "letter," of the Constitution). To be sure, there is much debate about what interpretive methodologies federal courts may properly deploy as they work to determine the meaning of the U.S. Constitution—including, in particular, whether they should be guided either wholly or primarily by the originalism-based style of interpretation that is the focus of this Article. The important point to be made here, however, is that such debates properly concern how *federal* courts should go about interpreting *federal* constitutional law. It is an entirely different matter for federal courts to dictate to *state* courts how they should go about interpreting *state* constitutional law. Put simply, it comports with our system of federalism,

court to supplant the underlying interpretive method used by a state court to interpret its own state constitution—as the independent-state-legislature theory, at least in its strong forms, effectively requires federal courts to do—raises a profound federalism-related problem. It does so because the embrace of a federal-law-based interpretive uniformity in adjudging whether state-court rulings bear "the hallmarks of legislation" clashes with the appropriate emergence, within our federal system, of different approaches to the judicial interpretation of local law within each of the nation's diverse, quasi-sovereign, and self-governing states.[161]

## V. CONCLUSION

There is more to be said about the independent-state-legislature theory. Among other things, there exist both judicial and legislative precedents concerning the theory that have generated extensive commentary by constitutional scholars.[162] Here, however, the focus

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at a fundamental level, for states to be able to formulate their own legal systems, including their own legal systems of state constitutional interpretation, free of interference by federal courts, whose mission is not to formulate state law.

[161] *Accord, e.g.*, Kramer, *supra* note 27, at 123–24 (reasoning that overlaying a federal-law-based "plain language" approach on state-court interpretation of state law would "permanently . . . alter the internal structure of state government"); Litman & Shaw, *supra* note 2, at 1235–36 (rejecting any "narrow mode" of interpretation of state law by the federal Supreme Court because it would create "an exceedingly poor fit with the myriad and varied institutional arrangements in the states"); Shapiro, *supra* note 2, at 190–91 (expressing concern that, among other things, "a maximalist [independent-state-legislature doctrine] essentially federalizes the interpretation and application of state election law as it applies to federal elections" in a manner that disrespects "[s]tate courts' understanding of and immersion in their states' legal culture, precedent, and constitutions"); Schapiro, *supra* note 2, at 685 (suggesting that any fair inquiry into whether state courts have invaded a state legislature's rightful sphere of action would require a "comprehensive assessment of a particular state's constitutional system" with a state-specific sensitivity to "the relationship among the constitution, the legislature, and the courts"); *id.* at 688 (adding that "constitutional structure, constitutional history, and constitutional culture" vary from state to state and that "a recognition of this variety and contingency casts doubt on the wisdom of assigning the interpretive task [with regard to declaring the meaning of state law] to the United States Supreme Court").

[162] Of particular importance with regard to the question of original meaning is the work of Professor Smith, who reports that "the 'legislatures' which engaged in the first exercises of power pursuant to the Elector Appointment and Elections Clauses clearly believed that they were bound by their state constitutions." Smith, *Revisiting the History*, *supra* note 2, at 460. In addition, much ink has been spilled on the lessons to be gleaned, and not gleaned, from early U.S. Supreme Court rulings, particularly *McPherson v. Blacker*, 146 U.S. 1 (1892).

is not on the post-ratification actions of Congress, the state legislatures, or state and federal courts. Instead, it is on the constitutional text and its original meaning, including as illuminated by ratification-era writings, such as the *Federalist Papers*.[163]

The analysis offered here focuses attention on the precise wording of Section Four, the judicial-review-supportive legal backdrop against which that text was adopted, the framing-era purposes of the Elections Clause itself, and the deep theoretical commitments—centered largely on fears of state legislative abuse—that drove at a basic level the entire constitutional project. These considerations together support three main conclusions about the original meaning of the Elections Clause. First, Section Four does not foreclose state courts, in any across-the-board way, from evaluating whether state legislation regarding federal elections violates state constitutions. Second, the same reasons that dictate this conclusion—and other reasons as well—cut sharply against recognizing any principle that would expose state court rulings on the constitutionality of state-made federal election laws to second-guessing by federal courts on the ground that such rulings bear the "hallmarks of legislation" as that term is used by Justice Alito in his provisional treatment of the issue presented in *Moore v. Harper*.[164] Finally, even if there does exist some specialized limiting principle

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*Compare, e.g.*, Morley 2, *supra* note 2, at 15 (arguing that *Blacker* lends support to the independent-state-legislature theory), *with* Amar & Amar, *supra* note 2, at 30–31 (arguing that advocates of the theory have greatly overread *Blacker*). Professors Amar and Amar have also directed attention to more recent decisions of the Court, including by arguing that the Court's ruling in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), undermines arguments for stripping state courts of their traditional judicial-review power pursuant to the independent-state-legislature theory. *See* Amar & Amar, *supra* note 2, at 35–36 (concluding that *Rucho* embodied "a square repudiation" of the independent-state-legislature theory). Perhaps the most extensive historical account has been offered by Michael Weingartner, whose research indicates that "[s]ince the Founding, there has been a consistent, deliberate practice of state constitutions regulating federal elections and constraining state legislatures" one which "enjoys the acceptance of courts, Congress, the public, and even state legislatures themselves." Weingartner, *supra* note 2, at 139. He thus has concluded that "longstanding practice, spanning all fifty states and with only scattered exceptions throughout history, has settled the meaning of the Elections and Electors Clauses and foreclosed the [independent-state-legislature] theory." *Id.* at 138.

[163] This is not to say that judicial and legislative precedents cast no light on the original meaning of Section Four. Indeed, those precedents may shed much light, especially insofar as they reflect actions taken near in time to the Constitution's promulgation and ratification.

[164] *See supra* notes 140–142 and accompanying text.

that empowers federal judges to overturn state-court invalidations of federal-election-related laws in some circumstances, the federal judiciary should apply that principle in only the most circumspect and restrained way.

Some analysts have advanced policy arguments in support of engrafting doctrines based on the independent-state-legislature theory into American law.[165] The most prominent of these arguments focuses on the claimed value of channeling authority regarding the governance of federal elections to democratically accountable state legislative officials.[166] This argument is subject to

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[165] *See* McConnell, *supra* note 2, at 661–62 (invoking "functional justifications," not rooted in the "legislative history," in support of a limited form of federal-court review under the independent-state-legislature theory); *see also* Pildes, *supra* note 2, at 720 n.92 (noting, for example, that "Judge Posner would defend the [approach of the concurring Justices] in *Bush v. Gore* on pragmatic . . . grounds").

[166] *See* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring) (arguing for restrictions on judicial interference with election laws because "[l]egislators can be held accountable by the people for the rules they write or fail to write," while "typically, judges cannot"; adding that "[l]egislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful" and that "[l]egislatures enjoy far greater resources for research and factfinding on questions of science and safety"); Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 154 (5th Cir. 2020) (Ho, J., concurring) ("The Constitution vests control over federal election laws in state legislatures, and for good reason—that's where we expect the voice of the people to ring most loudly and effectively."); *see generally* Marisam, *supra* note 2, at 589 ("Political accountability is, perhaps, the main justification given for the Independent State Legislature Theory."). Another policy argument points to the danger that judges will unwisely and disruptively interfere with elections at the eleventh hour. *See, e.g.*, *Democratic Nat'l Comm.*, 141 S. Ct. at 30 (expressing concern about "[l]ast-minute changes to longstanding election rules"); *id.* at 31 (Kavanaugh, J., concurring) (expressing similar concerns); Wise v. Circosta, 978 F.3d 93, 117 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) (assailing state judicial actions "changing the rules of the upcoming elections at the last minute" because doing so "is making the courts appear partisan, destabilizing federal elections, and undermining the power of the people to choose representatives to set election rules"); Epstein, *supra* note 2, at 619 (noting, in the process of endorsing a narrow independent-state-legislature doctrine, that any claimed ability of the legislature to change applicable law "after a popular election" is "very disconcerting"); *see generally* Marisam, *supra* note 2, at 595–96 (noting the existence of arguments along these lines). Worries about rule changes made by way of late-in-the-game state-court interference with federal elections, however, would seem to be best dealt with by developing doctrines that specifically target such interference. *See, e.g.*, Pildes, *supra* note 2, at 702–07 (detailing why state-court implementation of "new law" in the midst of an election dispute can raise serious problems when put in place after an election occurs, thereby denying "fundamental fairness" through the creation of "vote dilution" and/or the compromising of legitimate "reliance" interests; nonetheless emphasizing the need to impose strong limits on the application of any

criticism on its own terms.[167] But the deeper difficulty with the argument lies in its lack of an anchorage in the thinking of the

such "new law" principle); McConnell, *supra* note 2, at 663 (characterizing *Bush v. Gore* as a "unique context" case warranting federal intervention to address "after the fact" election-rule changes). In other words, concerns along these lines do not warrant "throwing out the baby with the bathwater" by entirely foreclosing (or broadly limiting) *all* state-court application of state constitutions to problematic state election laws under any circumstances. It is noteworthy, in this regard, that the North Carolina Supreme Court's ruling in *Moore* did not involve anything remotely like a late-in-the-game rejiggering of previously governing election-law rules in the context of a concrete election dispute. Instead, that case involved a challenge brought close on the heels of the state legislature's issuance of a congressional district map presumably designed to last for ten years. Professor McConnell, among others, has argued that there is value in promulgating election rules in an "ex ante" fashion—that is, "behind a veil of ignorance" because such action is taken "in advance of any particular controversy." McConnell, *supra* note 2, at 661–62. This rationale might, for example, provide a basis for federal-court intervention in the sort of post-election-day dispute about vote-making and vote-counting procedures presented by cases akin to *Bush v. Gore* if a state court's action in fact involved (as Chief Justice Rehnquist concluded it did in that case) a reading of a statute that dramatically departs from preexisting understandings of how that statute operates in governing the administration of elections. This concern, however, is entirely absent in a case like *Moore*. That case, after all, does not involve either a post-voting controversy, or a highly unexpected reinterpretation of a legislative enactment, or the legislature's having acted "behind the veil of ignorance" in formulating generally applicable election-administration rules. Indeed, it is hard to imagine any action that involves less of a neutral, detached, and mechanics-only-type legislative decision than one that purposefully seeks to structure electoral voting districts to favor members of the "in" political party over their "out" political opponents. *See id.* at 662 (emphasizing that, when a legislative election code is enacted, "no one knows (for sure) which rules will benefit which candidates"—as illustrated by the facts of *Bush v. Gore* in which "no one could have guessed in advance which candidate would favor strict enforcement of vote counting deadlines, no one could have guessed which candidate would benefit from counting ambiguous chads and dimples as votes, and no one could have guessed how the choice between optical scanning and punchcard voting systems would affect the relative positions of the candidates").

[167] For example, the argument's focus on channeling decision-making to electorally accountable government officials is not free of complexity because most state judges—like state legislators—have to stand for election. In addition, this argument oddly preferences legislative authority regarding federal elections over legislative authority in every other area of law—and it does so despite common-sense concerns about the heightened dangers of partisan nest-feathering in the election-law context. *See, e.g.*, *Hughs*, 978 F.3d at 154 (noting that skepticism about politicians regulating politics is "deeply engrained in our nation's DNA" and that "[a]s Americans, we have never trusted the fox to guard the henhouse"). The broader point is that fears of judicial abuse as state courts review federal-election-related laws must be weighed against fears of legislative abuse in the making of those same laws in the first place—with there being much reason to conclude that the latter set of fears is rooted in a far more worrisome set of potential dangers. *See generally supra* notes 81–82, 90–91 and accompanying text. To say the least, this footnote is not meant to supply a comprehensive response to the *policy* arguments offered in support of the independent-state-legislature

Framers and ratifiers themselves and, indeed, in the direct tension that it raises with the focused fears of factional state legislative abuse that pervaded the constitution-making process.[168] Along the same lines, some proponents of the independent-state-legislature theory have voiced concerns that "[o]ur country is now plagued by a proliferation of pre-election litigation that creates confusion and turmoil."[169] Again, however, worries about a set of perceived problems that are said "now" to exist shed little, if any, light on the Constitution's *original* meaning. What matters in discerning that meaning are the words of the Constitution itself as clarified by the conditions that surrounded their use as our founding charter made its way to becoming law. And what we know about those words and those conditions points with clarity to one conclusion: Federal courts lack the authority to formulate federal constitutional doctrine, at least in any highly interventionist form, founded on the so-called "independent state legislature" theory.

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theory, far less to identify all the countervailing considerations of policy that might cut in the other direction. *See, e.g.*, Persily et al., *supra* note 2, at 739 (detailing why, courts "at a minimum" should exercise "caution" in applying any independent-state-legislature doctrine because any "aggressive judicial intervention" pursuant to such a doctrine would inevitably spawn a wide range of "knotty questions"); Pildes, *supra* note 2, at 713 (reasoning that federal courts might have structural advantages over state courts in policing state elections of state officials—for example, state governors—because state judges often interact with such officials, but that "federal courts have no unique structural advantage that would incline them toward greater impartiality in federal elections" than state courts would bring to the same disputes). All of these matters range beyond the subject of this article because they do not focus on the Constitution's original meaning.

[168] *See, e.g.*, *supra* notes 25–35, 67–79 and accompanying text (highlighting the *Federalist Papers'* unstinting endorsement of state-court judicial review and recurring expression of intense mistrust of state legislatures, including in the election-law context).

[169] *Wise*, 978 F.3d at 105.