

# When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative

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## I. INTRODUCTION

When the Supreme Court agreed to hear a case two terms ago presenting a constitutional challenge to Arizona’s Independent Redistricting Commission (AIRC), few could understand why. As an appeal in a voting case, the Court

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needed to affirm or deny the lower court's decision, but few thought the merits of the case to be serious enough to warrant an oral argument, as opposed to summary disposition. Was the Court craving more election-related litigation? Were the garden variety campaign finance, redistricting, and voting rights suits not enough to satisfy the Court's appetite? Was the principal argument in the case—an echo of one made in *Bush v. Gore*<sup>1</sup> fifteen years ago—too irresistible?

Whatever the reasons the Court agreed to hear *Arizona State Legislature v. Arizona Independent Redistricting Commission (Arizona State Legislature)*,<sup>2</sup> the case presented a fresh opportunity to bat down an argument that had wandered around zombie-like since the 2000 election controversy. The argument focused on the Elections Clause, Article I, Section 4, Clause 1 of the Constitution, which provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”<sup>3</sup> The constitutional question in *Arizona State Legislature* was whether the AIRC, which was created by popular initiative and was somewhat removed from legislative control, violated the Elections Clause because, when it redistricted, it was not the “Legislature” prescribing the “Places and Manner of holding Elections.”<sup>4</sup> For the appellants, “Legislature” meant legislature—not legislative power broadly defined or the people acting as a quasi-legislature or any institution other than a Congress-like representative institution at the state level.<sup>5</sup>

This Article attempts to lay out the implications of that argument, otherwise known as the “Independent State Legislature Doctrine” (ISLD), because it posits that the legislature has a constitutionally blessed independent role in regulating elections. In Part I we give some background on *Arizona State Legislature*. Part II describes the history and precedent concerning the ISLD. Part III provides the most forceful defense of that doctrine. Part IV briefly presents the originalist and historical arguments against viewing the Elections Clause as narrowly about the legislature as an institution, to the exclusion of initiatives, commissions, or other methods of lawmaking. Part V presents the pragmatic and consequentialist arguments against the ISLD. Part VI presents our conclusions, which can be summarized briefly here. As appealing as a literal reading of the Elections Clause may be, its consequences would be both bizarre and disastrous. The ISLD, taken to its logical conclusion, would prevent not only redistricting commissions, but any

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<sup>1</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>2</sup> *Ariz. State Legislature*, 135 S. Ct. 2652.

<sup>3</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>4</sup> *Ariz. State Legislature*, 135 S. Ct. at 2658–59.

<sup>5</sup> Brief for Appellant at 12–13, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-1314\\_appnt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1314_appnt.authcheckdam.pdf) [<https://perma.cc/U8PL-PF43>].

election-related action by state courts, executives, or local governments that might conflict with the wishes of the legislature. A range of election-related initiatives passed since the Progressive Era would be placed into constitutional doubt, as would many state constitutional provisions, since very few constitutions were passed by state legislatures. In short, the implications of the ISLD would be far-reaching and not easily contained.

## II. BACKGROUND ON THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Passed by fifty-six percent of Arizona voters in the 2000 election,<sup>6</sup> the citizen initiative that created the AIRC was advertised as a way to counteract partisan gerrymandering and place the redistricting process at some remove from the politicians who would be benefited or burdened by the decennial alteration of district lines.<sup>7</sup> More specifically, the ballot summarized the initiative as a constitutional amendment “relating to ending the practice of gerrymandering and improving voter and candidate participation in elections by creating an independent commission of balanced appointments to oversee the mapping of fair and competitive congressional and legislative districts.”<sup>8</sup> Whether the initiative has succeeded in doing so depends on which partisans you ask and in which redistricting cycle. Democrats were unhappy with the results in the 2000 redistricting process, and Republicans were unhappy with the results after the 2010 census.<sup>9</sup>

With the best of intentions, the AIRC was designed to be both nonpartisan and bipartisan.<sup>10</sup> The five commissioners are selected from a list compiled by the State of Arizona’s Commission on Appellate Court Appointments.<sup>11</sup> The majority and minority leaders in each house of the state legislature each choose one person from that list.<sup>12</sup> Those four commissioners then choose a fifth who serves as the commission’s chair.<sup>13</sup>

The dispute over Arizona’s congressional districts that eventually landed at the Supreme Court arose from the 2011 redistricting plan proposed and passed by the AIRC. Republicans felt the plan was biased (in both process and

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<sup>6</sup> ARIZ. SEC’Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2000 GENERAL ELECTION 16 (Nov. 2000), <http://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf> [<https://perma.cc/6HXH-N9RL>] (784,272 of 1,396,958 voters).

<sup>7</sup> ARIZ. CONST. art. IV, pt. II, § 1; ARIZ. PROPOSITION 106 (2000), <http://apps.azsos.gov/election/2000/Info/pubpamphlet/English/prop106.pdf> [<https://perma.cc/BNW8-ULYG>].

<sup>8</sup> ARIZ. SEC’Y OF STATE, *supra* note 6, at 16.

<sup>9</sup> *See generally* Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 121 P.3d 843 (Ariz. Ct. App. 2005).

<sup>10</sup> *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 997 F. Supp. 2d 1047, 1049 (D. Ariz. 2014), *aff’d*, 135 S. Ct. 2652 (2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

result) in favor of Democrats<sup>14</sup>—so much so that the Governor worked to remove (and the state senate eventually impeached) the Independent Chair of the Commission, only to have the Alabama Supreme Court reinstate her. Although the AIRC’s plans were also controversial ten years earlier when it took its first try at redistricting—that time the Democrats objected and sued regarding the state legislative plan—no one then questioned the constitutionality of the commission.<sup>15</sup>

After the AIRC approved final congressional maps in 2012, the Arizona Legislature filed suit in the District Court for the District of Arizona seeking to enjoin the use of the AIRC maps and to have the court declare those maps unconstitutional.<sup>16</sup> The Arizona Legislature contended that Proposition 106, the AIRC, and its districting plans violated the Elections Clause.<sup>17</sup> In a two-to-one decision, a three-judge district court upheld the AIRC.<sup>18</sup> The majority considered the initiative a valid exercise of the state’s legislative power, and noted that the Arizona Supreme Court had already held that the AIRC acts as a legislative body.<sup>19</sup> The majority emphasized that previous Supreme Court decisions allowed states to design “their own lawmaking processes and [to use] those processes for the congressional redistricting authorized by the Clause.”<sup>20</sup> The majority relied on the precedent of *Ohio ex rel. Davis v. Hildebrant*<sup>21</sup> and *Smiley v. Holm*<sup>22</sup> to conclude “that the word ‘Legislature’ in

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<sup>14</sup> Marc Lacey, *Arizona Redistricting Panel Is Under Attack, Even Before Its Work Is Done*, N.Y. TIMES (Sept. 3, 2011), <http://www.nytimes.com/2011/09/04/us/04redistrict.html?pagewanted=all> [<https://perma.cc/Z58Z-HDNP>]. Republicans alleged that the Independent Chair of the Commission was really a Democrat in Independent clothing—with a husband who had done work for a Democratic state legislative candidate—and that the AIRC had hired a consultant who had previously worked for the Obama campaign. *Id.* For her part, the Chair, Colleen Mathis, pointed out that her husband actually worked for Republicans on Capitol Hill and that they had both attended the 1988 Republican National Convention. *Id.*

<sup>15</sup> See generally *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 121 P.3d 843 (Ariz. Ct. App. 2005).

<sup>16</sup> *Ariz. State Legislature*, 997 F. Supp. 2d at 1049.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1056.

<sup>19</sup> *Id.* at 1054–55.

<sup>20</sup> *Id.* at 1052.

<sup>21</sup> *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (rejecting challenge to a referendum overturning redistricting legislation passed by the Ohio Legislature).

<sup>22</sup> *Smiley v. Holm*, 285 U.S. 355 (1932). *Smiley v. Holm*, decided in 1932, involved a question of whether the redistricting plan passed by the Minnesota Legislature was subject to a veto by the Governor. *Id.* at 361–63. The Minnesota Supreme Court ruled that redistricting was solely a function of the state legislature, and therefore the Governor could not veto the plan. *Id.* at 362–63. The U.S. Supreme Court overruled the Minnesota Supreme Court. *Id.* at 375. In his decision, Justice Hughes explained that redistricting is fundamentally a lawmaking process and that the state may prescribe the manner in which such lawmaking is carried out. *Id.* at 367. As a result, the Minnesota scheme of involving the Governor in the process of redistricting by allowing him to veto the legislature’s proposal was constitutional. *Id.* at 367–68.

the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws."<sup>23</sup> The legislature appealed to the U.S. Supreme Court, which ruled five to four that the AIRC and the initiative that created it did not violate the Elections Clause.<sup>24</sup>

### III. THE CONSTITUTIONAL ARGUMENTS FOR AND AGAINST THE AIRC

#### A. Text and Structure

The constitutional argument against the AIRC derives from how to interpret the term "Legislature" as it is found in the Elections Clause of the U.S. Constitution.<sup>25</sup> Article I, Section 4, Clause 1, of the Constitution states that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."<sup>26</sup> For opponents of the AIRC, such as the plaintiff Arizona State Legislature,<sup>27</sup> the dissenters at the Supreme Court,<sup>28</sup> and academic proponents of the ISLD,<sup>29</sup> the word "Legislature" is unambiguous: it refers to "the representative body which makes the laws of the people."<sup>30</sup> While legislatures may vary in important respects, the people acting through direct democracy are not a "Legislature" under this view, nor is an independent commission when it draws congressional districts.<sup>31</sup> If one pays attention to the text, structure, and history of the Constitution and its amendments, AIRC opponents argued, then the commission cannot have the power to draw congressional districts.<sup>32</sup>

If you are a textualist, all you need to believe to be persuaded by this argument is that "Legislature" does not mean "legislative power." To be sure, non-legislative bodies, whether the "people" through the initiative process or

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<sup>23</sup> *Ariz. State Legislature*, 997 F. Supp. at 1054.

<sup>24</sup> *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

<sup>25</sup> *Ariz. State Legislature*, 997 F. Supp. 2d at 1049.

<sup>26</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>27</sup> *See* Reply Brief for Appellant at 1–2, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV5/13-1314\\_reply\\_appellant.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/13-1314_reply_appellant.authcheckdam.pdf) [<https://perma.cc/4MCY-PN9Z>].

<sup>28</sup> *See Ariz. State Legislature*, 135 S. Ct. at 2678 (Roberts, C.J., dissenting).

<sup>29</sup> *See* Brief of Coolidge-Reagan Foundation as Amici Curiae in Support of Appellant at 25, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-1314%20amicus\\_app\\_Coolidge-Reagan%20Foundation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1314%20amicus_app_Coolidge-Reagan%20Foundation.authcheckdam.pdf) [<https://perma.cc/JB7T-XELL>].

<sup>30</sup> *Ariz. State Legislature*, 997 F. Supp. 2d at 1051 (quoting court filings from the plaintiff, Arizona State Legislature).

<sup>31</sup> *See Ariz. State Legislature*, 135 S. Ct. at 2678 (Roberts, C.J., dissenting).

<sup>32</sup> *Id.* at 2679–85.

even a monarch, could exercise legislative power, but that does not mean those entities are legislatures.<sup>33</sup> If the Constitution and its Framers were indifferent as to the institution that would regulate congressional elections, they simply could have said, as the Constitution does elsewhere, that the state, rather than any particular part of state government, would have this authority.<sup>34</sup>

Rather, in the Elections Clause, as in sixteen other provisions,<sup>35</sup> the Constitution refers specifically to the state legislature. These other Clauses provide the best ammunition for Chief Justice Roberts's dissent, as in some contexts it seems pretty clear that the Constitution means "legislature" to refer to the representative body that makes laws.<sup>36</sup> Most damningly, Article I, Section 3, the provision that provided for state legislatures to choose U.S. Senators, was seen as preventing the popular election of Senators.<sup>37</sup> The

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<sup>33</sup> See *id.* at 2679 ("The majority devotes much of its analysis to establishing that the people of Arizona may exercise lawmaking power under their State Constitution. See *ante*, at 2660–2661, 2671–2672, 2672–2673. Nobody doubts that. This case is governed, however, by the Federal Constitution. The States do not, in the majority's words, 'retain autonomy to establish their own governmental processes,' *ante*, at 2673, if those 'processes' violate the United States Constitution."); Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 HARV. J.L. & PUB. POL'Y 341, 356 (2016) ("In extraordinary moments, powers might revert to the people because of some abuse or abdication of those powers. But when those powers were deposited back into the hands of the people, the latter always vested them in new institutions, ones hopefully better suited to their exercise. So while the people were the source of the executive, legislative, and judicial powers, they were not executives, legislators, or judges. Nor were the people the executive branch, the legislature, or the judiciary.")

<sup>34</sup> See, e.g., U.S. CONST. art. I, § 10.

<sup>35</sup> *Ariz. State Legislature*, 135 S. Ct. at 2692–94 (Roberts, C.J., dissenting).

<sup>36</sup> *Id.* ("Art. I, § 3, cl. 1: 'The Senate of the United States shall be composed of two Senators from each State, chosen by the *Legislature* thereof, for six Years . . . . Art. IV, § 3, cl. 1: 'New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the *Legislatures* of the States concerned as well as of the Congress.' . . . Art. IV, § 4: 'The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the *Legislature*, or of the Executive (when the *Legislature* cannot be convened), against domestic Violence.' . . . Amdt. 17, cl. 1: 'The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State *legislatures*.'" (quoting U.S. CONST.)).

<sup>37</sup> *Id.* at 2677 ("What chumps! Didn't they realize that all they had to do was interpret the constitutional term 'the Legislature' to mean 'the people'?"); Richard H. Pildes, *At the Supreme Court, a Win for Direct Democracy*, N.Y. TIMES (June 29, 2015), [http://www.nytimes.com/2015/06/30/opinion/at-the-supreme-court-awin-for-direct-democracy.html?\\_r=0](http://www.nytimes.com/2015/06/30/opinion/at-the-supreme-court-awin-for-direct-democracy.html?_r=0) [<https://perma.cc/86TE-MLC7>] ("And in some parts of the Constitution, at least, the framers certainly meant 'legislatures' to exclude direct popular decision making: The Constitution originally assigned the selection of senators to the state

Seventeenth Amendment providing for Senate elections was only necessary if the constitutional requirement of appointment by the state legislature prevented states from electing their Senators in the first place.<sup>38</sup>

Justice Ginsburg's opinion for the Court noted that the role of the state legislature can differ based on the constitutional context.<sup>39</sup> Echoing the Court's earlier decision in *Smiley v. Holm*,<sup>40</sup> her opinion characterized the differing functions of the legislature, depending on the relevant clause, as "electoral," "ratifying," "consenting," or "lawmaking."<sup>41</sup> Whenever the context implied that "legislature" referred to lawmaking, as in the case of the Elections Clause, then the state institution charged with the power to make laws—which could include the people acting through the initiative process or an independent commission—is empowered to perform the role the Constitution contemplates.<sup>42</sup> For Chief Justice Roberts, in contrast, the fact that the legislature may perform different functions did not mean the definition or identity of the legislature would change accordingly: a car is still a car, he argued, even if you use it for some purpose other than transportation, like sleeping or tailgating.<sup>43</sup>

### B. *Original Meaning of the Elections Clause*

The majority and dissent battled as well over the original meaning and intent behind the Elections Clause. To some extent, their disagreement revolved around the level of generality at which one should analyze the meaning of the Clause. Should one look to whether the institution of direct democracy is consistent with the democracy-enhancing features of the Clause? Or should one look to whether the Framers had a particular meaning in mind when they used the word "Legislature"?

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'legislatures,' for the purpose of rejecting popular elections. It took the 17th Amendment to make direct election of senators possible.'")

<sup>38</sup> See U.S. CONST. amend. XVII; *Ariz. State Legislature*, 135 S. Ct. at 2677 (Roberts, C.J., dissenting).

<sup>39</sup> *Ariz. State Legislature*, 135 S. Ct. at 2668 (Roberts, C.J., dissenting).

<sup>40</sup> *Smiley v. Holm*, 285 U.S. 355 (1932).

<sup>41</sup> *Ariz. State Legislature*, 135 S. Ct. at 2666–67. Justice Ginsburg discussed precedent for various legislative functions. For example, in *Ohio ex rel. Davis v. Hildebrant*, the Court "recognized that the referendum was 'part of the legislative power' in Ohio legitimately exercised by the people to disapprove the legislation creating congressional districts." *Id.* at 2666 (citation omitted) (quoting *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567 (1916)). In *Hawke v. Smith*, "The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with 'the ordinary business of legislation.'" *Id.* at 2667 (quoting *Hawke v. Smith*, 235 U.S. 221, 229 (1920)). In *Smiley v. Holm*, "the Elections Clause, [the Court] explained, respected the State's choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to 'the Legislature' a ratifying, electoral, or consenting function." *Id.*

<sup>42</sup> *Id.* at 2668.

<sup>43</sup> *Id.* at 2682 (Roberts, C.J., dissenting).

For the majority, the purpose of the Elections Clause was to ensure that Congress could override state election laws regulating federal elections.<sup>44</sup> The role of Congress was the chief point of discussion in the debates over the Clause; “the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate.”<sup>45</sup> Although the Framers may have been familiar with New England town meetings and the like, nothing resembling the statewide initiative of the Progressive Era had even been contemplated at the time the Constitution was written.<sup>46</sup> But, in deciding whether the use of the initiative and an independent redistricting commission was consistent with the Clause, the majority emphasized both the general notions of popular sovereignty underlying the Constitution,<sup>47</sup> as well as the concerns of some Framers regarding partisan gerrymandering.<sup>48</sup>

For the Chief Justice’s dissent, the fact that no debate existed over the term “Legislature” in the Elections Clause was “because everybody understood what ‘the Legislature’ meant.”<sup>49</sup> The earliest version of the Clause did not specify the state legislature, a phrase that only emerged after the Committee of Detail revised the original to read: “The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed by the legislature of each state; but their provisions concerning them may, at any time, be altered by the legislature of the United States.”<sup>50</sup> The inclusion and reemphasis of the word “legislature,” for Roberts, was intentional, and at any rate should signal a decision to specify which institution of state government would be responsible for regulating federal elections.<sup>51</sup> Even the debates between Hamilton and the anti-Federalists all assumed that the state legislature would be in charge of election regulation.<sup>52</sup> As for platitudes about popular sovereignty, the Framers instilled in the Elections Clause the notion that control of elections should be conducted by the institution most representative of the people.<sup>53</sup> However, all “recognized the distinction between the state legislature and the people themselves.”<sup>54</sup>

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<sup>44</sup> *Id.* at 2672 (majority opinion).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2657, 2659–60.

<sup>47</sup> *Ariz. State Legislature*, 135 S. Ct. at 2674–75 (first quoting THE FEDERALIST NO. 37, at 223 (James Madison) (Clinton Rossiter ed., 1961); then quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149, at 385 (P. Laslett ed., Cambridge Univ. Press 1964) (1690); and then quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

<sup>48</sup> *Id.* at 2672.

<sup>49</sup> *Id.* at 2684 (Roberts, C.J., dissenting).

<sup>50</sup> *Id.* (emphasis omitted) (quoting 1 DEBATES ON THE FEDERAL CONSTITUTION 146 (J. Elliot ed., 1836)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2674 (majority opinion) (quoting THE FEDERALIST NO. 61, *supra* note 47, at 374 (Alexander Hamilton)).

<sup>53</sup> *Ariz. State Legislature*, 135 S. Ct. at 2684 (Roberts, C.J., dissenting).

<sup>54</sup> *Id.* (quoting *Brown v. Sec’y of State*, 668 F.3d 1271, 1276 n.4 (11th Cir. 2012)).



### C. Precedent

The Court has entertained a handful of cases involving the Elections Clause or analogous clauses that assign a certain constitutional responsibility to the state legislature. Before *Arizona State Legislature*, it had not squarely confronted the question of whether redistricting could be performed by a body other than the state legislature—either the people themselves through the initiative process or an independent body like the AIRC. It had upheld a referendum that had overturned a congressional redistricting plan<sup>55</sup> and rejected a claim suggesting a gubernatorial veto of a redistricting plan passed by the legislature was unconstitutional.<sup>56</sup> However, the Court had also struck down the use of the initiative by a state to ratify proposed amendments to the U.S. Constitution<sup>57</sup> and as recently as the 2000 presidential election controversy, three Justices had argued that a state supreme court had violated the ISLD in the way that it had interpreted the state constitutional (and statutory) provisions related to the election recount rules.<sup>58</sup> In short, each side in the *Arizona State Legislature* case had material to work with to support its interpretation of the doctrine.

The earliest relevant precedent, however, came not from the Court but from the House of Representatives. During the Civil War, state courts faced the dilemma of reconciling the votes of soldiers cast out-of-state with state constitutional requirements that votes be cast in-state.<sup>59</sup> This dilemma came to a head in the 1865 case *Baldwin v. Trowbridge*.<sup>60</sup> The case concerned an 1864 election for a Michigan congressional district in which the losing candidate, Augustus Baldwin, sued the winner, Rowland Trowbridge, alleging that votes cast in the election by out-of-state soldiers (which went primarily to Trowbridge and accounted for his margin of victory) were invalid under the Michigan Constitution, which required all votes to be cast within state lines.<sup>61</sup>

The House of Representatives, which has the power under the Constitution to judge its own elections,<sup>62</sup> decided to hear the case, and forwarded the controversy to its Committee of Elections.<sup>63</sup> The Committee produced a majority report that one scholar called “the first and most comprehensive defense of the independent legislature doctrine ever made.”<sup>64</sup> The majority

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<sup>55</sup> *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 566 (1916).

<sup>56</sup> *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932).

<sup>57</sup> *Hawke v. Smith*, 253 U.S. 221, 231 (1920).

<sup>58</sup> *Bush v. Gore*, 531 U.S. 98, 120–21 (2000) (Rehnquist, C.J., concurring).

<sup>59</sup> Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 765–67 (2001).

<sup>60</sup> H.R. MISC. DOC. NO. 39-10, at 1–3 (1865); see Smith, *supra* note 59, at 769.

<sup>61</sup> Smith, *supra* note 59, at 769.

<sup>62</sup> U.S. CONST. art. I, § 5.

<sup>63</sup> Smith, *supra* note 59, at 769.

<sup>64</sup> *Id.* Before this decision, state courts in New Hampshire and Vermont had held in similar cases that out-of-state votes by soldiers were not barred by state constitutional requirements for in-state voting, but not because of the logic we identify with the ISLD. *Id.*

report, which was adopted by the House, argued that because the Elections Clause vests power to regulate congressional elections in the state *legislature*, any conflict between the legislature's election laws and the state constitution must be resolved in favor of the legislature.<sup>65</sup> The majority report set forth the basic components of the ISLD—that the Constitution gives special powers to state legislatures to regulate congressional elections; that “Legislature” should be read literally to signify the formal lawmaking body of the state; and that therefore the legislature's federal election regulation powers operate independently of state constitutional restraints.<sup>66</sup>

The dissenting Justices in *Arizona State Legislature* adopted much of the logic of *Baldwin*.<sup>67</sup> Writing for the dissenters, Chief Justice Roberts noted that the majority report determined the meaning of “Legislature” in the Elections Clause both from the common usage of the word at the time the Constitution was written and the way in which “Legislature” is used in other parts of the Constitution.<sup>68</sup> As a result, he argued that *Baldwin* was a precedent for the interpretation that the use of “Legislature” in the Elections Clause refers directly to the state legislature.<sup>69</sup> Justice Ginsburg's opinion for the Court pointed out that the majority opinion in *Baldwin* directly contradicted a Michigan Supreme Court decision, which had ruled that “state legislation in direct conflict with the State's constitution is void.”<sup>70</sup> Further, Justice Ginsburg called attention to the partisan interests of the members on the Elections Committee when the majority report was issued and questioned the report's precedential value.<sup>71</sup>

In the cases that succeeded *Baldwin*, the Court rejected the ISLD. In *Ohio ex rel. Davis v. Hildebrant*, the Court upheld a popular referendum that rejected redistricting legislation passed by the Ohio Legislature.<sup>72</sup> The Court found that the referendum was validly enacted under Ohio's Constitution, which by an amendment passed in 1912 “reserved [legislative power to the people] by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly.”<sup>73</sup> The Court also found that Congress, which by the language of Article I has the power “at any time by Law [to]

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at 767–68. Instead, the New Hampshire and Vermont courts both construed their state constitutions, which were adopted before the ratification of the Constitution, to be silent about whether their voting restrictions applied to federal elections. *See id.*; *see also* Opinion of the Justices, 45 N.H. 595, 606–07 (1864); Opinion of the Judges, 37 Vt. 665, 676 (1864).

<sup>65</sup> Smith, *supra* note 59, at 771–72.

<sup>66</sup> *Id.* at 770–72.

<sup>67</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2685–86 (2015) (Roberts, C.J., dissenting).

<sup>68</sup> *Id.* at 2687.

<sup>69</sup> *Id.* at 2685–86.

<sup>70</sup> *Id.* at 2674 (majority opinion).

<sup>71</sup> *Id.*

<sup>72</sup> *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 570 (1916).

<sup>73</sup> *Id.* at 566.

make or alter such Regulations [passed by the state legislatures] except as to Places of choosing Senators,”<sup>74</sup> had expressed in the 1911 Reapportionment Act<sup>75</sup> its desire that redistricting legislation be passed according to the normal procedures of each state’s constitution.<sup>76</sup> Thus, Ginsburg wrote in *Arizona State Legislature*, Hildebrant “established, ‘the Legislature’ did not mean the representative body alone.”<sup>77</sup>

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<sup>74</sup>*Id.* at 567 (quoting U.S. CONST. art. I, § 4, cl. 1); *see also* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (noting that the Elections Clause “invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices” (citation omitted) (quoting *Foster v. Love*, 522 U.S. 67, 64 (1997))).

<sup>75</sup>Reapportionment Act of 1911, ch. 5, 37 Stat. 13. 2 U.S.C. § 2a(c), the provision involved in *Arizona State Legislature*, 135 S. Ct. at 2666, is a direct descendant of the Act of 1911. Congress incorporated the relevant language of the 1911 Act when it passed a new reapportionment statute in 1929. Act of June 18, 1929, ch. 28, § 22, 46 Stat. 22, 26–27 (codified as amended at 2 U.S.C. §§ 2–5 (2012)). In 1941, Congress added that Representatives “shall be elected from the districts then prescribed by the law of such State.” Act of Nov. 15, 1941, ch. 470, 55 Stat. 761 (codified as amended at 2 U.S.C. § 2a). The Supreme Court has repeatedly recognized the direct line between the Act of 1911 and § 2a(c). *See* *Branch v. Smith*, 538 U.S. 254, 274 (2003) (plurality opinion) (recognizing past apportionment acts as “prior versions of § 2a(c)”; *id.* at 295 (O’Connor, J., concurring in part and dissenting in part) (“[T]he 1911 statute—the one in effect at the time Congress enacted the present version of § 2a(c)—is almost word for word the same as the current statute.”); *see also* Transcript of Oral Argument at 32–38, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-1314\\_ook3.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1314_ook3.pdf) [<https://perma.cc/3BM3-SNQN>] (argument by the Solicitor General’s office that § 2a(c) is a recognition by Congress that a state may validly redistrict as provided by “the law thereof”); Brief for Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of Appellees at 22–26, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV5/13-1314\\_amicus\\_appellee\\_brennan.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/13-1314_amicus_appellee_brennan.authcheckdam.pdf) [<https://perma.cc/K6RG-6MEB>] (detailing congressional regulation of congressional elections before the 1911 Act); Brief for Members of Congress as Amici Curiae in Support of Appellees at 16–19, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-1314\\_amicus\\_appellee\\_memberscongress.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1314_amicus_appellee_memberscongress.authcheckdam.pdf) [<https://perma.cc/R6V6-29NF>] [hereinafter Brief for Members of Congress] (similar).

<sup>76</sup>*Hildebrant*, 241 U.S. at 568–69 (“[T]he legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to [the] referendum which is now urged.” (quoted in part by *Ariz. State Legislature*, 135 S. Ct. at 2669)). For similar readings of the legislative record, *see* Brief for the Appellees at 28–30, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-1314\\_resp\\_az.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1314_resp_az.authcheckdam.pdf) [<https://perma.cc/96EQ-Y9P9>]; Brief for Members of Congress, *supra* note 75, at 18–23.

<sup>77</sup>*Ariz. State Legislature*, 135 S. Ct. at 2666.

In *Smiley v. Holm*, the Court then confronted squarely the question of the meaning of “Legislature” in the Elections Clause.<sup>78</sup> The case concerned redistricting legislation passed in 1931 by the Minnesota Legislature, but vetoed by the Governor.<sup>79</sup> The legislature, without having successfully overridden the veto by a vote, then submitted the bill to the Secretary of State, after which a citizen sued, seeking a declaration that the legislation was void because of the veto.<sup>80</sup> The Minnesota Supreme Court first dismissed the action, but the U.S. Supreme Court reversed.<sup>81</sup>

The Court began its analysis by noting that the central question concerned the nature of a state legislature’s power under the Elections Clause:

The question then is whether the provision of the Federal Constitution, thus regarded as determinative, invests the legislature with a particular authority and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws.<sup>82</sup>

The Court then proceeded to note that “[t]he use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function.”<sup>83</sup> A state “legislature may act as an electoral body,” as it once did for the selection of U.S. Senators under Article I, Section 3;<sup>84</sup> “[i]t may act as a ratifying body,” as *Hawke v. Smith* confirmed it does when it votes on constitutional amendments under Article V;<sup>85</sup> or “as a consenting body,”<sup>86</sup> as when it agrees to the purchase of land for a state under Article I, Section 8.<sup>87</sup>

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<sup>78</sup> *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

<sup>79</sup> *Id.* at 361.

<sup>80</sup> *Id.* at 361–62.

<sup>81</sup> *Id.* at 363, 375.

<sup>82</sup> *Id.* at 365.

<sup>83</sup> *Id.* (emphasis added).

<sup>84</sup> *Smiley*, 285 U.S. at 365.

<sup>85</sup> *Id.* at 365–66 (citing *Hawke v. Smith*, 253 U.S. 221 (1920)).

<sup>86</sup> *Id.* at 366.

<sup>87</sup> On this point, see Saul Zipkin, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 373–76 (2003). Zipkin, after an examination of the history of Supreme Court cases treating delegations of authority by the Constitution to the state legislatures, proposes a two-part test for reviewing whether “the meaning of ‘legislature’ is fixed or whether the state can self-define its legislative power.” *Id.* at 373. The first part of the test determines whether “the task is federal in nature.” *Id.* at 374. According to Zipkin, only the task under Article V (the ratification of constitutional amendments) is a function in which the state legislature acts as a federal agent; in Articles I and II, the legislatures pass statewide legislation, not substantive federal law bearing on the entire United States. *Id.* at 374–76. The second part analyzes “whether the task [performed] is essentially legislative, using the case law on legislative immunity to suggest that the legislative power and the legislative branch are not identical or coextensive.” *Id.* at 374. Ultimately, Zipkin argues that, under this test, “judicial involvement in redistricting would

Considering these factors, the Court pointed out that the provision in Minnesota grants the legislature “authority to provide a complete code for congressional elections,” which “involves lawmaking in its essential features and most important aspect.”<sup>88</sup> The Court therefore concluded, “in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments.”<sup>89</sup> As a result, the redistricting legislation was, like all other legislation under the Minnesota Constitution, subject to the gubernatorial veto.<sup>90</sup>

The majority in *Arizona State Legislature* read *Hildebrant* and *Smiley* together, arguing that it is unquestionable that Supreme Court precedent supports the proposition that redistricting is subject to no more or less than all the normal constraints on the legislative process as ordered by state constitutions.<sup>91</sup> For nearly a century, courts—including the District of Arizona in *Arizona State Legislature*—have relied on *Hildebrant* and *Smiley* for the proposition that regulations of congressional elections are subject to the normal processes of state legislation,<sup>92</sup> including referenda and gubernatorial

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be constitutional.” *Id.*; see also Transcript of Oral Argument, *supra* note 75, at 41–42 (Seth Waxman arguing for the AIRC that the Court in *Hawke* recognized that the meaning of “Legislature” is understood variously based on the constitutional task assigned).

<sup>88</sup> *Smiley*, 285 U.S. at 366.

<sup>89</sup> *Id.* at 367.

<sup>90</sup> *Id.* at 372–73.

<sup>91</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (2015).

<sup>92</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047, 1051–52 (D. Ariz. 2014), *aff’d*, 135 S. Ct. 2652 (2015); see also *Brown v. Sec’y of State*, 668 F.3d 1271, 1276 (11th Cir. 2012) (“The Supreme Court, however, has provided a clear and unambiguous answer to this question, twice explaining that the term ‘Legislature’ in the Elections Clause refers not just to a state’s legislative body but more broadly to the entire lawmaking process of the state.”); *Bagley v. Blagojevich*, 646 F.3d 378, 391 (7th Cir. 2011) (citing *Smiley* for the proposition that “[l]egislative acts include signing and vetoing bills because they are ‘integral steps in the legislative process’” (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998))); *Smith v. Clark*, 189 F. Supp. 2d 548, 553–54 (S.D. Miss. 2002) (“[T]hese . . . cases—the only ones that we have found that are helpful in defining the term ‘Legislature’—have made clear that the reference to ‘Legislature’ in Article I, Section 4 is to the law-making body and processes of the state.”), *aff’d sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *Ex parte Dillon*, 262 F. 563, 566 (N.D. Cal. 1920) (“Thus, when the Legislature of a state is referred to simply as the lawmaking body, the term may well be construed to embrace the entire lawmaking machinery of the state including a vote of the people where authorized by the local Constitution . . .”), *aff’d sub nom. Dillon v. Gloss*, 256 U.S. 368 (1921); *Am. Fed’n of Labor v. Eu*, 686 P.2d 609, 619 n.14 (Cal. 1984) (“*Davis v. Hildebrant* held that Ohio could submit a redistricting proposal to referendum.” (citation omitted)); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003) (en banc) (“A state’s lawmaking process may include citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state.”); *Koenig v. Flynn*, 179 N.E. 705, 707–08 (N.Y.) (“There is a distinction to be drawn between the functions of a Legislature, such, for

vetoed, and that any flexible state distribution of the legislative power does not violate the Guarantee Clause, or at most constitutes a nonjusticiable political question regarding the Guarantee Clause.<sup>93</sup>

However, Chief Justice Roberts claimed in his dissent that the precedents of *Hildebrant* and *Smiley* did not answer the question before the Court in *Arizona State Legislature*.<sup>94</sup> Although the Court ruled in *Hildebrant* that the referendum was constitutional, that did not mean “that the state legislature could be displaced from the redistricting process.”<sup>95</sup> Roberts interpreted

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instance, as choosing Senators, making application to the federal government for protection against invasion, ratifying a constitutional amendment, consenting to a purchase of state lands; there is, I say, a difference between these functions of the Legislature and the prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the state, called the lawmaking power—such, for instance, as dividing the state into congressional districts and directing the people where, when and how to vote.”), *aff’d*, 285 U.S. 375 (1932); *State ex rel. Donnelly v. Myers*, 186 N.E. 918, 919 (Ohio 1933) (“[*Hildebrant*] held that the term ‘Legislature’ means not only the General Assembly, but embraces the lawmaking power of the state as prescribed by the Constitution, and that an act redistricting the state for congressional purposes is subject to referendum.”); *State ex rel. Miller v. Hinkle*, 286 P. 839, 841 (Wash. 1930) (noting that *Hildebrant* supports subjecting redistricting authority to a popular referendum if allowed by the state constitution); *State ex rel. v. Howell*, 181 P. 920, 927 (Wash. 1919) (“[The *Hildebrant*] court passed the question of the power of the state to adopt and use the referendum as an instrument of legislative will ‘as obvious,’ holding that the state law, which had been made subject to the referendum, was valid and operative. A conclusion manifestly unsound if the word ‘Legislature’ means a bicameral body, and that meaning is inflexible under the Constitution of the United States; for, if that were so, the states would have no power to prevail against it whatever the form of their expression may have been.” (quoting *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916))); Transcript of Oral Argument, *supra* note 75, at 5 (Justice Sotomayor stating that “we made it very clear in *Smiley* and in *Hildebrant* that we’re defining legislature in this clause as meaning legislative process”); *id.* at 20 (Justice Sotomayor noting that the definition of “Legislature” as “legislative process” would provide simplicity, clarity, and a space for experimentation at the state level).

<sup>93</sup> *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (citing *Hildebrant* for the proposition that a challenge to a state’s distribution of legislative power is a nonjusticiable claim under the Guarantee Clause); *Wright v. Mahan*, 478 F. Supp. 468, 474 (E.D. Va. 1979) (“The Supreme Court has ruled that State initiative and referendum elections are not inconsistent with a republican form of government.”), *aff’d*, 620 F.2d 296 (4th Cir. 1980) (unpublished table decision); *Cagle v. Qualified Electors*, 470 So. 2d 1208, 1208–11 (Ala. 1985) (holding constitutional an amendment passed by popular vote requiring the legislature to receive permission from a county’s electors before enacting legislation affecting that county); *Iman v. S. Pac. Co.*, 435 P.2d 851, 854 (Ariz. Ct. App. 1968) (“It has been held that whether or not a state has ceased to be republican in form within the meaning of the guarantee of Art. 4 § 4 of the United States Constitution because of its adoption of the initiative and referendum is not a judicial question but a political one which is solely for the legislature to determine, hence courts have no jurisdiction over the matter.”).

<sup>94</sup> *Ariz. State Legislature*, 135 S. Ct. at 2686–87 (Roberts, C.J., dissenting).

<sup>95</sup> *Id.* at 2686.

*Smiley* in the same vein. In the dissent's view, *Smiley* did not mean that "Legislature" in the Elections Clause can mean the people of the state; rather, *Smiley* allowed for a legislative process in which the state legislature played a role, although not an autonomous one, in redistricting.<sup>96</sup> To the dissenters in *Arizona State Legislature*, *Smiley* was a far cry from taking the legislature out of the redistricting process completely by instituting an independent commission by popular initiative.<sup>97</sup>

Because the Constitution references state legislatures in other parts of the document, the Court's interpretations of those other clauses could bear on the meaning of "Legislature" in the Elections Clause, a point Chief Justice Roberts focused on in his dissent.<sup>98</sup> As discussed above, the majority evades some of these precedents (and those other clauses) by holding that the word "Legislature" means different things in different contexts.<sup>99</sup> However, for some clauses—most specifically, an analogous clause dealing with the appointment of presidential electors—the precedent might be particularly relevant.

The relevant portion of Article II, Section 1 of the Constitution reads:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.<sup>100</sup>

The first significant precedent addressing this provision, and the first case in which the Supreme Court seemed amenable to some version of the ISLD, is *McPherson v. Blacker*.<sup>101</sup> The case involved a challenge to the Michigan Legislature's distribution of presidential electors by subdivisions of the state.<sup>102</sup> The Court affirmed the legislature's authority under Article II to regulate the selection of presidential electors, holding that Article II "leaves [the question of establishing procedures for the selection of presidential electors] to the legislature exclusively."<sup>103</sup> However, the Court's reasoning in *McPherson* was, as Saul Zipkin has noted, "seemingly contradictory."<sup>104</sup> On the one hand, the opinion for the Court declares that the state legislature's power to regulate presidential elections is "plenary";<sup>105</sup> on the other, it holds

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<sup>96</sup> *Id.* at 2687.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2685.

<sup>99</sup> *Id.* at 2668.

<sup>100</sup> U.S. CONST. art. II, § 1.

<sup>101</sup> *McPherson v. Blacker*, 146 U.S. 1 (1892).

<sup>102</sup> *Id.* at 24–25.

<sup>103</sup> *Id.* at 27.

<sup>104</sup> Zipkin, *supra* note 87, at 361.

<sup>105</sup> *McPherson*, 146 U.S. at 35.

that “[w]hat is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist.”<sup>106</sup>

*McPherson* is not cited in the Court’s opinion in *Arizona State Legislature*, and is found only once in Roberts’s dissent.<sup>107</sup> The dissent simply took *McPherson* to mean that the power invested in the legislature under Article II and affirmed by the Court “can neither be taken away nor abdicated,”<sup>108</sup> and that this precedent applied to the facts in *Arizona State Legislature*.

The Court’s famous return to the ISLD in its resolution of the 2000 presidential election did not resolve *McPherson*’s ambiguities. In two cases dealing with the crisis in Florida’s vote count for the 2000 presidential election, the Supreme Court referenced the ISLD. In the first, *Bush v. Palm Beach County Canvassing Board*,<sup>109</sup> the Court vacated and remanded the Florida Supreme Court’s ruling that either the Florida Constitution’s voting rights protection or principles of equity demanded that the Secretary of State recognize an extended deadline for the recount of votes before certifying the state’s presidential electors.<sup>110</sup> In reaching this conclusion, the Court noted:

As a general rule, this Court defers to a state court’s interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2 . . . .<sup>111</sup>

The Court found that it was “unclear” whether the Florida Supreme Court’s determination that the legislature’s process for selecting electors must obey the suffrage requirement of the Florida Constitution, or whether the Florida court’s ruling jeopardized the capacity of the legislature’s scheme for selecting electors within the “safe harbor” provision of 3 U.S.C. § 5.<sup>112</sup>

In *Bush v. Gore*,<sup>113</sup> the Court reversed the Florida Supreme Court’s order for a statewide manual recount on equal protection grounds.<sup>114</sup> In a concurrence to the per curiam opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, defended the Court’s decision on ISLD

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<sup>106</sup> *Id.* at 25.

<sup>107</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2686 (2015) (Roberts, C.J., dissenting).

<sup>108</sup> *Id.* (emphasis omitted) (quoting *McPherson*, 146 U.S. at 35).

<sup>109</sup> *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam).

<sup>110</sup> *Id.* at 75–76, 78.

<sup>111</sup> *Id.* at 76.

<sup>112</sup> *Id.* at 77–78.

<sup>113</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>114</sup> *Id.* at 103; *see also id.* at 104 (citing *McPherson*, 146 U.S. at 35, for the proposition that “the state legislature’s power to select the manner for appointing electors is plenary”).



grounds.<sup>115</sup> The Chief Justice, citing *McPherson* as authority,<sup>116</sup> explained that the problem confronted by the Court was one of the “exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government.”<sup>117</sup> “Thus,” he reasoned, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”<sup>118</sup> The Florida Supreme Court’s decisions, by straining against the statutory scheme established by the legislature and by endangering the legislature’s wish to certify its electors within the “safe harbor” provision, unduly interfered with the legislature’s constitutionally mandated role to determine the manner of selecting electors.<sup>119</sup>

The Rehnquist concurrence therefore rests on this proposition: according to Article II, Section 1, Clause 2, “[t]he Florida legislature directs the manner in which the presidential electors are appointed, and all other actors within the Florida system have to stay within the confines of that directive.”<sup>120</sup> Normally, a state supreme court has great latitude to construe state law, but when it thwarts the independent constitutional authority of a state legislature, then a serious federal question arises.<sup>121</sup> More generally, the ISLD logic of the Rehnquist concurrence suggests that when there is a collision between the legislature’s determination pursuant to its constitutional grant of authority for federal elections and a provision of the state constitution (e.g., a suffrage requirement), the legislature’s determination wins.<sup>122</sup>

Considering the *sui generis* nature of *Bush v. Gore* and its political salience, it should be unsurprising that the decision is mentioned in neither the opinion of the Court nor the dissent in *Arizona State Legislature*. On the other hand, both the majority and the dissent addressed Article V of the Constitution, regarding the ratification of constitutional amendments and its implications for the ISLD.<sup>123</sup>

Article V reads:

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

<sup>115</sup> *Id.* at 111–12 (Rehnquist, C.J., concurring).

<sup>116</sup> *Id.* at 112–13.

<sup>117</sup> *Id.* at 112.

<sup>118</sup> *Id.* at 112–13.

<sup>119</sup> *Bush v. Gore*, 531 U.S. at 120–21 (Rehnquist, C.J., concurring).

<sup>120</sup> Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 620 (2001).

<sup>121</sup> *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

<sup>122</sup> *See generally* *Bush v. Gore*, 531 U.S. 98; *id.* at 111–22 (Rehnquist, C.J., concurring).

<sup>123</sup> *See* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665, 2667 (2015); *see also id.* at 2682–83 (Roberts, C.J., dissenting).

Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>124</sup>

In *Hawke v. Smith*,<sup>125</sup> the Court held that Ohio could not reserve power to its citizens to approve the legislature's ratification of a constitutional amendment.<sup>126</sup> The Court distinguished the case from *Hildebrant* and the Elections Clause context by observing that the "legislative action [contemplated by Article I, Section 4] is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required."<sup>127</sup> The Article V delegation of power to state legislatures has therefore been treated by the Court in a manner quite distinct from the delegation at issue in the Elections Clause. In the Article V context, in other words, *Hawke* holds that the state legislature performs an extraordinary, non-legislative, and purely federal function (ratifying federal constitutional amendments), and therefore it acts entirely outside the normal legislative procedures established by the state constitution.<sup>128</sup>

In *Arizona State Legislature*, Justice Ginsburg's majority opinion read *Hawke* as holding that the legislature was performing a ratification duty dissimilar to the normal process of lawmaking.<sup>129</sup> However, when it comes to the normal process of making laws, including laws governing redistricting, the power to do so is directly derived from the people.<sup>130</sup> The dissenters, however, pointed to the Court's definition of the term "Legislature" in *Hawke*, arguing that the case made clear there was an understanding at the time of the drafting of the Constitution that legislature meant a representative body, not the people.<sup>131</sup>

In recent cases prior to *Arizona State Legislature*, the Court often avoided answering direct challenges under the Elections Clause.<sup>132</sup> In *Grove v.*

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<sup>124</sup>U.S. CONST. art. V.

<sup>125</sup>*Hawke v. Smith*, 253 U.S. 221 (1920).

<sup>126</sup>*Id.* at 231.

<sup>127</sup>*Id.*

<sup>128</sup>*See Nat'l Prohibition Cases*, 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejections of amendments to it.").

<sup>129</sup>*Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015).

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* at 2680 (Roberts, C.J., dissenting).

<sup>132</sup>*See, e.g., Lance v. Coffman*, 549 U.S. 437, 442 (2007) (dismissing Elections Clause challenge on standing grounds); *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1093–94

*Emison*, however, the Court “said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a federal court.”<sup>133</sup> Nonetheless, the dissenters’ views in *Arizona State Legislature* were born out of some Justices’ desires to revive the pre-*Hildebrant* and *Smiley* ISLD in the Elections Clause context. For example, in *Colorado General Assembly v. Salazar*, the Court denied certiorari in a challenge to a state court’s redistricting plan drawn when the legislature failed to draw one itself.<sup>134</sup> Even when the state legislature later drew a plan, the state supreme court held that the state constitution permitted only one redistricting plan a decade, and that therefore, the court-ordered plan had to remain in force until 2010.<sup>135</sup>

The Court denied certiorari for the case, but Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented from the denial.<sup>136</sup> The three dissenters would have held the Colorado Supreme Court’s reading of the state constitution to deny the legislature a chance to redistrict before 2010 to be an impermissible interference with the legislature’s powers under the Elections Clause—a violation of the ISLD.<sup>137</sup> Pointedly distinguishing the case from *Hildebrant* and *Smiley*, the dissenters observed: “Conspicuously absent from the Colorado lawmaking regime, under the Supreme Court of Colorado’s construction of the Colorado Constitution to include state-court orders as part of the lawmaking, is *participation in the process by a body representing the people, or the people themselves in a referendum*.”<sup>138</sup> The dissenters sought to revisit a version of the question left hanging by their concurrence in *Bush v. Gore*, but nevertheless appeared to concede that redistricting involving a referendum might present a different issue under the Elections Clause.

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(2004) (mem.) (denying certiorari in a case presenting substantially the same question as *Arizona State Legislature*); *Branch v. Smith*, 538 U.S. 254, 272 (2003) (resolving redistricting controversy on statutory grounds).

<sup>133</sup> *Grove v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Some cases have dealt primarily with the question of when a federal court may involve itself with state legislature redistricting. *See, e.g., Chapman*, 420 U.S. at 3; *Scott v. Germano*, 381 U.S. 407, 408 (1965) (per curiam); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964). Other cases discuss the kinds of regulation the states may pursue through the Elections Clause and propose that states may not impose qualifications for election to Congress beyond those already specified in the Constitution. *See, e.g., Cook v. Gralike*, 531 U.S. 510, 522–23 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995).

<sup>134</sup> *Salazar*, 541 U.S. at 1093 (Rehnquist, C.J., dissenting from denial of certiorari).

<sup>135</sup> *Id.* at 1093–94.

<sup>136</sup> *Id.* at 1093.

<sup>137</sup> *Id.* at 1095.

<sup>138</sup> *Id.* (emphasis added).

#### IV. THE CONSEQUENCES OF A RESTRICTIVE READING OF THE ELECTIONS CLAUSE

As the above presentation of the majority and dissenting opinions suggests, the text, structure, history, and precedent concerning the Elections Clause provided ample material for both sides of the debate over the constitutionality of the AIRC. To be sure, there is something to the argument that the word “Legislature” may mean different things in different contexts, and also that precedent has interpreted the Constitution accordingly. Moreover, as with so many originalist arguments, if one abstracts out to a sufficient level of generality—e.g., popular sovereignty—then it becomes less difficult to read “Legislature” to include “direct democracy” or at least to permit an institution designed to counteract partisan manipulation of electoral rules. But to the naked eye, there is a difference between a commission or an initiative vote and a legislature.

At the end of the Court’s opinion, however, we find what we consider (and argued in an amicus brief to be<sup>139</sup>) the most persuasive grounds for upholding the AIRC against the constitutional challenge: the consequences of a restrictive reading of the Elections Clause would be so far-reaching and destabilizing that it would call into question practices that have been settled for a century or more.<sup>140</sup> For not only would a decision lead to the striking down of other redistricting commissions, but also all state laws or constitutional provisions regulating federal elections that were passed by initiative or by a state constitutional convention would be called into question.<sup>141</sup> The point to this argument is not that we should simply ignore the text because fidelity to the constitutional language would have perverse effects. Rather, the scope of the damage of a restrictive reading suggests that multiple actors in the political system have, for some time, believed that the Elections Clause did not prevent these kinds of regulations.

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<sup>139</sup> Brief of Nathaniel Persily et al., *supra* note \*, at 4.

<sup>140</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2676–77 (2015). The majority argued that “[b]anning lawmaking by initiative to direct a State’s method of apportioning congressional districts” would bring various election laws across many states into doubt. *Id.* at 2676. Not only would state election laws passed by popular initiative be called into question, but also election rules in state constitutions, most of which were passed by convention or ratified by the voters, would be questioned as well. *See id.* 2676–77 (“The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by ‘the Legislature.’ Core aspects of the electoral process regulated by state constitutions include voting by ‘ballot’ or ‘secret ballot,’ voter registration, absentee voting, vote counting, and victory thresholds. Again, the States’ legislatures had no hand in making these laws and may not alter or amend them.” (footnotes omitted)).

<sup>141</sup> *Id.*

The debate over the meaning of the word “Legislature” in the Elections Clause, as such, is representative of a larger debate over the role that historical practice should play in “changing” the meaning of the Constitution.<sup>142</sup> The critical question here, which gets lost in both the majority opinion and the dissent, is whether the innovation and widespread use of direct democracy to regulate elections should bear on the meaning of the Elections Clause.<sup>143</sup> A purist might say all such laws are unconstitutional until they are relegislated by the state legislature or perhaps by Congress, or until the Constitution is amended to delete the word “Legislature” from the Elections Clause. But when it comes to voting and elections, the Court abandoned long ago the notion that constitutional meaning was fixed at the time of the Framing.<sup>144</sup> Indeed, in upholding the AIRC, the Court did less violence to the text than it did when it created the right to vote<sup>145</sup> or the one-person, one-vote rule<sup>146</sup> out of whole cloth. At least in this instance, the Court’s decision merely upholds longstanding historical practices, rather than overturns them.

## A. Redistricting

### 1. Independent Commissions

Seven states—Hawaii,<sup>147</sup> New Jersey,<sup>148</sup> Washington,<sup>149</sup> Idaho,<sup>150</sup> Montana,<sup>151</sup> California,<sup>152</sup> and, of course, Arizona<sup>153</sup>—have established

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<sup>142</sup> See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

<sup>143</sup> See *id.* at 2560 (stating that “the longstanding ‘practice of the government’ can inform our determination of ‘what the law is,’” and this is “an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era” (citation omitted) (first quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); and then quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

<sup>144</sup> See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) (“We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment ‘does not enact Mr. Herbert Spencer’s Social Statics.’ Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era.” (citation omitted) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905))).

<sup>145</sup> *Id.* at 672 (Black, J., dissenting) (“The Court [did not use] . . . its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy.”).

<sup>146</sup> See *Reynolds v. Sims*, 377 U.S. 533, 591–92 (1964) (Harlan, J., dissenting) (“So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed below for failure to state a cause of action, because what has been alleged or proved shows no violation of any constitutional right.”); *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) (“To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution.”).

<sup>147</sup> HAW. CONST. art. IV, §§ 2, 9.

<sup>148</sup> N.J. CONST. art. II, § 2.

<sup>149</sup> WASH. CONST. art. II, § 43.

<sup>150</sup> IDAHO CONST. art. III, § 2.

commissions with independent constitutional authority to determine congressional districts.<sup>154</sup> In these states, which comprise roughly twenty percent of congressional seats (eighty-eight in total),<sup>155</sup> the legislature arguably does not control the redistricting process to the extent required by the dissent's interpretation of the Elections Clause.<sup>156</sup>

Independent commissions vary greatly in their composition and in their level of independence from state legislatures. Each independent commission has several features in common: a new group of commissioners is chosen following the decennial U.S. census;<sup>157</sup> commissioners work independently to draw districts for a period of months;<sup>158</sup> and the commission submits a final plan that becomes law without involvement of the legislature or governor.<sup>159</sup>

Although each commission has its differences in member selection, redistricting criteria, and voting rules, their defining feature is that they are an institution almost completely separate from state legislatures. The participation of both parties in the selection of an equal number of commissioners ensures partisan balance even under conditions of one-party legislative dominance,

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<sup>151</sup> MONT. CONST. art. V, § 14.

<sup>152</sup> CAL. CONST. art. XXI, § 2.

<sup>153</sup> ARIZ. CONST. art. IV, pt. II, § 1.

<sup>154</sup> I use the word “independent” to describe these commissions because they exist independently of the legislature and have independent constitutional authority to enact their plans. Their membership is not necessarily ideologically “independent” of the legislature, since members are typically appointed by (and in some cases may even be) state legislators. Montana's commission currently draws only state legislature districts, since the state only has one congressional seat, but it was active in drawing congressional lines in the past and may be again in the future. *See generally* MONT. LEGISLATIVE COUNCIL, A REPORT OF THE MONTANA DISTRICTING AND APPORTIONMENT COMMISSION: A REPORT TO THE 53RD LEGISLATURE (Dec. 1992), [http://leg.mt.gov/content/committees/interim/1999\\_2000/districting\\_and\\_apportionment/1990rept.pdf](http://leg.mt.gov/content/committees/interim/1999_2000/districting_and_apportionment/1990rept.pdf) [<https://perma.cc/524A-VLSJ>]. Prior to the 1990 census, Montana had two congressional districts, and its commission drew their boundaries in 1974 and 1983. *Id.* at 3, 6–8. If Montana gains an additional congressional seat in the future, the commission will automatically become active once again in apportioning congressional districts. *See* MONT. CONST. art. V, § 14.

<sup>155</sup> KRISTIN D. BURNETT, U.S. DEP'T OF COMMERCE, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS 5 (Nov. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<https://perma.cc/38SM-FESJ>].

<sup>156</sup> *See* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2687 (2015) (Roberts, C.J., dissenting). To be precise, those states together contain eighty-nine congressional districts. Because Montana currently has only one district, its commission did not draw districts this cycle; but it has in the past and may again in the future. *See* MONT. LEGISLATIVE COUNCIL, *supra* note 154, at 3.

<sup>157</sup> *See, e.g.*, IDAHO CONST. art. III, § 2(2); N.J. CONST. art. II, § 2(1); WASH. CONST. art. II, § 43(1).

<sup>158</sup> *See, e.g.*, HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(3).

<sup>159</sup> *See, e.g.*, MONT. CONST. art. V, § 14(4); N.J. CONST. art. II, § 2(3).

which currently exist in all commission states except Washington.<sup>160</sup> If non-commission states are any guide, the plans that emerge from these commissions are almost certainly different than those that would emerge from one-party states in which minority party interests can be ignored altogether and the legislature as an institution acts without restraint.<sup>161</sup> Indeed, the whole purpose of redistricting commissions is to create some distance between the commissioners and the elected legislature as it traditionally operates.

All seven independent state commissions appear to exclude the legislature to more or less the same extent as Arizona's commission. However, commissions in New Jersey,<sup>162</sup> Idaho,<sup>163</sup> and Washington<sup>164</sup> were enacted via legislatively referred constitutional amendments. In each of these states the legislature is now barred from changing the law and can do nothing if it objects to a plan developed by the commission—or to the commission's existence in the first place. In other words, when the commissions craft plans in those states, “the Legislature” does not “prescribe” “the Manner” of congressional elections. Moreover, by this argument, four other commissions would be suspect. Commissions in California and Arizona—both created by voter-initiated constitutional amendments, with no legislative approval<sup>165</sup>—would definitely be unconstitutional under the approach taken by the Roberts dissent. Notably, the commissions of Montana and Hawaii date to constitutional provisions drafted by *constitutional conventions* (in 1972 in Montana and in 1978 in Hawaii) and approved by subsequent popular referenda—and therefore also received no legislative approval.<sup>166</sup>

It might have been possible for the Court to adopt an interpretation of the Elections Clause that would have distinguished commissions based on the role the legislature plays in selecting members, or based on the restrictions upon service by legislators (i.e., if a commission were merely an agent of the legislature, perhaps the legislature is still sufficiently in charge for Elections

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<sup>160</sup> See *Statevote 2014: Election Results*, NAT'L CONF. ST. LEGISLATURES (Nov. 19, 2014), <http://www.ncsl.org/research/elections-and-campaigns/statevote-2014-post-election-analysis635508614.aspx> [<https://perma.cc/M3SG-P8U6>].

<sup>161</sup> See Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477, 488–92.

<sup>162</sup> N.J. PUBLIC QUESTION NO. 1 (1995), <http://www.state.nj.us/state/elections/election-results/1995-general-election-public-questions.pdf> [<https://perma.cc/8C2Q-4WA7>].

<sup>163</sup> IDAHO S.J. RES. 105 (1994), [https://www.legislature.idaho.gov/redistricting/1993SJ\\_R105.pdf](https://www.legislature.idaho.gov/redistricting/1993SJ_R105.pdf) [<https://perma.cc/NW94-R5AM>].

<sup>164</sup> WASH. S.J. RES. 103 (1983), [https://www.sos.wa.gov/\\_assets/elections/Voters'%20Pamphlet%201983.pdf](https://www.sos.wa.gov/_assets/elections/Voters'%20Pamphlet%201983.pdf) [<https://perma.cc/Y7VQ-B4CU>].

<sup>165</sup> CAL. PROPOSITION 11 (2008), [http://ag.ca.gov/cms\\_pdfs/initiatives/i746\\_07-0077\\_Initiative.pdf](http://ag.ca.gov/cms_pdfs/initiatives/i746_07-0077_Initiative.pdf) [<https://perma.cc/5Z6S-ZAQ4>]; ARIZ. PROPOSITION 106 (2000), <http://apps.azsos.gov/election/2000/Info/pubpamphlet/English/prop106.pdf> [<https://perma.cc/BNW8-ULYG>].

<sup>166</sup> MONT. LEGISLATIVE COUNCIL, *supra* note 154, at 7–8; *The Constitution of the State of Hawaii*, HAW. LEGIS. REFERENCE BUREAU, <http://lrhawaii.org/con/> [<https://perma.cc/8P3R-NDME>].

Clause purposes). New Jersey allows legislators to fill twelve of thirteen available seats,<sup>167</sup> while Hawaii allows them to fill eight of nine—but only if they will not run for reelection or a congressional seat for the next two elections.<sup>168</sup> All other states bar service by legislators entirely. In terms of a legislature's role in selection, only Washington allows its legislators to appoint *all* commission members;<sup>169</sup> most other states mandate that at least one member be selected by other commission appointees,<sup>170</sup> many give power to state party chairs,<sup>171</sup> and California<sup>172</sup> and Arizona<sup>173</sup> endow nonpartisan state agencies with power to screen candidates. Notably, no state gives *the legislature* as an institution any role in selecting candidates; rather, specific legislators holding leadership positions make the decisions.

California's commission, which excludes the state legislature as much as, or more, than Arizona's in all respects, would have fallen if the AIRC did. Regarding the method of enactment, constitutional conventions in Montana and Hawaii excluded the legislature just as much as voter-initiated amendments, while in the three other states the consent of the legislature decades ago hardly seems that relevant today given that the current legislature is barred from changing the law. Regarding the legislature's role in appointments, note that even in Arizona, four of the five members are selected by the majority and minority leaders of each house of the state legislature.<sup>174</sup> If Arizona's commission is unconstitutional, then the others that allow for a similarly limited role of appointment by legislators would be unconstitutional as well.

## 2. Backup Commissions

Three states—Connecticut,<sup>175</sup> Indiana,<sup>176</sup> and Maine<sup>177</sup>—empower an entity other than the legislature to draw districts, but only if the state legislature fails to do so on its own. Connecticut and Indiana both establish commissions for this purpose; Connecticut's is appointed by legislative leaders and commences work when the legislature misses a specific deadline,<sup>178</sup> while Indiana's is composed of legislators and is established when the legislature

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<sup>167</sup> N.J. CONST. art. II, § 2(1)(a)–(c).

<sup>168</sup> HAW. CONST. art. IV, § 2, para. 1.

<sup>169</sup> WASH. CONST. art. II, § 43(2).

<sup>170</sup> *See, e.g.*, HAW. CONST. art. IV, § 2, para. 1; MONT. CONST. art. V, § 14(2); N.J. CONST. art. II, § 2(1)(c).

<sup>171</sup> *See, e.g.*, IDAHO CONST. art. III, § 2(2); N.J. CONST. art. II, § 2(1)(b)(5).

<sup>172</sup> CAL. CONST. art. XXI, § 2(c).

<sup>173</sup> ARIZ. CONST. art. IV, pt. II, § 1(4).

<sup>174</sup> *Id.* § 1(6).

<sup>175</sup> CONN. CONST. art. III, § 6.

<sup>176</sup> IND. CODE ANN. § 3-3-2-2(a) (West 2006).

<sup>177</sup> ME. REV. STAT. ANN. tit. 21-A, § 1206(2) (2008 & Supp. 2015).

<sup>178</sup> CONN. CONST. art. III, § 6(b).



adjourns without creating a plan.<sup>179</sup> Maine mandates that its state supreme court create districts if a constitutional deadline passes and the legislature has failed to produce a plan.<sup>180</sup>

In Indiana and Maine, the backup mechanisms were created by statute, and can therefore be repealed by the legislature at any time. For this reason, they likely would not be threatened by a narrow interpretation of the Elections Clause. Connecticut's backup mechanism, though, was created by a legislatively referred constitutional amendment. On the one hand, the state legislature consented in the relevant amendment's original passage and may—by passing its own plan—prevent the amendment's provisions from ever going into effect. In addition, eight of the commission's nine members may be (and typically are) state legislators. On the other hand, the legislature has no ability to *repeal* the amendment, and once the backup commission starts work, the legislature as an institution has no role in creating districts and no ability to halt the process—much like in Arizona. In both 2001 and 2011, the legislature failed to draw its own districts, and the commission began work.<sup>181</sup>

### 3. *Other Restrictions on Redistricting*

At least three state constitutions enumerate criteria that state legislatures must use in drawing congressional districts. Virginia's requires that "[e]very electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district."<sup>182</sup> Florida's contains more specific and stringent mandates:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts

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<sup>179</sup> IND. CODE ANN. § 3-3-2-2(a).

<sup>180</sup> ME. REV. STAT. ANN. tit. 21-A, § 1206(2).

<sup>181</sup> In 2001, the commission successfully created new districts. *See Reapportionment Commission (Draft) Meeting Minutes*, CONN. GEN. ASSEMBLY REDISTRICTING PROJECT (Dec. 21, 2001), [http://www.cga.ct.gov/red2011/2001\\_Minutes\\_10.asp](http://www.cga.ct.gov/red2011/2001_Minutes_10.asp) [<https://perma.cc/T894-Y6NF>]. In 2011, the commission was deadlocked, and the task fell to the state supreme court and its appointed Special Master (some law professor). *In re* Reapportionment Comm'n, 36 A.3d 661, 661 (Conn. 2012).

<sup>182</sup> VA. CONST. art. II, § 6.

shall, where feasible, utilize existing political and geographical boundaries.<sup>183</sup>

Florida's language was already challenged on Elections Clause grounds in *Brown v. Secretary of State of Florida* and upheld.<sup>184</sup> In *Brown*, the court wrote that the Florida amendment simply "provide[s] some general guidance to the legislature regarding the exercise of its redistricting power," and the Arizona State Legislature attempted to distinguish its case from *Brown* rather than challenge *Brown's* holding.<sup>185</sup> Despite that, the language in both Florida and Virginia seemed ripe for a fresh challenge if the Court had held against the AIRC. Both of the above requirements were put into place without the consent of state legislatures; Virginia's language dates to the enactment of the state's current constitution in 1971,<sup>186</sup> while Florida's was created by a voter-initiated constitutional amendment in 2010.<sup>187</sup> These laws cannot be repealed by the states' legislatures, and either could be grounds for a lawsuit challenging any redistricting plan a legislature produced.

### B. *Other Election Regulations*

Because Arizona and other states that employ direct democracy prevent state legislatures from overturning citizen initiatives, many election laws—even apart from redistricting—would violate the restrictive interpretation of the Elections Clause.<sup>188</sup> Try as one might to limit this constitutional theory to independent redistricting commissions or to redistricting, in general, the principle cannot be so easily cabined.<sup>189</sup> If Arizona's redistricting commission

<sup>183</sup> FLA. CONST. art. III, § 20 (footnote omitted).

<sup>184</sup> *Brown v. Sec'y of State*, 668 F.3d 1271, 1280, 1285 (11th Cir. 2012).

<sup>185</sup> Brief for Appellant, *supra* note 5, at 41 ("Arizona law does not simply 'provide some general guidance to the legislature regarding the exercise of its redistricting power.' *Brown v. Sec'y of State*, 668 F.3d 1271, 1280 (11th Cir. 2012) (upholding initiative measure establishing standards legislature must follow when redistricting). Instead, it 'eviscerate[s]' the Legislature's 'constitutionally delegated power' and 'exclude[s] the legislature from the redistricting process.' *Id.*" (alterations in original)).

<sup>186</sup> See VA. CONST. art. II, § 6. Virginia's constitution was drafted by the state's legislature and approved by popular vote. See *Constitutions of the Several States*, GREEN PAPERS, <http://www.thegreenpapers.com/slg/constitution.phtml> [<https://perma.cc/38PR-7SU6>] (last modified Feb. 22, 2014).

<sup>187</sup> FLA. CONST. art. III, § 20 & n.1 (noting that this amendment passed in 2010 as Amendment No. 6 and was proposed by initiative petition).

<sup>188</sup> See ARIZ. CONST. art. IV, pt. I, § 1(6); CAL. CONST. art. II, § 10(c); see also *Comparison of Statewide Initiative Processes*, INITIATIVE & REFERENDUM INST., [http://www.iandrinstute.org/docs/A\\_Comparison\\_of\\_Statewide\\_IandR\\_Processes.pdf](http://www.iandrinstute.org/docs/A_Comparison_of_Statewide_IandR_Processes.pdf) [<https://perma.cc/VQG2-G4XQ>].

<sup>189</sup> Indeed, a good argument could be made that congressional redistricting is at the margin of election regulations captured by the Elections Clause's reference to the "Times, Places and Manner of holding elections." U.S. CONST. art. I, § 4, cl. 1. The line drawing process does not affect the times of elections, nor does it "prescribe" the "places" where

is unconstitutional because the legislature did not draw the districts or delegate authority to the commission to do so, so too are the many election law initiatives that were not passed by the legislature and might contradict laws the legislature might pass on its own.

### 1. *Voter-Initiated Amendments & Statutes*

Voter-initiated constitutional amendments—like Arizona’s Prop. 106—allow voters to amend state constitutions via popular vote, without involving legislatures or governors.<sup>190</sup> Eighteen states allow voter-initiated amendments.<sup>191</sup> State legislatures cannot undo voter-initiated amendments except by passing subsequent amendments of their own, which in all eighteen states requires a vote of the people.<sup>192</sup>

Twenty-four states (including six that do not permit voter-initiated amendments) allow voter-initiated state statutes, which permit voters to enact new laws without legislative consent.<sup>193</sup> The key difference between initiated statutes and initiated amendments is that statutes are easier to repeal, though the degree to which voter-initiated statutes bind legislatures varies by state.<sup>194</sup> Ten states’ constitutions specifically restrict the legislature’s ability to repeal or amend an initiated statute: two (including Arizona) bar it entirely;<sup>195</sup> three require a supermajority of both houses;<sup>196</sup> and five do one or the other but only for a set period of time.<sup>197</sup> In the remaining fourteen states without

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elections are “held.” At most, one might say redistricting prescribes the “manner” of congressional elections, but it does not regulate the manner in which such elections are “held.” A strict interpretation of the Elections Clause might only be limited to the timing of elections, the location of polling places, and other facets of administration on the days elections are held.

<sup>190</sup> See, e.g., ARIZ. CONST. art IV, pt. I, § 1(5).

<sup>191</sup> *State I&R*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/states.cfm> [<https://perma.cc/33N6-JWEQ>].

<sup>192</sup> *Id.* In fact, “[e]very state except Delaware requires a popular vote to approve constitutional amendments.” *Id.*; see also DEL. CONST. art. XVI, § 1.

<sup>193</sup> *State I&R*, *supra* note 191.

<sup>194</sup> *Limiting the Legislature’s Power to Amend and Repeal Initiated Statutes*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/limits-on-legislative-power.aspx> [<https://perma.cc/R48U-4SEB>] (last updated June 28, 2011) [hereinafter *Limiting the Legislature’s Power*].

<sup>195</sup> California bars repeal or amendment in perpetuity unless voters approve. CAL. CONST. art. II, § 10. Arizona bars repeal and permits amendment only with a three-quarters supermajority and when it “furthers the purposes” of the measure. ARIZ. CONST. art. IV, pt. I, § 1(6).

<sup>196</sup> Arkansas and Nebraska require a two-thirds supermajority to amend or repeal. ARK. CONST. art. V, § 1; NEB. CONST. art. III, § 2. Michigan requires a three-quarters supermajority to amend or repeal. MICH. CONST. art. II, § 9.

<sup>197</sup> Alaska bars repeal for two years after the effective date and allows amendment at any time. ALASKA CONST. art. XI, § 6. Nevada bars repeal or amendment for three years. NEV. CONST. art. XIX, § 2(3). Wyoming bars repeal for two years and allows amendment

constitutional restraints, the legislature can repeal or amend voter-initiated statutes at will.<sup>198</sup>

The following is a sample of laws currently in effect that regulate federal elections, were passed without the consent of the legislature, and now cannot be repealed by the legislature alone<sup>199</sup>:

- Ohio Amendment 2 (1949): Amended the constitution to bar “party tickets” on ballots and mandates that voters choose individual candidates.<sup>200</sup>
- Arkansas Amendment 50 (1962): Amended the constitution to allow the use of voting machines.<sup>201</sup> (Previously, an Arkansas constitutional provision could be construed to require the use of paper ballots in all elections.<sup>202</sup>)
- Ohio Issue 1 (1977): Amended the constitution to set the time period that a person must be a state resident prior to an election in order to vote to thirty days.<sup>203</sup> (Previously there had been no deadline.<sup>204</sup>)
- Oregon Measure 13 (1986): Amended the constitution to close voter registration twenty days before an election.<sup>205</sup> (Previously there had been no deadline.<sup>206</sup>)

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at any time. WYO. CONST. art. III, § 52(f). North Dakota requires a two-thirds supermajority to amend or repeal for seven years. N.D. CONST. art. III, § 8. Washington requires a two-thirds supermajority to amend or repeal for two years. WASH. CONST. art. II, § 1(c).

<sup>198</sup> This includes Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, and Utah. *Limiting the Legislature’s Power*, *supra* note 194; *see also* J.E. Macy, Annotation, *Power of Legislative Body to Amend, Repeal, or Abrogate Initiative or Referendum Measure, or to Enact Measure Defeated on Referendum*, 33 A.L.R.2d 1118, § 2 (1954) (“In the absence of special constitutional restraint, either [the legislature or the people] may amend or repeal an enactment by the other.”).

<sup>199</sup> *See also* Transcript of Oral Argument, *supra* note 75, at 10 (Justice Kagan noting that “there are zillions of these laws”).

<sup>200</sup> OHIO CONST. art. V, § 2a; *Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors*, OHIO SEC’y ST. 9, <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> [<https://perma.cc/7J7E-G462>] (last updated May 23, 2016) [hereinafter *Amendment and Legislation*].

<sup>201</sup> ARK. CONST. amend. 50 (“All elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes.”).

<sup>202</sup> ARK. CONST. of 1874, art. III, § 3 (“All elections by the people shall be by ballot. Every ballot shall be numbered in the order in which it shall be received, and the number recorded by the election officers, on the list of voters opposite the name of the elector who presents the ballot.”).

<sup>203</sup> OHIO CONST. art. V, § 1; *Amendment and Legislation*, *supra* note 200, at 17.

<sup>204</sup> OHIO CONST. art. V, § 1 (“Every citizen of the United States, of the age of eighteen years, who has been a resident of the state . . . such time as may be provided by law . . . is entitled to vote at all elections.”) (amended 1977).

- Mississippi Initiative 27 (2011): Amended the constitution to require—with limited exceptions—that voters present government-issued photo identification in order to vote in person.<sup>207</sup> (The initiative was placed on the ballot by petition after the state legislature had considered a similar bill but failed to enact it.<sup>208</sup>)
- Arizona Prop. 200 (2004): Enacted a statutory requirement that voters present identification—either one form of identification with a photograph, or two forms with just name and address—in order to vote in person.<sup>209</sup>

By definition, each of these laws was passed without legislative consent and cannot be repealed by the legislature alone. Therefore, if the Court had construed the Elections Clause narrowly, it is hard to imagine how they would not have been constitutionally vulnerable.

There are also state laws (typically statutes) that were passed by initiative (without the consent of the legislature) but now *can* be repealed by the legislature through standard legislation. Here is a sampling:

- Oregon Measure 60 (1998): Enacted a statutory requirement that biennial primary and general elections be conducted entirely by mail.<sup>210</sup> (The legislature later amended the statute to require that *all* elections be conducted by mail.<sup>211</sup>)
- Alaska Measure 4 (2004): Enacted a statutory requirement that vacant U.S. Senate seats be filled by special election rather than gubernatorial appointment in most circumstances.<sup>212</sup> (The statute was placed on the ballot after Alaska Governor Frank Murkowski appointed his

<sup>205</sup> OR. CONST. art. II, § 2(c); OR. MEASURE 13 (1986), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1986.pdf#page=68> [<https://perma.cc/6VJ3-TE4P>].

<sup>206</sup> OR. MEASURE 13 (1986), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1986.pdf#page=68> [<https://perma.cc/6VJ3-TE4P>].

<sup>207</sup> MISS. CONST. art. XII, § 249-A; MISS. INITIATIVE 27 (2011), <https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IID=27> [<https://perma.cc/8CCP-C53X>].

<sup>208</sup> Andrea Williams, *Voter Identification Petition Drive*, WTOK (May 25, 2009), <http://www.wtok.com/news/headlines/45993602.html> [<https://perma.cc/N43L-P8PN>].

<sup>209</sup> ARIZ. REV. STAT. ANN. § 16-579 (2015); ARIZ. PROPOSITION 200 (2004), <http://apps.azsos.gov/election/2004/Info/PubPamphlet/english/prop200.pdf> [<https://perma.cc/GX5R-ASXP>]. Another part of the proposition, requiring proof of citizenship to register to vote in federal elections, was struck down by the Supreme Court in 2013. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013).

<sup>210</sup> OR. MEASURE 60 (1998), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1998m.pdf> [<https://perma.cc/X4L5-CQMW>].

<sup>211</sup> OR. REV. STAT. § 254.465 (2015) (as amended in 2007).

<sup>212</sup> ALASKA STAT. § 15.40.140 (2014); ALASKA MEASURE 4 (2004), [http://www.elections.alaska.gov/doc/oep/2004/2004\\_oep\\_reg\\_1.pdf](http://www.elections.alaska.gov/doc/oep/2004/2004_oep_reg_1.pdf) [<https://perma.cc/WJ8L-G32N>].

daughter, Lisa Murkowski, to fill the Senate seat he vacated upon becoming governor.<sup>213</sup>)

- Washington Initiative 872 (2004): Enacted a statutory requirement that primary elections for state and federal offices be conducted using a “top-two,” nonpartisan system.<sup>214</sup> (The proposition was placed on the ballot after the state legislature effectively gave Washington Governor Gary Locke the ability to choose—via line-item veto—between a top-two system and a party-based system, and he chose the latter.<sup>215</sup>)

Each of these statutes was passed without the legislature’s consent yet is still binding law in the state. Although a legislature could vote to repeal them, it would likely need gubernatorial approval to do so successfully.<sup>216</sup> Therefore, it is possible that they would run afoul of a narrow construction of the Elections Clause as well.<sup>217</sup>

## 2. Original Constitutional Provisions

In forty-six states, the current state constitution was drafted by a constitutional convention without direct involvement by the state legislature.<sup>218</sup> (In the remainder—Florida, Georgia, North Carolina, and Virginia—current constitutions were drafted by the state legislature and ratified by a vote of the people.<sup>219</sup>) In most of the forty-six convention states, the state constitutions include many regulations of congressional and presidential elections.<sup>220</sup> A convention is not a “Legislature”; therefore, those provisions would fall by the same rule that would have made the AIRC constitutionally vulnerable.

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<sup>213</sup> See Associated Press, *Alaska Judge Orders 517,000 Ballots Reprinted, Redistributed for Nov. 2 Election*, USA TODAY, [http://usatoday30.usatoday.com/news/politics/elections/state/alaska/2004-09-29-ballots\\_x.htm](http://usatoday30.usatoday.com/news/politics/elections/state/alaska/2004-09-29-ballots_x.htm) [<https://perma.cc/Q44P-993M>] (last updated Sept. 30, 2004).

<sup>214</sup> WASH. REV. CODE ANN. § 29A.36.170 (West 2014) (as amended in 2013); WASH. INITIATIVE 872 (2004), <https://www.sos.wa.gov/elections/initiatives/text/i872.pdf> [<https://perma.cc/97E8-JDNS>].

<sup>215</sup> See *News Release: Gov. Gary Locke Signs Bill Enacting Montana Primary Election System*, OFF. GOVERNOR GARY LOCKE (Apr. 1, 2004), <http://www.digitalarchives.wa.gov/governorlocke/press/press-view.asp?pressRelease=1575&newsType=1> [<https://perma.cc/U5CL-ZY59>].

<sup>216</sup> See, e.g., WASH. CONST. art. III, § 12 (“Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it . . .”).

<sup>217</sup> The measures in Oregon and Washington have both been amended by the legislature in ways that preserved their spirit but changed their language. See OR. REV. STAT. § 254.465 (2015); WASH. REV. CODE ANN. § 29A.36.170 (West 2014).

<sup>218</sup> See *Constitutions of the Several States*, *supra* note 186.

<sup>219</sup> *Id.*

<sup>220</sup> See, e.g., ALASKA CONST. art. VI, § 1; OR. CONST. art. II, § 2; WASH. CONST. art. VI, § 1A (repealed 2011).

After the Declaration of Independence, the original thirteen states each adopted constitutions through constitutional conventions.<sup>221</sup> The remaining thirty-seven states each adopted their original constitutions by constitutional convention roughly around the time of their admission to the union.<sup>222</sup> Eighteen states now retain their original constitutions, while the remainder have enacted one or more subsequent constitutions.<sup>223</sup> In total, forty-six states have constitutions that were drafted by constitutional conventions, while four have constitutions that were drafted by the legislature.<sup>224</sup> (In both types of states, constitutions were generally approved by popular vote.<sup>225</sup>)

As for the role of Congress, some states (e.g., Hawaii) adopted constitutions without any congressional authority *prior* to admission into the union; others (e.g., Oklahoma) were admitted to the union prior to the creation of a constitution and subsequently adopted one under conditions set by Congress; and others (e.g., Arizona) adopted constitutions as part of the process of admission, in some cases making changes after Congress refused to admit them with their constitutions as written.<sup>226</sup>

In the eighteen states still using their first constitutions, the state legislature did not exist (at least in its present form) until the constitution was adopted, so inherently it could not have consented in its enactment. In the other states, the state legislature generally had *some* role in the creation of the convention, whether by bringing it into existence, supervising the choice of its members, or granting its mandate.<sup>227</sup> However, once convened, each of these conventions had independent authority to enact a constitution—none of the constitutions they created were subject to a vote by the state legislature. Similarly, though Congress approved the admission of new states and at times requested changes to their constitutions, it cannot be said to have had any direct role in approving individual provisions. In sum, forty-six state constitutions were drafted *without* legislative or congressional consent.

In the other four states, legislatures drafted constitutions themselves and then submitted them for a vote of the people. The legislatures of Virginia, Florida, and North Carolina did so using the basic power of amendment contained in their constitutions,<sup>228</sup> while Georgia's did so using a specific

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<sup>221</sup> See *Constitutions of the Several States*, *supra* note 186.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See *id.*

<sup>227</sup> See, e.g., CONN. CONST. art. XIII, §§ 1–4 (stipulating that the Connecticut state legislature may call a constitutional convention, select its membership, and determine its dates—but also that it must submit the convention's proposals to voters once the convention adjourns).

<sup>228</sup> FLA. CONST. art XI, § 1; *Register of the Papers of A. E. Dick Howard for the Virginia Commission for Constitutional Revision 1969-71*, U. VA. L. SCH., <http://www.law.virginia.edu/main/Howard,+Dick> [<https://perma.cc/Z92H-YSYU>]; David Walbert, *The 1971 Constitution*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist->

power granted to the legislature to enact a wholly new constitution.<sup>229</sup> In either case, the entire constitution can be considered to have been enacted *with* the consent of the state legislature, and its provisions are likely safe from a challenge based on the Elections Clause.

Nearly all state constitutions have an article or section specifically governing elections,<sup>230</sup> and most of these contain one or more original (unamended) provisions that implicate the Elections Clause.<sup>231</sup> Here is a sample of constitutional provisions that are (a) currently active, (b) implicate the Elections Clause, and (c) date to the adoption of state constitutions by convention:

- “Manner” of Voting: At least thirty-six states require that voting by electors be “secret,” “by ballot,” or “by secret ballot,” and many additionally require voting by elected officials—e.g., for U.S. Senators prior to 1913—be done by voice.<sup>232</sup> These are particularly notable because, at the time the Constitution was ratified, the issue of whether votes were cast using written ballots (which could be kept secret) or by vocal declarations (which could not) was broadly thought to be at the heart of the power the Elections Clause conveyed over “Manner.”<sup>233</sup>

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postwar/6100 [https://perma.cc/6MUA-T9DG]. For the relevant provisions, see FLA. CONST. of 1865, art. XVII, §§ 1–2; N.C. CONST. of 1868 art. XIII, §§ 1–2; VA. CONST. art. XII, §§ 1–2.

<sup>229</sup>LaVerne W. Hill & Melvin B. Hill, *Georgia Constitution*, NEW GA. ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution> [https://perma.cc/5528-THGR] (last modified Aug. 2, 2016). For the relevant provision, see GA. CONST. art. X, § 1.

<sup>230</sup>See *infra* Table 4; see also MINN. CONST. art. VII; N.J. CONST. art. II; OKLA. CONST. art. III; R.I. CONST. art. IV; VT. CONST. §§ 43–55. Exceptions are Massachusetts and New Hampshire. See MASS. CONST; N.H. CONST.

<sup>231</sup>See *infra* Table 4.

<sup>232</sup>For information on specific provisions and their provenance, by state, see Table 4, below.

<sup>233</sup>For James Madison, the decision “[w]hether the electors should vote by ballot or *vivâ voce*” was quintessentially one covered by the Elections Clause. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240 (Max Farrand ed., rev. ed. 1937) (quoting James Madison); see also 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 71 (Jonathan Elliot ed., 2d ed. 1863) (quoting delegate of the North Carolina ratifying convention as defining “manner” in the Elections Clause as “only enabl[ing states] to determine *how* these electors shall elect—whether by ballot, or by vote, or by another way”). Yet even some of the earliest state constitutions, such as the 1812 Louisiana Constitution, the 1776 and 1790 Pennsylvania Constitutions, and the 1796 Tennessee Constitution contained such provisions protecting a secret ballot, thereby placing the manner of voting out of the elected legislature’s reach. LA. CONST. of 1812, art. VI, § 13 (“In all elections by the people, and also by the Senate and House of Representatives jointly or separately, the vote shall be given by ballot.”); PA. CONST. of 1790, art. III, § 2 (“All elections shall be by ballot, except those by persons in their



- Threshold for Victory: Three states—Arizona,<sup>234</sup> Montana,<sup>235</sup> and Oregon<sup>236</sup>—mandate a *plurality* of votes as the standard for victory in all elections (excluding runoffs).
- Absentee Voting: Five states—Hawaii,<sup>237</sup> Louisiana,<sup>238</sup> North Dakota,<sup>239</sup> Pennsylvania,<sup>240</sup> and Michigan<sup>241</sup>—require state legislatures to provide for absentee voting.
- Voter Registration: Seven states—Mississippi,<sup>242</sup> North Carolina,<sup>243</sup> Virginia,<sup>244</sup> West Virginia,<sup>245</sup> Wyoming,<sup>246</sup> Washington,<sup>247</sup> and Michigan<sup>248</sup>—require electors to be registered in order to vote, and/or require the legislature to provide for registration of voters.<sup>249</sup> (Mississippi additionally bars registration within four months of an election,<sup>250</sup> while Virginia *requires* that registration be permitted until at least thirty days before an election.<sup>251</sup>)

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representative capacities, who shall vote viva voce.”); PA. CONST. of 1776, ch. II, § 32 (“All elections, whether by the People or in General Assembly, shall be by ballot . . . .”); TENN. CONST. of 1796, art. III, § 3 (“All elections shall be by ballot.”).

<sup>234</sup> ARIZ. CONST. art. VII, § 7(7). The provision was amended in 1988 by ARIZ. PROPOSITION 105 (1988), <http://www.azsos.gov/sites/azsos.gov/files/pubpam88.pdf> [<https://perma.cc/YFN4-FKSP>], but later returned to its original language by ARIZ. PROPOSITION 100 (1992), <https://www.azsos.gov/sites/azsos.gov/files/pubpam92.pdf> [<https://perma.cc/W7F2-MNVU>].

<sup>235</sup> MONT. CONST. art IV, § 5.

<sup>236</sup> Oregon’s provision applies only “until otherwise provided by law.” OR. CONST. art II, § 16.

<sup>237</sup> HAW. CONST. art II, § 4.

<sup>238</sup> LA. CONST. art. XI, § 2.

<sup>239</sup> N.D. CONST. art. II, § 1.

<sup>240</sup> PA. CONST. art. VII, § 14.

<sup>241</sup> MICH. CONST. art. II, § 4.

<sup>242</sup> MISS. CONST. art XII, § 249.

<sup>243</sup> N.C. CONST. art. VI, § 3.

<sup>244</sup> VA. CONST. art. II, § 2.

<sup>245</sup> W. VA. CONST. art. IV, § 12.

<sup>246</sup> WYO. CONST. art. VI, § 12.

<sup>247</sup> In Washington, the constitution requires registration only for cities and towns with more than 500 people, and allows the legislature discretion otherwise. WASH. CONST. art. VI, § 7.

<sup>248</sup> MICH. CONST. art. II, § 4.

<sup>249</sup> Interestingly, Texas’s constitution (written in 1876) originally *barred* voter registration; in 1891, it was amended to allow it, and in 1966, it was amended to require it. TEX. CONST. of 1876, art. VI, § 4 (“[N]o law shall ever be enacted requiring a registration of the voters of this State.”), *first amended* by S.J. Res. 19, 22nd Leg., Reg. Sess. (Tex. 1891) (permitting registration in larger cities), *and then amended* by Tex. H.R.J. Res. 13, 59th Leg., Reg. Sess. (Tex. 1966) (making registration mandatory).

<sup>250</sup> MISS. CONST. art XII, § 251.

<sup>251</sup> VA. CONST. art. II, § 2.

- Election Procedures:
  - Alabama lays out procedures for challenging the validity of votes and punishing voter fraud.<sup>252</sup>
  - Arkansas requires ballots that were unlawfully not counted initially to be counted after an election.<sup>253</sup>
  - Louisiana requires that all ballots be counted publicly.<sup>254</sup>
- Other:
  - Hawaii requires that primaries precede general elections by forty-five days or more.<sup>255</sup>
  - Georgia bars voters who did not vote in a general election from voting in any subsequent runoff.<sup>256</sup>
  - Michigan bars laws that permit partisan candidates to have “ballot designations.”<sup>257</sup>

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<sup>252</sup> ALA. CONST. art. VIII, § 185 (“Any elector whose right to vote shall be challenged for any legal cause before an election officer, shall be required to swear or affirm that the matter of the challenge is untrue before his vote shall be received, and anyone who willfully swears or affirms falsely thereto, shall be guilty of perjury, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one nor more than five years.”).

<sup>253</sup> ARK. CONST. art. III, § 11.

<sup>254</sup> LA. CONST. art. XI, § 2.

<sup>255</sup> HAW. CONST. art II, § 8.

<sup>256</sup> GA. CONST. art. II, § 2.

<sup>257</sup> MICH. CONST. art. II, § 4.

## V. TABLES

Table 1: *Redistricting Commissions and Other Non-Legislative Redistricting Mechanisms, by State*

| Type     | State                       | Description  | Method of Enactment              | Enacted Without Legislature? | Cannot be Repealed by Legislature? | Excludes Legislature from 'Field'? |
|----------|-----------------------------|--|----------------------------------|------------------------------|------------------------------------|------------------------------------|
| Advisory | Rhode Island <sup>258</sup> | Advisory commission suggests districts, but has no binding authority | Statute                          | No                           | No                                 | No                                 |
|          | Maine <sup>259</sup>        | Advisory commission suggests districts, but has no binding authority | Legislatively Referred Amendment | No                           | Yes                                | No                                 |
|          | Virginia <sup>260</sup>     | Advisory commission suggests districts, but has no binding authority | Executive Order                  | Yes                          | Yes                                | No                                 |

<sup>258</sup> An Act Establishing a Reapportionment Commission, ch. 100, § 1, 2011 R.I. Pub. Laws 359, 359–60; An Act Establishing a Reapportionment Commission, ch. 106, § 1, 2011 R.I. Pub. Laws 388, 388–89.

<sup>259</sup> ME. CONST. art. IV, pt. III, § 1-A.

<sup>260</sup> Va. Exec. Order No. 31 (Jan. 10, 2011).

| Type   | State                   | Description  | Method of Enactment              | Enacted Without Legislature? | Cannot be Repealed by Legislature? | Excludes Legislature from 'Field'? |
|--------|-------------------------|--|----------------------------------|------------------------------|------------------------------------|------------------------------------|
|        | New York <sup>261</sup> | Advisory commission suggests districts; legislature must reject plan twice before it may draft its own       | Legislatively Referred Amendment | No                           | Yes                                | No                                 |
|        | Iowa <sup>262</sup>     | Advisory commission suggests districts; legislature must reject plan three times before it may draft its own | Statute                          | No                           | No                                 | No                                 |
| Backup | Maine <sup>263</sup>    | If legislature fails to enact plan by set date, Supreme Court sets districts                                 | Statute                          | No                           | No                                 | No                                 |
|        | Indiana <sup>264</sup>  | If legislature fails to enact plan by end of session, commission sets districts                              | Statute                          | No                           | No                                 | No                                 |

<sup>261</sup> N.Y. CONST. art. III, § 5-b.

<sup>262</sup> IOWA CODE ANN. §§ 42.1–42.6 (West 2012 & Supp. 2015).

<sup>263</sup> See ME. REV. STAT. ANN. tit. 21-A, § 1206(2) (2008 & Supp. 2015).

<sup>264</sup> See IND. CODE ANN. § 3-3-2-2 (West 2006).

| Type        | State                      | Description   | Method of Enactment              | Enacted Without Legislature? | Cannot be Repealed by Legislature? | Excludes Legislature from 'Field'? |
|-------------|----------------------------|---|----------------------------------|------------------------------|------------------------------------|------------------------------------|
|             | Connecticut <sup>265</sup> | If legislature fails to enact plan by set date, commission sets districts | Legislatively Referred Amendment | No                           | <b>Yes</b>                         | No                                 |
| Independent | New Jersey <sup>266</sup>  | Appointed commission draws districts, without legislative involvement     | Legislatively Referred Amendment | No                           | <b>Yes</b>                         | <b>Yes</b>                         |
|             | Idaho <sup>267</sup>       | Appointed commission draws districts, without legislative involvement     | Legislatively Referred Amendment | No                           | <b>Yes</b>                         | <b>Yes</b>                         |

<sup>265</sup> See CONN. CONST. art. III, § 6; CONN. QUESTION 4 (1976), [http://www.sots.ct.gov/sots/lib/sots/electionservices/statementofvote\\_pdfs/1976\\_sov.pdf](http://www.sots.ct.gov/sots/lib/sots/electionservices/statementofvote_pdfs/1976_sov.pdf) [<https://perma.cc/L7J7-DBAJ>].

<sup>266</sup> See N.J. CONST. art. II, § 2; N.J. PUBLIC QUESTION 1 (1995), <http://www.state.nj.us/state/elections/election-results/1995-general-election-public-questions.pdf> [<https://perma.cc/8C2Q-4WA7>].

<sup>267</sup> See IDAHO CONST. art. III, § 2; IDAHO S.J. RES. 105 (1994), <https://www.legislature.idaho.gov/redistricting/1993SJR105.pdf> [<https://perma.cc/NW94-R5AM>].

| Type | State                     | Description   | Method of Enactment              | Enacted Without Legislature? | Cannot be Repealed by Legislature? | Excludes Legislature from 'Field'? |
|------|---------------------------|---|----------------------------------|------------------------------|------------------------------------|------------------------------------|
|      | Washington <sup>268</sup> | Appointed commission draws districts, without legislative involvement | Legislatively Referred Amendment | No                           | Yes                                | Yes                                |
|      | Hawaii <sup>269</sup>     | Appointed commission draws districts, without legislative involvement | Constitutional Convention        | Yes                          | Yes                                | Yes                                |
|      | Montana <sup>270</sup>    | Appointed commission draws districts, without legislative involvement | Constitutional Convention        | Yes                          | Yes                                | Yes                                |
|      | California <sup>271</sup> | Appointed commission draws districts, without legislative involvement | Voter-Initiated Amendment        | Yes                          | Yes                                | Yes                                |

<sup>268</sup> See WASH. CONST. art. II, § 43; WASH. S.J. RES. 103 (1983), [https://www.sos.wa.gov/\\_assets/elections/Voters%20Pamphlet%201983.pdf](https://www.sos.wa.gov/_assets/elections/Voters%20Pamphlet%201983.pdf) [<https://perma.cc/Y7VQ-B4CU>].

<sup>269</sup> See HAW. CONST. art. IV, §§ 2, 9.

<sup>270</sup> See MONT. CONST. art. V, § 14; MONT. LEGIS. COUNCIL, *supra* note 154, at 7–8.

<sup>271</sup> See CAL. CONST. art. XXI, § 2; CAL. PROPOSITION 11 (2008), [http://ag.ca.gov/cms\\_pdfs/initiatives/i746\\_07-0077\\_Initiative.pdf](http://ag.ca.gov/cms_pdfs/initiatives/i746_07-0077_Initiative.pdf) [<https://perma.cc/5Z6S-ZAQ4>].

| Type | State                  | Description   | Method of Enactment       | Enacted Without Legislature? | Cannot be Repealed by Legislature? | Excludes Legislature from 'Field'? |
|------|------------------------|---|---------------------------|------------------------------|------------------------------------|------------------------------------|
|      | Arizona <sup>272</sup> | Appointed commission draws districts, without legislative involvement | Voter-Initiated Amendment | <b>Yes</b>                   | <b>Yes</b>                         | <b>Yes</b>                         |

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<sup>272</sup> See ARIZ. CONST. art. IV, pt. II, § 1; ARIZ. PROPOSITION 106 (2000), <http://apps.azsos.gov/election/2000/Info/pubpamphlet/English/prop106.pdf> [<https://perma.cc/BNW8-ULYG>].

Table 2: *Composition of Independent Redistricting Commissions by State*

| State                     | # Commissioners |   | People or Body Making Appointments   | Criteria for Commissioner Independence  |
|---------------------------|-----------------|---|--|---|
| New Jersey <sup>273</sup> | 13              | 8 | Legislative leaders  | (None)  |
|                           |                 | 4 | State party chairs   | (None)  |
|                           |                 | 1 | Other members  | Have not held political office in the last five years                             |
| Hawaii <sup>274</sup>     | 9               | 8 | Legislative leaders  | <i>Will not</i> run for legislature or Congress for the <i>next</i> two elections |
|                           |                 | 1 | Other members  |   |
| Idaho <sup>275</sup>      | 6               | 4 | Legislative leaders  | Do not currently hold political office  |
|                           |                 | 2 | State party chairs   |   |
| Montana <sup>276</sup>    | 5               | 4 | Legislative leaders  | Do not currently hold political office  |
|                           |                 | 1 | Other members  |   |
| Washington <sup>277</sup> | 5               | 4 | Legislative leaders  | Have not held political office in the last two years                              |
|                           |                 | 1 | Other members  |   |
| Arizona <sup>278</sup>    | 5               | 4 | Legislative leaders, from slate of candidates selected by independent state commission | Have not held political office or done political work in the last three years     |
|                           |                 | 1 | Other members  |   |

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<sup>273</sup> N.J. CONST. art II, § 2.

<sup>274</sup> HAW. CONST. art. IV, § 2.

<sup>275</sup> IDAHO CONST. art. III, § 2(2).

<sup>276</sup> MONT. CONST. art. V, § 14(2)–(4).

<sup>277</sup> WASH. CONST. art. II, § 43(2)–(3).

<sup>278</sup> ARIZ. CONST. art. IV, pt. II, § 1(3).



| State                     | # Commissioners |   | People or Body Making Appointments                     | Criteria for Commissioner Independence  |
|---------------------------|-----------------|---|--|---|
| California <sup>279</sup> | 14              | 8 | State auditors, via regimented and independent process | Members <i>and their immediate families</i> have not held political office, done political work, or made large campaign contributions in the last ten years |
|                           |                 | 6 | Other members, from same pool as original eight        |   |

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<sup>279</sup> CAL. CONST. art. XXI, § 2(c).

Table 3: *Source of State Constitutional Provisions Regulating Manner of Elections*

| Constitution Regulates Manner? | Source of Current Constitutional Provision    | Count |
|--------------------------------|---|-------|
| Yes                            | Original provision                            | 36    |
|                                | Amendment (previously had original provision) | 7     |
|                                | Amendment (no original provision)             | 1     |
| No                             | None (previously had original provision)      | 1     |
|                                | None (no original provision)                  | 5     |

Table 4: *State Constitutional Provisions Governing Use of Ballots and/or Secrecy of Voting*

| State    | Provenance   | Relevant Provision(s)   |
|----------|--|---|
| Alabama  | Amendment<br><br>(previously had original provision) | ALA. CONST. art. VIII, § 177 (“Where . . . federal law requires elections for public office . . . the right of individuals to vote by secret ballot shall be guaranteed.”), <i>as amended by</i> ALA. CONST. amend. 865.<br><br><i>Original Provision:</i> ALA. CONST. art. VIII, § 179 (“All elections by the people shall be by ballot, and all elections by persons in a representative capacity shall be viva voce.”), <i>repealed by</i> ALA. CONST. amend. 579.   |
| Alaska   | Original Provision                                   | ALASKA CONST. art. V, § 3 (“Secrecy of voting shall be preserved.”).  |
| Arizona  | Original Provision                                   | ARIZ. CONST. art. VII, § 1 (“All elections by the people shall be by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved.”).   |
| Arkansas | Amendment<br><br>(previously had original provision) | ARK. CONST. amend. 50, § 2 (“All elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes.”).<br><br><i>Original Provision:</i> ARK. CONST. art III, § 3 (“All elections by the people shall be by ballot . . . . The election officers shall be sworn or affirmed not to disclose how any elector shall have voted, unless required to do so as witnesses in a judicial proceeding, or a proceeding to contest an election.”), <i>repealed by</i> ARK. CONST. amend. 50, § 1. |

| State       | Provenance         | Relevant Provision(s)  |
|-------------|--------------------|--|
| California  | Original Provision | CAL. CONST. art II, § 7 (“Voting shall be secret.”).<br><br>CAL. CONST. art. II, § 5 (“All elections by the people shall be by ballot.”) (amended 1972).   |
| Colorado    | Original Provision | COLO. CONST. art. VII, § 8 (“All elections by the people shall be by ballot . . .”).   |
| Connecticut | Original Provision | CONN. CONST. art. VI, § 5 (“In all elections of officers of the state, or members of the general assembly, the votes of the electors shall be by ballot, either written or printed, except that voting machines or other mechanical devices for voting may be used in all elections in the state . . . . The right of secret voting shall be preserved.”) (amended without changing relevant language 1986). |
| Delaware    | Original Provision | DEL. CONST. art. V, § 1 (“The general election . . . shall be by ballot . . .”).   |
| Florida     | Original Provision | FLA. CONST. art. VI, § 1 (“All elections by the people shall be by direct and secret vote.”) (amended without changing relevant language 1998).  |
| Georgia     | Original Provision | GA. CONST. art. II, § 1 (“Elections by the people shall be by secret ballot . . .”).   |
| Hawaii      | Original Provision | HAW. CONST. art. II, § 4 (“Secrecy of voting shall be preserved . . .”).   |
| Idaho       | Original Provision | IDAHO CONST. art. VI, § 1 (“All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed . . .”).   |
| Illinois    | Original Provision | ILL. CONST. art. III, § 4 (“The General Assembly by law shall . . . insure secrecy of voting . . .”).  |

| State         | Provenance         | Relevant Provision(s)  |
|---------------|--------------------|--|
| Indiana       | Original Provision | IND. CONST. art. II, § 13 (“All elections by the <i>People</i> shall be by ballot; and all elections by the General Assembly, or by either branch thereof, shall be <i>viva voce</i> .”).  |
| Iowa          | Original Provision | IOWA CONST. art. II, § 6 (“All elections by the people shall be by ballot.”).  |
| Kansas        | Original Provision | KAN. CONST. art. IV, § 1 (“All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.”).   |
| Kentucky      | Original Provision | KY. CONST. § 147 (“In all elections by persons in a representative capacity, the voting shall be <i>viva voce</i> and made a matter of record; but all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited . . . .”) (amended without changing relevant language 1945).   |
| Louisiana     | Original Provision | LA. CONST. art. XI, § 2 (“In all elections by the people, voting shall be by secret ballot. . . . In all elections by persons in a representative capacity, voting shall be <i>viva-voce</i> .”).<br><br><i>Also, state’s first constitution contained similar provision:</i> LA. CONST. of 1812, art. VI, § 13 (“In all elections by the people, and also by the Senate and House of Representatives jointly or separately, the vote shall be given by ballot.”). |
| Maine         | Original Provision | ME. CONST. art. II, § 1 (“[E]lections shall be by written ballot.”).   |
| Maryland      | Original Provision | MD. CONST. art. I, § 1 (“All elections shall be by ballot.”) (amended without changing relevant language 2008).  |
| Massachusetts | [None]             |  |

| State         | Provenance         | Relevant Provision(s)   |
|---------------|--------------------|---|
| Michigan      | Original Provision | MICH. CONST. art. II, § 4 (“The legislature shall enact laws . . . to preserve the secrecy of the ballot . . .”).   |
| Minnesota     | Original Provision | MINN. CONST. art. VII, § 5 (“All elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen.”).                      |
| Mississippi   | Original Provision | MISS. CONST. art. XII, § 240 (“All elections by the people shall be by ballot.”).   |
| Missouri      | Original Provision | MO. CONST. art. VIII, § 3 (“All elections by the people shall be by ballot or by any mechanical method prescribed by law.”).  |
| Montana       | Original Provision | MONT. CONST. art. IV, § 1 (“All elections by the people shall be by secret ballot.”).   |
| Nebraska      | Original Provision | NEB. CONST. art. VI, § 6 (“All votes shall be by ballot . . .”).  |
| Nevada        | Original Provision | NEV. CONST. art. II, § 5 (“All elections by the people shall be by ballot, and all elections by the Legislature, or by either branch thereof shall be ‘Viva-Voce.’”). |
| New Hampshire | [None]             |   |
| New Jersey    | [None]             |   |
| New Mexico    | Original Provision | N.M. CONST. art. VII, § 5 (“All elections shall be by ballot.”).  |

| State          | Provenance                                       | Relevant Provision(s)   |
|----------------|--|---|
| New York       | Amendment<br>(previously had original provision) | <p>N.Y. CONST. art. II, § 7 (“All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.”).</p> <p><i>Original Provision:</i> N.Y. CONST. of 1894, art. II, § 5 (“All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot . . .”).</p> |
| North Carolina | Original Provision                               | <p>N.C. CONST. art. VI, § 5 (“All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce.”).</p>  |
| North Dakota   | Amendment<br>(no original provision)             | <p>N.D. CONST. art. II, § 1 (“The legislative assembly shall provide by law for secrecy in voting . . .”).</p> <p><i>No Original Provision in Constitution of 1889.</i></p>   |
| Ohio           | Original Provision                               | <p>OHIO CONST. art. V, § 2 (“All elections shall be by ballot.”).</p>   |
| Oklahoma       | [None]<br>(previously had original provision)    | <p><i>Original Provision:</i> OKLA. CONST. of 1907, art. III, § 6 (“In all elections by the people the vote shall be by ballot . . .”) (amended 1978).</p> <p>The Constitution was amended in 1978 to remove relevant language. <i>See</i> OKLA. LEGIS. REFERENDUM 224 (1978), <a href="https://www.sos.ok.gov/documents/questions/531.pdf">https://www.sos.ok.gov/documents/questions/531.pdf</a> [<a href="https://perma.cc/7VHD-8PWY">https://perma.cc/7VHD-8PWY</a>].</p>               |

| State          | Provenance   | Relevant Provision(s)   |
|----------------|--|---|
| Oregon         | Original Provision                                   | OR. CONST. art. II, § 15 (“In all elections by the Legislative Assembly, or by either branch thereof, votes shall be given openly or viva voce, and not by ballot, forever; and in all elections by the people, votes shall be given openly, or viva voce, until the Legislative Assembly shall otherwise direct.”).  |
| Pennsylvania   | Original Provision                                   | PA. CONST. art. VII, § 4 (“All elections by the citizens shall be by ballot or by such other method as may be prescribed by law; Provided, That secrecy in voting be preserved.”).<br><br><i>Also, state’s first constitution contained similar provision:</i> PA. CONST. of 1790, art. III, § 2 (“All elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce.”). |
| Rhode Island   | [None]   |   |
| South Carolina | Amendment<br><br>(previously had original provision) | S.C. CONST. art. II, § 1 (“All elections by the people shall be by secret ballot . . .”).<br><br><i>Original Provision:</i> S.C. CONST. art. II, § 1 (“All elections by the people shall be by ballot . . .”) (amended 1971).   |
| South Dakota   | Amendment<br><br>(previously had original provision) | S.D. CONST. art. VII, § 3 (“The legislature shall by law . . . insure secrecy in voting . . .”).<br><br>S.D. CONST. art. VII, § 3 (“All votes shall be by ballot . . .”) (amended 1974).  |



| State         | Provenance                                       | Relevant Provision(s)  |
|---------------|--|--|
| Tennessee     | Original Provision                               | <p>TENN. CONST. art. IV, § 4 (“In all elections to be made by the General Assembly, the members thereof shall vote viva voce, and their votes shall be entered on the journal. All other elections shall be by ballot.”).</p> <p><i>Also, state’s first constitution contained similar provision: TENN. CONST. of 1796, art. III, § 3 (“All elections shall be by ballot.”).</i></p> |
| Texas         | Original Provision                               | <p>TEX. CONST. art. VI, § 4 (“In all elections by the people, the vote shall be by ballot . . .”).</p>   |
| Utah          | Amendment<br>(previously had original provision) | <p>UTAH CONST. art. IV, § 8 (“All elections . . . shall be by secret ballot.”). The amendment added language requiring union elections to be by secret ballot as well.</p> <p><i>Original Provision: UTAH CONST. art. IV, § 8 (“All elections shall be by secret ballot.”) (amended 2011).</i></p>   |
| Vermont       | [None]   |  |
| Virginia      | Original Provision                               | <p>VA. CONST. art. II, § 3 (“In elections by the people . . . [v]oting shall be by ballot or by machines for receiving, recording, and counting votes cast. . . . Secrecy in casting votes shall be maintained . . .”) (amended without changing relevant language 1995).</p>  |
| Washington    | Original Provision                               | <p>WASH. CONST. art. VI, § 6 (“All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.”).</p>   |
| West Virginia | Original Provision                               | <p>W. VA. CONST. art. IV, § 2 (“In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect.”).</p>   |

| State     | Provenance   | Relevant Provision(s)  |
|-----------|--|--|
| Wisconsin | Amendment<br><br>(previously had original provision) | WIS. CONST. art III, § 3 (“All votes shall be by secret ballot”).<br><br><i>Original Provision:</i> WIS. CONST. art. III, § 3 (“All votes shall be given by ballot, except for such township officers as may by law be directed or allowed to be otherwise chosen.”) (amended 1986). |
| Wyoming   | Original Provision                                   | WYO. CONST. art. VI, § 11 (“All elections shall be by ballot. . . . All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.”).  |

## VI. CONCLUSION: A REPUBLICAN GUARANTEE CLAUSE CASE BY A DIFFERENT NAME

Given the collateral damage that a restrictive reading of the Elections Clause would cause, it is at least worth entertaining the possibility that controversies like the one involving the AIRC should be considered nonjusticiable political questions. Of course, because the Court has already adjudicated several cases under the Clause, the prospects of using the AIRC case to reverse course seemed remote. But the Pandora's Box opened by engaging with the knotty questions posed by the ISLD, at a minimum, should caution against aggressive judicial intervention.

A baseline consideration absent from the debate over the Elections Clause is whether the Constitution requires a state to have a legislature at all. Although the word "Legislature" appears sixteen times in the Constitution, no provision requires that each state have a legislature. The Republican Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."<sup>280</sup> But the Court has long held that challenges under the Guarantee Clause present nonjusticiable political questions—both in the specific context of adjudicating whether direct democracy violated the clause,<sup>281</sup> as well as whether the state of Rhode Island had a legitimate government.<sup>282</sup> Indeed, the precise reason the one-person, one-vote rule emerged from the Equal Protection Clause was that the Court had turned back challenges to malapportioned redistricting plans based on the Guarantee Clause.<sup>283</sup> Finally, as mentioned above, the Court reiterated this position in the precedent most relevant to the AIRC case, *Davis v. Hildebrant*.<sup>284</sup> There, the Court rejected the notion that the use of a referendum to overturn a legislatively enacted congressional redistricting plan violated either the Elections Clause or the Republican Guarantee Clause.<sup>285</sup>

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<sup>280</sup> U.S. CONST. art. IV, § 4, cl. 1.

<sup>281</sup> *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 138 (1912).

<sup>282</sup> *See Luther v. Borden*, 48 U.S. (7 How.) 1, 33–34 (1849).

<sup>283</sup> *See Baker v. Carr*, 369 U.S. 186, 209 (1962) ("We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause."); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.").

<sup>284</sup> *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916).

<sup>285</sup> *See id.* ("[The attack on the referendum] must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution. But the proposition and the argument disregard the settled rule that the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution." (citation omitted)).

Many have urged the Court to provide a robust definition of a “Republican Form of Government”<sup>286</sup> and become aggressively involved in questions of democratic design. Indeed, were it to do so, the Court not only might curb the excesses of the initiative process, but it could deal with any number of election controversies (e.g., partisan gerrymandering, voter identification, campaign finance) in a fashion that was not preoccupied, to the exclusion of all else, with discrimination, which the focus on the Equal Protection Clause inevitably requires. The decision to avoid those controversies, however, was based on the prescient prediction that doing so would place the Court in the most contested and partisan of constitutional disputes—ones in which the Court would be directly affecting winners and losers in elections. Perhaps the gravitation of such questions into equal protection jurisprudence (see, e.g., *Bush v. Gore*<sup>287</sup>) means that such a train has now fully left the station, so opening up one more constitutional clause as a door to litigation may prove inconsequential. The analysis above suggests, however, that aggressive judicial intervention here would not necessarily lead to more populist or “small d” democratic results.

If election regulation through direct democracy is consistent with a republican form of government, it is consistent with a “Legislature” prescribing the “time, place and manner of holding” federal elections. Indeed, the widespread use of the initiative to do precisely that should weigh in the balance of its constitutionality. “The life of the law has not been logic,” Justice Holmes famously said, “it has been experience.”<sup>288</sup> That over-quoted phrase may be most true in the field of election regulation. To the casual observer, the American experience with the law of democracy seems not only illogical, but, at times, downright bizarre. The Court was right to step back from the abyss the AIRC case presented. Existing jurisprudence provides ample opportunity for judicial mischief when it comes to election regulations. Opening up an entirely new area to litigation would have produced almost no tangible benefits, and the costs to self-government could have been substantial.

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<sup>286</sup> See, e.g., Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 22 (1993); Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 710 (1994); Catherine A. Rogers & David L. Faigman, *And to the Republic for Which It Stands*: *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1066–71 (1996).

<sup>287</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>288</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).