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History of the Article II Independent State Legislature Doctrine

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HISTORY OF THE ARTICLE II INDEPENDENT STATE LEGISLATURE DOCTRINE

Hayward H. Smith

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HISTORY OF THE ARTICLE II INDEPENDENT STATE LEGISLATURE DOCTRINE

HAYWARD H. SMITH*

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But it is said, the constitution has fixed this matter, because it says that the senators shall be chosen by the *legislature*—When men get attached to a party, or to a sentiment, trifles light as air will have weight to support them in their opinions—Were it not for

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this, I can hardly imagine any sensible man would lay much stuff upon this argument.¹

I. INTRODUCTION

In *Bush v. Palm Beach County Canvassing Board*² (*Bush I*), the Supreme Court suggested that when state legislatures direct the manner of appointing presidential electors under Article II, Section 1,³ they must remain free from state constitutional limitations.⁴ In *Bush v. Gore*⁵ (*Bush II*), three Justices argued that Article II legislatures must remain free from obviously incorrect state court statutory interpretation.⁶ Since then, several defenders of the Court's Election 2000 decisions have embraced this idea that Article II grants to state legislatures a degree of independence that they do not otherwise enjoy.⁷ This Comment investigates whether there is any historical basis for such an Article II "independent state legislature" doctrine, a task entirely neglected by the Court in *Bush I*, the concurrence in *Bush II*, and all but one of the commentators.⁸ It con-

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

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

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

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

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

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

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

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

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

8. See POSNER, *supra* note 7, at 31-34, 153-57 (offering a cursory review of the history of Article II, Section 1). As for the original understanding of the clause, Posner insists that "[w]e cannot be certain that the choice of the word [legislature]" was made "simply because the legislature is the branch of government that makes laws." *Id.* at 154. He ulti-

cludes that the founding generation's original understanding of Article II did not include special solicitude toward state legislatures. Moreover, the doctrine's actual origins in the Civil War Era and its subsequent history reveal that it has never been anything but a trifle which politicians and courts call upon to lend legal weight to sentiments otherwise unrecognized by the law.

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

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

In *Bush I*,¹¹ the United States Supreme Court vacated the Florida Supreme Court's judgment.¹² Although in normal cases the Court defers to state court interpretations of state statutes, in this case it did not. The Court explained that when the Florida Legislature enacted the law governing the selection of presidential electors it was "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under [Article II, Section 1, Clause 2] of the United States Constitution."¹³ That clause

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

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

10. See *id.* at 1236-37.

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

12. *Id.* at 78.

13. *Id.* at 76.

provides that “[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, [presidential electors].”¹⁴ The Elector Appointment Clause, according to the Court, embodies a federal constitutional limitation on the extent to which a state constitution can “circumscribe” its legislature’s power to direct the manner of appointing electors.¹⁵ Because there were “expressions” in the Florida Supreme Court opinion¹⁶ that could be read to indicate that it interpreted the election law “without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, ‘circumscribe the legislative power,’” the Court vacated and remanded the case, asking the Florida court to clarify the extent to which it saw the Florida Constitution as limiting the legislature’s authority.¹⁷

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

Alternatively, the doctrine could manifest itself in a weak form that would permit state constitutions to place minimal restrictions on the manner of elector appointment. Under this version of the doctrine, for instance, it would be permissible for a state constitution to impose suffrage requirements on the popular election of electors, so long as popular election is the mode of appointment chosen by the

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

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

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

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

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

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

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

state legislature. Thus, the Florida Supreme Court's interposition of the Florida Constitution in *Bush I* would be appropriate, as would constitutionally mandated procedures for resolving contested elections.²¹ Yet, a more intrusive constitutional command—one, for instance, which would require the legislature to appoint electors via a winner-take-all popular election—would too tightly circumscribe the legislature's authority.

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

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

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

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

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

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

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

Unlike in *Bush I*, however, the Florida court left out any reference to the state constitution in its construction of the legislature's "contest" scheme.²⁶ The Florida court's judgment in *Bush II*, therefore, appeared to be impervious to the independent legislature doctrine as described by the Supreme Court in *Bush I*.

Indeed, the Supreme Court did not decide *Bush II* on the basis of Article II. On December 9, a sharply divided Court stayed the recounts ordered by the Florida Supreme Court.²⁷ Three days later, on December 12, a majority of five Justices held that the recounts would violate the Fourteenth Amendment's Equal Protection Clause and that because the Florida Legislature had intended to obtain the benefits of a federal safe harbor provision²⁸ requiring selection of electors to be completed by December 12, there was no time to conduct constitutionally adequate recounts without violating Florida election law.²⁹

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

(Fla. 2000), and that the tally of the Miami-Dade votes was the result of only a partial recount. See *Gore v. Harris*, 772 So. 2d at 1262.

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

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

28. See 3 U.S.C. § 5 (1994).

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

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

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

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

33. *Id.* at 112-15 (Rehnquist, C.J., concurring). Justice Ginsburg, speaking for all four dissenting Justices, rejected the concurrence's notion that Article II "authorizes federal su-

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

The history of the Article II independent legislature doctrine deserves detailed study because the *Bush* opinions conspicuously fail to offer any compelling textual, doctrinal, or policy rationale for its existence. Even with selective italicization of the word “legislature,” the doctrine does not arise ineluctably from the text of the Constitution.³⁴ As for Supreme Court precedent, the Court itself admitted in *Bush I* that the leading case on the meaning of the Elector Appointment Clause, *McPherson v. Blacker*,³⁵ does not address the independence of state legislatures.³⁶ With respect to intertextual analysis,³⁷ the Court in *Smiley v. Holm*³⁸ explicitly rejected the argument that state legis-

perintendence over the relationship between state courts and state legislatures.” *Id.* at 141 (Ginsburg, J., dissenting). The Framers, she argued, “understood that in a republican government, the judiciary would construe the legislature’s enactments.” *Id.* (citing THE FEDERALIST NO. 78 (Alexander Hamilton)). Moreover, reading Article II to require the Supreme Court to “protect one organ of the State from another . . . contradicts the basic principle that a State may organize itself as it sees fit.” *Id.*

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

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

35. 146 U.S. 1 (1892).

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

37. “Sometimes interpretation of a phrase in the Constitution benefits from a comparison of how similar language elsewhere in the document has been understood.” Amar, *supra* note 18, at 1068. In one sense, the constitutional provision which is most analogous to Article II is the Twenty-third Amendment, which gives the District of Columbia the right to appoint presidential electors as if it were the least populous state in the Union. See U.S. CONST. amend. XXIII (“The District [of Columbia] shall appoint in such manner as the Congress may direct [presidential electors].”). See generally ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 126-30 (1978). The language of the amendment is precisely parallel to that of Article II; “the district” has been substituted for “each State” and “the Congress” has been substituted for “the Legislature thereof.” See Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 492 n.64 (1992) (noting that Congress designed the Twenty-third Amendment to mimic Article II). If the logic of the Article II independent legislature doctrine were carried to its extreme vis-à-vis the Twenty-third Amendment, the Federal Constitution could not limit the manner in which Congress directs the appointment of the District’s electors.

38. 285 U.S. 355 (1932).

latures under Article I, Section 4³⁹ act independently of their constitutions when they prescribe the times, places, and manner of holding elections for Senators and Representatives.⁴⁰ And while in *Hawke v. Smith*⁴¹ the Court held that state legislatures *do* enjoy independence when they decide whether to ratify a constitutional amendment under Article V,⁴² it was careful to explain that such “expression of assent or dissent” was “entirely different” than the authority “plainly give[n] . . . to the state to legislate [with respect to the manner of holding elections].”⁴³

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

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

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

41. 253 U.S. 221 (1920).

42. U.S. CONST. art. V.

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

Id.

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

respect to that function?⁴⁴ The Court's opinion in *Bush I*, however, makes no attempt to answer this question.⁴⁵ And while the concurrence in *Bush II* emphasizes that "state-imposed restrictions [in a presidential election] implicate a uniquely important national interest," it never explains exactly what that interest is or how the independent legislature doctrine would further it.⁴⁶ Sympathetic commentators have attempted to fill the void left by the Court, but their arguments ring hollow.⁴⁷

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

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

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

47. See Epstein, *supra* note 7, at 620 (arguing that "the strong federal interest in the selection of the President of the United States makes it appropriate for federal courts to see that all state actors stay within the original constitutional scheme"); see also POSNER, *supra* note 7, at 158 ("The 'Manner directed' clause can head off Presidential election crises by preventing one branch of state government, disappointed perhaps by the outcome of the election, from changing the outcome by altering the election rules after the result is known, provoking an interbranch struggle that is a recipe for chaos."); McConnell, *supra* note 7, at 661-63 (stating that by specifying "[l]egislature," Article II, Section 1: (1) "ensures that the manner of selecting electors will be chosen by the most democratic branch of the state government" and (2) "places authority to set electoral rules in the institution least able to manipulate the rules to favor a particular candidate"). Epstein's argument rings hollow because it is circular. Those of McConnell and Posner ring hollow because they fail to adequately explain why the Constitution requires the Supreme Court to be the ultimate arbiter of what the election rules were prior to the deadlock. An Article II independent legislature doctrine does not eliminate retrospective judicial interpretation of a state legislature's "prospective" election rules—it simply shifts it from the state court to the Supreme Court. The Supreme Court can just as easily manipulate those rules after the election as can the state court and is no less "interested" in doing so. See POSNER, *supra* note 7, at 180-81 (noting that judges on the Florida Supreme Court "had a smaller stake in the outcome of the Presidential election than the Justices of the U.S. Supreme Court did, because the President does not appoint state judges"); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 725 (2001) [hereinafter Pildes, *Judging "New Law"*] ("[T]here is no general structural reason to think that federal courts, or the United States Supreme Court, are better positioned than the state courts to have a comparative institutional advantage that would predictably make them less prone to the appearance or reality of partisan pressures or temptations."). Therefore, if there is indeed no genuine structural interest in maintaining especially close adherence to the intentions of an Article II legislature, and if the state court has not violated any individual constitutional rights, see *id.* at 702-06 (describing how a state court may violate the Fourteenth Amendment by creating "new law" after an election), then it is difficult to see why the Supreme Court, as opposed to Congress, should decide which branch of the state government should emerge victorious from an election deadlock. See U.S. CONST. art. II, § 1, cl. 3 (assigning responsibility to count electoral votes to Congress); U.S. CONST. amend. XII (same); 3 U.S.C. §§ 1-15 (1994) (setting the ground rules for counting electoral votes in Congress);

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

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

As Professor Richard H. Pildes explains in this symposium, however, federal courts have traditionally dealt with “runaway” state courts in the context of disputed elections under the guise of the Due Process and Equal Protection Clauses.⁵¹ In reversing novel state court interpretations of state election laws in order to avoid “patent and fundamental unfairness,” these federal courts have required a

Bush v. Gore, 531 U.S. at 154 (Breyer, J., dissenting) (“The legislative history of the [Electoral Count] Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts”); Richard H. Pildes, *Disputing Elections*, in THE LONGEST NIGHT: COMPARATIVE PERSPECTIVES AND POLEMICS (Arthur Jacobson & Michele Rosenfeld eds.) (forthcoming 2001) (manuscript at 9) (explaining how Congress passed the Electoral Count Act of 1887 after several years of deliberation “in as non-partisan a context as could be selected,” and not only “specifically chose a national political institution, the Congress itself, for resolving disputed Presidential elections,” but also “specifically considered and rejected the alternative of United States Supreme Court resolution”). See generally Elizabeth Garrett, *Leaving the Decision to Congress*, in THE VOTE 38 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

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

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

50. See POSNER, *supra* note 7, at 158-60 (arguing that the “lawlessness” of the Florida court is a consideration which should inform interpretation of Article II, Section 1); Epstein, *supra* note 7, at 621 (arguing that the Florida Supreme Court “created its own electoral scheme that substituted judicial authority for that of the Secretary of State”); McConnell, *supra* note 7, at 666 (arguing that the work of the Florida court “was obviously not ‘interpretation’”); Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, NEW CRITERION, Mar. 2001, at 4, 11 (describing *Bush I* as “a valiant effort” to restrain a “lawless state court” which had been “captured” by “runaway political passions”).

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

much stronger showing of ex post facto creation of “new law” than that required, in the name of Article II, by the *Bush II* concurrence.⁵² Thus, even as a manifestation of *disrespect* for state courts, the super-strong version of the independent legislature doctrine must depend on some positive characteristic of Article II legislatures which would, in Professor Pildes’ words, “justify a greater federal court willingness to find ‘new law’ [under Article II] than do the general provisions of the Fourteenth Amendment.”⁵³

D. Summary of Historical Findings

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

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

Part III examines the *post*-Founding history of the independent legislature doctrine. Contrary to the impression left by the Court’s

52. *Id.* at 701.

53. *Id.* at 726.

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

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

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

opinions⁵⁷ and contrary to the belief of at least one prominent commentator,⁵⁸ the *Bush* cases were not the first time that a court has passed on the independence of Article II legislatures. Although the *Bush II* super-strong version of the doctrine is completely unprecedented, the actual origins and subsequent history of the strong version of the doctrine and its Article I, Section 4 cousin demonstrate that politicians and courts have always utilized the concept of independent legislatures in an unprincipled and results-driven manner, without ever providing a functional justification for legislative independence from state constitutions, let alone state courts.

Specifically, Part III locates the origins of the strong version of the independent legislature doctrine, not in *Bush I* or even the now-famous *McPherson* case, but rather in an obscure set of voting rights cases which arose during the American Civil War—the “soldier-voting” cases.⁵⁹ The doctrine, it seems, was born out of desperate and transparently manipulative judicial and political attempts to prevent state constitutions from accidentally disfranchising Civil War soldiers who had risked their lives to preserve the Union and end slavery.

Thus, the Civil War soldier-voting cases, while perhaps morally sound in result, did not provide a very compelling source of principled constitutional interpretation. Nevertheless, in a curious turn of events, the strong independent legislature doctrine survived the Civil War era and emerged as dicta in the 1892 Supreme Court case of *McPherson v. Blacker*.⁶⁰ Subsequently, after the turn of the century, courts faced with issues less egregious than soldier disfranchisement ignored the precedent of the soldier-voting cases and the unpersuasive *McPherson* dicta and soberly rejected both Article II and Article I, Section 4 independent legislature doctrines.⁶¹ In 1944, however,

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

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

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

60. 146 U.S. at 8-11.

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

when war once again threatened to disfranchise soldiers, a state court resurrected the doctrine in order to avoid that untenable result, frankly admitting its doubt as to the weight of the doctrine but resting on the democratic sentiment to which it had become attached.⁶²

II. ORIGINAL UNDERSTANDING OF THE ARTICLE II INDEPENDENT LEGISLATURE DOCTRINE

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

A. *The Constitutional Convention*

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

The Framers chose an electoral college system over two other basic modes of election: election by the national legislature and election by the people directly.⁶⁷ The feasibility of the presumptive mode—election by the national legislature⁶⁸—was intimately related to two

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

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

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

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

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

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

68. See Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 37 (1986). Slonim notes

other issues: the executive's term of office and his eligibility for reelection. "Since the executive was to be elected by the legislature, it was deemed essential that he not be eligible for reelection, for reeligibility would compromise his independence; but if he was to serve only one term, then it ought to be a reasonably lengthy one."⁶⁹

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

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

Selection of the President by means of a weighted electoral college had the advantages of popular election—eligibility for reelection without dependence⁷⁵—without its liabilities. Members of such an entity would be in a better position to select candidates than the people at large,⁷⁶ and the small and slave states would enjoy the same handicap with respect to the President that they did, thanks to the Connecticut Compromise, with respect to the national legislature.⁷⁷

Most of the Convention debates over the mode of selecting the President occurred at this fundamental level.⁷⁸ Moreover, almost all

that both the Virginia Plan and the New Jersey Plan provided for election of the executive by the national legislature. *Id.*

69. *Id.* at 38.

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

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

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

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

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

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

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

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

78. Madison came the closest to addressing the narrow question of independent legislatures on July 25 when he surveyed the various modes of executive selection that had been proposed. He found four general sources of authority: "The election must be made either by some existing authority under the Natil. or State Constitutions—or by some special

occurred well before the language of the Elector Appointment Clause was first proposed. David Brearley's committee, which designed the proposal that became Article II, Section 1, did not propose electors "appoint[ed] in such manner as [the] Legislature may direct" until the very late date of September 4.⁷⁹

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

authority derived from the people—or by the people themselves." 2 FARRAND, RECORDS, *supra* note 70, at 109. Under the national constitution, the "[e]xisting authorities . . . [would] be the Legislative & judiciary," neither of which was appropriate. *Id.* "The existing authorities in the States," he continued, "are the Legislative, Executive & Judiciary," all of which he found unsuitable. *Id.* at 110. The remaining choice, therefore, was between an electoral scheme involving "electors chosen by the people"—which would presumably constitute the "special authority derived from the people" which he had referred to earlier—and "an immediate appointment by the people." *Id.* at 109-10. In Madison's thinking, therefore, a scheme in which the state legislatures directly selected the national executive would derive authority from the state constitutions, while a scheme in which electors chosen by the people selected the executive would derive authority "from the people" directly. But from what source he thought the hybrid scheme of Article II derived *its* authority remains unclear. It seems unlikely, though, that Madison thought the authority was derived solely from the Federal Constitution, as a strong or super-strong independent legislature doctrine would imply.

79. *Id.* at 493-94.

80. *Id.*

81. *Id.* at 525.

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

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

84. *See* Kirby, *supra* note 8, at 502 ("The point simply did not occur to [the Framers]."). It is interesting to note (but not very helpful) that the language of Article II, Section 1, as it appears in the Constitution today, is slightly different than the language proposed by the Brearley Committee and first agreed to by the Framers. The Brearley language required appointment "in such manner as *its* Legislature may direct." 2 FARRAND, RECORDS,

B. *The Ratification Debates*

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

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

But while Madison did not record any comments by the Convention delegates regarding the exact manner in which electors were to be appointed under the Elector Appointment Clause, many speakers

supra note 70, at 497 (emphasis added). A committee of style subsequently replaced “its Legislature” with “the legislature thereof.” *Id.* at 597. Presumably, the committee of style thought the change had no substantive effect. *See id.*

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

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

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

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

at the state conventions did touch on this question, at least tangentially.⁸⁹ Some, like Hamilton in *The Federalist No. 68*,⁹⁰ assumed that the people would select electors.⁹¹ Others thought that the state legislatures would select the electors.⁹² Wilson begged the question when he said that, “[w]ith the approbation of the state legislatures, the people may elect with only one remove: for ‘each state shall appoint, in such manner as the legislature thereof may direct, [presidential electors].’”⁹³ Thus, even in the most basic sense, the meaning of the words “in such manner as the legislature thereof may direct” was unclear to the Ratifiers.⁹⁴

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

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

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

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

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

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

Gov. JOHNSTON expressed doubts with respect to the persons by whom the electors were to be appointed. Some, he said, were of opinion that the people at large were to choose them, and others thought the state legislatures were to appoint them.

Mr. IREDELL was of the opinion that it could not be done with propriety by the state legislatures, because, as they were to direct the manner of appointing, a law would look very awkward, which should say, “They gave the power of such appointments to themselves.”

Mr. MACLAINE thought the state legislatures might direct the electors to be chosen in what manner they thought proper, and they might direct it to be done by the people at large.

Mr. DAVIE was of opinion, that it was left to the wisdom of the legislatures to direct their election in whatever manner they thought proper.

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

C. Original Purposes of the Elector Appointment Clause

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

1. Narrative of the Convention Debates Over Electoral College Schemes

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

Elbridge Gerry of Massachusetts "liked the principle of Mr. Wilson's motion" but voiced two objections.¹⁰⁰ First, he feared that it "would alarm & give a handle to the State partizans, as tending to supersede altogether the State authorities."¹⁰¹ Second, he was "not clear that the people ought to act directly even in [the] choice of electors" because they would be "too little informed of personal characters in large districts" and also "liable to deceptions."¹⁰² Hugh Williamson of North Carolina remarked that he did not see the advantage of electors over state legislatures, and warned that electors

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

96. *Id.* at 80.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

“would be attended with great trouble and expence.”¹⁰³ The states voted against Wilson’s motion eight to two, dropped the idea of electors, and returned to the debate over the relative merits of legislative and popular appointment.¹⁰⁴

On July 17, Maryland’s Luther Martin tried to break the deadlock in that debate by proposing another electoral college system. He moved that the executive “be chosen by Electors to be appointed by the several Legislatures of the individual States.”¹⁰⁵ Madison did not record Martin’s reasoning. Perhaps by substituting “several Legislatures” for “the people” Martin was attempting to address the concerns that Gerry had raised with Wilson’s scheme in June. In any event, without any recorded comment, the states voted against Martin’s proposal 8 to 2.¹⁰⁶

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

103. *Id.* at 81.

104. *Id.*

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

106. *Id.* at 32.

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

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

109. *Id.* at 56.

110. *Id.*

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

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

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

Oliver Ellsworth of Connecticut apparently disagreed that the state executive was the appropriate body to choose electors, and he moved instead that the executive "be chosen by electors appointed by the Legislatures of the States," the electors being allocated in a ratio favorable to the small states.¹¹⁷ Gerry responded that he preferred Ellsworth's idea over appointment by the national legislature or the people, but "not to an appt. by the State Executives."¹¹⁸ Ellsworth's motion for appointment of electors by state legislatures then passed by a vote of 8 to 2.¹¹⁹

The agreement of July 19 did not last long. On July 23, William Houston of Georgia "urged the extreme inconveniency & the considerable expense, of drawing together men from all the States for the single purpose of electing the Chief Magistrate."¹²⁰ He feared the "improbability, that capable men would undertake the service of Electors from the more distant States."¹²¹ North Carolina's Hugh Williamson likewise warned that "[t]he proposed Electors would certainly not be men of the 1st. nor even of the 2d. grade in the States."¹²² Such men, he said, "would all prefer a seat either in the

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

114. *Id.* at 57.

115. *Id.* (emphasis added).

116. *Id.*

117. *Id.*

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

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

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

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

122. *Id.* at 100.

Senate or the other branch of the Legislature.”¹²³ To forestall a motion by Houston to return to appointment by the national legislature, Gerry proposed to eliminate the electors from the scheme adopted on July 19: “the Legislatures of the States should vote by ballot for the Executive in the same proportions as it had been proposed they should chuse electors”¹²⁴ On the motion to postpone to consider Gerry’s proposal, however, “*noes* were so predominant that the States were not counted.”¹²⁵ Instead, Houston’s motion passed 7 to 4.¹²⁶ Accordingly, the difficult questions of reeligibility and term of office returned to haunt the Convention.¹²⁷

The ensuing debate of late July ranged widely over all the proposed modes of selecting the executive.¹²⁸ The Convention moved away from electoral college schemes and placed selection of the executive in the hands of the national legislature, where it stayed until the end of August with much wrangling over details.¹²⁹ Then, on August 24, Gouverneur Morris moved to have the President¹³⁰ “chosen by Electors to be chosen by the people of the several States.”¹³¹ The motion was narrowly defeated 6 to 5.¹³² That the mode of choosing *electors*, as opposed to the mode of choosing the President, remained a stumbling block is apparent from the ensuing attempt to restore some sort of electoral college scheme by posing the “abstract question” of whether the President “shall be chosen by electors.”¹³³ That attempt was defeated by an equally divided vote of the states.¹³⁴

The near success of Morris’ August 24 motion meant that the mode of selecting the President remained unsettled.¹³⁵ The Convention referred this question and others to a new committee chaired by

123. *Id.*

124. *Id.* at 101.

125. *Id.*

126. *Id.*

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

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

129. *Id.* at 403-04.

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

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

132. *Id.*

133. *Id.*

134. *Id.*

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

David Brearley of New Jersey.¹³⁶ On September 4, Brearley's committee recommended what would become, with some modification, the electoral college scheme codified in Article II.¹³⁷ The committee's report took up where Ellsworth's July 19 proposal had left off, marrying the notion of electors to a voting ratio which favored the small and slave states; it provided that "[e]ach State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature."¹³⁸

2. Inferences

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

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

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

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

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

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

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

141. *Id.* (suggestion of Ellsworth).

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

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

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

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

of appointing electors once removed from the people would be preferable.¹⁴⁶

Not coincidentally, Gerry's two reasons to prefer legislative appointment—(1) protection of state interests and the federal system and (2) filtration of the popular will through an intermediate body—echoed those offered to explain state legislative appointment of Senators under Article I, Section 3.¹⁴⁷ As Madison explained in *The Federalist No. 62*, legislative selection of Senators was “recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and may form a convenient link between the two systems.”¹⁴⁸ Madison may have even felt that Article I, Section 3 created independent legislatures: in *The Federalist No. 45*, he wrote that “[t]he Senate will be elected absolutely and exclusively by the State Legislatures.”¹⁴⁹ Moreover, since the Founding, proponents of independent legislature doctrines have pointed to Article I, Section 3 to support their arguments.¹⁵⁰

Absent other evidence, Gerry's two reasons to prefer legislative electors and Article II's superficial similarity to Article I, Section 3 might explain why the Framers decided to give legislatures the power to “direct” the “manner” of appointing electors.¹⁵¹ Moreover, if the Founders shared Gerry's propositions, they might be considered

146. *Id.*

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

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

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

150. The 1874 Senate Report quoted by the Supreme Court in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395, at 9 (1874)), for instance, contended that the power conferred by Article II on state legislatures “cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States.” See also POSNER, *supra* note 7, at 154 (comparing Article II to Article I, Section 3). Similarly, the Supreme Court suggested that a state legislature's independent Article V ratification power was not unlike its independent Article I, Section 3 power to choose Senators. See *Hawke v. Smith*, 253 U.S. 221, 227-28 (1920).

151. See U.S. CONST. art. II, § 1.

fundamental principles of representation that were constitutionalized upon ratification of the Constitution. If so, those underlying principles form part of the original understanding of the text of the Elector Appointment Clause. A determined originalist might even argue that the Framers held those principles so deeply that they were symptomatic of an original understanding that the Elector Appointment Clause was to give virtually *unlimited* discretion to state legislatures in the appointment of electors. Under this view, the Founders would have understood legislative discretion under the Clause not as a mere baseline but as an essential and absolute requirement. The principles of representation articulated by Gerry might, in other words, provide the basis for an originalist defense of the independent legislature doctrine.

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

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

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

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

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

Moreover, the founding generation never understood Article V of the Articles of Confederation to create independent legislatures serving state-protection or filtration functions. The Articles, of course, contemplated a much more robust form of state sovereignty than the Constitution which replaced them;¹⁵⁶ thus, any attempt to derive the Founders' understanding of Article II from their previous understanding of Article V of the Articles of Confederation must be made with caution. Nevertheless, the analogy provides a baseline understanding. As it was, three out of the four state constitutions adopted after the Articles were proposed in November 1777, but before the Federal Constitution was adopted, contained explicit provisions purporting to regulate the selection of congressional delegates.¹⁵⁷ This practice was consistent with the pre-Confederation state constitutions of 1776 and 1777, of which eight out of ten had similar provisions.¹⁵⁸ The Framers were certainly aware of this understanding

155. See *supra* Part II.B.

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

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

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

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

Id.; N.C. CONST. of 1776, art. XXXVII, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 21, at 407 (providing that delegates "shall be chosen annually by the General Assembly, by

when they settled on the language of the Elector Appointment Clause for the new Federal Constitution. Thus, the clause, like Article V of the Articles of Confederation before it, was intended to serve federalism only in the sense that, “by virtue of their status as independent sovereigns within a federal system,”¹⁵⁹ *states*—not independent state legislatures—decided the mode by which they would appoint their electors.

Furthermore, during the Convention, many of the Framers demonstrated their general hostility to a decisive role for state legislatures in the appointment of electors. When Gerry suggested that the legislatures choose the executive directly, for instance, the “*noes* were so predominant” that the votes were not even counted.¹⁶⁰ Even with respect to an electoral college system, many delegates do not appear to have desired giving legislatures any power. Rather, delegates repeatedly proposed electoral college schemes involving popular electors. Wilson did so in June;¹⁶¹ King, Patterson, and Madison did so on July 19;¹⁶² and Morris did so on August 24.¹⁶³ Gerry himself would have preferred assigning the power to choose electors to the state executives.¹⁶⁴ The idea of exclusive legislative appointment of electors—perhaps embodied in the convention’s brief acceptance of Ellsworth’s July 19 compromise for electors appointed by state legislatures¹⁶⁵—

ballot”); PA. CONST. of 1776, § 11, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 280 (providing that delegates “shall be chosen by ballot by the future general assembly at their first meeting, and annually forever afterwards, as long as such representation shall be necessary”); S.C. CONST. of 1776, art. XV, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 21, at 466 (providing that delegates shall “be chosen by the general assembly and legislative council jointly by ballot in the general assembly”); VT. CONST. of 1777, ch. 2, § X, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 21, at 491-92 (providing that delegates “shall be chosen, by ballot, by the future General Assembly, at their first meeting, and annually, forever afterward, as long as such representation shall be necessary”); VA. CONST. of 1776, *reprinted in* 10 SOURCES AND DOCUMENTS, *supra* note 21, at 54 (providing that delegates “shall be chosen annually, or superseded in the mean time, by joint ballot of both Houses of Assembly”). The two state constitutions with no such provisions were New Jersey and New Hampshire. *See* N.H. CONST. of 1776, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 21, at 342-43; N.J. CONST. of 1776, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 21, at 449-53.

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

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

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

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

163. *Id.* at 403-04.

164. *See id.* at 57.

165. Even Ellsworth’s doomed compromise, however, may not have been an accurate reflection of a willingness on the part of the delegates to settle for exclusive legislative appointment of electors. Its brief success may have been due to some ambiguity as to exactly what it meant. Although the language of the resolution appears to give no role to the people in selecting electors, there is evidence that at least some of the Framers did not see it as inconsistent with popular election of electors. One week after Ellsworth’s resolution was adopted, subsequent to its reconsideration and rejection, Madison recorded Mason as remembering the following: “[i]t has been proposed that the election should be made by Elec-

became acceptable, it seems, only as a compromise that would placate those who, like Gerry, were opposed to direct election of anything. The near success of Morris's August 24 motion for popular electors indicates that, even at that late date, many delegates would still have preferred to bypass state legislatures altogether with popular electors.¹⁶⁶

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

D. Contemporaneous Practice

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

1. State Constitutions After the Founding

An indication of the founding generation's understanding of the relationship between state constitutions and the selection of national representation is the degree to which post-Founding state constitutions purported to regulate that selection. Admittedly, the pre-1789 pattern of regulation described above was not as pervasive in the state constitutions adopted after 1789. Neither the Georgia Constitution of 1789, the Pennsylvania Constitution of 1790, nor the South Carolina Constitution of 1790 contained any provisions regarding the selection of Federal Representatives, Senators or Elec-

tors *chosen by the people* for that purpose. This was at first agreed to: But on further consideration has been rejected." *Id.* at 119 (emphasis added).

166. *See id.* at 403-04.

167. U.S. CONST. art. II, § 1.

tors.¹⁶⁸ (Previous constitutions in all three states *had* contained such provisions regarding the selection of delegates to Congress.)¹⁶⁹ Neither did the constitutions of the new states which entered the Union in the 1790s—Kentucky, Vermont, and Tennessee.¹⁷⁰

On the other hand, in 1792, Delaware adopted a new constitution which provided that federal representatives “shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner.”¹⁷¹ And in 1795, Georgia amended its constitution of 1789 to provide that “[a]ll elections to be made by the general assembly, shall be by joint ballot of the senate and house of representatives.”¹⁷² Georgia retained and further refined that change, which would appear to encompass the election of Senators and electors, in the Georgia Constitution of 1798.¹⁷³ In addition, in 1799, Kentucky scrapped its first constitution after only seven years and included in the new version a clause mandating that in all elections, whether by the people or the legislature, “the votes shall be personally and publicly given *viva voce*.”¹⁷⁴ Yet, no state constitution explicitly regulated the appointment of electors until 1810, when Maryland amended its constitution of 1776 to guarantee every free white male citizen of the state a right to vote for not only state elected officials, but also Representatives and electors.¹⁷⁵

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

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

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

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

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

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

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

Id.

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

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

[E]very free white male citizen . . . shall have a right of suffrage . . . in the election . . . for electors of the President and Vice-President of the United States,

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

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

The historical record reveals that the founding generation did indeed think that state constitutions restrained this legislative activity. First, they considered state constitutional veto mechanisms applicable to both Article I, Section 4 and Article II legislation. Second, they considered state constitutions relevant to the question of whether they were to appoint electors and Senators in joint session or concurrently.

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

(i) Massachusetts

The Massachusetts Constitution of 1780 provided that “[n]o bill or resolve” would become law until it had been “laid before the governor for his revisal.”¹⁷⁸ If the governor “approve[d]” of the bill or resolution, he was to sign it, but if he had “any objection” to its passage, he was to return it to the legislature “together with his objec-

for Representatives of this State in the Congress of the United States, for delegates to the general assembly of this State, electors of the senate, and sheriffs.

Id.

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

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

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

tions thereto.”¹⁷⁹ If two-thirds of both houses of the legislature nevertheless passed the vetoed bill, it would become law.¹⁸⁰

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

(ii) *New York*

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

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

179. *Id.*

180. *Id.*

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

182. *Id.* at 507.

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

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

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

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

187. *Id.*

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

Governor Clinton signed the bill and returned it to the Senate, whereupon it became law.¹⁸⁹

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

b. Joint or Concurrent Legislative Appointment—A Matter of State Constitutional Law.—In 1788, state legislatures faced with the task of choosing Senators and appointing electors had to decide whether they were to do so in joint session or concurrently. The lower, more numerous, house of the legislature would naturally want to choose in joint session, while the upper house would want to maintain the negative over the lower house guaranteed by concurrent selection. When debate over this question arose in state legislatures during the first federal elections, as it did in Massachusetts and New York,¹⁹⁴ both sides of the debate framed their arguments in terms of state constitutional commands. Few suggested that the state constitutions could not, as a matter of federal constitutional law, determine the question.

189. *See id.*

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

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

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

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

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

(i) *Massachusetts*

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

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

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

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

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

198. *Id.*

199. *Id.*

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

201. *Id.* at 497-98.

202. *Id.* at 498.

(ii) New York

In New York, the natural inclinations of the upper and lower houses with respect to this question were exacerbated by a sharp partisan division between the Assembly and the Senate: anti-Federalists dominated the Assembly while Federalists controlled the Senate.²⁰³ As a result, the ultimately fruitless debate over legislation to direct the manner of appointing Senators and electors was particularly spirited. Throughout, the legislators resorted frequently to both state and federal constitutional principles. Some contended that appointment must be concurrent because the state constitution required each house to have a negative on the other house.²⁰⁴ Others in that camp insisted that the Federal Constitution's use of the word "legislature" required the separate action of both houses.²⁰⁵ On the other hand, the opposition argued that Article XXX of the state constitution,²⁰⁶ which had existed prior to the Founding and called for appointment of delegates to Congress by joint ballot, continued to regulate the state's appointments to Congress under the new Constitution.²⁰⁷ Those in favor of concur-

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

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

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

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

Id.

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

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

Id.

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

Every legislature then are left to exercise their discretion on this head subject to such rules and restrictions as their own constitutions provide, if any exists. The case then with respect to the legislature of New-York, stands thus: The

rent election responded that Article XXX was a mere relic which did not apply to the new offices created by the Constitution.²⁰⁸ With few exceptions,²⁰⁹ however, they did not deny that if the state constitution did speak to the new offices, it would apply.²¹⁰

III. HISTORY OF THE DOCTRINE AFTER THE FOUNDING

The Article II independent legislature doctrine, then, does not arise from an original understanding. Instead, the super-strong (*Bush II*) version of the doctrine—which protects state legislatures from state courts—appeared for the first time in the *Bush II* concurrence,²¹¹ and the merely strong (*Bush I*) version of the doctrine—which protects state legislatures from state constitutions—originated in an obscure set of Civil War voting rights cases. The strong version's origins in the Civil War and its subsequent history reveal that,

new constitution commits to their discretion the manner in which they shall exercise the right of electing senators, but their own constitution directs how this discretion shall be used, in the article providing for the election of delegates.

Id.

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

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

[T]he legislature must by law prescribe the mode or manner in which the legislative body is to elect senators for the Congress—that mode is a matter of pure discretion, independent of any rule in the state constitution, and ought to be so regulated that each branch shall have its due weight, that the will of the people may be respected, who have conferred equal powers on the one and the other.

Id.

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

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

Id.

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

until now, it has served almost exclusively as a tool to expand the franchise,²¹² and also that no special competence of Article II state legislatures has ever been identified which would provide a principled, functional justification for legislative independence from state constitutions (or courts).

A. *The Civil War Soldier-Voting Cases*

1. *The Problem of Soldier-Voting*

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

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

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

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

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

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

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

asked to decide whether these “soldier-voting” statutes were valid exercises of legislative authority.

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

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

history has furnished no better example illustrating the capacity of the people for self government [than] citizen soldiers pausing amid the horrors of war to discharge their duties as the primary legislators of the republic, and to guard by an intelligent use of their ballots . . . the welfare of their country, and those principles of civil

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

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

Id.

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

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

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

liberty for which they are ready at any moment to lay down their lives upon the field of battle.²²⁰

2. *Hints of the Doctrine: Vermont and New Hampshire*

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

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

A few months later, the New Hampshire Supreme Court cited the Vermont court's analysis when it upheld New Hampshire's latest soldier-voting law, which also vested absentee soldiers with the right to vote for Representatives and electors.²³⁰ The court framed the question as whether "under the Constitution of the United States *and* the Constitution of this State," the legislature had the power to authorize absentee soldier voting.²³¹ As for the applicability of the

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

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

222. *Id.* at 666.

223. *Id.* at 676.

224. *Id.* at 676-78.

225. *Id.* at 676.

226. *Id.*

227. *Id.* at 678.

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

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

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

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

state constitution, the court concluded that the right of suffrage in New Hampshire was left to the control of the legislature, “except so far as the legislative authority over the subject has been restrained by the Constitution of this State, or that of the United States.”²³² That conclusion, of course, was just a restatement of the question, but it seems to have assumed the applicability of the state constitution.

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

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

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

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

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

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

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

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

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

Civil War exigencies pushed New Hampshire's Supreme Judicial Court toward recognition of an independent legislature doctrine, but no one clearly enunciated that doctrine until the United States House of Representatives took up the disputed election case of *Baldwin v. Trowbridge* in 1865.²³⁹ In 1864, Rowland E. Trowbridge faced Augustus C. Baldwin in an election for Representative of Michigan's fifth congressional district.²⁴⁰ Trowbridge won by only 710 votes, but that margin of victory depended on 1,538 votes which were cast outside of the state by residents serving in the Union Army.²⁴¹ Without the soldier vote, which Trowbridge won more than 3 to 1, Baldwin would have won the election by 125 votes.²⁴² Baldwin contested Trowbridge's victory on the ground that the votes cast by absent soldiers pursuant to Michigan's 1864 soldier-voting law had violated the Michigan Constitution's requirement that all voters give their votes "in the various townships or wards in which they resided."²⁴³

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

(a) *The Majority Report.*—The majority report of the Committee of Elections is the first and most comprehensive defense of the independent legislature doctrine ever made.²⁴⁹ Its constitutional interpre-

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

240. *Id.* at 1.

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

242. *See id.*

243. *Id.* at 3.

244. U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business.").

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

246. *Id.* at 3.

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

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

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

tation, however, borders on the incoherent and is ultimately unpersuasive.

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

Under the Constitution, the report argued, "the power [to prescribe the times, places, and manner of elections for Representatives] is conferred upon the *legislature*."²⁵³ The word "legislature," according to the report, means "the legislature *eo nomine*,"²⁵⁴ as known in the political history of the country," not "the legislative power of the State."²⁵⁵ The legislative power of the state "would include a convention authorized to prescribe fundamental law."²⁵⁶ The Framers, however, were aware of the difference between "organic conventions" and "legislatures."²⁵⁷ Indeed, the Constitution uses the two terms "to denote different legislative bodies, and in such contrast as to clearly indicate that ["legislature"] is employed in its historic rather than in its normal sense."²⁵⁸ Thus, the report concluded, if the Framers had "intended to confer [Article I, Section 4] power upon State organic conventions, [they] would have chosen some word less liable to misconstruction [than 'legislature']."²⁵⁹

This portion of the majority report recognized that, at the time of the Founding, every state had legislatures "created or restrained by some fundamental law, in the shape of charters or constitutions."²⁶⁰ Yet, it never explained why the Framers would not have considered the term "legislature" in this "normal" sense, as opposed to its "historic" sense. Instead, it fell back on *ipse dixit* and the bizarre inter-

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

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

252. *Id.*

253. *Id.* (emphasis in original).

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

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

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

textual distinction between the word “legislature” and the word “convention.” The distinction is bizarre because it is not at all inconsistent to recognize it and still think of legislatures as creatures of their constitutions, even if the constitutions were made by conventions; and thinking that would not, as the report argued, require equating “conventions” with “legislatures” in every constitutional clause which uses the term “legislature.”²⁶¹

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

Stated directly, the majority report held in this passage that the Federal Constitution empowered the Michigan legislature to super-

261. Most ridiculously, the report notes that Article I, Section 2 of the Constitution provides that electors for Representatives “shall have the qualifications requisite for the most *numerous branch of the State legislature*.” Then, it asks, “[d]id anybody ever hear of a constitutional convention, in the history of this country, composed of two houses?” *Id.* Similarly, the report argues that it would be absurd to think that a “constitutional convention” could elect a Senator under Article I, Section 3, appoint electors under Article II, consent to sale of land to the United States under Article I, Section 8, or apply to Congress for protection against domestic violence under Article IV, Section 4. *Id.* at 2-3.

262. *Id.* at 3.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *See id.*

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

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

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

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

Moreover, history had taught that legislatures were not independent. “[F]rom the adoption of the Federal Constitution until this

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

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 2-3.

274. *Id.* at 3.

275. *Id.*

276. *Id.*

time,” the report stated, “it was never before contended . . . that [Article I, Section 4] conferred upon [a state legislature] power to act utterly independent of, and in utter disregard of, the State constitution.”²⁷⁷ State constitutions had fixed limitations upon the Article I, Section 4 actions of their legislatures.²⁷⁸ According to the report, “in every instance” where a conflict arose between such limitations and an act of the legislature, “the constitution has, by courts and legislative bodies, been sustained, and the acts of the legislature . . . held to be null and void.”²⁷⁹ Such a “long and undisturbed construction of [the] power to fix these limitations,” the report concluded, should not be disturbed “at this late day.”²⁸⁰

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

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

The Committee of Election’s report in the *Shiel* case held that the state constitution’s June date did indeed apply to congressional elec-

277. *Id.*

278. *See id.*

279. *Id.*

280. *Id.* at 3-4.

281. *See id.* at 4.

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

283. *Id.* at 1.

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

285. *Id.* at 1, 3.

286. *Id.* at 1.

287. *Id.*

288. *Id.*

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

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

After reviving history and precedent, Representative Marshall's minority report in *Baldwin* concluded that the language of Article I, Section 4 must mean that "the time, place and manner of holding elections for representatives shall be prescribed in each State by the legislature thereof, such legislature acting in subordination and in

289. *Id.* at 1-2.

290. *Id.*

291. *Id.* at 2-3.

292. *Id.* (emphasis added).

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

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

295. *Id.*

296. See *id.*

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

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

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

conformity to that organic law to which it owes its own existence.”³⁰⁰ The independent legislature doctrine advanced by the majority report was entirely novel, and Marshall called upon the House “to pause long before they establish a precedent that will operate as an invitation to the State legislatures to disregard those wholesome limitations which the people have attempted to place around the action of their own servants.”³⁰¹

B. McPherson v. Blacker and Senator Morton’s 1874 Report

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

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

The Court rejected this argument and upheld the district system.³⁰⁷ It ruled that the Constitution “leaves it to the legislature exclusively to define the method” of appointing electors.³⁰⁸ The fact that every state had, over time, adopted election by general ticket did not

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

301. *Id.*

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

303. 146 U.S. 1 (1892).

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

305. *See id.* at 24.

306. *See id.* at 24-25.

307. *Id.* at 36.

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

mean that the Michigan Legislature had lost its constitutional power to appoint in a different manner.³⁰⁹

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

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

The second passage of dicta in *McPherson* directly supports a strong version of the doctrine but is of little value as precedent. After the Court demonstrated that state legislatures had always appointed electors in any manner they saw fit, without regard to national uniformity or past practice, it noted that many constitutional amendments had been proposed—and rejected—in the pursuit of uniform-

309. *Id.* at 36.

310. *Id.*

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

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

313. *Id.*

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

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

Id. (alteration in original).

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

ity.³¹⁶ As an example, the Court quoted extensively from an 1874 Senate Report in support of one such proposal.³¹⁷ Language in the report reinforced the Court's holding that Article II does not require state legislatures to direct any one particular manner of elector appointment.³¹⁸

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

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

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

When the excerpted language of the report is considered in its original historical context, moreover, the foundation that it provides for the doctrine appears even more dubious. Indiana Senator Oliver P. Morton submitted Senate Report 395 in support of his proposal to amend the Constitution to require a uniform system of popular election of the President.³²¹ In the report, Morton, much like the House of Representatives in *Baldwin*,³²² sought to demonstrate that state legislatures enjoyed immunity from state constitutions, but for a com-

316. See *id.* at 33-34.

317. *Id.* at 34-35.

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

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

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

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

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

pletely different reason. Whereas the House had affirmed that immunity to extend the franchise to soldiers, Morton affirmed it, not because of its merits but rather because of its obvious demerits. The specter of independent Article II legislatures demonstrated the need for constitutional reform of the Electoral College.

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

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

324. *Id.*

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

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

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

328. *Id.* at 9.

329. *Id.*

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

election of electors by the people and take such election into their own hands.”³³¹ This potential for the system to “[set] at defiance the popular will” demonstrated “the necessity for a uniform constitutional rule.”³³²

Morton’s forceful but overstated forensics in support of a failed³³³ amendment, while perhaps prescient,³³⁴ should not be taken as a persuasive source of constitutional principles³³⁵ or even as a reflection of contemporaneous sentiment. The doctrine had by no means become widely accepted at the time of Morton’s report. One year before, in 1873, Pennsylvania had adopted a new constitution which purported to regulate the procedure for resolving contested elections of electors.³³⁶ Two years after, in 1876, the state of Colorado entered the union with a constitution which required its General Assembly to directly appoint electors in the 1876 presidential election.³³⁷ The constitution further required that, after the 1876 election, the General Assembly “shall provide that . . . the electors of the electoral college shall be chosen by direct vote of the people.”³³⁸

C. *Judicial Rejection of the Doctrine*

During the first decades of the twentieth century, and in spite of the *McPherson* dicta,³³⁹ courts faced with more palatable legal out-

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

The independent legislature doctrine did not fully reemerge until 1944 when Kentucky's soldiers, overseas fighting the Axis, found themselves disfranchised by their state's constitution.³⁴⁵ As had courts during the Civil War, the Kentucky Supreme Court in *Commonwealth ex rel. Dummit v. O'Connell* felt compelled to come to the "right" result, as it telegraphed to the public in the opening paragraph of its opinion:

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

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

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

Second, *State ex rel. Schrader v. Polley*³⁴⁹ and the Maine case concerning female suffrage³⁵⁰ had required legislatures, pursuant to state constitutions, to submit "manner" regulations to referen-

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

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

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

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

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

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

dum votes. This precedent did not stand in the way of recognizing the independent legislature doctrine, the *O'Connell* court explained, because referendums had been recognized "as part of the legislative authority of the State" referred to by the word "legislature" in the Federal Constitution.³⁵¹

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

For support, the *O'Connell* court relied exclusively on an American Law Reports annotation describing the history of soldier-voting laws.³⁵⁴ The annotation itself cites only the majority report from the *Baldwin* case³⁵⁵ (which clearly supports the independent legislature doctrine), and the New Hampshire³⁵⁶ and Vermont³⁵⁷ soldier-voting cases (which only tenuously support the doctrine, if at all).³⁵⁸ Thus, the court admitted that it possessed "no certainty" that its conclusions about the independence of the Kentucky Legislature were "correct."³⁵⁹ Nevertheless, given its aversion to declaring legislative acts unconstitutional and the "sacredness . . . of the right of all adult Americans" to vote, the court upheld the Kentucky Legislature's otherwise unconstitutional sol-

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

352. *Id.*

353. *Id.*

354. *See id.* (quoting Annotation, *Election: Validity, Construction, and Effect of Absentee Voters Law*, 14 A.L.R. 1256, 1257 (1921)).

355. H.R. REP. NO. 39-13 (1866).

356. Opinion of the Justices, 45 N.H. 595 (1864), available at 1864 WL 1585.

357. *In re Opinion of the Judges*, 37 Vt. 665 (1864).

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

359. *Id.* at 696.

dier-voting law as a proper exercise of federal constitutional power.³⁶⁰

IV. CONCLUSION

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

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

360. *Id.* In 1962, a strikingly similar democratic sentiment led James C. Kirby, Jr., the Chief Counsel to the Senate Judiciary Subcommittee on Constitutional Amendments, to argue that Article II legislatures can ignore substantive state constitutional limitations. See Kirby, *supra* note 8, at 500-01 (arguing that state legislatures can deal with the problem of "outmoded residence qualifications" that disfranchise "[m]illions of mobile American voters" by simple legislation rather than the "generally cumbersome procedure of constitutional amendment"); see also *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down durational residency requirements). In defense of the super-strong independent legislature doctrine, Richard Posner cites Kirby's article as support for the proposition that while "Article II does not regulate the process by which state legislation is enacted and validated, any more than it precludes interpretation," it does regulate the actions of the state judiciary once the elector appointment law "is duly enacted, upheld, and interpreted (so far as interpretation is necessary to fill gaps and dispel ambiguities)." POSNER, *supra* note 7, at 111 n.39. Kirby's article does not, in fact, support that proposition. Kirby simply adopts the strange distinction made by the Kentucky court in *O'Connell*, a decision which Kirby describes as "especially well-reasoned": "a legislature must function 'in the method prescribed by the State Constitution,' but [once] the legislature functions in the prescribed manner, 'the scope of its enactment' is not also limited." Kirby, *supra* note 8, at 504 (citing *O'Connell*, 181 S.W.2d at 694).

361. *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

the Federal Constitution but rather as subordinate instruments of state constitutions.

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

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

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

363. *McPherson v. Blacker*, 146 U.S. 1, 7 (1892).

364. *O'Connell*, 181 S.W.2d at 692.

365. See generally *id.*; H.R. REP. NO. 39-14.

366. As Justice Scalia recently remarked about the propriety of formally amending the Constitution with the Nineteenth Amendment, "[w]hy let five out of nine lawyers decide when the time has come to give women the [right to] vote?" Asseo, *supra* note 65; see also BORK, *supra* note 63, at 167 (rejecting the notion that the Constitution "keeps sprouting new heads in accordance with current intellectual and moral fashion").

367. See POSNER, *supra* note 7, at 154 ("We need not break our shovels trying to excavate the original intent behind the choice of the word 'Legislature' in the 'Manner directed' clause. One thing courts do all the time is find contemporary functions for old legal categories, pouring new legal wine into old wineskins.").

ciple dictates prohibition of Florida's constitutional suffrage guarantees or the recounting of votes?