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## Legislative Delegations and the Elections Clause

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# LEGISLATIVE DELEGATIONS AND THE ELECTIONS CLAUSE

DEREK T. MULLER\*

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## I. INTRODUCTION

*Arizona State Legislature v. Arizona Independent Redistricting Commission* might be viewed as a dispute about the control over redistricting, with a heavy emphasis on the perceived problems of and solutions to partisan gerrymandering and incumbent entrenchment.<sup>1</sup> Or the case might be about the power of the people to wrest control from an unresponsive legislature and pass their own laws via ballot initiative.<sup>2</sup> But that is not really this case. This Article notes

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\* Associate Professor of Law, Pepperdine University School of Law. I received valuable support for this Article from my colleagues here in Malibu. I offer my sincere thanks to Michael Helfand, Michael Morley, Dan Tokaji, Franita Tolson, and participants at the Florida State University Law Review symposium for their helpful comments. Special thanks to Derek O'Reilly-Jones for his excellent legal research.

1. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (“This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering . . .”).

2. *Id.* at 2675 (“In this light, it would be perverse to interpret the term ‘Legislature’ in the Elections Clause so as to exclude lawmaking by the people . . . .”); cf. Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012) (describing the breadth of state control over presidential elections).

that it is something more nuanced. This case is less about the ballot initiative or about partisan gerrymandering, and more about a delegation of legislative power from the legislature to an unelected agency.

The case turned almost exclusively on the definition of the word “Legislature” as it appears in the Constitution, which has little precedent in Supreme Court opinions except for a couple of century-old cases of tangential relevance.<sup>3</sup> But there is also a rich history of interpreting and constructing the Elections Clause—but it has occurred in Congress and in the states. These historical election disputes were all but absent in the Supreme Court, effectively ignored.

This Article examines the dispute over Arizona’s independent redistricting commission largely through a critique of the delegation of power from the legislature to an unelected entity. It then examines the historical records from two sources. First, it scrutinizes pre-Seventeenth Amendment discussions about the power to delegate legislative power to the people. Second, it considers congressional adjudications about election disputes concerning the proper role of the state legislature and delegations of the lawmaking power to other entities. These two examinations conclude that the historical understanding of the power of the “Legislature” precluded a delegation of its power to another entity. It concludes with some concerns about several Justices’ conclusions in the case, along with parting thoughts about the impact of these historical records in future litigation.

## II. BACKGROUND

Arizonans enacted Proposition 106 in 2000, which transferred the power to draw legislative districts from the Arizona legislature to an independent redistricting commission.<sup>4</sup> The Arizona legislature sued, challenging the commission’s power to redraw congressional districts. That is because it cited Article I, Section 4, Clause 1 of the United States Constitution, often known as the “Elections Clause.” It provides “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”<sup>5</sup>

The Arizona state legislature argued that the ballot initiative transferred power from the legislature to the commission.<sup>6</sup> Because

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3. See cases cited *infra* note 13.

4. ARIZ. CONST. art. IV, pt. 2, § 1.

5. U.S. CONST. art. I, § 4, cl. 1.

6. Brief for Appellant at 12-14, 23-53, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015) (No. 13-1314).

the legislature must retain at least some power to draw congressional districts, it claimed that transference was unconstitutional. And because the independent redistricting commission is not the “Legislature,” the law should fall.

An additional point about what was at issue in this case requires clarification. The issue was not specifically whether a ballot initiative could create a redistricting commission. Indeed, at oral argument, Paul Clement, representing the legislature, noted that the issue would be the same whether the transfer of power happened by an executive fiat.<sup>7</sup> Instead, the problem was that the newly created commission permanently and totally divested the legislature of any power to draw districts.<sup>8</sup> Mr. Clement further suggested that a permanent delegation of authority to this commission, even if sanctioned by the state legislature, might also be problematic.<sup>9</sup> That total divestment is the problem—not necessarily the means by which the divestment took place.

The Arizona Constitution assigns the independent redistricting commission its responsibilities in the “legislative responsibilities” section.<sup>10</sup> There, it characterizes the commission as exercising “legislative power” when considering a challenge to the removal of a member of the commission.<sup>11</sup> Thus, vesting the redistricting commission in an independent commission delegates the legislature’s power.

The briefs in the case focused on founding-era dictionaries<sup>12</sup> and a couple of early twentieth century Supreme Court cases.<sup>13</sup> But many

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7. Transcript of Oral Argument at 11, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015) (No. 13-1314).

8. *Id.* at 12.

9. *Id.* at 14.

10. ARIZ. CONST. art. IV, pt. 2, § 1.

11. *Id.*

12. See, e.g., Brief for Appellant, *supra* note 6, at 39 (first citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); then citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792)); Brief for Appellees *Ariz. Indep. Redistricting Comm’n*, et al. at 39-40, *Ariz. State Legislature*, 135 S. Ct. at 2652 (No. 13-1314) (first citing JOHNSON, *supra*; then citing NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 174 (1806) [hereinafter WEBSTER, COMPENDIOUS DICTIONARY]); Brief of the Brennan Ctr. for Justice at N.Y.U. Sch. of Law as Amicus Curiae in Support of Appellees at 5, *Ariz. State Legislature*, 135 S. Ct. at 2652 (No. 13-1314) (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755) [hereinafter JOHNSON, DICTIONARY 1st ed.]; then citing NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (14th ed. 1751); and then citing THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (12th ed. 1760)); Brief of Former Cal. Governors George Deukmejian, et al. as Amici Curiae in Support of Appellees at 4, 8, *Ariz. State Legislature*, 135 S. Ct. at 2652 (No. 13-1314) (citing JOHNSON, DICTIONARY 1st ed., *supra*; then citing THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797); and then citing NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL DICTIONARY (20th ed. 1763); and finally citing WEBSTER, COMPENDIOUS DICTIONARY, *supra*).

other sources of authority have grappled extensively with this definition of the word “Legislature”—evidenced by the litigation and debates surrounding pre-Seventeenth Amendment reforms regarding the election of senators and in the quasi-judicial findings of Congress itself in disputes arising under the Elections Clause.

### III. LEGISLATIVE DELEGATIONS CONCERNING THE ELECTION OF SENATORS

Article I, Section 3 of the Constitution provides, “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one vote.”<sup>14</sup> Section 4 continues, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”<sup>15</sup> The phrase “by the Legislature thereof” appears in consecutive sections of the Constitution. The difference is in the verbs “chosen” and “prescribed.”<sup>16</sup>

Admittedly, an analogy comparing the two rests on an assumption that the “Legislature” for purposes of section 3 is the same as the “Legislature” for purposes of section 4. The Court has not always treated them the same,<sup>17</sup> and neither has Congress.<sup>18</sup> But some analysis about the meaning of the word “Legislature” in section 3 prior to the Seventeenth Amendment still might prove instructive.

At the founding, the Constitution originally dictated that the “Legislature [of the State]” was responsible for electing that state’s senators.<sup>19</sup> A compromise at the constitutional convention ensured that

13. Brief for Appellant, *supra* note 6, at 9, 13 (citing *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); then citing *Smiley v. Holm*, 285 U.S. 355 (1932)); Brief for Appellees, *supra* note 12, at 40-41 (citing *Smiley*, 285 U.S. at 365-66; then citing *Hildebrant*, 241 U.S. at 569-70; and then citing *Hawke v. Smith*, 253 U.S. 221, 229-31 (1920)).

14. U.S. CONST. art. I, § 3, cl. 1. (amended 1913).

15. *Id.* art. I, § 4, cl. 1.

16. *Id.*

17. *Smiley*, 285 U.S. at 365-66 (explaining that the term ‘legislature’ has always referred to the same thing, the legislative body that makes the laws of the people, and noting that the use of the term in different relations throughout the federal Constitution only implies that that same body will perform different functions in different situations); see also *Ariz. State Legislature*, 135 U.S. at 2667-68 (explaining state legislatures performed different functions, dependent on the duties required by the different sections of the Constitution).

18. Cf. Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 769 & n.249 (2001) (noting that in 1903, the Senate as a whole firmly rejected a senate report by the Senate Committee on the Judiciary that implied that the two uses of “legislature” should be interpreted identically).

19. U.S. CONST. art. I, § 3, cl. 1. (amended 1913); see also *Focus on the Constitution: Constitutional Crisis of the Civil War Senate*, U.S. SENATE, <http://senate.gov/artandhistory/>

one of the houses of Congress would be held accountable directly to the people, and the other house would be more directly responsive to the state legislature.<sup>20</sup> By the early twentieth century, this measure of election had fallen out of favor with progressives: increased deadlock, spoiled selections, and vacancies led to disapproval.<sup>21</sup> They favored direct election of senators. State legislatures themselves disapproved of the responsibility the Constitution placed upon them—they were very close to calling a constitutional convention<sup>22</sup> before Congress ratified the Seventeenth Amendment and sent it to the states.<sup>23</sup> But why was the Seventeenth Amendment required? If state legislatures wanted to give their power to the people, could they have done so directly? Contemporaneous legal consensus agreed unanimously that state legislatures could not so delegate their power to another entity.<sup>24</sup>

#### A. *Preference Primaries and Ballot Notations*

Oregon first attempted a unilateral effort to provide for the direct election of senators. It held a preferential primary in which the people could vote for their preferred senate candidate.<sup>25</sup> But the primary did not bind the legislature: plurality winners of this election had no

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history/common/briefing/direct\_election\_senators.htm (last visited Apr. 4, 2016) (noting that the onset of the Civil War saw pro-union factions of seceding states electing their own senators).

20. James Madison, Thursday June 7th, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150, 152-56 (Max Farrand ed., 1911) (recording the ten to one dismissal of James Wilson's proposal to consider referring election of senators to the people followed by the ten to zero approval of John Dickenson's motion to appoint election of the Senate to state legislatures); James Madison, Monday June 25, in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 405-08 (recording the nine to two dismissal of the same proposition when Wilson brought it up again in a different context).

21. Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 538-46 (1997) (claiming the three major motivations for the Seventeenth Amendment to be popular concern over corruption in state legislatures, deadlock and delay in the election of senators, and an argument by members of the populist movement that the people could be and should be entrusted with direct election).

22. Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 710 (1999) (stating that twenty-seven of the thirty-one states needed had formally called for a convention, with Arizona and New Mexico expected to do so as soon as their statehoods became official, and with Alabama and Wyoming having submitted resolutions but not yet formally called for a convention).

23. H.R.J. Res. 39, 62d Cong. (1912).

24. See *infra* Sections IV.A-B.

25. ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 76 (1978).

right to the Senate, and their fate still hinged on the state legislature's vote.<sup>26</sup> Popular primary winners could lose, and did lose, the actual election when the state legislature met.<sup>27</sup>

Nevertheless, the Oregon system became a model for many states after its introduction.<sup>28</sup> Similar efforts were underway in other states, and some of these efforts were met with legal challenges. Often, legal scrutiny examined whether the preference primary operated as a delegation of power from the legislature to the people. The North Dakota Supreme Court, for example, when examining the state's statutes that mirrored Oregon's, concluded, "The Legislature still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates, as we have heretofore observed."<sup>29</sup> The fact that the authority to elect senators still resided with the "legislature" mattered.

The Wisconsin Supreme Court also considered the scope of a preference primary. With rhetorical flourish, it emphasized that "the duty of the legislators to meet, consult, and exercise their conscientious judgments" remained with the legislature, but that the primary indicated, "the wishes of the people are entitled to grave consideration."<sup>30</sup> But, as with North Dakota, a primary merely influenced the legislature, something like a petition to the legislature. The ultimate power resided in the Wisconsin legislature, which saved the law.

[I]f it be the object and purpose of this law to shift the burden of, and responsibility for, the election of United States Senators from the Legislature to the electorate; if our legislators are to play the part of automatons and become mere passive instruments by and through whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primaries, as the members of our electoral college confirm the result of a presidential election; if the electors in reality elect United States Senators, instead of the Legislature—then the constitutional scheme has been superseded, and the spirit of the Constitution has been evaded and disregarded.<sup>31</sup>

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26. C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 146 (1995) ("But there was still the irritating possibility that a candidate who had garnered a bare plurality of primary votes in one party would win the Senate seat over a much more popular candidate whose party was not in the legislative majority.").

27. ALLEN H. EATON, *THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON* 94 (1912).

28. GRIMES, *supra* note 25, at 76.

29. *State ex rel. McCue v. Blaisdell*, 118 N.W. 141, 147 (N.D. 1908); *see also id.* ("[I]t is not a delegation of legislative power, as the Legislature, in electing a United States Senator, does not act in a legislative way at all.").

30. *State ex rel. Van Alstine v. Frear*, 125 N.W. 961, 971 (Wis. 1910).

31. *Id.*

An additional initiative sought to strengthen the impact of the Oregon system by giving incentives to legislatures to support the people's choice.

Candidates for the legislature were then "permitted" to include in their platform one of two statements regarding their views on the election of senators. 'Statement #1' assured the voters that a candidate would, regardless of party affiliation, abide by the results of the general election. 'Statement #2' declared the candidate's intention to vote according to his personal discretion, and no doubt to his own political peril.<sup>32</sup>

A similar law was also implemented in Nebraska.<sup>33</sup>

There might be problems with a ballot notation that dictates whether a candidate for office pledges to adhere to some other condition for office—indeed, the Supreme Court expressly struck down similar notations in *Cook v. Gralike*, even as Nebraska relied on its history of senate pledge notations.<sup>34</sup> The goal, of course, was to put weighty political pressure on the legislature. Nevertheless, neither the original Oregon system, nor the addition of a ballot notation, seized away from the legislature the role in electing senators. Instead, both sought to influence the state legislature in the exercise of its function without wholly usurping it.

### B. Pledges

The Oregon system took another step beyond primaries and notations. By 1908, a new law would *require* members of the legislature to take an oath pledging to vote for the senate candidate who received the most votes in the preference primary, making a pledge supporting "Statement #1" compulsory.<sup>35</sup> Commentary at the time concluded, "Doubtless this measure was unconstitutional . . ." <sup>36</sup> Its constitutionality in Oregon was never challenged; but similar efforts in other states are instructive.

A challenge to Wisconsin's primary concluded that no pledge was required in its laws, which avoided any potential problems: "Not a word is said in the act about requiring legislative candidates to pledge themselves to support the nominee of the party. The law in

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32. HOEBEKE, *supra* note 26, at 146.

33. Rossum, *supra* note 22, at 710.

34. *Cook v. Gralike*, 531 U.S. 510, 522-27 (2001); *see also* Brief of Amicus Curiae State of Neb. in Support of Petitioner at 17-20, *Cook*, 531 U.S. at 510 (No. 99-929).

35. EATON, *supra* note 27, at 169 n.22 ("I further state to the people of Oregon as well as to the people of my delegation district that during my term of office I will always vote for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of the Senator in Congress without regard of my individual preference.").

36. *Id.* at 96.

terms imposes no duty upon any member of the Legislature to vote for any person who was a candidate before the primary.<sup>37</sup> In North Dakota, a similar pledge was struck down as an additional qualification for state legislative office. Once the pledge was negated, the primary system could remain in place, because “[t]he legislative member is in no manner obligated or required, except perhaps morally” to vote for any candidate.<sup>38</sup>

Finally, even though no litigation challenged the compulsory Oregon pledge, it remained unenforceable. Consider the Oregon legislature’s senate election in early 1913, well after the full force of the Oregon system was in place and shortly before the ratification of the Seventeenth Amendment. Despite a compulsory pledge purportedly binding all legislators, some legislators still voted for a senate candidate who did not receive the plurality of the preference primary’s votes.<sup>39</sup> Contemporary scholarly commentary generally accepted that any such system could not result in the legislature wholly abdicating its role in electing senators.<sup>40</sup> Indeed, one concern addressed the “delegation” of legislative power “to some commission.”<sup>41</sup> The legislature would continue to exercise its own judgment and final authority in senate elections until the ratification of the Seventeenth Amendment.

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37. State *ex rel.* Van Alstine v. Frear, 125 N.W. 961, 971 (Wis. 1910).

38. State *ex rel.* McCue v. Blaisdell, 118 N.W. 141, 145 (N.D. 1908); *see also id.* (assessing the “assumption that the pledge feature of the law, when considered in connection with the provisions permitting the members of each political party to designate their choice as to senatorial candidates, in effect operates as an election of United States Senators by popular vote, instead of by the Legislature, as the federal Constitution requires. If, therefore, the pledge feature of the statute is eliminated because unconstitutional [sic], much of counsel’s argument ceases to have any force.”); *accord Frear*, 125 N.W. at 971 (“This provision was held to be unconstitutional and void, because it was an attempt to coerce the member of the Legislature to abdicate their right to use their individual judgments in making a selection, but it was also held that such [a] void provision did not affect the remainder of the act.”); *id.* at 972 (“[T]he act creates neither a legal duty nor moral obligation to carry out the verdict at the primary . . . .”) (Marshall, J., concurring).

39. *See* JOURNAL OF THE SENATE OF THE TWENTY-SEVENTH LEGIS. ASSEMB. OF THE STATE OF OR., Reg. Sess., at 117 (1913) (noting that Harry Lane won the plurality of votes in the preference primary and recording a vote in the Oregon Senate of twenty-eight votes for Mr. Lane and two votes for Ben Selling); *id.* at 131 (noting the preference primary results and recording a vote in the Oregon House of fifty-nine votes for Mr. Lane and one vote for Mr. Selling).

40. Note, *Devices for Securing in Substance Direct Election of United States Senators.*, 24 HARV. L. REV. 50, 50-51 (1910); *cf.* Samuel Russell, *The Constitutional Power of State Legislatures to Direct Election of Senators by the Popular Electorate*, 16 VA. L. REG. 818, 820 (1911) (explaining that amending Article I, Section 3 of the Constitution to include “in such manner as the legislature thereof may direct,” consistent with the Presidential Electors Clause, would ensure state discretion in the manner of appointment).

41. Russell, *supra* note 40, at 820 (comparing the legislature submitting senators’ election to a popular vote with an agent submitting a doubtful point to his principal for decision, the precise opposite of delegation).

This trail through the Oregon system suggests that while legislatures increasingly obtained direct guidance from their constituents regarding senate elections, they were never fully “deprived” of their ultimate role in electing senators.<sup>42</sup> They always held the ultimate authority and final say in the process—despite other forces that would increasingly persuade or influence their election process. Notable, too, is the emphasis on the power of the legislature and not on the form of the possible delegation—judicial critiques focused much more on the fact that the legislature may have lost power than the fact that the transfer of power happened by initiative.<sup>43</sup> It also explains why the Seventeenth Amendment was needed to amend the Constitution: neither a popular initiative nor a legislative act could delegate its electoral authority to some other tribunal. The text of the Constitution precluded such a delegation, and amendment was necessary.

#### IV. LEGISLATIVE DELEGATIONS CONCERNING THE ELECTIONS CLAUSE

The Constitution also provides that each house of Congress “shall be the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>44</sup> Courts have established myriad ways of adjudicating congressional elections disputes.<sup>45</sup> But Congress itself also engages in a judicial function when it evaluates who has won an election, and whether that winner is qualified to take a congressional seat.<sup>46</sup> I have

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42. Cf. Vikram David Amar, *Reflections on the Oral Argument in the Arizona Independent Redistricting Commission Case*, JUSTIA.COM (Mar. 13, 2015), <https://verdict.justia.com/2015/03/13/reflections-oral-argument-arizona-independent-redistricting-commission-case> (suggesting that as states adopted plans similar to Oregon’s, legislatures were effectively removed from the process of electing senators).

43. See Russell, *supra* note 40, at 821 (“It is for the United States Senate to construe these provisions of the Constitution, and they would be construed with a view to place no unnecessary restrictions on the right of each state to its equal suffrage in the senate. The Constitution does not forbid the election of United States Senators by the people, but rather commits the matter to legislative discretion.”); see also DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004).

44. U.S. CONST. art. I, § 5, cl. 1.

45. See, e.g., Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 24-29 (2013).

46. See *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929) (“Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers, which are not legislative, but judicial, in character. Among these is the power to judge of the elections, returns, and qualifications of its own members.”). See generally *Powell v. McCormack*, 395 U.S. 486 (1969) (discussing extensively the scope and limits of Congress’s power to adjudicate upon its own members’ qualifications).

written extensively about Congress's role in this regard when it comes to qualifications.<sup>47</sup> But what about elections? Specifically, has Congress ever interpreted what the Elections Clause means?

As an important qualification to the enumerations below, these cases are complicated. They are at times internally inconsistent. They often include findings that are not essential to the decision to seat or deny to seat a member. Sometimes they include findings that are not ultimately adopted by a house of Congress. And the descriptions below are great simplifications, which may lack some of the nuance that the totality of the congressional record might reflect.

### A. *The Independent State Legislature Doctrine*

Congress's power to adjudicate election disputes has been significant—and not just to interpret the winners and losers, but to scrutinize conformity with statutory and constitutional law.<sup>48</sup> In some of those cases, Congress and state courts have interpreted the Elections Clause through the lens of the “independent state legislature doctrine”—the notion that the state legislature's power pursuant to the Clause arises from the United States Constitution and not from any state law.<sup>49</sup> Four congressional adjudications typify examination of this doctrine.

#### 1. *The Case of Farlee Against Runk*

In 1846, Mr. Runk won an election by just 16 votes, but Mr. Farlee argued that it was only because thirty-six students at Princeton illegally voted for Mr. Runk. Of the nineteen depositions, of those not entitled to vote, four had voted for Runk, one for Farlee, and the remaining fourteen declined to testify. An 1844 law promulgated by the legislature forbid college students from voting in New Jersey, but a subsequent constitutional amendment permitted students to vote if they were residents of the state for one year and of the county for five months. If the Princeton students were eligible, or if they were not determinative of the outcome, then Mr. Runk would win; if the prior law trumped the later constitutional amendment, and if the illegal voters were not determinative of the outcome, then Mr. Farlee would

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47. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 581 (2015).

48. See, e.g., Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322, 328-34 (2014).

49. Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 150 (2015) (noting that the House of Representatives interpreted the Elections Clause in 1866 to resolve an election challenge and that the Senate interpreted the Elections Clause in an 1874 report written by its Committee on Privileges and Elections); Smith, *supra* note 18, at 4.

win. By a split vote, 96-96, Mr. Runk retained his seat.<sup>50</sup> In 1846, a state constitutional amendment supplanted the state legislature's prior law—or, the evidence was inconclusive to establish that enough invalid votes existed under the state legislature's law.

### 2. *The Case of Shiel Against Thayer*

Oregon in 1861, George K. Shiel was elected on the day fixed by the state's constitution. A.J. Thayer, however, had been later elected on the day of the presidential election. There was no law dictating that the congressional election was to be held on the day of the presidential election.<sup>51</sup> But a committee report noted that the state constitution "has fixed, beyond the control of the legislature, the time for holding an election for Representative."<sup>52</sup> Mr. Shiel was seated pursuant to the state constitution in the absence of a directive from the state legislature.

### 3. *The Case of Baldwin Against Trowbridge*

In 1864, the Michigan constitution required voters to be residents of the state three months prior to Election Day. To enfranchise soldiers, the Legislature enacted a law authorizing voting even if one had not been a resident for that period. Mr. Trowbridge was permitted to retain his seat, even though he had been elected with the support of soldiers who voted pursuant to the state law rather than the constitutional requirement.<sup>53</sup>

### 4. *The Case of Donnelly Against Washburn*

In 1880, Ignatius Donnelly challenged a seat held by William D. Washburn of Minnesota. One basis for the challenge was the fact that the state legislature required that St. Paul and Minneapolis number their ballots for elections as a mechanism to prevent fraud, and Mr. Washburn was elected under that system. The state courts later found the law unconstitutional because it violated the privilege of secrecy in voting.<sup>54</sup> But in Mr. Washburn's defense, members of the committee noted that the state constitution held no power over the legislature in this instance, because "this right and power is derived

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50. ASHER C. HINDS, 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 813, at 1054-56 (1907); *see also* CONG. GLOBE, 35th Cong., 1st Sess. 2319 (1858).

51. HINDS, *supra* note 50, § 613, at 797.

52. *Id.* § 522, at 654.

53. ASHER C. HINDS, 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 856, at 24-27 (1907).

54. *Id.* § 947, at 238.

exclusively from the Constitution of the United States.”<sup>55</sup> Ultimately, the committee could not reach a conclusion on the matter, and Mr. Washburn retained his seat, effectively elected pursuant to the state legislature’s statute and not the state constitutional provision.

In *Arizona State Legislature*, the Court only addressed two of these cases, *Shiel* and *Baldwin*, and Justices gave the cases differing weight. The majority cited the dicta in *Shiel* for the proposition that the Constitution could control a state law—dicta, because there was no state law to the contrary.<sup>56</sup> Chief Justice Roberts’ dissent cited *Baldwin* for the proposition that a state law could trump the Constitution.<sup>57</sup>

### B. *Additional Views of the Power of the State Legislature Under the Elections Clause*

The “independent state legislature doctrine,” however, is not the only basis for congressional exploration of the scope of the legislature’s power under the Elections Clause. A reading of Congress’s adjudication of disputes arising under the Elections Clause leads to a few potential conclusions.

#### 1. *Executive Power to Fill Vacancies: The Case of John Hoge*

In 1804, the House evaluated whether to seat John Hoge of Pennsylvania. A congressman resigned, and the governor issued a writ of election. Hoge won that election. Some members of the House argued that the election was not valid because the rules for the election had not been prescribed by the “Legislature,” but by the executive. Nevertheless, the House seated him, because pursuant to Article I, Section 2, Clause 4, the “Executive Authority” of a state “shall issue Writs of Election to fill” vacancies, and, absent a rule from the Legislature articulating the time, place, and manner of such elections, the executive has the power to articulate such rules.<sup>58</sup> The executive could act in the absence of the state legislature on account of independent authorization under the Constitution.

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55. *Id.* § 947, at 240.

56. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015).

57. *Id.* at 2685-86 (Roberts, C.J., dissenting).

58. *See generally* 14 ANNALS OF CONG. 837-58 (1804); *id.* at 841-44 (showing the explanation of Mr. Findley, chairman of the Committee on Elections, and his finding that “[t]he Governor had acted in obedience to the express words of the Constitution, and violated no law of the State”).

## 2. *Constitutional Conventions*

### a. *The Cases of Edouard Gilbert and George W. Wright*

A California convention promulgated the state constitution, then placed it before the people to ratify it. At the same election, the people elected two representatives to the House, pursuant to the soon-to-be-ratified Constitution. The elections of these two were challenged in 1850—after all, there was no Legislature of California, much less a constitution, and there may have been an invalid election as a result. But the House looked at its historic practice regarding newly admitted states. Most states had sent representatives without a law passed by the legislature designating the time, place, and manner of elections.<sup>59</sup> And while in most cases the constitution of the state had been adopted prior to the election (even though the election took place without an act of the legislature), in at least one other state did the two events occur simultaneously.<sup>60</sup> The House ultimately seated the two representatives pursuant to the state constitution in the absence of a legislative directive.<sup>61</sup>

### b. *The Case of the West Virginia Members of the Forty-Third Congress*

West Virginia held a constitutional convention in early 1872. It authorized a ratification vote, and elections for members of the legislature, on the fourth Thursday of August. But an 1869 law enacted by the legislature required congressional elections to take place on the fourth Thursday of October. Congressional elections were held on both dates, and the dueling slates were presented to Congress. The House ultimately concluded that the convention did have the power to prescribe the time for elections, citing precedent in Michigan and Iowa. And the House concluded that the election could take place on the very day that the rules purporting to establish the time for

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59. CONG. GLOBE, 31st Cong., 1st Sess. 1790 (1850) (“Now, I have examined all the precedents that I have been able to find since this question arose, and so far as that examination has extended, I find that every one of the new States, except Missouri and Texas, sent Representatives here, and they were admitted to seats on this floor, without any law having been previously passed by the Legislature of such State designating the time, place, and manner of holding the elections.”); *id.* (“This Government has been going on for half a century, admitting new States upon the very same principle, so far as the admission of Representatives on this floor is concerned, upon which these Representatives from California claim to be admitted . . .”).

60. *Id.* (“But there is another objection taken to this, and it is, that in most of these cases the constitution had been adopted before the members of Congress were elected. Granted. But here is a case before us to meet that objection. Here is the constitution of Michigan . . . . And was the admission of the members thus elected objected to? Not at all. But there was, I suppose, at that time, in this body, no astute constitutional lawyer distinguished as the gentleman from North Carolina, to raise such an objection.”).

61. *Id.* at 1779, 1795.

elections were ratified by the people.<sup>62</sup> It ultimately upheld the election held pursuant to the convention in the absence of a law from the state legislature.<sup>63</sup>

*c. The Cases of James B. Belford and Thomas M. Patterson*

A similar episode took place in Colorado in 1876. Despite the strong protests to the contrary, such as claims that “th[e] grant to the convention is void because [it is] forbidden by the Constitution,”<sup>64</sup> and “[t]he Constitution gave Congress the right to do it itself, not to authorize some other tribunal,” the members of the House concluded that the elections pursuant to rules promulgated by the convention were proper.<sup>65</sup>

*3. Delegations*

*a. The Case of John P. Stockton*

The New Jersey Legislature had enacted a law authorizing a joint session of the legislature to elect senators to Congress.<sup>66</sup> The joint meeting adopted its own rules, including rules dictating that the recipient of a majority of the votes would be elected as senator.<sup>67</sup> On March 15, 1865, the joint meeting adopted a rule by a vote of forty-one to forty that the plurality winner would win the election.<sup>68</sup> John P. Stockton then received forty votes and was elected by plurality vote.<sup>69</sup>

A dispute arose over whether this mode of election was valid. The New Jersey Legislature had enacted a law indicating that senators “shall be appointed by the Senate and General Assembly of this State in joint meeting assembled.”<sup>70</sup> Congress apparently agreed that the legislature could elect a senator pursuant to Article I, Section 3 while sitting in a joint session.<sup>71</sup> Members of the Senate, however, disputed whether the joint meeting could promulgate a rule authorizing election by plurality vote. “Appointed,” it was argued, was a term of art in New Jersey that included a vote by a majority; or, absent a

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62. See generally HINDS, *supra* note 50, § 522, at 649-60, for exhaustive details.

63. See *id.* at 660 (finding that two candidates were “duly elected” by virtue of the August election).

64. 6 CONG. REC. 154 (1877).

65. See generally HINDS, *supra* note 50, §§ 523-524, at 660-67, for exhaustive details.

66. CONG. GLOBE, 39th Cong., 1st Sess. 1565-66 (1866).

67. *Id.* at 1564.

68. *Id.*

69. *Id.*

70. *Id.* at 1565.

71. *Id.*

directive from the legislature, a majority vote was necessary.<sup>72</sup> While the joint session may have had the authority to promulgate its own rules, it did not have the authority to alter preexisting rules—"it cannot undertake to change the parliamentary law or the common law, because that is a matter that only the Legislature can do."<sup>73</sup>

Further debate arose over how the state defines its own "legislature." Mr. Stockton himself pointed out that the New Jersey Constitution "declares it a Legislature when sitting separately" and "declares it to be a Legislature when in joint meeting assembled."<sup>74</sup> It became a philosophical point as to whether the "legislature" might also include the two houses in joint meeting.<sup>75</sup>

But in the end, the validity of the election turned on only one of two conclusions: that the joint convention was simply the legislature arranged in a different form; or, that the joint convention's parliamentary rule was not a "manner" "prescribed" pursuant to the Elections Clause.

As to the matter of form, it seemed straightforward to conclude the legislature meeting in joint convention acted in the capacity of the legislature, "for they could not give the authority to anybody else."<sup>76</sup> But form was not the sole issue; function mattered as well. The legislature for "choosing" was very different than the legislature for "prescribing," and while the legislature in joint assembly might well elect, it could only do so because this configuration did not impair the "choosing" function.<sup>77</sup> For example, it did not prevent the legislature from electing "without the participation of the Governor."<sup>78</sup> Accordingly, a joint convention could elect a senator because the legislature had merely arranged itself into a different form and not delegated its authority to another body.<sup>79</sup>

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72. *Id.* ("And the word appointed is one used in the ancient constitution of New Jersey . . . . Under the old constitution it meant *election* by a majority of all votes. We submit that such is its meaning now."); *id.* at 1566 (statement of Mr. Clark) ("[T]he Legislature of New Jersey being silent on that subject, no competent authority having prescribed the rule, it was necessary that there should be a majority of the votes of that joint convention to entitle the Senator from New Jersey to hold his seat . . . .").

73. *Id.* at 1568 (statement of Mr. Fessenden).

74. *Id.* (statement of Mr. Stockton).

75. *Id.* at 1568-69; *see also id.* at 1571 (statement of Mr. Johnson) ("[T]here is nothing in the Constitution of the United States which prescribes to the States the manner in which they shall elect their Legislature, or the powers which they shall devolve upon the Legislatures so chosen.").

76. *Id.* at 1571 (statement of Mr. Johnson).

77. *Id.* at 1590.

78. *Id.*; *see also* 3 JOSEPH STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES § 703 (1991).

79. CONG. GLOBE, 39th Cong., 1st Sess. 1599 (1866).

But exercising the lawmaking function was slightly different. “The Legislature referred to in the Constitution is that tribunal in which is vested the law-making power.”<sup>80</sup> The joint convention lacked the same power as the legislature, because it could not enact its own laws.

[I]f there had been a law upon the statute-book requiring a majority this convention could not have elected by a plurality, then I say that that convention could not make such a rule. If it could not repeal a law of the State, how has it this whole subject under its control and the right to say by what number of votes a man shall be appointed Senator? If they could say that he could be appointed by a plurality they might just as well say that he might be selected by lot, or by a committee appointed who should designate a name and that individual be declared elected.<sup>81</sup>

Because the legislature had not enacted a law authorizing election by plurality vote, the joint convention could not do so itself.<sup>82</sup>

A fallback claim argued the joint convention was not prescribing the manner of election in a lawmaking capacity.<sup>83</sup> If election by plurality vote were a kind of parliamentary rule that fell outside of the typical formal lawmaking function, then the joint convention could promulgate it without usurping the function of the legislature.<sup>84</sup>

Neither argument carried the day. And, with ambiguity, the Senate omitted the actual reasoning for determining that Stockton was not entitled to his seat from their exclusion resolution.<sup>85</sup>

#### *b. The Case of Sessinghaus v. Frost*

Missouri had no statewide voter registration law in place in 1880 but had one in place for certain cities. St. Louis did not qualify as one

80. *Id.* at 1590.

81. *Id.* at 1595 (statement of Mr. Cragin); *see also id.* at 1601 (statement of Mr. Sumner) (“This power is to be exercised by the ‘Legislature,’ which may *prescribe* the manner. It is not to be exercised by any other body than the Legislature, and the manner is to be prescribed by the Legislature. Now, assuming that it may be exercised in joint meeting, it is clear that this must be in pursuance to some legislative act, which shall *prescribe* in advance the manner.”); *id.* at 1668 (arguing that the joint convention could not exercise legislative power).

82. *See, e.g., id.* at 1677 (statement of Mr. Sherman) (“[W]hile the Legislature may prescribe a plurality rule in the election of a Senator, a joint convention of the Legislature in the exercise of the law cannot do it.”).

83. *Id.* at 1673 (statement of Mr. Stockton) (“Although the Legislature in joint meeting assembled may not be able to pass a law, or do any act which the Houses are required to do separately, when it is admitted that they can elect a Senator, it necessarily follows that they can pass rules for their governance while in the performance of that duty.”).

84. *Cf. id.* at 1594 (statements of Mr. Clark and Mr. Stockton).

85. *Id.* at 1677.

of those cities, but it enacted its own voter registration law anyway. As a result, a number of otherwise-eligible voters were refused the right to vote.

The majority of the committee considering the question concluded that the St. Louis ordinance could not control the election.<sup>86</sup> And more detailed commentary questioned whether the state legislature could even cede power to the city if it wanted to do so: “The Constitution of the United States having expressly declared that the manner of holding elections for Representatives shall be prescribed in each State by the Legislature thereof, could the State Legislature or the constitution of Missouri delegate its authority to any other power, to any other body?”<sup>87</sup> The answer was no:

I think there is no man . . . who will go to the length of saying that any city, by virtue of any State constitution or any legislative enactment can adopt a system of registration imposing upon voters regulations other than those imposed upon them by the constitution of their State or by the Legislature thereof.<sup>88</sup>

## V. CONCLUDING THOUGHTS

To derive conclusions from these precedents is a challenge. But some tendencies are apparent. The House has concluded that the power to “prescribe” the “times, places, and manner” of elections may be affected by other provisions of the Constitution, such as the Article I, Section 2 power of the executive to issue writs of election when vacancies happen. The Senate has found some relationship, but not perfect symmetry, in the word “Legislature” in Article I, Section 3 and Section 4. There has been some, but not complete, preference for the independent state legislature doctrine to allow the legislature to act unencumbered by state constitutional law. The House has found some flexibility responding to direct democracy in the context of constitutional conventions; and there has been skepticism of the delegation of legislative authority to another government entity. These tendencies can clarify some understatements in the Court’s factual explanations in the Arizona redistricting opinions.

### A. Direct Democracy

By the mid-nineteenth century, Congress had repeatedly confronted issues concerning constitutional conventions, scrutinizing whether the people could act in a lawmaking capacity. And houses of

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86. HINDS, *supra* note 53, § 975, at 313-14.

87. 14 CONG. REC. 3617 (1883) (statement of Mr. Miller).

88. *Id.*; accord HINDS, *supra* note 53, § 975, at 314 (statement of Mr. A.A. Ranney) (“It is more than doubtful whether the legislature, which is alone invested with authority of this kind, could thus delegate it any way.”).

Congress generally permitted the people to exercise that authority, perhaps to the Chief Justice's surprise.<sup>89</sup> Nevertheless, what state conventions might take from the state legislature they might be required to give back to the state legislature, because the conventions only acted in the absence of any other law. Indeed, when the state had just been admitted to the union, promulgation of a new constitution occurred at a time when no state legislature, much less state, existed.<sup>90</sup>

Additionally, the *Arizona State Legislature* majority opinion acknowledged that direct lawmaking did exist at the founding and early in the Republic, and that it did not "gain[] a foothold" until the twentieth century.<sup>91</sup> That is true, but somewhat misleading in the context of construing the phrase "Legislature." (Indeed, it is somewhat irrelevant to note later in the opinion that "the initiative and the referendum—were not yet in our democracy's arsenal," when other forms of direct democracy were known well before the twentieth century and bear upon the question of the direct democracy and the power of the "Legislature.")<sup>92</sup>

Historically, Congress also continued to turn to the independent state legislature doctrine in ensuing legislation, and state courts would continue to believe that the legislature could trump a state constitution.<sup>93</sup> Even in instances when state courts found a state law unconstitutional, a house of Congress might still conclude that the Elections Clause permitted the federal election to take place under that state law.<sup>94</sup>

Justice Ginsburg's majority opinion in *Arizona State Legislature* does not accurately reflect these points, noting that in *Baldwin*, the Michigan Supreme Court held "as courts generally do, that state leg-

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89. CONG. GLOBE, 31st Cong., 1st Sess. 1795 (1850); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677-80 (2015) (Roberts, C.J., dissenting). Even this did not occur without some dissent in Congress. *See id.* And perhaps the greatest and earliest critic of this view was Justice Joseph Story, who spoke out vociferously against any efforts of the Massachusetts constitutional convention of 1820 to provide for any regulation of federal elections, as doing so would usurp the state legislature's role under the Elections Clause. *See generally* JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 110 (Boston, Daily Advertiser rev. ed. 1853), <http://www.archive.org/details/cu31924032657326> ("Here an express provision was made for the manner of choosing representatives by the state legislatures. They have unlimited discretion in the subject. . . . [T]hat is the proposition on the table? It is to limit this discretion . . .").

90. CONG. GLOBE, 31st Cong., 1st Sess. 1795 (1850).

91. *Ariz. State Legislature*, 135 U.S. at 2659.

92. *Id.* at 2672.

93. *See generally* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189 (2014).

94. HINDS, *supra* note 53, § 947, at 238.

islation in direct conflict with the State's constitution is void."<sup>95</sup> Courts, yes—but not necessarily Congress. Courts facing a conflict between two provisions might conclude that the constitution trumps the law, but a house of Congress judging an election might still conclude that the law trumps the constitution—at least, if the adjudicating of the election also includes a consideration of the scope of the Elections Clause. Indeed, the Michigan Supreme Court did not even consider an Elections Clause argument that might have otherwise empowered the state legislature: it only compared the state law to its state constitution.<sup>96</sup>

### B. Congressional Precedent

This distinction between the roles of courts and Congress yields two more questions about the proper role of these precedents. First, this case represents an instance of the Supreme Court tacitly assuming jurisdiction over a dispute that is supposedly reserved to Congress. At the very least, the Court has felt comfortable extending its role into these types of disputes that had traditionally been reserved to Congress.<sup>97</sup> And it is, after all, an area in which Congress has regularly engaged its judicial function and pored over the relevant provisions of the Constitution in dispute.

This critique differs from the pure standing critique that Justices Scalia and Thomas raised in their dissents.<sup>98</sup> They worried about the courts “treading upon” separation of powers disputes between “state legislatures and executives.”<sup>99</sup> That worry, however, is distinct from the notion that Congress, and perhaps not the judiciary, *ought* to resolve the interpretation of the Elections Clause pursuant to its Article I, Section 5 power. And that might come closer to the political question doctrine.<sup>100</sup>

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95. *Ariz. State Legislature*, 135 S. Ct. at 2674 (emphasis added).

96. *See People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 136 (1865) (“And we are only concerned, therefore, in determining whether the constitution of Michigan has prevented the state legislature from exercising complete control over the locality of elections, and whether, if such control is limited, the limitation is applicable to the subject before us.”).

97. The scope of a kind of political question doctrine in the area of election disputes is left for another day, but the Court has had little difficulty injecting itself in election disputes in situations where Congress otherwise might sit as “judge.” *See generally* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

98. Curiously, although Justices Scalia and Thomas agreed that there was no standing and would have dismissed the Arizona state legislature's claim, they chose to dissent rather than concur in the result. *See Ariz. State Legislature*, 135 S. Ct. at 2694-97 (Scalia, J., dissenting); *id.* at 2697 (Thomas, J., dissenting).

99. *Id.* at 2697 (Scalia, J., dissenting).

100. *See Powell*, 395 U.S. at 548; *see also Muller*, *supra* note 47, at 578.

Second, the Court's treatment of a few congressional adjudications, and its wholesale failure to cite many more, calls into question how courts ought to handle these precedents. After all, Congress is acting as judge in these election disputes; it takes evidence, holds hearings, and issues opinions, often citing its own precedents.<sup>101</sup> It takes on a judicial function and acts in a judicial manner. How the Court might—and should—use those precedents remains deeply undertheorized, although the examination of congressional precedents is nothing new.<sup>102</sup> While the Court introduces some rather ad hoc standards for these precedents (for instance, Chief Justice Roberts suggesting that *Baldwin* is the superior precedent because it's later in time than *Shiel*), it might benefit the Court—and litigants—to explore more of these election disputes' briefs, arguments, and opinions.

Justice Ginsburg does offer a rather unfair characterization of Congress's role under Article I, Section 5 in *Baldwin* in an attempt to diminish its value: "Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision."<sup>103</sup> Evidence suggests that Congress has generally resisted raw tribal partisanship in adjudicating election contests.<sup>104</sup> To devalue Congress's express authority to adjudicate election disputes as a kind of bare partisan squabbling is an undermining of the structural design of the Constitution in all election disputes.

### C. Legislative Delegations

Finally, suppose one could surmount these justiciability problems and examine more deeply the historical election disputes adjudicated in Congress (or, in the context of the Seventeenth Amendment, in the state courts and legislatures). They offer a fairly consistent string of instances rejecting the proposition that the power of the legislature could be delegated to another entity. These are wholly missed by the Court.

The majority opinion in *Arizona State Legislature* offers no constitutional analysis, simply asserting *ipse dixit* that the state constitution authorizes the people to delegate legislative power to another

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101. U.S. CONST. art 1, § 5, cl. 1.

102. See *Powell*, 395 U.S. at 509; see also *U.S. Term Limits*, 514 U.S. at 819.

103. *Ariz. State Legislature*, 135 S. Ct. at 2674.

104. See, e.g., Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1840-41 (2014). But see *id.* (acknowledging increased partisanship during and following the Civil War).

agency.<sup>105</sup> Chief Justice Roberts, in dissent, briefly notes this absence of legal authority for the delegation principle.<sup>106</sup> But even that opinion misses a salient issue. Assuming the state legislature (or the people) had the power under state law (or the state constitution) to delegate its power to another, does the United States Constitution authorize that delegation?

There is a non-delegation doctrine in administrative law,<sup>107</sup> one that extends to congressional power but not necessarily state legislative power.<sup>108</sup> Within the congressional and state-based precedent of legislative power discussed above, however, one finds a similar non-delegation doctrine that prevents the authority from being transferred entirely from the state legislature to someone else.

The Seventeenth Amendment analogy rests, constitutionally speaking, on the idea that no one—neither the state legislature itself nor the people acting via initiative—could delegate the electoral power from the state legislature to the people.<sup>109</sup> And the discussions in cases like *Stockton*<sup>110</sup> and *Sessinghaus*<sup>111</sup> turn largely upon the notion that the legislative power cannot be delegated to another entity—not to a joint convention, not to a municipality, not to anyone else.

There is some irony, then, in the majority's position that seeks so strongly to separate the section 3 and section 4 powers of the state legislature. The section 3 power of the legislature to elect emphatically could never be delegated away, a point the majority readily accepts. But that the section 4 power—the lawmaking authority—of the state could be simply handed off to another agency to exercise on a permanent basis is far less obvious. Indeed, existing precedent disfavors the delegation of lawmaking authority to another entity.

Even within the analogous congressional non-delegation doctrine, agencies are given some authority that may otherwise ostensibly be within the purview of Congress: when Congress provides an “intelligible principle” to an agency, the agency may act within scope

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105. *Ariz. State Legislature*, 135 S. Ct. at 2673.

106. *Id.* at 2677-78.

107. *See, e.g.*, *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989) (“Congress generally cannot delegate its legislative power to another Branch.”).

108. *See Ariz. State Legislature*, 135 S. Ct. at 2689 (Roberts, C.J., dissenting) (reflecting doubt that Congress could “delegate authority to one actor when the Constitution vests that authority in another actor” (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001))).

109. While Justice Ginsburg's opinion explains that the power to elect senators has a different “function,” one “to the exclusion of other participants,” it does not explain why that power could not have been delegated to another entity, unless the Constitution, overriding contrary state law, precluded such a delegation. *See Ariz. State Legislature*, 135 S. Ct. at 2667-68 (quoting *Smiley v. Holm*, 285 U.S. 355, 365 (1932)).

110. *See discussion supra* Section IV.B.3.a.

111. *See discussion supra* Section IV.B.3.b.

of that principle.<sup>112</sup> And Congress always holds the final authority to override the decision of a federal agency.<sup>113</sup> One could perhaps ignore the express legislative delegation to the independent commission and instead conclude that commission acted pursuant to the “intelligible principle” of a series of redistricting standards promulgated by the people.<sup>114</sup>

But the Arizona legislature remained wholly cut out of the process, with no similar opportunity to override the decision of the commission. Its express purpose, after all, was to cut the legislature out of the process.

These deep-rooted understandings of the power of the legislature in the federal Constitution do not necessarily constrict the state legislature, of course. It might be the case that the federal Constitution, one of enumerated powers and one that specifically vests the law-making authority exclusively in Congress, does not include a similar non-delegation doctrine principle as to state legislatures. But Congress’s—and the states’—historical understanding of the legislature’s role in both section 3 and section 4 disputes belies the notion that the State can vest the legislature’s federal constitutional authority in an unelected body.<sup>115</sup>

And the Elections Clause itself offers a similar structural reason to incorporate a non-delegation principle. The Clause permits “Congress . . . at any time by Law” to “make or alter such Regulations.”<sup>116</sup> Because Congress may not cede this authority to another body, and because Congress always has the power to override the decisions of any agency that might otherwise engage in its regulatory capacity, a better reading of the state legislature’s role would subject it to similar constraints. After all, it would seem incongruous for state legislatures to have more power than Congress to allocate their authority without some meaningful explanation for such a distinction.<sup>117</sup>

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112. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328-29 (2002).

113. See, e.g., Contract with America Advance Act, 5 U.S.C. §§ 801-808 (2012) (allowing for expedited congressional review of federal regulations).

114. See ARIZ. CONST. art. IV, pt. 2, § 1(14) (describing scope of authority and factors the independent commission should consider in drawing congressional districts).

115. Despite the best efforts of the people of Arizona to divest the state legislature of any power in the area of redistricting, the very point of tasking the legislature with the primary lawmaking responsibility is precisely because it is the branch accountable to the people. See generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

116. U.S. CONST. art. I, § 4, cl. 1.

117. Admittedly, an immediate flaw with this reading of the Elections Clause arises when considering the state “legislature” itself. The legislature need not be composed in the same fashion as the United States Congress. But, it would undermine the notion that the “legislature” is wholly without an independent constitutional meaning and turns exclusively on how the states—including decisions of the people or within the state constitution—choose to define the “legislature.”

This delegation point is certainly a narrow issue in the case, and these inquiries only scratch the surface of a much deeper investigation into the scope of any non-delegation principles that may extend to state legislatures under the United States Constitution. In this case, the broader affirmation of the people to enact laws via ballot initiative will likely have broader consequences, such as potentially authorizing the people to amend the manner of choosing electors,<sup>118</sup> or consenting to divide a state into parts.<sup>119</sup> Apparently, there is deeply engrained in the constitutional structure a prohibition on delegation of the electoral power, but not of the lawmaking power—when, in reality, the non-delegation doctrine in Article I cases places its emphasis on the lawmaking power.<sup>120</sup>

But it is, perhaps, in some of these smaller points—the tacit acceptance of judicial authority to decide what Congress usually decides; the ad hoc, selective examination of Congress’s judicial precedents; the largely uncritical resolution of a permanent delegation of authority from the legislature to another entity—that the case will have a lasting impact on the roles of the judiciary and the legislature.

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118. See *McPherson v. Blacker*, 146 U.S. 1, 2 (1892); Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”: Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599, 599 (2008); Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 372-73 (2007).

119. Letter from Timothy Cook Draper, to Initiative Coordinator, Office of the Att’y Gen. (Dec. 19, 2013), [https://oag.ca.gov/system/files/initiatives/pdfs/13-0063%20\(13-0063%20\(Six%20Californias\)\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/13-0063%20(13-0063%20(Six%20Californias)).pdf) (proposing a statewide ballot measure under California’s constitution).

120. See, e.g., Lawson, *supra* note 112, at 351-53.

