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Revisiting the History of the Independent State Legislature Doctrine

Hayward H. Smith

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ARTICLE

REVISITING THE HISTORY OF THE INDEPENDENT STATE LEGISLATURE DOCTRINE

HAYWARD H. SMITH*

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In hopes of legitimizing the independent state legislature doctrine, its proponents have recently made two claims with respect to history, which this Article refers to as the Substance/Procedure Thesis and the Prevailing View Thesis. The former admits that the original understanding was that state “legislatures” promulgating election law pursuant to the Elector Appointment and Elections Clauses are required to comply with state constitutionally-mandated “procedural” lawmaking requirements (such as a potential gubernatorial veto), but asserts that they were otherwise understood to be independent of “substantive” state constitutional restraints. The latter asserts that the independent state legislature doctrine was the “prevailing view” during the nineteenth century (before it was abandoned in the twentieth century).

This Article debunks the Substance/Procedure Thesis. Previously unreviewed historical evidence, including that arising from a review of the 1776 drafting history of the predecessor language of Article V of the Articles of Confederation, confirms that the Founding generation understood that “legislatures” would be subject to substantive state constitutional restrictions as well as constitutionally-mandated lawmaking procedures. The evidence shows that the Framers of the Elector Appointment and Elections Clauses—including in particular John Dickinson and James Madison—expected that state constitutions would impose substantive limitations on “legislatures.” The evidence also demonstrates that the

Framers' subjective expectations were shared by other members of the Founding generation. State constitutions adopted in the years immediately following the Founding contained substantive restrictions on election law that, although they did not explicitly refer to federal elections (as did the Delaware constitution of 1792), were understood to apply to all elections, including federal elections.

This Article also debunks the Prevailing View Thesis. It cannot be sustained on any objective view of the evidence. A review of every state constitution adopted during the 1800s reveals that both explicit and non-explicit limitations on "legislatures" were widespread before, during, and after the Civil War. On the other hand, apart from the House of Representatives' contested election case of *Baldwin v. Trowbridge*, the doctrine was little more than a lawyer argument episodically invoked in House contested election cases or state courts, without prevailing in either forum. Suggestions to the contrary are based on mischaracterizations of the cases.

Finally, this Article argues that the episodic invocations of the doctrine that did occur in the nineteenth century are irrelevant under any form of argument from history relevant to constitutional interpretation. In particular, *Baldwin v. Trowbridge* should not be treated as if it were judicial precedent—and not only because it has been overtaken by subsequent Supreme Court decisions. In deciding contested election cases in the late nineteenth century, and particularly in the 1860s, the House of Representatives acted in a demonstrably non-judicial manner. Courts should not afford its decisions respect under the doctrine of stare decisis.

I. INTRODUCTION

Twenty years ago, I wrote an article about a then-obscure aspect of the contested 2000 presidential election.¹ In the course of reaching their decision in favor of George W. Bush, the Justices of the Supreme Court observed that the Elector Appointment Clause of the Constitution² assigns the power to direct the manner in which a state appoints its presidential electors to the "legislature" of the state.³ The Court raised the possibility that there was a limit on the extent to which a state constitution could

1. Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

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

3. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam).

circumscribe a “legislature’s” exercise of this power.⁴ Three Justices went further and argued that the legislative handiwork of such a “legislature” was entitled to stricter adherence by state courts than ordinary state legislation.⁵ In my article, I gave these arguments what I intended to be a pejorative name—the “independent state legislature doctrine” (the Doctrine)⁶—and examined whether that doctrine had any basis in history. I concluded that the Founding generation’s original understanding was contrary to the Doctrine,⁷ but explained that the Doctrine had, in fact, emerged for a time during the Civil War and subsequently when it was used to disregard state constitutional place-of-voting restrictions that would have prevented soldiers in the field from voting.⁸ I assumed that my article and the Doctrine would quickly fade into history.

The Doctrine has not faded into history but roared back out of history into the present. In the 2020 federal elections, the Doctrine became the predicate for a number of lawsuits complaining about this or that aspect of a state’s administration of the presidential and congressional elections,⁹ as well as the purported basis for subsequent collateral attacks on President Biden’s election, both in court¹⁰ and out of court.¹¹ In the typical court

4. *Id.*

5. *Bush v. Gore*, 531 U.S. 98, 112–15 (2000) (Rehnquist, C.J., concurring).

6. Smith, *supra* note 1, at 732; *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, 1039 (2000) (discussing “independent legislatures” under Article V of the Constitution). The Doctrine would perhaps better be described as a theory aspiring to be a doctrine.

7. Smith, *supra* note 1, at 743–64.

8. *Id.* at 764–83.

9. *See generally* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL. RTS. J. 59, 77 (2021) (cataloguing lawsuits). The Doctrine is now said to apply to Congressional elections as well as presidential elections by virtue of the Elections Clause, which, similar to the Elector Appointment Clause, provides that the state “legislatures” are to prescribe the rules for Congressional elections. *See* U.S. CONST. art. I, § 4, cl. 1 (“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.”).

10. *See* Mot. for Leave to File Bill of Compl., Bill of Compl., at 1, *Texas v. Pennsylvania*, No. 220155 (U.S., Dec. 7, 2020) (alleging that “government officials” in Georgia, Michigan, Wisconsin, and Pennsylvania “usurped their legislatures’ authority and unconstitutionally revised their state’s election statutes” in violation of the Elector Appointment Clause).

11. *See* 167 CONG. REC. H75, 77–78 (daily ed. Jan. 6, 2021) (remarks of Rep. Stephen Scalise) (“[N]owhere in Article II, Section 1 does it give the secretary of state . . . that ability; nowhere does it give the Governor that ability; nowhere does it give a court that ability. It exclusively gives that ability to the legislatures.”); *id.* at 78 (alleging that, in some states, “the Democratic Party has gone in and

case, the complaining party characterizes the disfavored state-imposed election practice—particularly any practice imposed by a court as mandated by a state constitution—as an unconstitutional usurpation of the “legislature’s” prerogative under the Elector Appointment and/or Elections Clauses. Whether there has been a violation of either clause, and, if so, the appropriate remedy, are federal questions, meaning that the Supreme Court, not any state court, would be the final arbiter.¹² Four Justices of the Supreme Court expressed support for adopting the Doctrine,¹³ though the full Court ultimately declined to take up the question.¹⁴

selectively gone around this process”); *id.* (the Supreme Court “chose to punt” but “[w]e don’t have that luxury today” and must “fix this” and “restore integrity to the election process”); *see also* Carol D. Leonnig & Philip Rucker, *Audio: Trump Says He Spoke to a “Loving Crowd” at Jan. 6 Rally*, WASH. POST, at 03:22 (July 21, 2021, 10:48 PM), <https://www.washingtonpost.com/politics/2021/07/21/trump-interview-i-alone-can-fix-it/> [<https://perma.cc/6QMQ-JYTS>] (audio recording of Donald J. Trump, Mar. 31, 2021) (“The legislatures of the states did not approve all of the things that were done for those elections. And under the Constitution of the United States, they have to do that.”); *id.* at 5:52 (arguing that a state’s presidential election should be “sent back” when “the legislature . . . did not approve those vast changes [concerning] hours, days, when to vote” but rather “it was all done [by] local politicians and local judges”).

12. By contrast, the attempt to prevent President Biden’s election in Congress on January 6, 2021, would have had Vice President Pence be the “ultimate arbiter” of the validity of electoral votes and reject some of Biden’s votes on the ground that they were tainted by alleged violations of the independent state legislature doctrine and/or “fraud.” Matthew A. Seligman, *The Vice President’s Non-Existent Unilateral Power to Reject Electoral Votes*, at 2 (Oct. 1, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020 [<https://perma.cc/2SFV-CCUR>]. The thinking is reflected in John Eastman’s shocking memorandum of early January 2021, a copy of which is included as an appendix to Seligman’s article. Seligman concludes that “[e]very major tool of constitutional interpretation shows that the theory [that the Vice President has the power to reject electoral votes] is, without question, legally incorrect.” *Id.* at 31.

13. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (reflecting statement of Justice Alito); Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay); *id.* at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay); *Degraffenreid*, 141 S. Ct. at 732–33 (Thomas, J., dissenting); *id.* at 738 (Alito, J., dissenting). In 2022, the Doctrine was unsuccessfully used to seek interim Supreme Court relief against state court involvement in North Carolina and Pennsylvania congressional redistricting following the 2020 census. *See Toth v. Chapman*, No. 21A457, 2022 WL 667924, at *1 (Mar. 7, 2022) (reflecting order denying injunction in Pennsylvania case); *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (reflecting order denying stay in North Carolina case). In the North Carolina case, Justices Alito, Thomas, and Gorsuch dissented from the denial of interim relief and expressed further support for the Doctrine. *See id.* at 1090 (Alito, J., dissenting from denial of stay) (“[The Elections Clause] specifies a particular organ of a state government, and we must take that language seriously.”). Justice Kavanaugh concurred in the denial of the stay but agreed with the dissenting Justices that “the Court should grant certiorari in an appropriate case.” *Id.* at 1089 (Kavanaugh, J., concurring in denial of stay).

14. *See Degraffenreid*, 141 S. Ct. at 732 (denying petition for writ of certiorari). We have good reason to worry about how the Doctrine’s patina of legitimacy might operate lawlessly, outside of court,

As the Doctrine has re-emerged, its proponents have sought to provide various rationales for its existence. In terms of history, they have made two claims: one relating to the alleged original understanding of the Doctrine (the Substance/Procedure Thesis), and the other to the nineteenth-century history of the Doctrine (the Prevailing View Thesis).

The Substance/Procedure Thesis of the original understanding is an attempt to work around the previously accumulated evidence demonstrating that the Founding generation understood that “legislatures” were subject to their state constitutions when regulating federal elections, just like ordinary legislatures. The authors of the thesis have seized on a purported distinction between procedural lawmaking requirements arising from state constitutions (which they admit “legislatures” are required to follow) and substantive limitations (as to which they contend “legislatures” must remain free), which distinction they claim is grounded in the original understanding of the Constitution’s reference to “legislatures.”¹⁵ Apart from the textual

even without being blessed by the Supreme Court. See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, HARV. L. REV. FORUM (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3926381 [<https://perma.cc/BNV8-ZAWF>] (explaining how a legislature unhappy with the outcome of an election could “send in an alternative slate of electors based upon this supposed technicality” and could do so “even if there was no good reason to believe that state courts or state election officials meaningfully deviated from the intent of the legislature in running a presidential election”).

15. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 93 (2020) [hereinafter Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*] (concluding that the independent state legislature doctrine, as modified by the substance/procedure distinction, is “faithful to both the text and structure of the U.S. Constitution” and “furthers many of the Framers’ goals concerning federal elections”); *id.* at 27 (absence of discussion of the Doctrine at the founding “does not change either the original public meaning of that language or the reasonable implications that may be drawn from it”); see also Mike Rappaport, *What Does the Constitution Mean by a State Legislature?*, LAW & LIBERTY (Apr. 19, 2021) [hereinafter Rappaport, LAW & LIBERTY], <https://lawliberty.org/what-does-the-constitution-mean-by-a-state-legislature/> [<https://perma.cc/EQS5-GHRQ>] (arguing that if a “legislature” is enacting an election law, then it “use[s] its normal process for passage of a law,” but for substantive limitations the state constitution “cannot override the state legislature”; this “original meaning makes sense, can be understood, and places strict limits on how the Constitution applies to state legislatures in some extremely important cases”). The blog of the Center for the Study of Constitutional Originalism at the University of San Diego School of Law has featured posts on this issue by three originalist scholars, each of which posited a different original understanding. In the first, Professor Rappaport, the director of that center, repeated the substance/procedure argument he made in the aforementioned *Law & Liberty* article. See Mike Rappaport, *What Does the Constitution Mean by a State Legislature?*, THE ORIGINALISM BLOG (May 3, 2021), <https://originalismblog.typepad.com/the-originalism-blog/2021/05/what-does-the-constitution-mean-by-a-state-legislaturemike-rappaport.html> [<https://perma.cc/5L4Q-KLPY>]. In the second, Rob Natelson, in a guest post, argued that neither substantive nor procedural regulations apply—if there are “irregularities” in a presidential election, then the state

reference to “legislatures,”¹⁶ the view is derived from a perceived dearth of Founding-era state substantive constitutional limitations on federal elections¹⁷ and speculation that this arose from a belief in the Doctrine

legislatures can respond as “independent assemblies,” without regard to “their constitutions or other institutions,” by investigating the “irregularities” and either “call[ing] a re-vote for presidential electors” or “choos[ing] the electors themselves,” in all cases without the involvement of any governor. Rob Natelson, *On “Federal Functions,” the 2020 Presidential Election, the Necessary and Proper Clause, and Our Constitutional Law Courses*, THE ORIGINALISM BLOG (Feb. 18, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/02/on-federal-functions-the-2020-presidential-election-the-necessary-and-proper-clause-and-our-constitu.html> [<https://perma.cc/664J-7GXD>]. In a subsequent post, Professor Michael Ramsey, a member of that center, offered a third, entirely different view of the original understanding which, unlike the other two, appears consistent with the historical evidence summarized in this Article. See Michael Ramsey, *Helen White & Cameron Kistler on Originalism and Meaning of State Legislatures*, THE ORIGINALISM BLOG (Mar. 6, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/03/helen-white-cameron-kistler-on-originalism-and-meaning-of-state-legislatures-michael-ramsey.html> [<https://perma.cc/KAP3-KT3V>] (“[T]here’s nothing remarkable about the proposition that early post-ratification state constitutions contained provisions regulating federal elections” because “it seems likely to me that this language was understood to give power to the legislatures of the states, acting pursuant to their (state) constitutional procedures”).

16. According to Professor Rappaport, the Doctrine and the substance/procedure distinction are correct because the Constitution “means what it says.” Rappaport, *LAW & LIBERTY*, *supra* note 15. Similarly, Professor Morley refers to the Doctrine as the “plain-meaning interpretation of ‘Legislature.’” Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 22; *id.* at 89 (concluding that the Doctrine is “solidly grounded in the Constitution’s plain text”). Oddly, this literal approach focuses on the noun “legislature” to the exclusion of the verbs “direct” and “prescribe,” even though the latter words are the ones that specify the action that either is, or is not, subject to normal constraints.

17. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38 (“Neither the state constitutions adopted immediately after the U.S. Constitution’s ratification, nor those of new states that joined the Union in the 1790s, contained provisions relating to federal elections.”). Others have invoked the substance/procedure distinction while remaining agnostic as to whether it constitutes the original understanding. It appears that the distinction was first articulated in the World War II soldier-voting case, *Commonwealth ex rel. Dummit v. O’Connell*, 181 S.W.2d 691 (Ky. 1944), as a way to distinguish Supreme Court precedent. In reaching its decision ensuring that “the youth of our native State” who were “absent in the defense of the nation” would be permitted to vote, the Kentucky Court of Appeals reasoned that, while Supreme Court precedents made clear that a “legislature” must “function in the method prescribed by the State Constitution in directing the times, places, and manner” of elections, 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.” *Id.* at 692–94. Some commentators later approvingly cited the substance/procedure distinction drawn by *O’Connell*, while claiming that limited evidence of original intent is not to the contrary. See James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) (making substance/procedure distinction, citing *O’Connell*, 181 S.W.2d at 694); *id.* at 501 (“[A] reading of the debates in the Constitutional Convention and State Ratifying Conventions is of little assistance.”); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 111 n.39 (Dennis J. Hutchinson et al. eds., 2001) (making substance/procedure distinction, citing Kirby, *supra*, at 500–04); *id.* at 217–18 (conceding that

among the Founding generation.¹⁸ There is also a related supposition as to constitutional purpose and structure—that the use of the word “legislature” was intended to give life to some important constitutional value, under which “legislatures” must enjoy extraordinary discretion to craft the substance of the law governing federal elections, free from constitutional restraints and other checks that would ordinarily apply.¹⁹

The Prevailing View Thesis is an attempt to legitimize the Doctrine by characterizing certain episodes from the 1800s in which the Doctrine was invoked as evidence that the Doctrine “reflect[ed] the prevailing understanding of states, Congress, and other actors in the nineteenth century.”²⁰ The sentiment seems to be that this alleged “prevailing view” was mistakenly discarded in the twentieth century, and should now be “revitaliz[ed]” or “resuscitate[d]” by the Supreme Court.²¹ This account of the Doctrine’s alleged prevalence in the nineteenth century has seeped into

the Doctrine is “a meaning very likely unintended by the Constitution’s framers”). *See also* Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 834 (2002) (“The distinction between substance and procedure—however creaky it may be in other contexts—serves well here . . .”) (citing Kirby, *supra*, at 503–04).

18. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38 (suggesting that the Founding generation did not impose substantive constitutional restraints on “legislatures,” but “left the matter to the plenary discretion” of the legislatures, because that was “[c]onsistent with the Elections Clause and Presidential Electors Clause”).

19. *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (referring to “respect for the constitutionally prescribed role of state legislatures?”); *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (citing U.S. CONST. art. I, § 4, cl. 1) (“The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting elections rules.”); *id.* at 34–35 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) (referring to “the important federal judicial role in reviewing state courts about state law in a federal Presidential election”); Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 35 (arguing that “the independent state legislature doctrine is most faithful to the Constitution’s underlying logic and structure”).

20. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 1 (“Throughout [the nineteenth century], the doctrine was consistently applied across a broad range of circumstances.”).

21. *Id.* at 10, 14. This account of the history has been presented to the Supreme Court as accurate. *See* Brief of Amicus Curiae Honest Elections Project in Support of Petitioners at *1, *4–8, & *6 n.2, *Berger v. North Carolina State Conference of the NAACP*, No. 21-248, 2022 WL 216176 (Jan. 18, 2022) (citing Professor Morley’s account twelve times).

the academic literature.²² It has also gained traction in more popular accounts of the controversy surrounding the 2020 presidential election.²³

Part II revisits the original understanding of the Doctrine and debunks the Substance/Procedure Thesis. The historical evidence confirms that the Founding generation understood that “legislatures” would be subject to substantive state constitutional restrictions no less than constitutionally-mandated lawmaking procedures.²⁴ The evidence pertains to: (1) the Framers’ original intent; (2) the broader public’s original understanding; and (3) the lack of historical basis for the purpose/structure rationales offered in support of the Doctrine’s extraordinary deference to “legislatures.”

First, the evidence demonstrates that the Framers of the Elector Appointment and Elections Clauses intended and/or expected that state

22. See Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 734 (2016) (“Historically, Congress also continued to turn to the independent state legislature doctrine in ensuing [litigation], and state courts would continue to believe that the legislature could trump a state constitution.”) (citing Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189 (2014)); see also Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1057 n.14 (2021) [hereinafter Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*] (describing Professor Morley as having “chronic[ed] support in several nineteenth-century state supreme court decisions, and in several Reconstruction Congress evaluations of congressional elections”) (citing Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 25–27, 41–45, 69, 91–92).

23. See Garrett Epps, *In Election Litigation, An Ominous Sign*, WASH. MONTHLY (Nov. 21, 2020), <https://washingtonmonthly.com/2020/11/21/in-election-litigation-an-ominous-sign/> [https://perma.cc/RVS8-475R] (“There’s no question that the ‘independent legislature’ doctrine has some historical grounding. In a detailed scholarly article published earlier this year, Michael Morley of the Florida State University School of Law traces the concept to the early years of the republic.”).

24. Throughout this Article, I put the word “legislature” in quotes as shorthand to refer to a state legislature exercising its power to: (a) “direct” the “manner” of appointing presidential electors (under the Elector Appointment Clause); (b) “prescribe” the “time, place, and manner” of Congressional elections (under the Elections Clause); and/or (c) “direct” the “manner” of appointing delegates to Congress (under Article V of the Articles of Confederation). The original understanding of these provisions was not simply the original understanding of the word “legislature,” in isolation, but rather, in each instance, the original understanding of the word “legislature” as the grammatical subject of a clause containing a certain lawmaking verb (“direct” or “prescribe”) and the object of that verb (the “manner” of appointment or the “time, place, and manner” of election). See Grace Broszofsky, Michael C. Dorf, & Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors* (Sept. 25, 2020), <https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view> [https://perma.cc/FM8R-JXHL] (evidencing the constitutional and historical interchangeability of “directing” and “prescribing” and “lawmaking”). Questions about how a legislature might exercise other, non-legislative powers assigned to it—such as the power to “ratify” a constitutional amendment or “choose” a Senator—are governed by different constitutional clauses, in which “legislature” appears before different verbs (“ratify” or “choose”) and the verbs act on different objects (an “amendment” or a “senator”). Those provisions should be interpreted in light of their different texts, purposes, history, and precedent, which I do not address in this Article.

constitutions would impose substantive limitations on “legislatures.” When the Framers drafted those provisions, they worked against the backdrop of their prior experience under Article V of the Articles of Confederation, which provided that delegates to Congress were to be “appointed in such manner as the legislature of each State shall direct.”²⁵ A review of the previously unexamined 1776 drafting of Article V by John Dickinson and others, combined with a review of the state constitutional limitations that were placed on “legislatures” between 1776 and 1787, demonstrates that the intent and experience under the Articles of Confederation were always that “legislatures” referred to in that clause would be defined by, and subject to, their state constitutions.²⁶

In 1787, the members of the committees that drafted the Elector Appointment and Elections Clauses were familiar with this prior understanding of “legislatures.” Many had been personally involved in drafting the Articles of Confederation or the state constitutional provisions that regulated “legislatures.” If they had intended to switch from a regime of dependent “legislatures” to a regime of independent “legislatures”—and there is no evidence they did—it is beyond implausible that they would have done so by using slight variations on the “legislature” language that was widely understood to create dependent “legislatures.”²⁷

The fact that these Framers expected state constitutions to continue to control “legislatures” under the new Constitution is confirmed by two salient, but previously overlooked, points of post-Founding history, one involving John Dickinson and the second James Madison.²⁸ Dickinson was the original drafter of the “legislature” language in 1776, and, at the Philadelphia Convention, he served on the Committee of Unfinished Parts (a/k/a the Brearley Committee), which generated the Elector Appointment Clause. After the Founding, he returned to Delaware and became the president of the Delaware constitutional convention that convened in late 1791 and produced a new constitution for the state in early 1792. That constitution was flatly inconsistent with what we now call the independent legislature doctrine as it expressly regulated the way in which the state’s

25. U.S. ARTICLES OF CONFEDERATION of 1781, art. V.

26. See *infra* Part II.B.1.a.

27. See *infra* Part II.B.1.b.

28. See *infra* Part II.B.1.c.

“legislature” might prescribe the manner of electing the state’s representatives to Congress.²⁹

Like Dickinson, Madison served on the Committee of Unfinished Parts, but his opportunity to help create a new state constitution for his state did not come until 1830. In that year, Virginia’s constitutional convention decided to constitutionally limit the way in which its “legislature” might apportion the state’s congressional seats, requiring that apportionment be based on the number of free persons plus “three-fifths of all other persons.”³⁰ Although this provision was also flatly inconsistent with what we now call the independent legislature doctrine, Madison voted in favor of it (as did John Marshall and several other famous Virginians).

Second, the Framers’ subjective view was shared by other members of the Founding generation, and this is demonstrated by more than just the existence of the Delaware constitution of 1792. Previous scholarship (including my own) overlooked the fact that several state constitutions adopted from 1789 to 1803 contained substantive restrictions on election law that, although they did not explicitly refer to federal elections like the Delaware constitution of 1792, were understood by the Founding generation to apply to all elections held in the state, including federal elections. For example, Pennsylvania’s constitution of 1790 provided that “[a]ll elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*.”³¹ The existence of such non-explicit substantive limitations further contravenes the Substance/Procedure Thesis of the original understanding.³²

Third, the historical record contradicts the notion that the Founding generation saw any “structural” reason to give these “legislatures” an exemption from substantive regulation by state constitutions or freedom

29. DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 578 (Francis Newton Thorpe ed., 1909) [hereinafter 1 CONSTITUTIONS].

30. VA. CONST. of 1830, art. III, § 6, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3823 (Francis Newton Thorpe ed., 1909) [hereinafter 7 CONSTITUTIONS].

31. PA. CONST. of 1790, art. III, § 2, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3096 (Francis Newton Thorpe ed., 1909) [hereinafter 5 CONSTITUTIONS].

32. *See infra* Part II.B.2.

from the normal checks and balances of state government. They did not perceive anything special or unique about either the role that “legislatures” were to play in the constitutional design, the nature of “time, place, and manner” legislation, or the threat of court interference with such legislation.³³

Part III revisits the nineteenth-century history of the Doctrine and debunks the Prevailing View Thesis. That thesis inexplicably disregards the many restraints on “legislatures” that Americans included in their state constitutions during the nineteenth century. A review of every state constitution adopted during that century reveals that both explicit and non-explicit limitations on “legislatures” were widespread before, during, and after the Civil War. Just a few examples of constitutions that imposed explicit limitations on “legislatures” are the Maryland constitution of 1810, which gave free white males the right to vote, by ballot, in presidential and congressional elections;³⁴ Iowa’s constitution of 1846, which precluded the “legislature” from creating congressional districts that ignored the integrity of counties;³⁵ Connecticut’s 1864 amendment to its constitution of 1818, which ensured that soldiers outside the state could vote in presidential and congressional elections;³⁶ South Carolina’s constitution of 1868, which provided that “Presidential electors shall be elected by the people”;³⁷ and Pennsylvania’s constitution of 1873, which provided that the trial and determination of contested presidential elections “shall be by the courts of law.”³⁸ The most frequent non-explicit limitation that state constitutions

33. See *infra* Part II.B.3.

34. MD. CONST. of 1776, art. XIV (adopted 1810), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1705 (Francis Newton Thorpe ed., 1909) [hereinafter 3 CONSTITUTIONS].

35. IOWA CONST. of 1846, art. 3, Legis. Dep’t, § 32, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1129 (Francis Newton Thorpe ed., 1909) [hereinafter 2 CONSTITUTIONS].

36. CONN. CONST. of 1818, art. XIII (adopted 1864), *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 550.

37. S.C. CONST. of 1868, art. VIII, § 9, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3298 (Francis Newton Thorpe ed., 1909) [hereinafter 6 CONSTITUTIONS].

38. PA. CONST. of 1873, art. VIII, § 17, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3140–41.

imposed on “legislatures” (throughout the nineteenth century) was the requirement that “all elections” be either “by ballot” or “*viva voce*.”³⁹

The Prevailing View Thesis emphasizes the 1866 House of Representatives contested election case of *Baldwin v. Trowbridge*, as if the adoption of the Doctrine in that case was the rule in the nineteenth century, not the exception.⁴⁰ However, this disregards that, prior to *Baldwin*, the House had twice rejected the Doctrine (once in 1850 and again in 1861). *Baldwin* was a flip-flop. After *Baldwin*, the Doctrine merely existed as an argument that was sometimes invoked in House contested election cases or state courts, without prevailing in either forum. Over time, the Doctrine was rejected by courts and ignored by the House. To the extent the Prevailing View Thesis suggests otherwise, it is based on mischaracterizations of the House contested election and state court cases upon which it purports to rely.⁴¹

With the history set straight, Part IV explains why the episodic invocations of the Doctrine that did occur in the 1800s are irrelevant to interpretation of the Constitution today. The history—when accurately recounted—does not support any recognized “argument from history,” such as originalism, liquidation, or gloss.⁴² Nor is the nineteenth-century history of the Doctrine relevant as a source of legal precedent. It was long ago superceded by a line of Supreme Court cases that speak directly to the invalidity of the Doctrine.⁴³

The only nineteenth-century invocation of the Doctrine that resembles a judicial “precedent”—the House’s 1866 decision in *Baldwin*—should not be treated as precedent to be followed by a court. The historical evidence demonstrates that in the late nineteenth century, and particularly in the 1860s, the House was not operating in a judicial manner when it decided contested election cases like *Baldwin*. The House lacked any meaningful procedure for litigating and deciding these matters; the limited process that did exist was not mandatory; the House’s decision-making was largely opaque, with the grounds for decision often unclear; and congressmen were hardly in a position to act like judges. The contemporaneous impression of both insiders and outsiders was that House contested election cases were

39. See *infra* Part III.B.1–3.

40. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 48 (describing *Baldwin* as the “best-known example” of the Doctrine being applied).

41. See *infra* Part III.B.1–3.

42. See *infra* Part IV.

43. See *infra* Part IV.A.

rife with partisan decision-making untethered from the law. This impression is confirmed by pulling back the “judicial” curtain on the House’s treatment of three issues that recurred during the 1860s: (i) application of the Incompatibility Clause to congressmen who held commissions as military officers; (ii) the effect of electoral improprieties in Missouri; and (iii) the independent state legislature doctrine. On these issues, it appears that the House’s determinations depended, not on the outcome of anything resembling a judicial process, but on the partisan bona fides of the “judges” and contestants. Given the House’s injudiciousness in these matters, the rationale for *stare decisis*—the reasons why courts are supposed to follow precedent—would not be furthered by treating the House’s decisions as precedent.⁴⁴

II. REVISITING THE ORIGINAL UNDERSTANDING OF THE DOCTRINE

A. Existing Scholarship Identifying Evidence of the Original Understanding

The scholarship identifying evidence as to the Founding generation’s understanding of “legislatures” begins with my 2001 article. I reviewed the debates at the Constitutional Convention and ratifying conventions pertaining to the selection of the President and found nothing suggesting an intent to create independent “legislatures,”⁴⁵ but rather expressions of hostility to giving them a decisive role in the process.⁴⁶ Moreover, I identified that the language chosen by the Framers for the Elector

44. See *infra* Part IV.B. The evidence of injudiciousness in House contested elections during this period also suggests some wishful thinking among some about the manner in which the House might exercise its power to judge election cases if it decided to resume that function. See Nicholas O. Stephanopoulos, *The New Pro-Majoritarian Powers*, 109 CALIF. L. REV. 2357, 2368 (2021) (suggesting that Congress should exercise its judging powers to effectively set aside unsavory state election laws); Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1841 (2014) [hereinafter Levitt, *The Partisanship Spectrum*] (suggesting that House members are able to “forego tempting opportunities to pursue [tribal partisanship]” in contested elections); Muller, *supra* note 22, at 736 (“Evidence suggests that Congress has generally resisted raw tribal partisanship in adjudicating election contests.”) (citing Levitt, *supra*, at 1840–41); JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 172 (2007) (“Members of Congress sitting in judgment should make a bona fide effort to clear their minds both of partisan loyalty and of any personal relationship with the parties to the dispute.”).

45. Smith, *supra* note 1, at 743–57; see also Jack N. Rakove, *Presidential Selection: Electoral Fallacies*, 119 POL. SCI. Q. 21, 30 (2004) (“[I]n the absence of any recorded debate of the point, we should similarly balk at ascribing too much importance . . . to the decision allowing the state legislatures to determine the mode of appointing electors.”).

46. Smith, *supra* note 1, at 756.

Appointment Clause echoed that contained in Article V of the Articles of Confederation, under which most state constitutions had been explicitly regulating “legislatures” prior to the Convention.⁴⁷ There was not the same amount of explicit state constitutional regulation of “legislatures” after the Founding, but there was some.⁴⁸ And the “legislatures” which engaged in the first exercises of power pursuant to the Elector Appointment and Elections Clauses clearly believed that they were bound by their state constitutions. They submitted “manner” regulations to the relevant veto power (where applicable),⁴⁹ and proceeded on the basis that state constitutions determined whether legislative appointments of electors and senators had to be made in joint session or concurrently.⁵⁰

More recently, three scholars (Grace Brosofsky, Michael C. Dorf, and Laurence H. Tribe) have adduced additional evidence that Founding-era state “legislatures” understood that, when they “directed” the manner of appointing electors, they were exercising lawmaking power governed by state constitutional procedures.⁵¹ State “legislatures” in 1788 and 1789 proceeded as if they were passing ordinary legislation subject to ordinary constitutional lawmaking requirements, not as if “directing” the manner of appointment involved some special form of extra-constitutional Article II legislation.⁵² Such “manner” legislation was passed in the normal fashion in Pennsylvania, Maryland, Delaware, New Hampshire, New Jersey, South Carolina, and Virginia.⁵³ Interestingly, South Carolina’s legislature apparently believed it necessary to enact normal legislation giving itself the power to appoint electors before actually proceeding to appoint the electors itself.⁵⁴ Moreover, in Georgia, the Governor sounded the alarm when the state legislature could not obtain a quorum to pass the necessary “manner” legislation, and the legislature attempted to go through its constitutionally-mandated multi-day lawmaking process before ultimately directly

47. *Id.* at 754–56.

48. *Id.* at 757–58.

49. *Id.* at 759–61; *see also* Nathaniel F. Rubin, Essay, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 67–69 (2021) (discussing role of gubernatorial veto under the Elector Appointment Clause).

50. Smith, *supra* note 1, at 761–64.

51. Brosofsky, Dorf, & Tribe, *supra* note 24.

52. *Id.* at 5–6.

53. *Id.* at 6–7 n.5.

54. *Id.* at 7.

appointing the electors.⁵⁵ Similarly, New York sat out of the election altogether because its legislature could not, consistent with the state's constitutional lawmaking requirements, manage to direct the manner of appointing electors.⁵⁶ Professor Natelson has similarly pointed out that Founding-era “legislatures” prescribed “manner” legislation for congressional elections by statute rather than by something less than law.⁵⁷

Further confirmation that “directing” the manner of appointing presidential electors was understood to require full constitutional lawmaking is provided by Bruce Ackerman and David Fontana’s account of an episode arising in the 1796 presidential election. As they have recounted, Alexander Hamilton desired to cast doubt on the validity of Vermont’s electors as part of a strategy to cause his preferred Federalist candidate (Thomas Pinckney of South Carolina) to prevail over the obvious Federalist candidate (John Adams).⁵⁸ Hamilton did so by spreading the false rumor that Vermont’s appointment of electors had been made via a mere “Resolve of the Legislature, not a law.”⁵⁹ This aspersion did not elevate Pinckney over

55. *Id.* at 7–8. Rhode Island and North Carolina had not yet ratified the Constitution and so did not participate in this election. Connecticut participated, but it did not have a constitution. Its legislature directly appointed electors, apparently within the bounds of its governing document (“a revised version of its colonial charter”). *Id.* at 7 n.6, 9.

56. Smith, *supra* note 1, at 761.

57. Robert G. Natelson, *Federal Functions: Execution of Powers the Constitution Grants to Persons and Entities Outside the U.S. Government*, 23 U. PA. J. CONST. L. 193, 199 n.41 (2021) [hereinafter Natelson, *Federal Functions*]. At the same time, Professor Natelson incorrectly concluded that, under the Elector Appointment Clause, “legislatures” directed the manner of appointing presidential electors by “simple resolution, without the signature of the governor, rather than by legislation,” citing Massachusetts as an “example” of this occurring. *Id.* at 199 n.44; *see also* Natelson, *supra* note 15 (arguing that “legislatures” can act as “independent assemblies” in presidential elections). While it is true that Massachusetts used “resolutions” to direct the manner of appointing electors, the Massachusetts constitution required the governor to approve “resolutions” as well as bills, and this is exactly what happened with respect to the first federal elections. *See* Smith, *supra* note 1, at 759–60 (demonstrating how, in November 1788, both houses of the Massachusetts legislature presented their resolutions directing the manner of appointing electors to the governor, John Hancock, for his signature, which he gave). The Massachusetts governor’s involvement in promulgating “manner” legislation is further demonstrated by an incident in 1796 in which the governor, Samuel Adams, expressed regret to the legislature for having “approved” the “resolve” they had sent him concerning how “vacancies” in presidential electors would be filled. *See* ACTS AND RESOLVES OF MASS. 1796–97, at 641–42 (Boston, Young & Minns 1896) (expressing reservations about how the resolve he approved would allow the electors to fill such vacancies).

58. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 569 (2004).

59. *Id.* at 569, 572–75. The rumor was false because, as the archives of Vermont demonstrate, the state’s 1796 electors were appointed by a “grand committee” as directed by a 1791 law that was enacted pursuant to the Vermont constitution’s regular lawmaking requirements. *Id.* at 574–75. The

Adams as Hamilton had hoped, but it generated a “cloud of suspicion” as to the validity of Vermont’s electors until Adams’s Republican opponent, Thomas Jefferson, disclaimed the rumor, explaining in a letter to James Madison that whatever had occurred must have conformed in substance with the lawmaking requirements of “the Vermont constitution.”⁶⁰

Professor Morley reviewed the debates from the Constitutional Convention and ratifying conventions concerning the Elector Appointment and Elections Clauses.⁶¹ He concluded that these sources “do not shed light . . . on whether either the Framers or the greater public intended or understood those provisions as establishing the independent state legislature doctrine,” but nevertheless proceeded to argue that history somehow supports the Doctrine.⁶²

Most recently, Professors Vikram Amar and Akhil Amar have delivered a comprehensive explanation of why the Doctrine is wrong as a matter of text, history, precedent, and other reasons; from their deep and well-informed knowledge of the Founding, they conclude that the Doctrine has no basis in the original understanding of the Constitution.⁶³

Apart from the preceding, scholarly attention to evidence of the original understanding of these clauses has focused on concepts other than the independent state legislature doctrine. In 2010, Professor Natelson studied

Vermont constitution required proposed laws to be presented to the governor and council for their revision and concurrence before they became law, see VT. CONST. of 1786, ch. 2, § XVI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3757, and this requirement was followed with respect to the 1791 law directing the manner of appointing presidential electors, see MANNING J. DAUER, THE ADAMS FEDERALISTS 105–06 n.58 (1st ed. 1953) (“[T]he first law providing for choice of electors was passed on November 1, 1791, concurred in by the Governor and Council on Nov. 3, and duly became law.”).

60. Ackerman & Fontana, *supra* note 58, at 575, 577 (“I cannot suppose that the Vermont constitution has been strict in requiring particular forms of expressing the legislative will.”).

61. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 30–32 (discussing the Elector Appointment Clause); *id.* at 28–30 (discussing the Elections Clause).

62. *Id.* at 32. Professor Morley’s latest article on the independent state legislature doctrine, published at the end of 2021, provides a helpful “descriptive taxonomy of the doctrine’s possible applications, with a normative assessment of their relative merits,” Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 508 (2021) [hereinafter Morley, *The Independent State Legislature Doctrine*], but does not identify any new historical evidence from the eighteenth or nineteenth centuries or otherwise engage with the contents of this Article other than describe it as providing “competing views that question the doctrine’s historical foundation.” Morley, *The Independent State Legislature Doctrine*, *supra*, at 536 n.279.

63. Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish* (forthcoming 2021 Supreme Court Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755 [https://perma.cc/VJ3D-WRP5].

the original meaning of the Elections Clause, but he was focused on whether that language gives Congress the power to regulate congressional campaigns, not the possibility of an independent state legislature doctrine.⁶⁴ In 2015, several prominent historians filed an amicus brief in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁶⁵ but they were focused on the different question of whether an initiative-created constitutional provision giving the power of the “legislature” to an independent redistricting commission was consistent with the Elections Clause, not whether “legislatures” exercising their Elections Clause power must remain “independent” of run-of-the-mill constitutional regulation.⁶⁶ In 2021, Eliza Sweren-Becker and Michael Waldman examined the Elections Clause at the Founding, but they were focused on the original understanding of the scope of Congress’s power to override “time, place, and manner” regulations prescribed by state legislatures.⁶⁷

It is against the evidence summarized in the prior paragraphs—all of which tends to show that the original understanding was contra to the independence of “legislatures”—that proponents of the Doctrine have formulated the Substance/Procedure Thesis. That thesis concedes that “legislatures” were understood to be bound by constitutionally-required lawmaking *procedures*, but contends that they were understood to not be bound by *substantive* limitations. The following section identifies new evidence from the historical record that debunks the thesis by showing that the Founding generation understood that “legislatures” were as much subject to substantive restraints as procedural ones.

B. *The Failure of the “Substance/Procedure” Thesis of the Original Understanding*

The Substance/Procedure Thesis is incorrect. The Founding generation did not understand that “legislatures” would remain free from substantive restrictions when acting pursuant to the Elector Appointment and Elections

64. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 1 (2010).

65. Brief of Jack N. Rakove, Richard R. Beeman, Alexander Keyssar, Peter S. Onuf, & Rosemarie Zagari for Ariz. Indep. Redistricting Comm’n as Amici Curiae Supporting Appellees, *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015) (No. 13-1314).

66. See Brief of Jack N. Rakove, Richard R. Beeman, Alexander Keyssar, Peter S. Onuf, & Rosemarie Zagari for Ariz. Indep. Redistricting Comm’n as Amici Curiae Supporting Appellees at 4, 26, *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015) (No. 13-1314) (analyzing Election clause sufficiency as it relates to an independent redistricting commission).

67. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 997–98 (2021).

Clauses. The historical record compels this conclusion in three ways. First, the evidence demonstrates that the Framers of these provisions, who drafted against the backdrop of their prior experience with “legislatures” under the Articles of Confederation, expected that state constitutions would impose substantive limitations on “legislatures.” Second, the expectations of the Framers coincided with the original understanding of the broader Founding generation. This is evidenced by the fact that, in the years immediately following adoption of the Constitution, the Founding generation imposed a number of substantive restrictions on “legislatures,” well beyond merely requiring them to follow constitutionally-mandated lawmaking procedures. And, third, the historical record contradicts the notion that the Founding generation saw any reason to treat these “legislatures” with unusual deference—that is, allow these “legislatures” to operate “independently”—because they perceived something special or unique about either the role that “legislatures” were to play in the constitutional design, the nature of “time, place, and manner” legislation, or the threat of court interference with such legislation.

1. The Framers’ Intent Regarding Substantive Limitations on “Legislatures”

The following analysis of the Framers’ intentions and expectations regarding substantive limitations on “legislatures” begins with their experience with “legislatures” under Article V of the Articles of Confederation, the precursor to the Elector Appointment and Elections Clauses. The analysis then turns to the Framers’ decision in 1787—informed by their experience under the Articles—to adopt Article V’s “legislature” language for use in the Constitution. Finally, the analysis finds confirmation of the Framers’ intent that state constitutions would continue to regulate “legislatures” under the new Constitution, as they had under the Articles, in the fact that two key Framers, John Dickinson and James Madison, participated in creating new constitutions for their states that did just that.

a. The Experience with “Legislatures” Under the Articles of Confederation

Article V of the Articles of Confederation provided that “delegates [to Congress] shall be annually appointed in such manner as the legislature of each State shall direct.”⁶⁸ The intent and experience under the Articles of Confederation was that “legislatures” referred to in that clause would be defined by, and subject to, their state constitutions. This is demonstrated by a review of the drafting history of Article V as well as a review of the state constitutional limitations that were placed on “legislatures” between 1776 and 1787, and then adhered to in subsequent years.

i. The Framing of Article V of the Articles of Confederation

On June 7, 1776, Richard Henry Lee proposed that Congress declare the Colonies be “free and independent States” and prepare “a plan of confederation” to “transmit[] to the respective Colonies for their consideration and approbation.”⁶⁹ Congress debated his proposal on June 8.⁷⁰ Conservatives, including John Dickinson, favored the formation of the confederation before a declaration of independence, and, as a result, consideration of independence was postponed to July 1.⁷¹

In the meantime, on June 12, Congress formed a committee to “prepare and digest the form of a confederation to be entered into between these colonies.”⁷² That committee (the “confederation committee”) consisted of one member from each colony. Dickinson was the representative from Pennsylvania.⁷³ Although there is little evidence regarding the committee’s

68. U.S. ARTICLES OF CONFEDERATION of 1781, art. V.

69. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 425 (Worthington C. Ford ed., Gov’t Prtg. Off. 1906) [hereinafter 5 JOURNALS OF THE CONTINENTAL CONGRESS] (footnote omitted).

70. *Id.* at 427; MERRILL JENSEN, THE ARTICLES OF CONFEDERATION, AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774–1781, at 114 (1940).

71. JENSEN, *supra* note 70, at 114–15; 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 428–31.

72. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

73. *Id.* The journals identify the members of the confederation committee as Josiah Bartlett (New Hampshire), Sam Adams (Massachusetts), Stephen Hopkins (Rhode Island), Roger Sherman (Connecticut), Robert R. Livingston (New York), John Dickinson (Pennsylvania), Thomas McKean (Delaware), Thomas Stone (Maryland), Thomas Nelson (Virginia), Joseph Hewes (North Carolina), Edward Rutledge (South Carolina), and Button Gwinnett (Georgia). *Id.*

work, according to historian Merrill Jensen, Dickinson was “given the task of writing the Articles which were presented to Congress,” there is “little doubt that Dickinson was dominant in the committee,” and the draft ultimately presented to Congress on July 12 was “an embodiment of the views of the conservatives, and of [Dickinson’s] views in particular.”⁷⁴

When Dickinson and the confederation committee began drafting, they had at their disposal the draft “Sketch of Articles of Confederation” that Ben Franklin had submitted to Congress a year before.⁷⁵ With respect to the selection of delegates to Congress, Franklin’s draft provided as follows:

Art. IV. That for the more convenient Management of general Interests, Delegates shall be annually elected in each Colony to meet in General Congress at such Time and Place as shall be agreed on in ~~each~~ the next preceding Congress. Only where particular Circumstances do not make a Deviation necessary, it is understood to be a Rule, that each succeeding Congress be held in a different Colony till the whole Number be gone through, and so in perpetual Rotation; and that accordingly the next Congress after the present shall be ~~in the~~ at Annapolis in Maryland.⁷⁶

Other documents that are thought to have been considered by Dickinson and the committee did not touch on the issue of how delegates to Congress were to be selected.⁷⁷

Dickinson’s use of Franklin’s language to frame what became Article V of the Articles of Confederation is illuminated by the three successive drafts of the articles produced by Dickinson in the summer of 1776. The first draft—believed to be a clean copy of an early Dickinson draft in the hand of Josiah Bartlett—provided as follows:

Art. 14th. For the more Convenient management of the General Interest, Delegates shall be Annually appointed by Each Colony to meet in General

74. JENSEN, *supra* note 70, at 126–27.

75. See 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 252 (Paul H. Smith et al. eds., Lib. of Cong. 1979) [hereinafter 4 LETTERS OF DELEGATES] (“[I]here can be no doubt that the members of the committee began their work with a copy of Benjamin Franklin’s proposed Articles of Confederation before them . . .”).

76. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 196 (Worthington C. Ford ed., Gov’t Prtg. Off. 1905).

77. See JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 136–38 (1979) [hereinafter THE BEGINNINGS OF NATIONAL POLITICS] (discussing two draft confederation plans, prepared by Silas Deane and the Connecticut delegates, which pre-dated the drafts prepared by Dickinson).

Congress in the City of Philadelphia in the Colony of Pennsylvania until otherwise ordered by Congress which meeting shall be on the first Monday of November Every year, with a power reserved in Each Colony to supersede the Deligates thereof at any time within the year and to send new Deligates in their Stead for the Remainder of the year. Each Colony shall support its own Deligates in Congress.⁷⁸

The second draft, in Dickinson's own hand, is believed to be the draft that he used in the confederation committee in late June. It provided as follows:

Art. [17]. For the more convenient Management of the general Interests, Delegates shall be annually appointed by Legislature of each Colony or such Branch thereof as the Colony shall authorize for that purpose, to meet in General Congress at the City of Philadelphia in the Colony of Pennsylvania [until] otherwise ordered by Congress, which Meeting shall be on the first Monday in November in every Year, with a Power reserved to those who appointed the said Delegates, to supersede them or any of them, at any Time within the Year, and to send new Delegates in their stead for the Remainder of the Year.⁷⁹

78. 4 LETTERS OF DELEGATES, *supra* note 75, at 241; *see also id.* at 233–50 (reprinting Bartlett's draft, with provision relating to representation at page 241); *id.* at 252 ("There is no evidence to indicate that Bartlett's manuscript is anything more than a clean copy of one of Dickinson's drafts."); Rakove, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 77, at 139 n.6. In reproducing the text of Bartlett's draft, the editors of LETTERS OF DELEGATES used angle brackets and regular brackets to identify variations between the draft and the subsequent draft that was reported to Congress on July 12. *See* 4 LETTERS OF DELEGATES, *supra*, at 252 (explaining that "words appearing in Bartlett's manuscript but omitted from the committee draft are placed in angle brackets" while "words substituted in or added to the latter appear in this text in regular brackets"). I have removed the editors' notations to show just the text of the Bartlett draft.

79. 4 LETTERS OF DELEGATES, *supra* note 75, at 241 (footnote omitted). This second draft (the earliest in Dickinson's hand) is reprinted in the fourth volume of LETTERS OF DELEGATES in parallel with the prior draft in Josiah Bartlett's hand, with the clause relating to representation appearing at page 241. *See id.* at 233–50 (reproducing text of drafts); *see also id.* at 251–55 (providing explanatory notes). Dickinson did not number the articles in this draft, but the editors of LETTERS OF DELEGATES marked this provision "Art. [17]." *Id.* at 241. The asterisk in the text marks a query that Dickinson wrote in the margin next to this language: "Q. How Representation in Congress to be regulated? How many shall make a Quorum, save in the [Executive?]." *Id.* at 253 n.12. The editors of LETTERS OF DELEGATES commented that it was "highly likely that this document was the basic draft Dickinson employed in committee from about June 17 to July 1, and from which he copied the committee draft reported to Congress." *Id.* at 251; *see also* RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 77, at 139 (noting that this draft "apparently served as a working copy for the committee").

The third draft, again in Dickinson's hand, is believed to be the draft that was used to report the confederation committee's work to Congress on July 12.⁸⁰ It provided as follows:

Art XVI. For the more convenient Management of the general Interests of the United States, Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct, ~~or such Branches thereof as the Colony shall authorize for that purpose,~~ to meet in General Congress at the City of Philadelphia, in the Colony of Pennsylvania, until otherwise ordered by Congress the United State assembled; which Meeting shall be on the first Monday of November in every Year, with a Power reserved to those who appointed the said Delegates, respectively to ~~supercede~~ recall them or any of them at any time within the Year, and to send new Delegates in their stead for the Remainder of the Year. Each Colony shall support its own Delegates in ~~Congress~~ a Meeting of the States, and while they act as Members of the Council of State, herein after mentioned.⁸¹

After famously arguing against independence during the debate on July 1, and absenting himself from the vote the following day, Dickinson left Philadelphia to serve in the Pennsylvania militia.⁸² The alterations indicated in the text are believed to reflect changes made by Dickinson before he left,⁸³ and thus before the draft was read to Congress on July 12, by which time Dickinson was with his battalion in New Jersey.⁸⁴ Indeed, the document that Congress printed to reflect the first reading on July 12 (First Printed Form) incorporated the alterations.⁸⁵

Dickinson thus brought the language close to what was finally included in Article V of the Articles of Confederation, but Congress subsequently made two additional non-stylistic changes. After Dickinson left, debate on

80. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 546 n.1.

81. *Id.* at 549–50.

82. JANE E. CALVERT, QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON 242 (2009); DAVID L. JACOBSON, JOHN DICKINSON AND THE REVOLUTION IN PENNSYLVANIA 1764–1776, at 113–15 (1965).

83. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 546 n.1.

84. See 4 LETTERS OF DELEGATES, *supra* note 75, at 251–52 (explaining that “it seems unlikely that much time was devoted to [Dickinson’s draft] after [July 1]” because “the independence debate preempted the attention of Congress” and Dickinson’s time was dominated by “the call for the Pennsylvania militia to meet the British military threat to New York and New Jersey”).

85. On July 12, “[t]he committee appointed to prepare articles of confederation brought in a draught, which was read,” and then 80 copies were ordered to be printed. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 546, 555. For the resulting First Printed Form, see *id.* at 674–89 (displaying draft Article XVI at 680–81).

the First Printed Form was “intermittently conducted in a committee of the whole of Congress between July 22 and August 20,”⁸⁶ at which time Congress voted a second print reflecting further revisions (Second Printed Form).⁸⁷ It provided as follows:

Art. XII. For the more convenient management of the general interests of the United States, Delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet at the city of Philadelphia, in Pennsylvania, until otherwise ordered by the United States in Congress Assembled; which meeting shall be on the first Monday in November in every year, with a power reserved to each State to recal its Delegates or any of them at any time within the year, and to send others in their stead for the remainder of the year. Each State shall support its own Delegates in a meeting of the States, and while they act as members of the Council of State, herein after mentioned.⁸⁸

Here can be seen the two non-stylistic changes that Congress made from the First Printed Form. First, “should be annually appointed” was changed to “shall be annually appointed.”⁸⁹ Second, the power to “recal” delegates was now reserved “to each State,” as opposed to “those who appointed the said Delegates.”⁹⁰ According to John Adams’ notes of the debates on July 26, 1776, the second change occurred after Francis Hopkinson of New Jersey moved “that the power of recalling delegates be reserved to the State, not to the Assembly, because that may be changed.”⁹¹

After the Second Printed Form (August 20, 1776), Congress delayed further consideration of the articles until April 1777 because some states were unrepresented and because the demands of the war took precedence.⁹² When debate continued in April and afterwards, significant changes to the draft continued to be made, but the language of this provision relating to selection of representation did not materially change. It ultimately became

86. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS*, *supra* note 77, at 139; *see also* JENSEN, *supra* note 70, at 249–50 (listing the dates which Congress debated the First Printed Form).

87. 5 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 69, at 674–89. The Second Printed Form is set forth as such in the fifth volume of *JOURNALS OF THE CONTINENTAL CONGRESS*, in parallel with the First Printed Form. *See id.* at 674–89 (displaying draft Article XII at 680–81).

88. *Id.* at 680–81.

89. *Id.* at 680.

90. *Id.*

91. 6 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 1077 (Worthington C. Ford ed., Gov’t Prtg. Off. 1906).

92. JENSEN, *supra* note 70, at 251; JACOBSON, *supra* note 82, at 118.

Article V of the final document that Congress sent to the states for ratification in November 1777,⁹³ the adoption of which was not completed until March 1781.⁹⁴

Thus, from Ben Franklin's draft to its final form, the language governing state selection of representation in Congress evolved as follows:

- “Delegates shall be annually elected in each Colony” (Franklin draft);⁹⁵ to
- “Delegates shall be Annually appointed by Each Colony,” but “with a power reserved in Each Colony to supersede [and] send new Deligates” (first Dickinson draft, in Bartlett's hand);⁹⁶ to
- “Delegates shall be annually appointed by Legislature of each Colony or such Branch thereof as the Colony shall authorize for that purpose,” but “with a Power reserved to those who appointed the said Delegates, to supersede . . . [and] send new Delegates” (second Dickinson draft, in Dickinson's hand);⁹⁷ to
- “Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct, or such Branches thereof as the Colony shall authorize for that purpose,” but “with a Power reserved to those who appointed the said Delegates, respectively to supercede [and] send new Delegates”⁹⁸ (Dickinson's third draft, before his cross-outs); to
- “Delegates should be annually appointed in such Manner as the Legislature of each Colony shall direct,” but “with a Power reserved to those who appointed the said Delegates, respectively to recal them [and] send new Delegates” (Dickinson's third draft, after his

93. JENSEN, *supra* note 70, at 253. For the final draft of the Articles of Confederation, *see* 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 907–25 (Worthington C. Ford ed., Gov't Prtg. Off. 1907) [hereinafter 9 JOURNALS OF THE CONTINENTAL CONGRESS] (displaying the final draft of the Articles of Confederation).

94. JENSEN, *supra* note 70, at 238.

95. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 76, at 196.

96. 4 LETTERS OF DELEGATES, *supra* note 75, at 241.

97. *Id.*

98. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 549–50.

cross-outs, i.e., the First Printed Form, read to Congress on July 12, 1776);⁹⁹ to

- “Delegates shall be annually appointed in such manner as the legislature of each State shall direct,” but “with a power reserved to each State to recal [and] send others” (Second Printed Form and Article V as adopted).¹⁰⁰

In sum, Dickinson and the confederation committee began by deciding against calling upon each colony to “elect” or “appoint” its delegates without providing them with any further instructions as to how that was to occur. They then considered whether delegates ought to be directly “appointed by Legislature” or “Branch thereof,” but decided against that as well. Instead, they decided that “the Legislature” would “direct” the “manner” in which delegates would be appointed.¹⁰¹ The Framers also decided to delete language that would have provided that, instead of “the Legislature,” the colony could “authorize” particular “Branches” of the legislature to direct the manner of appointment. And finally, Congress chose to reserve “to each State,” instead of “those who appointed,” the power to recall and replace delegates.

Several aspects of this drafting history are contrary to the notion, central to the independent state legislature doctrine, that the Framers intended for institutional “legislatures” to enjoy independence from the constraints ordinarily imposed on them. First, the confederation committee’s consideration of language that would have made clear that a colony could authorize “Branches” of “the Legislature” to exercise the function instead of “the Legislature” is significant. The fact that there could have been “branches” (plural) comprising a subpart of “the Legislature,” can only mean that that they were thinking of the “the Legislature” as having more than two branches, and thus in the broader sense as the entire group of governmental institutions involved in lawmaking, and not in the narrower

99. *Id.*

100. *Id.* at 680–81; see also 9 JOURNALS OF THE CONTINENTAL CONGRESS *supra* note 93, at 909–10.

101. The move from “appointment by Legislature” to “appoint[ment] in such manner as the Legislature . . . shall direct” gave the states the choice of whether to appoint their delegates to Congress through legislative appointment or by popular vote. See EDMUND S. MORGAN, *INVENTING THE PEOPLE, THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 264 (1988) (noting that Rhode Island and Connecticut delegates were “chosen at large by the voters”).

sense of a bicameral assembly that came to dominate American discourse in the years that followed.

Indeed, there is compelling evidence that, at the time he was drafting, Dickinson would have been thinking of “the legislature,” and “branches thereof,” in that broader sense. In the fall of 1776, shortly after the confederation committee completed and presented its draft of the Articles of Confederation, Dickinson drafted *Essay of a Frame of Government for Pennsylvania (Frame)* as an alternative to the radical, unicameral constitution recently adopted by that state.¹⁰² For Pennsylvania, Dickinson proposed that laws would be passed by the “General Court,” comprised of *three* branches: an Assembly, a Senate, and an executive Council (selected from the Assembly and Senate) consisting of a Governor, Lieutenant Governor, and thirteen others.¹⁰³ The Council would have the power to “assent, dissent or propose amendments” to bills received from the Assembly or Senate.¹⁰⁴ Dickinson explained that “vesting the Supreme Legislature in three different bodies” in this fashion would “give maturity and precision to acts of legislation . . . by preventing measures from being too much influenced by sudden passions.”¹⁰⁵ At the same time, Dickinson hoped that “all the branches of the Legislature” would “enter into the generous contest of gaining the greatest share of approbation of [the people], by most effectually promoting their happiness.”¹⁰⁶ Amendment of the constitution would require, among other things, “two-thirds of each branch of the Legislature.”¹⁰⁷

Dickinson’s view was not idiosyncratic. In *Thoughts on Government* (1776), John Adams wrote about “the legislature” and “branches of the legislature” in similarly broad terms.¹⁰⁸ According to Gordon Wood, this document

102. CALVERT, *supra* note 82, at 255 (“In the autumn of 1776 [Dickinson] published *An Essay of a Frame of Government for Pennsylvania*.”); Robert F. Williams, *The Influences of Pennsylvania’s 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 PA. MAG. HIST. & BIOGRAPHY 25, 32 (1988) (noting that Dickinson “attacked” the 1776 constitution in this document but recognizing some dispute over its authorship); Paul Leicester Ford, *The Adoption of the Pennsylvania Constitution of 1776*, 10 POL. SCI. Q. 426, 453 (1895) (“In the middle of July Dickinson himself printed an *Essay of a Frame of Government for Pennsylvania . . .*”).

103. AN ESSAY OF A FRAME OF GOVERNMENT FOR PENNSYLVANIA 5–8 (Phila., James Humphreys, Jr. 1776) [hereinafter FRAME].

104. *Id.* at 11.

105. *Id.* at 3.

106. *Id.*

107. *Id.* at 15.

108. JOHN ADAMS, THOUGHTS ON GOVERNMENT 196 (Phila., John Dunlap 1776) [hereinafter JOHN ADAMS, THOUGHTS ON GOVERNMENT].

was “widely circulated among the leading Revolutionaries in several states” and was “the most influential pamphlet in the early constitution-making period.”¹⁰⁹ In it, Adams made the case against giving “the whole power of legislation” to the “single assembly” representing the people.¹¹⁰ Adams proposed a “distinct assembly,” an upper house that would act as a “mediator” between “the two extreme branches of the legislature,” which he identified as “that which represents the people, and that which is vested with the executive power.”¹¹¹ The Assembly and the upper house would “unite” to choose a Governor who, stripped of royal prerogatives, would have “a free and independent exercise of his judgment, and be made also an integral part of the legislature.”¹¹² Both the upper house and the Governor would have a “negative” on legislation.¹¹³

Nor was this broader view of “legislature” merely hypothetical. The South Carolina constitution of 1776—one of two constitutions existing when Dickinson drafted the articles—vested South Carolina’s “legislative authority” in “the president and commander-in-chief, the general assembly and legislative council.”¹¹⁴ When in 1778 the latter branches created a new constitution vesting the “legislative authority” in “a general assembly, to consist of two distinct bodies, a senate and a house of representatives,”¹¹⁵ the incumbent president, John Rutledge, issued a futile veto, and then

109. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 203 (1969) [hereinafter WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*].

110. JOHN ADAMS, *THOUGHTS ON GOVERNMENT*, *supra* note 108, at 196.

111. *Id.*

112. *Id.*

113. *Id.*; see also Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 AM. ANTIQUARIAN SOC. 317, 336 (1980) (“Adam’s theory of balance . . . required that the governor in his capacity as part of the legislature should have a negative on laws that was as effective as that of the Senate or House.”). Chief Justice Roberts referenced the eighteenth-century notion of a three-branch legislature in his dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n, 576 U.S. 787, 827–28 (2015) (Roberts, C.J., dissenting).

114. S.C. CONST. of 1776, art. VII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244. In 1777, the New York Constitutional Convention actually adopted a proposal that “the legislature consist of three separate and distinct branches, intending to add the governor as the third branch [and giving him] a negative on all laws passed by the senate and assembly,” before reverting back to a two-house legislature at John Jay’s urging. See CHARLES Z. LINCOLN, 1 THE CONSTITUTIONAL HISTORY OF NEW YORK 504 (1906); see also WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 109, at 225 (describing the debate over the proposed “incorporation of the governor as a third ‘separate and distinct’ branch of the legislature” and the compromise of a “separate Council of Revision of which the governor was made a member”).

115. S.C. CONST. of 1778, art. II, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3248.

resigned.¹¹⁶ Rutledge explained that the new constitution “annihilate[d] one branch of the legislature” in disregard of the fact that, in the old constitution, “the people, being at liberty to choose what form they pleased, agreed to one vesting an authority for making the laws by which they were to be bound in three branches.”¹¹⁷ He feared that “if we have power to lop one branch of the legislature, we may cut off either of the other branches, and suffer the legislative authority to be exercised by the remaining branch only.”¹¹⁸

Under this broader view of what constituted “the legislature” and “branches thereof,” the exact composition of the “legislature” that was to “direct” the manner of appointing delegates would have to be delineated by the state, either in its constitution or by law.¹¹⁹ That indefiniteness gives rise to two important conclusions about the intentions of Dickinson and his compatriots. First, for them, in 1776, there could have been no room for a “legislature” to operate independently of the state—the term had no definite meaning until it was fixed by the state. Second, it is clear the Framers did not intend, by specifying “legislature,” to necessarily empower either bicameral or unicameral institutional assemblies of representatives.¹²⁰ This undermines any assumption that they thought such assemblies had some special competence with respect to directing the manner of appointment, or that they had in mind some particular “separation of powers” principle when they used the word “legislature.”

The provision that Dickinson included in his draft *Frame* specifying how Pennsylvania would appoint its delegates to Congress underscores the indefiniteness of “the Legislature.” Under Dickinson’s *Frame*, the power was not given to what would now be considered the bicameral legislature

116. DAVID RAMSAY, 1 THE HISTORY OF THE REVOLUTION OF SOUTH CAROLINA, FROM A BRITISH PROVINCE TO AN INDEPENDENT STATE 131–32 (1785).

117. *Id.* at 133.

118. *Id.* at 134.

119. The Framers’ decision not to include the language about “Branches” could have reflected a determination that either: (a) the entire “Legislature” (not just “Branches thereof”) had to be involved in directing the manner of appointment; or (b) the language was unnecessary, i.e., a colony’s authority to pick which legislative “branches” would act as the “legislature” was clear without spelling it out. Either way, the state would have to delineate the institutions that would act as the “legislature.”

120. It was not only that the “Legislature” could be defined as more than the two representative houses. It was conceivable that a state might choose to designate one of its two legislative houses to play the role. For example, in 1776, one of Thomas Jefferson’s drafts for the Virginia constitution would have assigned the responsibility to elect delegates to the lower house of the Assembly. *See* 1 THE PAPERS OF THOMAS JEFFERSON 351 (Julian P. Boyd et al. eds., 1950) (displaying Jefferson’s second draft for the Virginia constitution).

(the Senate and Assembly) but rather to all three branches of what he referred to as the “Supreme Legislature,” including the executive committee with Governor and Lieutenant Governor, which he referred to as the Council.¹²¹ This approach contrasted with that of South Carolina’s constitution of 1776, which assigned the power to choose delegates to “the general assembly and the legislative council,”¹²² even though the colony’s “legislative authority” also included a third branch, consisting of the president.¹²³

Moreover, whatever was to comprise “the Legislature” of a given state, neither the drafting history of Article V nor the resulting language gives any reason to think that the Framers intended for that institution (or institutions) to act “independently.” It is apparent from the evolution of the language, which went through several iterations, that it was carefully crafted, and also perhaps “bitterly fought over,” as was the rest of the draft.¹²⁴ As Committee Member Edward Rutledge wrote to John Jay on June 29, 1776, the draft had “the Vice of all [Dickinson’s] Productions to a considerable Degree; I mean the Vice of Refining too much.”¹²⁵ Surely, if it had been their intention, Dickinson and his colleagues would have found a more direct way to express their desire for legislative independence than just specifying it was the “legislatures” that were to direct the manner of appointing delegates.

The fact that Dickinson and his colleagues did not include—and evidently never considered including—an explicit expression of legislative independence is particularly significant because, as they drafted this language, two colonies had adopted constitutions which regulated their “legislatures” with respect to the selection of delegates to Congress. The South Carolina constitution (March 26, 1776) required delegates to be “chosen by the general assembly and legislative council, jointly by ballot, in the general assembly.”¹²⁶ Similarly, the Virginia constitution (June 29, 1776) required delegates to be “chosen annually, or superseded[] in the mean

121. See FRAME, *supra* note 103, at 14 (“The Council, Senate and Assembly to join, and by ballot chuse annually from themselves, Delegates to represent this colony in Congress. The election to be conducted in the same manner as the election of members of the Council.”).

122. S.C. CONST. of 1776, art. XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3246.

123. S.C. CONST. of 1776, art. VII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244.

124. JENSEN, *supra* note 70, at 127.

125. Letter from Edward Rutledge to John Jay (June 29, 1776), *in* 4 LETTERS OF DELEGATES, *supra* note 75, at 337, 338.

126. S.C. CONST. of 1776, art. XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3246.

time, by joint ballot of both Houses of Assembly.”¹²⁷ If Dickinson’s committee considered these constitutional impingements on “legislatures” to be problematic—as they would have if they were proponents of legislative independence—it is hard to explain why they did not explicitly address the problem in their drafting. And as the full Congress, and then the states, further considered Dickinson’s draft before final adoption of the Articles in 1781, this backdrop of constitutional regulation of “legislatures” only increased as more state constitutions were adopted, as explained in the next section of this Article.

Finally, it is telling that Congress consciously chose, on the motion of Francis Hopkinson, to reserve the power to recall and replace delegates, not to “those who appointed” the delegates, but “to each State.” This gave the “State” the power to effectively undo, and then redo, the allegedly special handiwork of the “legislature.” This was inconsistent with the concept (if indeed it was a concept at the time) of some specific institutional “legislature” operating, with special expertise, independently of the state of which it was a part.

ii. Constitutional Limitations on “Legislatures” from
1776–1787

That substantive regulation of “legislatures” was expected by Dickinson and his colleagues on the confederation committee is confirmed by their subsequent actions. After completing their work, several of them returned to their home states and participated in creating state constitutions that expressly regulated the way in which “legislatures” could exercise their power to direct the manner of appointing delegates to Congress, and those regulations were subsequently followed.

Dickinson himself missed the drafting of the Pennsylvania constitution in the summer of 1776 because he was in New Jersey with the militia.¹²⁸ However, as noted previously, Dickinson’s draft *Frame* for Pennsylvania, prepared in the fall of that year, would have required the three branches of the state’s legislature (Council, Senate and Assembly) to “join, and by ballot to chuse [the Delegates] annually from themselves,” with the election to be conducted “in the same manner as the election of members of the

127. VA. CONST. of 1776, The Constitution or Form of Government, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3817.

128. JACOBSON, *supra* note 82, at 119.

Council.”¹²⁹ The members of the Council were to be “chosen one after another by the Senate and Assembly jointly by ballot, from themselves.”¹³⁰ Election would require two thirds of the votes, but if that could not be achieved after two ballots, then the election would be “determined by lot.”¹³¹

Delaware’s representative on the confederation committee was Thomas McKean.¹³² After July 1776, McKean returned to Delaware to participate in its constitutional convention, held in August and September of 1776.¹³³ While McKean’s later assertion that he wrote the state’s first constitution “in a tavern without a book or any assistance” is likely an exaggeration,¹³⁴ he was a member of the drafting committee and there is no doubt that he played a key role, along with George Read, who had also been in Congress in July 1776.¹³⁵ The constitution they created specified that Delaware’s delegates to Congress would be “chosen . . . by joint ballot of both houses in the general assembly.”¹³⁶

Button Gwinnett was Georgia’s representative on the confederation committee.¹³⁷ After July 1776, Gwinnett returned to Georgia and participated in the elected body which assembled in October 1776 and produced the state’s first constitution, ultimately adopted on February 5, 1777.¹³⁸ Gwinnett served on the committee that drafted the constitution

129. FRAME, *supra* note 103, at 14.

130. *Id.* at 7.

131. *Id.*

132. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

133. See Richard Lynch Mumford, *Constitutional Development in the State of Delaware, 1776–1897*, at 59–62 (June 1968) (Ph.D. dissertation, University of Delaware) (on file with author) (detailing the convention proceedings).

134. McKean made this claim in a letter dated August 22, 1813. See ROBERDEAU BUCHANAN, *LIFE OF THE HON. THOMAS MCKEAN* 51 (1890) (quoting McKean’s letter) (internal quotations omitted). Mumford explains why this claim was very likely an exaggeration. Mumford, *supra* note 133, at 57–58.

135. Mumford, *supra* note 133, at 57–59, 62.

136. DEL. CONST. of 1776, art. 11, reprinted in 1 CONSTITUTIONS, *supra* note 29, at 564. The journal of the convention reflects that this provision of the committee draft (among others) was considered on September 18, 1776. PROCEEDINGS OF THE ASSEMBLY OF THE LOWER COUNTIES ON DELAWARE 1770–1776, OF THE CONSTITUTIONAL CONVENTION OF 1776, AND OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE 1776–1781, at 217 (Claudia A. Bushman et al. eds., 1986). The entire draft of the committee was approved on September 20, 1776. *Id.* at 219.

137. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

138. ETHEL K. WARE, *A CONSTITUTIONAL HISTORY OF GEORGIA* 29–31 (Columbia Univ. eds., 1967).

and appears to have played a prominent part in its drafting.¹³⁹ The constitution that he and others created specified that the “continental delegates” were to be “appointed annually by ballot,” apparently by the state’s unicameral legislature, the “house of assembly.”¹⁴⁰ Notably, the constitution stated that this provision was subject to “the regulations contained in the twelfth article of the Confederation of the United States.”¹⁴¹ This was a reference to Article XII of the draft articles that appeared in the Second Printed Form printed by Congress on August 20, 1776, which later became Article V of the Articles of Confederation sent to the states for ratification in November 1777.¹⁴²

New York’s representative on the confederation committee was Robert R. Livingston.¹⁴³ Livingston returned to his home state of New York after July 1776 and helped draft its constitution, adopted in April 1777.¹⁴⁴ Livingston was appointed to the drafting committee and, along with John Jay and Gouverneur Morris, is thought to have been primarily responsible for the draft constitution.¹⁴⁵ The initial drafts provided that delegates would be “annually appointed by an act of the Legislature, without the nomination of the Governor, which shall originate in the . . . senate but be liable as all other acts to the amendment of the general assembly below.”¹⁴⁶ However, at the suggestion of Morris, the following elaborate provision was substituted:

[T]he 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 joint ballot of the senators and members of assembly so met together as aforesaid.¹⁴⁷

139. See *id.* at 30–32 (“[I]t is natural that Gwinnet should have taken a prominent part in the drafting of the Constitution.”).

140. GA. CONST. of 1777, art. XVI, reprinted in 2 CONSTITUTIONS, *supra* note 35, at 780.

141. *Id.*

142. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 680–81 (displaying Art. XII of the draft articles).

143. *Id.* at 433.

144. 1 LINCOLN, *supra* note 114, at 500 (“The discussion on the proposed Constitution began on the day of its presentation, March 12, and continued until its adoption on the 20th of April.”).

145. *Id.* at 490–91, 496.

146. *Id.* at 536–37.

147. *Id.* at 537.

This became Article XXX of the New York constitution of 1777.¹⁴⁸

Samuel Adams was the Massachusetts representative on the confederation committee.¹⁴⁹ At the Massachusetts constitutional convention of 1779, Adams was a member of the committee appointed to frame the constitution, and also, along with John Adams and James Bowdoin, the three-person subcommittee that did the preliminary work.¹⁵⁰ The resulting constitution specified that the state's delegates to Congress would be annually "elected by the joint ballot of the senate and house of representatives, assembled together in one room."¹⁵¹

This understanding that "legislatures" were dependent on state constitutions was not unique to the members of the confederation committee that framed Article V. Most of the state constitutions adopted between Independence and the adoption of the United States Constitution purported to regulate the selection of delegates to Congress.¹⁵² This demonstrates a widespread understanding among Americans of the time that, under the Articles as drafted, "legislatures," when directing the manner of appointing delegates to Congress, were to act subject to state constitutional commands.

Lest there be any doubt about the understanding, after these constitutions were established, the credentials that "legislatures" gave to their delegates

148. N.Y. CONST. of 1777, art. XXX, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2634–35.

149. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 433.

150. Taylor, *supra* note 113, at 326.

151. MASS. CONST. of 1780, ch. IV, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1906. The proposed Massachusetts constitution that had been rejected in 1778 contained a similar provision, specifying that delegates would be selected by joint ballot of the Senate and House of Representatives. *See* MASSACHUSETTS, COLONY TO COMMONWEALTH 51–58 (Robert J. Taylor ed., 1961) (reflecting a copy of the failed constitution).

152. Smith, *supra* note 1, at 755; DEL. CONST. of 1776, art. 11, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 564; PA. CONST. of 1776, § 11, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3085; MD. CONST. of 1776, art. XXVII, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1695; N.C. CONST. of 1776, art. XXXVII, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2793; GA. CONST. of 1777, art. XVI, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 780; N.Y. CONST. of 1777, art. XXX, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2634; S.C. CONST. of 1778, art. XXII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3253; MASS. CONST. of 1780, ch. IV, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1906; N.H. CONST. of 1784, Part II.—The Form of Government, Delegates to Congress, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2467 (Francis Newton Thorpe ed., 1909) [hereinafter 4 CONSTITUTIONS]. These are listed earliest to latest; Gordon Wood provides the exact dates of adoption for the earlier of these constitutions. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 133.

for delivery to Congress reflected that appointment had been made pursuant to the state constitutions. For example, in November 1785, the credentials of the Massachusetts delegates made clear that they had been elected “by joint Ballot of the two branches of the General Court agreeably to the Constitution.”¹⁵³ The November 1785 credentials of James Monroe reflect that he was appointed by “joint ballot of both Houses,” which was the method of appointment provided for in the Virginia constitution.¹⁵⁴ Similarly, the credentials of the New York delegates that year referred to the “[n]omination” process set forth in the New York constitution.¹⁵⁵

b. The Framers’ Adoption of the “Legislature” Language in Light of Their Experience Under the Articles of Confederation

The drafting history of the Elector Appointment and Elections Clauses at the constitutional convention in 1787 has been reviewed by lawyers previously. The Elector Appointment Clause emerged in September from a committee chaired by David Brearley of New Jersey (the Committee of Unfinished Parts, sometimes called the Brearley Committee),¹⁵⁶ and the Elections Clause emerged in August from the committee chaired by John Rutledge of South Carolina (the Committee of Detail).¹⁵⁷ In both instances, the language that came out of committee was adopted by the convention without any changes that are material to the present discussion. Nothing from this drafting history supports the notion that the Framers intended for “legislatures” operating pursuant to these clauses to be immune from constitutional restraint or otherwise treated differently than legislatures going about their normal legislative business.¹⁵⁸ However, this

153. 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 879 (Worthington C. Ford ed., Gov’t Prtg. Off. 1933); MASS. CONST. of 1780, ch. IV, reprinted in 3 CONSTITUTIONS, *supra* note 34, at 1906 (requiring delegates to be “elected by the joint ballot of the senate and house of representatives”).

154. 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 153, at 902; VA. CONST. of 1776, The Constitution or Form of Government, reprinted in 7 CONSTITUTIONS, *supra* note 30, at 3817 (providing delegates were to be chosen “by joint ballot of both Houses of Assembly”).

155. 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 153, at 880; N.Y. CONST. of 1777, art. XXX, reprinted in 5 CONSTITUTIONS, *supra* note 31, at 2634–35.

156. Smith, *supra* note 1, at 751–52; Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 31.

157. Sweren-Becker & Waldman, *supra* note 67, at 1005; Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 28–29; Natelson, *Federal Functions*, *supra* note 57, at 198–199.

158. Smith, *supra* note 1, at 777–78.

does not mean that the evidence of the framing is neutral as to the existence of the Doctrine.¹⁵⁹

The “legislature” language adopted by the Framers for the Elector Appointment and Elections Clauses closely resembles the “legislature” language of Article V of the Articles of Confederation.¹⁶⁰ Each of the three clauses gave the “legislature” the responsibility to direct or prescribe the manner of appointment or election of national representatives, whether to

159. To the contrary, in addition to the argument in text, reasonable inferences can be drawn from the drafting history against the existence of the Doctrine. See Smith, *supra* note 1, at 756–57 (arguing that the drafting history suggests an aversion to giving too much power to “legislatures”). But see Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 32 (concluding that the “histories do not shed light . . . on whether either the Framers or the greater public intended or understood those provisions as establishing the independent state legislature doctrine”). See also Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 661 (2001) (finding “no relevant legislative history”).

160. Compare U.S. ARTICLES OF CONFEDERATION of 1781, art. V (“[D]elegates [to Congress] shall be annually appointed in such manner as the legislature of each state shall direct . . .”), with U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”) and U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”). Under the Articles of Confederation, most delegates to Congress were appointed by the legislatures themselves. See *supra* note 101 (noting that only two states held popular elections for delegates). Therefore, the predominant practice with respect to the selection of delegates under the old constitution (legislative appointment) was similar to the requirement with respect to the selection of senators under the new Constitution (legislative “choosing”). See U.S. CONST. art. I, § 3, cl. 1 (providing that each state’s senators were to be “chosen by the Legislature thereof”). And thus it has often been said that the selection method for senators reflected that senators were to “represent[] not the people of the respective states, but the states themselves,” as had delegates to Congress under the Articles of Confederation. Michael Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 999 (2008) [hereinafter Ramsey, *Missouri v. Holland and Historical Textualism*]. This is true, but it ignores a lot of textual differences to further say that “the selection method [for Senators] was a direct carry-over from the Articles, where the state legislatures (under [Article V]) chose their delegates to the Congress.” *Id.* Textually speaking, the “direct carry-over from the Articles” was the Elector Appointment Clause, which, like its predecessor under the Articles, but unlike the new provision for “choosing” senators, gave states optionality as to the manner of appointing representatives (by providing that “legislatures” would “direct the manner” of appointment). John Dickinson recognized these distinctions when he wrote that, under the new Constitution, selection of senators would have to be made in “the same manner, in which the members of Congress are now appointed,” resulting in a senate “created by the sovereignties of the several states.” John Dickinson, *Fabius II* (1788), reprinted in FRIENDS OF THE CONSTITUTION, WRITINGS OF THE “OTHER” FEDERALISTS, 1787–1788, at 61 (Colleen A. Sheehan and Gary L. McDowell, eds., 1998). On the other hand, because presidential electors were “to be appointed, as the legislature of each state may direct, the fairest, freest opening is given for each state to chuse such electors for this purpose, as shall be most signally qualified to fulfill the trust.” *Id.* at 63.

the confederation Congress (a hybrid executive/legislature),¹⁶¹ Congress (the legislature), or the Electoral College (to pick the executive). Given the textual similarities, the Framers' decision to use the "legislature" language again in the new Constitution should be viewed in light of their prior experience under the Articles.¹⁶²

As established in the previous section, under the Articles of Confederation, it was understood that "legislatures" were normal legislatures, subject to substantive regulation by state constitutions. The Framers knew this when they gathered in 1787. For example, consider the members of the two committees who framed the Elector Appointment and Elections Clauses (the Committee of Unfinished Parts and the Committee of Detail).¹⁶³ The Committee of Unfinished Parts included both John Dickinson and Roger Sherman. In 1776, Dickinson and Sherman had worked together on the confederation committee, which produced the original "legislature" language of Article V of the Articles of Confederation. Other members of the Committee of Unfinished Parts had participated in

161. See RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS*, *supra* note 77, at 383 (noting "the anomalous character of Congress," which was described by Thomas Burke as "a deliberating Executive assembly").

162. The original understanding of the Articles of Confederation can be "crucial evidence of the Constitution's meaning" when the latter borrowed language from the former. Ramsey, *Missouri v. Holland and Historical Textualism*, *supra* note 160 at 986 (arguing that the Framers "surely knew how the Articles granted treaty-making power to the Congress and how that power had been understood throughout the 1780s" and that "[t]here is no reason to suppose that [the Framers] would have used parallel language in the Constitution had they intended a wholly different effect, and every reason to suppose that they saw their language as parallel."). Making the comparison is useful for present purposes, but should not be taken as a suggestion that the nature of national representation did not change from the Articles of Confederation to the Constitution. Madison, for example, "envisioned a genuine national government, resting for its authority, not on the state governments and not even on the peoples of the several states considered separately," but rather on "an American people" who "constituted a separate and superior entity, capable of conveying to a national government an authority that would necessarily impinge on the authority of the state governments." MORGAN, *supra* note 101, at 267.

163. The Committee of Unfinished Parts consisted of Nicholas Gilman (New Hampshire), Rufus King (Massachusetts), Roger Sherman (Connecticut), David Brearley (New Jersey), Gouverneur Morris (Pennsylvania), John Dickinson (Delaware), Daniel Carroll (Maryland), James Madison (Virginia), Hugh Williamson (North Carolina), Pierce Butler (South Carolina), and Abraham Baldwin (Georgia). Madison's Notes (Aug. 31, 1787), *in* 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 475, 481 (Max Farrand ed., 1911) [hereinafter 2 *RECORDS OF THE FEDERAL CONVENTION*]. The Committee of Detail consisted of Edmund Randolph (Virginia), James Wilson (Pennsylvania), Oliver Ellsworth (Connecticut), John Rutledge (South Carolina), and Nathaniel Gorham (Massachusetts). Journal (July 24, 1787), *in* 2 *RECORDS OF THE FEDERAL CONVENTION*, *supra*, at 97, 97.

creating the state constitutions which regulated “legislatures.” This included James Madison (Virginia constitution of 1776) and Gouverneur Morris (New York constitution of 1777). Both Dickinson (in his draft *Frame* for Pennsylvania) and Morris (at the New York constitutional convention) had personally proposed specific state constitutional provisions designed to regulate “legislatures.” Likewise, the Committee of Detail’s members also included delegates who had participated in creating state constitutions which regulated “legislatures,” specifically Edmund Randolph (Virginia constitution of 1776) and Nathaniel Gorham (Massachusetts constitution of 1780). Others on the two committees may not have had such first-hand experiences but nevertheless would have been able to observe how state constitutions had been regulating “legislatures” under the Articles of Confederation, including by having themselves been appointed to Congress prior to 1787 by state “legislatures” pursuant to state constitutional requirements.¹⁶⁴

Assume for a moment that by 1787, in a departure from the past, legislative “independence” had become a concept that the Framers wanted to enshrine in the new constitution.¹⁶⁵ If that were the case, it is simply

164. Nine of the eleven members of the Committee of Unfinished Parts (all but Roger Sherman and David Brearley), and four of the five members of the Committee of Detail (all but Oliver Ellsworth) had been appointed to Congress in the years before 1787 by state “legislatures” that were subject to state constitutions which contained substantive regulations of “legislatures.” See CALVIN JILLSON & RICK K. WILSON, CONGRESSIONAL DYNAMICS: STRUCTURE, COORDINATION, AND CHOICE IN THE FIRST AMERICAN CONGRESS, 1774–1789, at 330–42 (1994) (“Appendix E, Delegate Listing by Congressional Year, 1774–88.”).

165. Proponents of the Doctrine have not pointed to any evidence that the Framers developed an affinity for independent “legislatures.” To the contrary, the period leading up to 1787 was characterized by a growing animus towards the state legislatures. Brief of Jack N. Rakove, Richard R. Beeman, Alexander Keyssar, Peter S. Onuf, & Rosemarie Zagari for Ariz. Indep. Redistricting Comm’n as Amici Curiae Supporting Appellees at 15, *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015) (No. 13-1314) (citing WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 362); *id.* at 18. Moreover, that growing mistrust of legislatures strengthened the basis for the emerging concept of judicial review of legislative overreach. See WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 109, at 456 (quoting May 1787 newspaper which had argued that legislative acts were subject to “scrutiny by the people, that is, by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect”). John Dickinson reflected this trend in thought. At the constitutional convention, he said that no power of judicial review ought to exist, but was “at a loss what expedient to substitute.” Madison’s Notes (Aug. 15, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 163, at 296, 299. However, when Dickinson subsequently advocated for adoption of the Constitution, he cited judicial review as a positive feature of the new charter. See John Dickinson, *Fabius IV* (1788) (explaining that the states and the people would be represented by “the federal independent judges” in “the determination of

inconceivable that they would have attempted to incorporate this novel concept into the new constitution by using language so closely resembling that of the old constitution, under which—as they knew very well—“legislatures” had been decidedly non-independent.

c. The Framers' Intent Implemented

The Framers' expectation that state constitutions would continue to control “legislatures” is confirmed by the involvement of both John Dickinson and James Madison in creating post-Founding state constitutions that did just that.

i. John Dickinson and the Delaware Constitution of 1792

In late 1791 and early 1792, Delaware held a constitutional convention to replace its constitution of 1776. Two veterans of the federal convention—John Dickinson and Richard Bassett—were delegates.¹⁶⁶ Dickinson was chosen president and, according to a leading analysis of the convention, he was its leader.¹⁶⁷

Early in the convention a draft constitution emerged which contained the following provision regulating the way in which the “legislature” might prescribe the place and manner of electing members of Congress:

The Representative, and when there shall be more than one, the Representatives of the People of this State, in Congress, shall be voted for at the same Places where Representatives in the State Legislature are voted for, and in the same Manner.¹⁶⁸

[the] constitutionality [of the laws?]”, *reprinted in* FRIENDS OF THE CONSTITUTION, WRITINGS OF THE “OTHER” FEDERALISTS, 1787–1788, *supra* note 160, at 219.

166. JOHN A. MUNROE, FEDERALIST DELAWARE 1775–1815, at 195 (1954); Mumford, *supra* note 133, at 121.

167. Mumford, *supra* note 133, at 114, 119. Mumford explains that Dickinson’s political views “corresponded in large measure with the general tenor of changes made by the convention.” *Id.* at 119.

168. MINUTES OF THE GRAND COMMITTEE OF THE WHOLE CONVENTION OF THE DELAWARE STATE WHICH COMMENCED AT DOVER, ON TUESDAY, THE TWENTY-NINTH DAY OF NOVEMBER, IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND NINETY-ONE, FOR THE PURPOSE OF REVIEWING, ALTERING, AND AMENDING THE CONSTITUTION OF THIS STATE; OR, IF THEY SEE OCCASION, FOR FORMING A NEW ONE IN STEAD THEREOF 77 (Wilmington, James Adams 1792).

This provision, without alteration, was included in the final draft of the constitution adopted by the convention.¹⁶⁹ The existing minutes do not reflect any debate concerning this clause.

Thus, we see Dickinson making his fourth and final appearance in the history which debunks the theory that the Framers codified the independent state legislature doctrine when they referred to “legislatures” in the Constitution. In the summer of 1776, Dickinson was the original drafter of the “legislature” language used in Article V of the Articles of Confederation; in the fall of 1776, he drafted a constitution for Pennsylvania that would have substantively regulated the state “legislature” in its selection of delegates to Congress; in the summer of 1787, he was a member of the Committee of Unfinished Parts that framed the Elector Appointment Clause, incorporating the “legislature” language from the Articles; and, finally, in 1791–1792, he led the Delaware constitutional convention which adopted a provision that substantively regulated how the state’s “legislature” might exercise its power under the Elections Clause.

ii. James Madison and the Virginia Constitution of 1830

More confirmation that the Framers expected state constitutions to regulate “legislatures” with respect to federal elections comes from James Madison’s participation in the Virginia constitutional convention of 1829–1830. On January 12, 1830, John W. Green, a judge of the Virginia Supreme Court of Appeals, proposed that the new constitution provide that the number of congressional seats to which Virginia was entitled be apportioned “amongst the several counties, cities, boroughs and towns of the State, according to their respective numbers,” and that those numbers were to be determined by “adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.”¹⁷⁰ As John Randolph explained, the question prompted by Green’s proposal was “shall the

169. MINUTES OF THE CONVENTION OF THE DELAWARE STATE, AT THE SECOND SESSION THEREOF, WHICH COMMENCED AT DOVER, ON TUESDAY THE TWENTY-NINTH DAY OF MAY, IN THE YEAR OF OUR LORD, ONE THOUSAND SEVEN HUNDRED AND NINETY-TWO, FOR THE PURPOSE OF REVIEWING, ALTERING, AND AMENDING THE CONSTITUTION OF THIS STATE, OR IF THEY SEE OCCASION, FOR FORMING A NEW ONE INSTEAD THEREOF 64, 101 (Wilmington, Brynberg and Andrews 1792); DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 578.

170. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 857 (Richmond, Samuel Shepherd & Co. 1830) [hereinafter DEBATES OF THE VIRGINIA STATE CONVENTION].

apportionment of representation which the Federal Constitution secures to the slave-holding States, be the apportionment on which members of Congress shall be elected, or shall it not?"¹⁷¹ This would regulate the core of the Virginia "legislature's" power under the Elections Clause to prescribe "manner" legislation.

There was a brief debate before the convention adopted Green's proposal by a vote of 60–35.¹⁷² James Madison was among those voting "aye," and he was joined by other notable figures, including Chief Justice John Marshall, future Associate Justice Phillip P. Barbour, and future U.S. President John Tyler.¹⁷³ Evidently, none of them were convinced by Lewis Summers, a delegate from the western part of the state. Summers—briefly invoking what we now call the independent state legislature doctrine—argued against Green's proposal on the ground that it was "unnecessary and improper, to regulate by the State Constitution, any of the powers or duties devolved on the Legislature by the Constitution of the United States"; he did not think such power or duties could be "abridged or restrained by any act of the Convention."¹⁷⁴

Although Madison did not speak on the issue—other than through his "aye" vote—his thinking may also be reflected in comments he made earlier that day on the separate issue of how much authority the Virginia legislature would have to reapportion its own membership. Madison would have preferred that the constitution prescribe "an exact and permanent rule for the apportionment" for future legislatures.¹⁷⁵ Instead, the convention had agreed that the legislature would be obliged to reapportion every ten years within certain "great districts" established by the constitution but expressly prohibited from reapportioning as between those "great districts."¹⁷⁶

171. *Id.* at 858.

172. *Id.* at 859; VA. CONST. of 1830, art. III, § 6, reprinted in 7 CONSTITUTIONS, *supra* note 30, at 3823.

173. DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 859.

174. *Id.* at 857. It appears that Summers and the other delegates were less concerned with this constitutional question than with the underlying question of whether slaves would be accounted for in representation. Summers was the only one to mention the Doctrine, and he made clear that, even if he was wrong about it, he could not vote to "consecrate" an apportionment rule "for the benefit of slave-holders, while every effort to secure the rights of the free white population in the State Legislature, was so obstinately and successfully resisted." *Id.* John Randolph was the primary responder to Summers, and he dwelled on how rejecting Green's proposal would create "a most violent presumption—almost to the point of direction affirmation—that the [Three-Fifths Clause] of the Constitution of the United States, Virginia stands ready to give up." *Id.* at 858.

175. *Id.* at 847.

176. *Id.*; VA. CONST. of 1830, art. III, § 4, reprinted in 7 CONSTITUTIONS, *supra* note 30, at 3823.

Madison thought that some provision needed to be made for the latter because otherwise the people would inevitably “resort to another [constitutional] convention,” for which “there seemed to be a universal wish to guard [against].”¹⁷⁷ Madison proposed that a supermajority of the legislature (“two-thirds of each House concurring”) be given the power to reapportion every ten years “throughout the commonwealth.”¹⁷⁸ Madison’s proposal was adopted by the convention,¹⁷⁹ but only after surviving several attempts at amendment, including one that sought to strike the supermajority requirement on the ground that “a majority ought to govern.”¹⁸⁰ In opposing that motion, Madison explained that “its effect would be to give the State a legislative Constitution, instead of a constitutional Legislature.”¹⁸¹ Madison thought that, with the two-thirds requirement baked into the constitution, “the Legislature might be safely entrusted with the task of apportionment.”¹⁸²

2. The Public’s Original Understanding—Substantive Constitutional Limitations on “Legislatures” from 1789 to 1804

The Framers’ expectation that “legislatures” would be subject to substantive constitutional regulation was not idiosyncratic or unique to their generation. The historical record shows that this was also the original understanding of the broader American populace that imposed state constitutional limitations on “legislatures” in the years following the drafting and adoption of the Constitution.

As explained in the previous section, Delaware’s constitution of 1792 regulated its “legislature” with respect to the Elections Clause. This reflects not only the original intent of the two Framers who were present at the state constitutional convention—John Dickinson and Richard Basset—but also the original understanding of the rest of the convention’s members.¹⁸³

Prior to the Delaware convention, another express constitutional regulation of a “legislature” had been briefly considered at the Pennsylvania convention which produced that state’s constitution of 1790. On February 1, 1790, Albert Gallatin proposed that Pennsylvania be “divided

177. DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 847.

178. *Id.*

179. VA. CONST. of 1830, art. III, § 5, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3823.

180. DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 849.

181. *Id.*

182. *Id.*

183. *See* Mumford, *supra* note 133, at 113–18 (describing the delegates to the convention).

into districts for the purpose of electing members of the house of representatives of the United States,” with the representatives “apportioned between the said districts in proportion to the number of taxable inhabitants contained in each.”¹⁸⁴ There was no debate, and Gallatin withdrew his motion the following day without explaining why.¹⁸⁵

Moreover, the explicit regulation contained in Delaware’s constitution of 1792 and proposed for Pennsylvania’s constitution of 1790 are not the only evidence confirming the Founding generation’s understanding that state constitutions could regulate “legislatures” with respect to federal elections. Several state constitutions adopted from 1789 to 1803 contained provisions that, although they did not explicitly refer to federal elections, were understood to apply to all elections held in the state, including federal elections. The existence of these non-explicit substantive limitations further contravenes the Substance/Procedure Thesis of the original understanding.¹⁸⁶

Pennsylvania’s constitution of 1790 provided that “[a]ll elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*.”¹⁸⁷ On its face, a provision relating to “all elections” would seem to apply to federal elections as well as state and local elections, and, indeed, this was the understanding. William Findley was a delegate to the Pennsylvania constitutional convention in 1789–90 and a member of the nine-member committee which reported the first draft of the constitution, which included the “All elections shall be by ballot” provision.¹⁸⁸ Findley

184. THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS 373 (Harrisburg, John S. Wiestling 1825) [hereinafter PROCEEDINGS OF PENNSYLVANIA CONVENTION OF 1790].

185. *Id.* at 374.

186. In my 2001 article, I identified only some of the state constitutional provisions dating from the years following ratification that, like the revolutionary state constitutions that preceded them, purported to explicitly regulate the functioning of state legislatures. Smith, *supra* note 1, at 757–58. I identified the provision from the Delaware constitution (regulating Congressional elections), provisions in the Georgia and Kentucky constitutions (regulating elections by the state legislatures themselves, which would have included elections of presidential electors and senators), and the 1810 amendment to the Maryland constitution (regulating both Congressional and presidential elections). *Id.* at 758.

187. PA. CONST. of 1790, art. III, § 2, reprinted in 5 CONSTITUTIONS, *supra* note 31, at 3096.

188. PROCEEDINGS OF PENNSYLVANIA CONVENTION OF 1790, *supra* note 184, at 154, 158. Another member of the drafting committee was James Wilson. *Id.* at 154. As noted previously, Wilson

later served in House of Representatives (from 1791–1799 and again from 1803–1817)¹⁸⁹ and was the chairman of the Committee on Elections in 1804 when that committee made a report to the House in the contested election case of John Hoge of Pennsylvania.¹⁹⁰ In defending the committee’s report in the Hoge matter to the full House, Findley, who rightfully claimed a special “acquaint[ance]” with the “laws and practice respecting elections” in Pennsylvania,¹⁹¹ made clear that the state constitution’s “all elections shall be by ballot” provision was intended to apply to congressional elections.¹⁹²

Hoge had been elected to the House in a special election called by the Governor of Pennsylvania, pursuant to Article I, Section 2, to fill a vacancy caused by resignation.¹⁹³ Hoge’s election (which occurred simultaneously with the presidential election) was challenged on the ground that the Governor had provided insufficient notice of the election and precipitated an election that lacked sufficient legal authority.¹⁹⁴ The committee found that there had been sufficient notice,¹⁹⁵ and during the floor debate, Findley explained why there was sufficient legal authority for every part of the special election that had occurred: the United States Constitution gave the Governor the authority to schedule the special election by issuing the writ, “the laws of Pennsylvania” provided for “election officers” who were to act “at all elections . . . for national purposes throughout the year,” and “[t]he constitution of Pennsylvania prescribe[d] the manner that citizens shall vote, by ballot.”¹⁹⁶

Substantially similar clauses requiring that “all elections shall be by ballot” appeared in the constitutions of Georgia (1789), Kentucky (1792), Tennessee (1796), and Ohio (1803).¹⁹⁷ In addition to the broadly worded

had been part of the Committee of Detail which framed the Elections Clause at the Federal Convention in 1787.

189. Findley, *William 1741–1821*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/F000124> [<https://perma.cc/N6Y9-9CKX>].

190. 14 ANNALS OF CONG. 841 (1804).

191. *Id.*

192. *Id.* at 842.

193. U.S. CONST., art. I, § 2 (“When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”).

194. 14 ANNALS OF CONG. 839.

195. *Id.*

196. *Id.* at 849–50. Ultimately, the House voted in favor of Hoge, and he retained his seat. *Id.* at 857–58.

197. GA. CONST. of 1789, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789; KY. CONST. of 1792, art. III, § 2, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269; TENN. CONST. of

language (“all elections”), there are three other good reasons to think that the drafters of these constitutions, like John Findley in Pennsylvania, made a considered choice—and meant what they said—when they specified “by ballot” as the method of voting for “all elections.”

First, the choice between elections “by ballot” or “viva voce” was an important issue at the time. When James Madison identified what the Elections Clause meant by “manner” legislation, the first item on his list was “[w]hether the electors should vote by ballot or viva voce.”¹⁹⁸ The choice could mean the difference between secret ballot elections in New England, where “elections were pretty tame affairs,” and viva voce elections in the South, often characterized by a raucous, sometimes violent atmosphere,¹⁹⁹ in which the “voters, one by one, had to swear that they were qualified and then publicly declare the names of those they were voting for.”²⁰⁰ Election by ballot was more susceptible to fraud,²⁰¹ while viva voce voting, though transparent, had its own obvious issues, “especially where less wealthy men had to announce their vote in the presence of those to whom they were beholden—landlords, employers (possibly of family members), local officials with real authority.”²⁰²

Second, the choice between ballot and viva voce voting was an actively contested issue. Only a few years after providing that “all elections” would be “by ballot,” both the Georgia constitution (1798) and the Kentucky constitution (1799) switched to provide that “all elections” would be “viva voce.”²⁰³ In Kentucky, the change was spearheaded by John Breckinridge,

1796, art. III, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3418; OHIO CONST. of 1803, art. IV, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2907.

198. Madison's Notes (Aug. 9, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 163, at 230, 240.

199. MORGAN, *supra* note 101, at 183; *see* JACK N. RAKOVE, ORIGINAL MEANINGS, POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 204 (1996) (“And how, literally, were citizens to give their votes: by voicing their preference to the sheriff, who would then record their vote in a poll book, or by secret ballot; at a raucous public fete, with people gathered from miles around for the closest approximation to carnival a Protestant society could produce, or in widely separated polling places, with a decorum more suited to republican manners?”).

200. Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 234 (2013).

201. JOAN WELLS COWARD, KENTUCKY IN THE NEW REPUBLIC 143 (1979).

202. Ratcliffe, *supra* note 200, at 234.

203. GA. CONST. of 1798, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 800 (“In all elections by the people the electors shall vote viva voce until the legislature shall otherwise direct.”); KY. CONST. of 1799, art. VI, § 16, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1287 (“In all elections by the people, and also by the senate and house of representatives, jointly or separately, the votes shall be personally and publicly given viva voce.”).

future U.S. Attorney General under President Jefferson, who believed that “viva voce voting provided the only way for the poor man to exert his influence: only by voting aloud and seeing his name recorded could the citizen be sure his vote was correctly recorded.”²⁰⁴ In Vermont’s 1786 constitution, all elections had been “by ballot,” but now, in 1793, this was removed, such that the method of voting was no longer constitutionally mandated.²⁰⁵

Finally, this generation of constitution-makers was perfectly capable of using language that would limit such provisions to state elections. The “by ballot” clause in the Delaware constitution of 1792 did not itself apply to “all elections”; rather, it was limited to “elections of governor, senators, and representatives.”²⁰⁶ The ballot requirement was made applicable to congressional elections only by the separate provision (Article VIII, Section 2) requiring that congressional elections be held in the same manner as elections for state representatives.²⁰⁷

In addition to ballot/viva voce provisions, another set of “all elections” provisions that appeared in constitutions dating from this time period was the “all elections shall be free and equal” provision. Provisions such as this were included in the constitutions of Kentucky (1792 and 1799), Delaware (1792), New Hampshire (1792), Vermont (1793), and Tennessee (1796).²⁰⁸ Similarly, several of these constitutions also provided that electors would, “in all cases,” be “privileged from arrest” during elections, at least so long as they were innocent of treason, felony, or breach of the peace.²⁰⁹

204. COWARD, *supra* note 201, at 143.

205. Compare VT. CONST. of 1786, ch. 2, § XXXI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3759 (“All elections . . . shall be by ballot, free and voluntary.”), with VT. CONST. of 1793, ch. 2, § 34, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3770 (“All elections . . . shall be free and voluntary.”).

206. DEL. CONST. of 1792, art. IV, § 1, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 574.

207. DEL. CONST. of 1792, art. VIII, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 578.

208. KY. CONST. of 1792, art. XII, § 5, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1274; KY. CONST. of 1799, art. X, § 5, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1289; DEL. CONST. of 1792, art. I, § 3, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 568; N.H. CONST. of 1792, art. XI, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2472; VT. CONST. of 1793, art. VIII, ch. 1, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3763; VT. CONST. of 1793, ch. 2, § 34, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3770; TENN. CONST. of 1796, art. XI, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3422.

209. PA. CONST. of 1790, art. III, § 3, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3096; KY. CONST. of 1792, art. III, § 3, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269; DEL. CONST. of 1792, art. IV, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 574; TENN. CONST. of 1796, art. III, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3418.

At least one other state constitution from this period contained a provision that was thought to regulate the state's "legislature" even though it did not even purport to apply to "all elections" or similar. In 1791, James Jackson contested Anthony Wayne's election (by a margin of twenty-one votes) as one of Georgia's representatives to Congress. In arguing his case to the House of Representatives, Jackson invoked the Georgia constitution of 1789. Jackson complained that although voters were to meet on election day "in the respective counties [of their residences], agreeably to the constitution,"²¹⁰ in fact, three "residents of Chatham [actually] voted in Effingham."²¹¹ He argued that this was contrary to "the [first] section, [fourth] article of the constitution of Georgia,"²¹² which required that electors "have resided six months within the county."²¹³ In response, Wayne's counsel argued that these voters must have "had a right to vote at some place," and that there was no "fraud in a citizen who happens to be absent from his own county" voting at "any other part of the same district."²¹⁴ The House voted unanimously to unseat Wayne,²¹⁵ but split on the question of whether to seat Jackson, with the result that the seat remained vacant.²¹⁶ The argument over whether the state constitution prescribed the place of voting was one of many arguments made in the case, and it is impossible to know how the argument was received by House members; however, the point is that both contestants assumed that the state constitution was applicable, and there is no record of any member of the House saying otherwise.

As explained later in this Article, similar non-explicit substantive limitations continued to appear in state constitutions during the nineteenth

210. 3 ANNALS OF CONG. 460 (1792).

211. *Id.* at 461.

212. *Id.* at 463.

213. GA. CONST. of 1789, art. IV, § 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789. The Ohio constitution of 1803 similarly provided that a qualified voter could only vote "in the county or district in which he shall actually reside at the time of the election." OH. CONST. of 1803, art. IV, § 1, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2907.

214. PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA RESPECTING THE CONTESTED ELECTION FOR THE EASTERN DISTRICT OF GEORGIA 35–36 (Phila., Parry Hall 1792).

215. 3 ANNALS OF CONG. 472 (1792).

216. *Id.* at 479. Professor Foley attributes the House's unanimous removal of Wayne to "clear evidence of enough wrongdoing to affect the election's outcome," and goes on to describe the subsequent debate over whether the House had the authority to seat Jackson even though he had not been certified under state law as the winner. EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 40–43 (2016) [hereinafter *BALLOT BATTLES*].

century. Moreover, it is noteworthy that when disputes over the independent state legislature doctrine arose in the nineteenth century, they invariably concerned state constitutional provisions which, like those described in this section, applied to “all elections” or similar, but did not explicitly reference federal elections.

The Substance/Procedure Thesis, ignorant and/or dismissive of the history set forth here, posits that there should have been more substantive regulation of “legislatures” in state constitutions of the 1790s and speculates that the perceived dearth of such regulation occurred because the Founding generation eschewed such regulation to remain “[c]onsistent with” the independent state legislature doctrine.²¹⁷ The reality is that several of the original states simply had no constitutional activity during the decade after ratification. Virginia’s constitution of 1776 remained unchanged until 1830, New Jersey’s constitution of 1776 remained unchanged until 1844, New York’s constitution of 1777 was first amended in 1801, and North Carolina’s constitution of 1776 was first amended in 1835. Connecticut did not have a constitution until 1818, and Rhode Island did not have one until 1843. Of the states that held constitutional conventions in the decade after ratification—Georgia (1789 and 1798), South Carolina (1790), Pennsylvania (1790), Delaware (1792), New Hampshire (1792), Kentucky (1792 and 1799), Vermont (1793), and Tennessee (1796)—all but South Carolina adopted constitutional provisions that regulated federal elections, either explicitly (Delaware) or by virtue of “all elections” provisions (the rest).

Moreover, there could be any number of other, more mundane reasons why any particular eighteenth-century constitution was not amended to place more “time, place, and manner” restrictions on federal elections. Perhaps no one thought of such provisions. Or perhaps they thought of them, but did not like them, either because of their substance or because they thought they should be implemented through ordinary legislation. Or perhaps they thought of them, and liked them, but realized that there was no political will to constitutionalize them.

For some questions, constitutionalization could have faced significant headwinds from constantly shifting political strategy in the states. For the first two presidential elections of 1789 and 1792, the manner of appointing

217. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38. Notably, the state constitutions of the time did not always provide clear mechanisms for amendment. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 73–75 (1998) (discussing the avenues for constitutional change available under early state constitutions).

presidential electors was “irrelevant and inconsequential because the election and re-election of George Washington were foreordained.”²¹⁸ However, as Alexander Keyssar has explained, increasingly after those first elections, “states took advantage of the flexible [federal] constitutional architecture to switch procedures from one election to the next” and this “reflected more than an impulse to experiment with a new institution: electoral strategizing was clearly at work.”²¹⁹ Similar strategic considerations were at work in this period when states decided whether to elect their congressional delegations at-large or by districts.²²⁰

3. The Ahistorical Structural Rationales Offered for the Doctrine

The Substance/Procedure Thesis also incorrectly supposes that the Framers assigned the function of prescribing federal election law to “legislatures”—with the understanding that those “legislatures” would perform that function without normal restraints—because they believed that it would promote some value important to the success of the constitutional design. Three variations on this argument are based, in turn, on some alleged attribute of (a) state legislatures; (b) “time, place, and manner” legislation; or (c) state courts. There appears to be no originalist basis for such a purpose-based or structural defense of the Doctrine.

The first variation on the structural argument arises from Chief Justice Rehnquist’s comment in *Bush v. Gore*²²¹ that the Doctrine is grounded in a “respect for the constitutionally prescribed role of state legislatures.”²²² Although more than twenty years have passed since then,

218. Rakove, *Presidential Selection: Electoral Fallacies*, *supra* note 45; see EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 16–17 (2020) (explaining that the states prepared for first election in the context that it was “foreordained that George Washington would win”); ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 27 (2020) (“Federalists and Anti-Federalists alike, in the fall of 1787 and the spring of 1788, may have been less focused on ‘the mode of appointment of the Chief Magistrate’ because they all knew that—however the electoral system actually worked—George Washington would be their first president.”).

219. KEYSSAR, *supra* note 218, at 32–34 (explaining that “a party with majority support in a state or its legislature would gain an advantage if it utilized the general ticket or had the legislature itself choose electors” but “a minority party had instrumental reasons for preferring district elections”).

220. David W. Houpt, *Contested Election Laws: Representation, Elections, and Party Building in Pennsylvania, 1788–1794*, 79 PA. HIST.: J. MID-ATL. STUD. 257, 258 (2012) (“[A] review of the debates surrounding the framing of elections laws [in Pennsylvania in the 1780s and 1790s] reveals that political strategy played a decisive role in the decision to select a particular mode of electing representatives.”).

221. *Bush v. Gore*, 531 U.S. 98 (2000).

222. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

proponents of the Doctrine have yet to articulate—let alone prove with evidence from the historical record—any reason why the Framers would have wanted to give state legislatures the ability to legislate without restraint with respect to the manner of selecting the President and congressmen.²²³ Whereas state legislatures' exclusive power to “chuse” senators was thought to facilitate “select appointment” of senators, and to protect state interests,²²⁴ no such special competence of unrestrained legislatures for regulating federal elections has been identified. Put bluntly, any argument that unrestrained state legislatures had some special role to play is doomed once the Elector Appointment Clause and the Elections Clause are conflated. The latter provides that Congress is free to displace the work of the state legislatures,²²⁵ so how special could the role of those state legislatures have been? At the Constitutional Convention, an effort was made to strip Congress of the power to preempt the state legislatures, but, as is well known, it was defeated after James Madison explained that it was “impossible to foresee all the abuses” that state legislatures might inflict were they given “the uncontroled right of regulating the times places & manner of holding elections.”²²⁶

The absence of any particular respect for the constitutional role of “legislatures” is demonstrated not only by the way that Americans imposed substantive constitutional restraints on them, but also by the way that the “legislatures” themselves willingly delegated away their own authority as “legislatures” during the early years of the Republic. Mark S. Krass has surveyed election laws passed between 1787 and 1829 in the thirteen original colonies and found that “state legislatures aggressively delegated authority to determine the times, places and manner of federal elections to local government officials.”²²⁷ For example, legislatures “allowed local election officials to pick where the polls would be located, open and close them at

223. See *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (answering “why” by stating that “the text of the Constitution requires [it]”).

224. THE FEDERALIST NO. 62 (James Madison).

225. U.S. CONST. art. I, § 4 (“[B]ut the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

226. Madison's Notes (Aug. 9, 1787), *supra* note 198, at 240; see 1 COLLECTED WORKS OF JAMES WILSON 265–66 (Kermit L. Hall & Mark David Hall eds., 2007) (recording James Wilson explaining to the Pennsylvania ratifying convention that Congress would use the power “to correct the improper regulations of a particular state”).

227. Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 16) (summarizing evidence and conclusions).

will, and make critical decisions about how voting would unfold.”²²⁸ It is hard to believe this would have occurred had the Founding generation believed that “legislatures” deserved special “respect” because of the role they were playing.

In lieu of identifying any reason why the Framers would have had any special “respect” for “legislatures,” a second variation of the structural argument says that “time, place, and manner” law is a special kind of legislation, addressing particularly thorny issues, for which legislatures need to remain free from normal constraints. For example, when advocating for the freedom of state legislatures in the Covid election context, Justice Kavanaugh emphasized the need for legislatures to “[a]ssess[] the complicated tradeoffs involved in changing or retaining election deadlines, or other election rules.”²²⁹ In the same case, Justice Gorsuch argued that, for election law, state legislative choices must remain from interference because “[l]egislators can be held accountable,” “[l]egislatures . . . bring to bear the collective wisdom of the whole people,” and “[l]egislatures enjoy . . . resources for research and factfinding on questions of science and safety.”²³⁰ An academic version of this argument is that election law presents “local needs and exigencies” that can only be met by legislatures whose “flexibility” is not “shackle[d]” by state constitutions.²³¹

The notion that election regulations should be free of the normal constitutional restraints did not originate in the Founding era. Many subjects understood to fall within the concept of “time, place, and manner” were constitutionalized during this time period. This included not only the constitutional limitations placed on federal elections after adoption of the Constitution (described earlier), but also more extensive regulation of state elections. As an example, consider elections for the lower houses of state legislatures. State constitutions adopted between 1776 and 1800 often

228. *Id.*

229. *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 32–33 (2020) (Kavanaugh, J., concurring).

230. *Id.* at 29 (Gorsuch, J., concurring).

231. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 32.

addressed the date of election for representatives,²³² the duration of the election,²³³ the method of voting,²³⁴ the places for voting,²³⁵ and

232. See S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244 (“[L]ast Monday in October . . . and the day following . . .”); N.J. CONST. of 1776, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2595 (“[S]econd Tuesday in October . . .”); DEL. CONST. of 1776, art. 27, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 567 (“1st day of October . . .”); PA. CONST. of 1776, § 9, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3084 (“[S]econd Tuesday in October . . .”); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 (“[T]he first Monday of October . . .”); GA. CONST. of 1777, art. II, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 778 (“[F]irst Tuesday in December . . .”); VT. CONST. of 1777, ch. II, § VIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3742 (“[F]irst Tuesday of September . . .”); S.C. CONST. of 1778, art. XIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3251 (“[L]ast Monday in November . . . and the day following . . .”); MASS. CONST. of 1780, ch. I, § III, art. V, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1899 (“[I]n the month of May, ten days at least before the last Wednesday of that month.”); N.H. CONST. of 1784, Part II.—The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 (setting elections annually “in the month of March”); VT. CONST. of 1786, ch. II, § VIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3755 (“[F]irst Tuesday of September . . .”); GA. CONST. of 1789, art. I, § 6, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 786 (“[F]irst Monday in October, until such day of election be altered by law . . .”); S.C. CONST. of 1790, art. I, § 10, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3260 (“[S]econd Monday in October . . .”); PA. CONST. of 1790, art. I, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3092 (“[S]econd Tuesday of October.”); DEL. CONST. of 1792, art. II, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 570 (“[F]irst Tuesday of October.”); N.H. CONST. of 1792, § XII, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2477 (“[I]n the month of March . . .”); KY. CONST. of 1792, art. I, § 4, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1265 (“[F]irst Tuesday in May . . .”); VT. CONST. of 1793, ch. II, § 8, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3765 (“[F]irst Tuesday of September . . .”); TENN. CONST. of 1796, art. I, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3415 (“[F]irst Thursday in August . . .”); GA. CONST. of 1798, art. I, § 7, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 792 (“[F]irst Monday in November, until such day of election be altered by law.”); KY. CONST. of 1799, art. I, § 3, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 (“[F]irst Monday in the month of August . . .”).

233. See S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3244 (“[L]ast Monday in October . . . and the day following . . .”); MD. CONST. of 1776, art. III, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 (“[W]hole election shall be concluded in four days . . .”); S.C. CONST. of 1778, art. XIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3251 (“[L]ast Monday in November . . . and the day following . . .”); KY. CONST. of 1792, art. I, § 4, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1265 (“[E]lections may be continued for three days, if, in the opinion of the presiding officer or officers, it shall be necessary, and no longer.”); TENN. CONST. of 1796, art. I, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3415 (“[F]irst Thursday in August and terminating the succeeding day.”); KY. CONST. of 1799, art. I, § 3, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 (“[P]residing officers of the several elections shall continue the same for three days, at the request of any one of the candidates.”).

234. See DEL. CONST. of 1776, art. 27, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 567 (“[B]y ballot . . .”); PA. CONST. of 1776, § 9, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3084 (“[B]y ballot . . .”); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 (“[V]iva voce . . .”); N.C. CONST. of 1776, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2790 (“[B]y ballot . . .”); GA. CONST. of 1777, art. XIII, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 780 (“[B]y ballot, and shall be taken by two or more justices of the peace in each county,

apportionment of representation in the lower house among the state's counties, cities, or election districts.²³⁶

who shall provide a convenient box for receiving the said ballots: and, on closing the poll, the ballot shall be compared in public with the list of votes that have been taken, and the majority immediately declared . . ."); N.Y. CONST. of 1777, art. VI, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2630 (providing for a "fair experiment" as between voting "by ballot" and "viva voce"); VT. CONST. of 1777, ch. II, §§ VIII, XXIX, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3742, 3746 ("[B]y ballot" and "[B]y ballot, free and voluntary"); MASS. CONST. of 1780, ch. I, § III, art. III, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1898 ("[C]hosen by written votes . . ."); N.H. CONST. of 1784, Part II.—The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 ("[C]hosen by ballot . . ."); VT. CONST. of 1786, ch. II, §§ VIII, XXXI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3755, 3759 ("[C]hosen by ballot" and "[B]y ballot, free and voluntary"); GA. CONST. of 1789, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789 ("[B]y ballot . . ."); S.C. CONST. of 1790, art. I, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 ("[B]y ballot . . ."); PA. CONST. of 1790, art. III, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3096 ("[B]y ballot . . ."); DEL. CONST. of 1792, art. IV, § 1, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 574 ("[B]y ballot."); N.H. CONST. of 1792, § XIV, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2477 ("[B]y ballot . . ."); KY. CONST. of 1792, art. III, § 2, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269 ("[B]y ballot . . ."); VT. CONST. of 1793, ch. II, § 8, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3765 ("[B]y ballot . . ."); TENN. CONST. of 1796, art. III, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3418 ("[B]y ballot."); GA. CONST. of 1798, art. IV, § 2, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 800 ("[V]iva voce until the legislature shall otherwise direct."); KY. CONST. of 1799, art. VI, § 16, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1287 ("[V]iva voce.").

235. See S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3245 ("churches or church wardens" or, if none, places appointed by the general assembly); MD. CONST. of 1776, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1691 ("at the court-house" in the county "in which they offer to vote" or "at such other place as the Legislature shall direct"); N.H. CONST. of 1784, Part II.—The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 ("[W]ithin the town, district, parish, or place where they dwell . . ."); GA. CONST. of 1789, art. IV, § 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 789 ("[W]ithin the county . . ."); S.C. CONST. of 1790, art. I, § 4, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 ("[I]n the election district in which he offers to give his vote . . ."); KY. CONST. of 1792, art. III, § 1, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1269 ("[N]o person shall be entitled to vote except in the county in which he shall actually reside at the time of the election."); KY. CONST. of 1799, art. I, § 5, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 ("[A]t the places of holding their respective courts, or in the several election precincts into which the legislature may think proper . . .").

236. See S.C. CONST. of 1776, art. XI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3245 (assigning between four and thirty representatives to each of several named parishes and districts); VA. CONST. of 1776, The Constitution or Form of Government, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3815–16 (assigning numbers of representatives to each county and certain districts, cities, and boroughs); N.J. CONST. of 1776, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2595 (assigning one representative per county and providing that legislature could adjust "on the principles of more equal representation"); DEL. CONST. of 1776, art. 3, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 562 (providing for seven representatives per county); PA. CONST. of 1776, §§ 17–18, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3086 (requiring reapportionment every seven years based on "complete lists of taxable inhabitants" in Philadelphia and the counties; and, providing that counties could subdivide themselves into districts); MD. CONST. of 1776, art. II, *reprinted in*

Constitutionalization was an affirmative choice to wrest control of these issues from the state legislatures. For example, in South Carolina, the constitution of 1778 provided that the 1776 apportionment of representation—which had been set by the existing legislature on an arbitrary geographic basis—would in seven years, and then every fourteen

3 CONSTITUTIONS, *supra* note 34, at 1691 (apportioning four delegates per county); N.C. CONST. of 1776, The Constitution, or Form of Government, &c, art. III, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2790 (assigning two representatives per county and one each for several towns); GA. CONST. of 1777, art. IV, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 778–79 (assigning ten representatives per county except fourteen for Liberty county and one each for Glynn and Camden counties); N.Y. CONST. of 1777, arts. IV–V, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2629–30 (assigning between two and ten representatives to counties by name and providing for reapportionment after every seven years if not “justly proportioned to the number of electors in the said counties respectively”); VT. CONST. of 1777, ch. II, § XVI, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3744 (assigning two representatives to each town of “eighty taxable inhabitants” and one to “each other inhabited town in this State”); S.C. CONST. of 1778, arts. XIII, XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3251–52 (assigning between three and thirty representatives to each of several named parishes and districts, but providing for reapportionment); MASS. CONST. of 1780, ch. I, § III, art. II, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1898 (assigning one representative to “every corporate town” that had “one hundred and fifty ratable polls” and another representative for each additional two hundred and twenty-five); N.H. CONST. of 1784, Part II.—The Form of Government, House of Representatives, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2461 (assigning one representative to “every town, parish or place intitled to town privileges” that had “one hundred and fifty rateable male polls” and another representative for each additional three hundred); VT. CONST. of 1786, ch. II, § VIII, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3755 (assigning two representatives to “each town” of “eighty taxable inhabitants” and one to “each other inhabited town”); GA. CONST. of 1789, art. I, § 6, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 786 (assigning between two and five representatives to each of several named counties); S.C. CONST. of 1790, art. I, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 (assigning between one and fifteen representatives to each of several named counties); PA. CONST. of 1790, art. I, § 4, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3093 (requiring apportionment “according to the number of taxable inhabitants” as determined every seven years); DEL. CONST. of 1792, art. II, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 570 (assigning seven representatives per count until two-thirds of each branch concurs in increasing number); N.H. CONST. of 1792, § IX, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2476–77 (similar to provision in state’s constitution of 1784); KY. CONST. of 1792, art. I, § 6, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1265 (providing for reapportionment every four years among the counties “according to the number of free male inhabitants”); VT. CONST. of 1793, ch. II, § 7, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3765 (showing similarities to Vermont’s 1786 constitution); TENN. CONST. of 1796, art. I, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3415 (requiring reapportionment among the several counties “according to the number of taxable inhabitants in each” every seven years); GA. CONST. of 1798, art. I, § 7, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 791–92 (requiring apportionment every seven years by county “according to their respective numbers of free white persons, including three-fifths of all the people of color” but “each county shall have at least one but not more than four members”); KY. CONST. of 1799, art. I, § 6, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1278 (providing that representation “shall be forever regulated and ascertained by the number of qualified electors” within counties and towns, with apportionment every four years).

years thereafter, be reformed and done “in the most equal and just manner,” according to “the particular and comparative strength and taxable property of the different parts of the [State], regard being always had to the number of white inhabitants and such taxable property.”²³⁷ However, as historian Rosemarie Zagarrri explains, after the seven years passed, “the legislature [in 1785] simply ignored the constitution” and “left the previous system intact.”²³⁸ At the state’s 1790 constitutional convention, the cause of reform backslid because “apportionment for the convention had been done by the same inequitable process as for the assembly.”²³⁹ Subsequently, disproportionality continued to grow, but “the legislature once again did nothing.”²⁴⁰ Finally, in 1808, a constitutional amendment again called for periodic reapportionment on the basis of population and taxes, predicated on a decennial census.²⁴¹ The amendment included another provision designed “[t]o avoid a repetition of the legislature’s previous failure to abide by the constitution”—the constitution now directed the *governor* to conduct the required enumeration if the legislature failed to do it.²⁴²

The third and final variant of the structural argument focuses not on the alleged virtues of unrestrained legislatures, or the uniqueness of election law, but on the alleged vices of state courts. Chief Justice Rehnquist sought to avoid this theme in 2000, when he denied that the Doctrine was based on any “disrespect for state *courts*,”²⁴³ but in 2020 the state court reaction to COVID-19 brought it to the fore. Justice Gorsuch wrote in the Wisconsin case that “[n]othing in our founding document contemplates the kind of judicial intervention that took place here.”²⁴⁴ Similarly, Justice Kavanaugh wrote that “state courts do not have a blank check to rewrite state election laws for federal elections.”²⁴⁵ And in the Pennsylvania case, Justice Alito

237. S.C. CONST. of 1778, art. XV, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3252.

238. ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850, at 48 (1987).

239. *Id.* at 50; S.C. CONST. of 1790, art. I, § 3, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3258 (omitting provision of 1778 constitution which had required reapportionment after seven years).

240. ZAGARRI, *supra* note 238, at 52.

241. S.C. CONST. of 1790, amendment ratified Dec. 17, 1808, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3265–66.

242. ZAGARRI, *supra* note 238, at 53 (citing S.C. CONST. of 1790, amendment ratified Dec. 17, 1808, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3266).

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

244. *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring).

245. *Id.* at 34 n.1 (Kavanaugh, J., concurring).

complained that the state court had invoked the state constitution “to make whatever rules it thought appropriate for the conduct of a fair election.”²⁴⁶ In their view, the Elector Appointment Clause and the Elections Clause were intended to serve as structural checks on the problem of overreaching state courts—for them, it is obvious that the use of the word “legislature” in these clauses “requires federal courts to ensure that state courts do not rewrite state election laws.”²⁴⁷ Otherwise, the references to “legislature” in the Constitution would be rendered “meaningless.”²⁴⁸ An academic version of the argument is that “the Framers’ allocation of power over federal elections” to “legislatures” would be undermined if state constitutions could limit “legislatures” because then “courts—particularly state courts—would have a larger role in overseeing such elections.”²⁴⁹

Here again, proponents of the Doctrine have failed to identify anything in the historical record suggesting that the Founding generation would have understood these clauses to mean that federal courts were to cabin state court interpretation of election law. Of course, the necessary inquiry would be anachronistic. At the time of the Founding, the court litigation that we

246. *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Statement of Justice Alito).

247. *Democratic Nat’l Comm.*, 141 S. Ct. at 35 n.1 (Kavanaugh, J., concurring).

248. *Boockvar*, 141 S. Ct. at 2.

249. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 34–35. An emerging twist on the anti-court variation of the Doctrine is to restate it as a neutral separation-of-powers principle that neither favors “legislatures,” disfavors courts, nor discounts the applicability of constitutional limitations on “legislatures,” but rather purports to draw a line between appropriate and inappropriate levels of judicial review. In Justice Alito’s March 2022 dissent from the Supreme Court’s denial of interim relief in the North Carolina redistricting case, he objected that the lower court had “discern[ed] in the State Constitution a judicially enforceable prohibition of partisan gerrymandering” in a manner that had “the hallmarks of legislation.” *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting). Assuming this is a workable principle, and is not simply one court disagreeing with another court, it is unclear whether the principle would draw its content from the federal conception of judicial review or the state conception, and, in either case, what vintage conception would apply. Moreover, it is also unclear why the principle would not also apply to judicial review of “manner” legislation by federal courts. Picking up on Justice Alito’s dissent, Professor Michael Ramsey has argued that perhaps the Constitution uses the word “legislature” to impose on the states an eighteenth-century “classical separation of powers theory” with respect to “manner” legislation, i.e., “to give power to the legislature and *not* to parts of the state government that are *not* the legislature (most notably the state executive and the state judiciary).” See Michael Ramsey, *Vikram Amar on the Independent State Legislature Theory*, THE ORIGINALISM BLOG (Mar. 17, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/03/vikram-amar-on-the-independent-state-legislature-theory-michael-ramsey.html> [<https://perma.cc/462U-JUVU>] (arguing that “the state’s distribution of power . . . is subject to the specific federal constraint that the power must be exercised (as the Constitution expressly says) by the legislature”).

see today concerning election design, such as redistricting, was just not a thing (including because judicial review was only in its infancy), and disputes over ballot-casting rules were apparently handled on the fly by sheriffs, election judges, and other local officials to whom such matters had been assigned by the legislature.²⁵⁰ Moreover, as to ballot-counting disputes, the reality is that the Framers would likely have been surprised to see any courts—state or federal—much involved. For congressional elections, the Framers could not have been more clear that the “the Judge of the Elections [and] Returns” would be the House and Senate themselves, not any federal or state court.²⁵¹ For presidential elections, the Framers could not have been less clear. The Constitution did not even mandate how to appoint presidential electors, let alone make provision for resolving disputes over elections for elector, the appointment of electors, or the counting of electoral votes.²⁵² More broadly, as Professor Foley has demonstrated, “[t]here was no paradise at the time of the Founding in terms of handling ballot-counting disputes in important elections” as “the Founders themselves were struggling in a condition of confusion on this topic.”²⁵³

250. See generally Krass, *supra* note 227 (evidencing such assignments).

251. U.S. CONST. art. I, § 5, cl. 1; see C.H. Rammelkamp, *Contested Congressional Elections*, 20 POL. SCI. Q. 421, 422–23 (1905) (explaining that this power was lodged with the House and the Senate because “[t]o have allowed the courts, whose officers were directly or indirectly appointed by the crown, to decide contested elections in the colonial assemblies would have invited executive interference”).

252. See FOLEY, *BALLOT BATTLES*, *supra* note 216, at 7 (noting “the hole in America’s . . . Constitution concerning the institution for resolving a disputed presidential election”).

253. *Id.* at 47; *id.* at 25 (“[T]hey had no shared understanding of what method of resolving ballot-counting controversies was more faithful to [their] fundamental commitment to republicanism.”). Although the Framers could not have foreseen the degree to which courts are now involved in election law (whether that of election design, ballot-casting, or ballot-counting), it by no means follows that the anti-court variation of the Doctrine constituted the original understanding of the word “legislature.” *Cf.* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (noting the role that federal and state court judicial review plays in redistricting litigation even though there was not “[any] suggestion [by the Framers] that the federal courts had a role to play” or “had ever heard of courts doing such a thing”). Moreover, speculation that “legislature” was originally understood to require states to uniformly and forever abide by a particular eighteenth-century “classical separation of powers theory,” see *supra* note 249, is similarly unfounded. At the time of the Founding, it was understood that the states had varying separation-of-powers arrangements, and that they would remain unaffected by adoption of the Constitution. See THE FEDERALIST NO. 47 (James Madison) (clarifying that he did not wish “to be regarded as an advocate for the particular organizations of the several State governments” after surveying the variety of state constitutions in which, in different ways, “the legislative, executive, and judiciary departments are by no means totally separate and distinct”). And it was also understood that, after the Founding, states would be able to change their internal structures in ways that diverged from each other and the new federal model. See THE FEDERALIST NO. 21 (Alexander Hamilton) (explaining

III. REVISITING THE NINETEENTH-CENTURY HISTORY OF THE DOCTRINE

A. Existing Scholarship Concerning the Doctrine's History

When reviewing the nineteenth-century history of the independent state legislature doctrine and related scholarship, it is important to distinguish between the historical version of the Doctrine and today's version of the Doctrine. Under the historical version, state courts and Congress considered declining to observe state constitutional requirements. By contrast, in today's version of the Doctrine, federal courts, in the name of protecting state "legislatures," are considering whether to assume the role of overseeing state court interpretation of state law, effectively federalizing state law pertaining to federal elections.

For the modern version of the Doctrine, there is no history to review. The first time that any federal or state court suggested that the Elector Appointment Clause or the Elections Clause alters the normal relationship between state legislatures, state courts, and federal courts was

why the Constitution's requirement that the United States guarantee each state a "Republican Form of Government" would be "no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode"); see also TARR, *supra* note 217, at 88–90 (concluding that the federal example had a limited impact on the structure of state governments in the decade after the Founding). In fact, since the Founding, there have been significant changes in state separation-of-powers arrangements. See Helen Hershkoff, *State Courts and the "Passive Virtue": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1885 (2001) ("Separation of powers is thus not a stable concept, even within a single state."). In particular, the power of today's state courts to engage in judicial review of state legislation is very different than what it was under the state constitutions existing at the Founding. See TARR, *supra*, at 72 ("The notion that judges could invalidate all governmental actions inconsistent with their interpretation of the constitution was simply unknown in the 1770s and early 1780s and would have been considered far beyond the scope of legitimate judicial power."); see also GORDON S. WOOD, *EMPIRE OF LIBERTY* 445 (2009) ("[I]t was clear by the 1780s that legislatures in America were bound by explicitly written constitutions in ways that the English Parliament was not. But it was not yet clear that the courts by themselves were able to enforce those boundaries upon the legislatures."). The Constitution is at least agnostic as to whatever changes have occurred and arguably prohibits the United States, including federal courts, from interfering with them. See Amar & Amar, *supra* note 63, at 28–29 (arguing that the Constitution "requires the federal government to respect and protect—not disregard and override—these state choices about how to create, divide, limit, and implement lawmaking powers") (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988)); see also *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991) ("[The Constitution] does not require a state to allocate powers among the branches of state government in the same manner in which the Constitution prescribes that allocation among the branches of the federal government.") (citing *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)).

Chief Justice Rehnquist's concurrence in *Bush*.²⁵⁴ This was also the first time anyone suggested that it was the job of federal courts to police the relationship between “legislatures” and state courts.

On the other hand, the anti-constitution version of the doctrine—under which state courts and Congress have considered not enforcing state constitutions—does have a history in Congress and state courts.²⁵⁵ In my 2001 article, I found that the Doctrine gained traction during the Civil War, when it emerged in a contested House election case (*Baldwin*) as a pretext for Republicans in Congress to disregard state constitutional provisions that would have deprived Union soldiers in the field of their votes because they had been outside of the state when they voted.²⁵⁶ The doctrine was rejected in the early twentieth century by the U.S. Supreme Court and other courts,²⁵⁷ but then re-emerged briefly during World War II when the Kentucky Supreme Court used it in the same way it had been used in the Civil War, to preserve the votes of soldiers “absent in the defense of the nation.”²⁵⁸

Since 2001, other researchers have identified several additional instances from the second half of the nineteenth century in which political actors and courts invoked the historical, anti-constitution version of the doctrine.²⁵⁹ In addition, Professor Muller identified an episode which occurred at the Massachusetts constitutional convention of 1820 in which Supreme Court Justice Story argued that a proposed constitutional provision requiring election of federal representatives and presidential electors by district would violate the Constitution by improperly cabining the “legislature” of the state.²⁶⁰ It is from these historical data points that the Prevailing View Thesis of the Doctrine's history has been spun.

254. See *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (arguing that any “significant departure” by a state court “presents a federal constitutional question”).

255. Smith, *supra* note 1, at 764–83.

256. *Id.* at 764–75.

257. *Id.* at 779–80.

258. See *id.* at 781–83 (quoting from the World War II soldier-voting case, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944)).

259. See Morley, *Rethinking the Right to Vote Under State Constitutions*, *supra* note 22, at 198–204 (discussing nineteenth-century instances of the anti-constitution version being invoked); Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 148–51 (2015) [hereinafter Morley, *The Intratextual Independent “Legislature” and the Elections Clause*]; Muller, *supra* note 22, at 725–33; Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 27–32.

260. See Muller, *supra* note 22, at 734 n.89 (describing Justice Story's argument).

B. *The Failure of the “Prevailing View” Thesis of the Doctrine’s History*

No objective view of the evidence supports the thesis that the Doctrine constituted the “prevailing understanding of [the Elector and Elections Clauses] throughout the nineteenth century.”²⁶¹ It was not the “prevailing understanding” either before, during, or after the Civil War. The evidence includes, but is not limited to, the explicit and non-explicit limitations on “legislatures” that were widespread throughout the 1800s, which I have identified and catalogued below after conducting a review of every state constitution adopted and/or amended during that century.

1. Constitutional Limitations on “Legislatures” in the Antebellum Period

Early nineteenth-century Americans continued to believe—as they had in the late eighteenth century—that state constitutions could properly limit legislatures acting pursuant to the Elector and Elections Clauses. This is demonstrated by several sources of evidence.

Beginning with Maryland in 1810, several state constitutions contained provisions that explicitly regulated the way states, through their “legislatures,” appointed their presidential electors or elected their congressional representatives.

- In 1810, Maryland amended its constitution to give “every free white male citizen” the right to vote in elections for presidential electors, congressmen, and certain state offices. The amendment further specified that voting in those elections would be “by ballot,” not *viva voce*.²⁶² Notably, unlike most of the original states, Maryland never legislatively appointed its presidential electors, but always selected them by popular election, both before and after this amendment.²⁶³

261. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 93; *id.* at 38.

262. MD. CONST. of 1776, art. XIV (1810), *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1705 (“[E]very free white male citizen of this state . . . shall have a right of suffrage, and shall vote, by ballot, in the election . . . for electors of the President and Vice-President of the United States, for [r]epresentatives of this [s]tate in the Congress of the United States [and specified state offices].”).

263. See KEYSSAR, *supra* note 218, at 32 (documenting the elector selection method across the states).

- In 1830, Virginia adopted a new constitution which specified the state's congressional representation "shall be apportioned as nearly as may be amongst the several counties, cities, boroughs, and towns . . . according to their respective numbers," and also that those numbers shall include "three fifths of all other persons" (i.e., slaves).²⁶⁴
- In 1831, Delaware adopted a new constitution which again provided (as had the state's constitution of 1792) that the state's congressmen would be elected "at the same places . . . and in the same manner" as representatives in the state legislature.²⁶⁵
- Florida's constitution of 1838 provided that "[r]eturns of elections for members of Congress and the general assembly shall be made to the secretary of state, in manner to be prescribed by law."²⁶⁶
- In 1842, Rhode Island adopted a constitution which provided that voting for several specified offices, including "representative[s] to Congress, shall be by ballot."²⁶⁷
- Iowa's constitutions of 1846 and 1857 provided that congressional districts consisting of more than two counties could not be "entirely separated by any county belonging to another district" and that "no county shall be divided" in forming a congressional district.²⁶⁸

264. VA. CONST. of 1830, art. III, § 6, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3823.

265. DEL. CONST. of 1831, art. VII, § 2, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 595.

266. FLA. CONST. of 1838, art. VI, § 16, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 675. The exact same provision appeared in the state's 1865 constitution. FLA. CONST. of 1865, art. VI, § 12, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 697.

267. R.I. CONST. of 1842, art. VIII, § 2, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3230.

268. IOWA CONST. of 1846, art. 3, Legislative Department, § 32, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 1129 ("When a Congressional, Senatorial, or Representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a Congressional, Senatorial, or Representative district."). Iowa's constitution of 1857 contained the same provision. IOWA CONST. of 1857, art. III, Legislative Department, § 37, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 1144. Iowa's constitutional regulation of congressional districts went beyond what was required by the districting statute enacted by Congress in 1842. *See* Reapportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring states—for the first time—to use districts of "contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative"). Michael Weingartner has noted that this provision of the Iowa constitution was the subject of a House

- California’s constitution of 1850 provided that congressional districts consisting of two or more counties “shall not be separated by any county belonging to another district; and no [county] shall be divided in forming a congressional . . . district.”²⁶⁹
- The Virginia constitution of 1850 included the same “three-fifths” clause as its 1830 constitution as well as a requirement that the state be divided into congressional districts that “shall be formed respectively of contiguous counties, cities, and towns, be compact, and include, as nearly as may be, an equal number of the population, upon is based representation in the House of Representatives of the United States.”²⁷⁰
- Oregon’s constitution of 1857 provided that qualified electors could vote in “any county of a congressional district in which such electors may reside for members of Congress.”²⁷¹

Second, starting with Mississippi’s constitution of 1817, it was common for new states to enter the Union with constitutions that specified the time, place, or manner of electing the state’s first congressional representatives.²⁷² The House blessed this practice in 1850 when some members challenged the election of California’s first representatives.²⁷³ Representative Abraham Watkins Venable of North Carolina, invoking the Elections Clause, argued at length that California’s election, called by its constitution “before the existence of [its] first Legislature,” was “under no regulation of any Legislature as to time, place or manner, and therefore

contested election in 1850, and no one then suggested that it was irrelevant by virtue of the independent state legislature doctrine. See Michael Weingartner, *Liquidating the Independent State Legislature Theory* 58 (Sept. 25, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138 [<https://perma.cc/4SZ5-DDSL>] (discussing the 1850 contested election case of *Miller v. Thompson*); see also H.R. REP. NO. 31-400 (1850) (reproducing the majority and minority reports in *Miller v. Thompson*).

269. CAL. CONST. of 1849, art. IV, § 30, reprinted in 1 CONSTITUTIONS, *supra* note 29, at 396.

270. VA. CONST. of 1850, art. IV, §§ 13–14, reprinted in 7 CONSTITUTIONS, *supra* note 30, at 3839.

271. OR. CONST. of 1857, art. II, § 17, reprinted in 5 CONSTITUTIONS, *supra* note 31, at 3002.

272. MISS. CONST. of 1817, art. VI, Schedule, § 7, reprinted in 4 CONSTITUTIONS, *supra* note 152, at 2047. Such provisions also appeared in the first constitutions of Alabama (1819), Missouri (1820), Michigan (1835), Florida (1838), Iowa (1846), Wisconsin (1848), Minnesota (1857), Oregon (1857), Kansas (1859), Nevada (1864), Nebraska (1867), Arkansas (1868), South Dakota (1889), Montana (1889), Washington (1889), Wyoming (1889), and North Dakota (1889).

273. See Muller, *supra* note 22, at 729 (describing House proceedings relating to the challenge).

utterly void.”²⁷⁴ In response, Representative John Larne Robinson of Indiana pointed out the history of new states sending representatives who “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 elections.”²⁷⁵ The House voted to seat the new California members by a vote of 109–59.²⁷⁶

Third, state constitutions in this period frequently contained “all elections” provisions that, by their terms, would have applied to federal elections (even though federal elections were not explicitly mentioned). For example, a non-exhaustive list of constitutions adopted by new states during this period that required “all elections” to be “by ballot” includes Ohio (1803), Louisiana (1812), Alabama (1819), Michigan (1835), Texas (1845), California (1849), and Minnesota (1857).²⁷⁷ The same was true of new constitutions adopted by older states during this period, as evidenced by New York (1821) and Pennsylvania (1838).²⁷⁸ In contrast, Kentucky’s 1850 constitution, like its predecessor, continued to specify *viva voce* voting for all elections, which is also what the Virginia constitution of 1830 did.²⁷⁹ Such “all elections” provisions regulated other aspects of elections as well. The Kentucky constitution of 1850 required “[a]ll elections by the people shall be held between the hours of six o’clock in the morning and seven o’clock in the evening,”²⁸⁰ while the California constitution of 1849 provided “[a] plurality of the votes given at an election shall constitute a choice, where not otherwise directed in this constitution.”²⁸¹

The broad “all elections” language was intentional. The original “all elections” proposal at the Virginia convention of 1830 would have applied

274. CONG. GLOBE, 31st Cong., 1st Sess. 1779, 789–91, 1795, app. at 1253–55 (1850).

275. *Id.* at 1790.

276. *Id.* at 1795.

277. OH. CONST. of 1803, art. IV, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2907; LA. CONST. of 1812, art. VI, § 13, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1389; ALA. CONST. of 1819, art. III, § 7, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 99; MICH. CONST. of 1835, art. II, § 2, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 1932; TEX. CONST. of 1845, art. VII, § 6, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3560; CAL. CONST. of 1849, art. II, § 6, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 393; MINN. CONST. of 1857, art. VII, § 6, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2008.

278. N.Y. CONST. of 1821, art. II, § 4, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2643; PA. CONST. of 1838, art. III, § 2, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3108.

279. KY. CONST. of 1850, art. VIII, § 15, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1308; VA. CONST. of 1830, art. III, § 15, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3826.

280. *Id.* at § 16.

281. CAL. CONST. of 1849, art. XI, § 20, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 404.

only to “all elections for members of either branch of the General Assembly” and elections by the legislature, but this was modified to “all elections in this Commonwealth.”²⁸² By contrast, Connecticut chose to limit its by ballot requirement to “all elections of officers of the State, or members of the General Assembly.”²⁸³

Fourth, as Professor Levitt has explained, Congress passed a law in 1845 that contemplated that when presidential electors were appointed in certain situations, it would be “in such manner as the State shall by law provide.”²⁸⁴ Professor Levitt found no indication in the legislative history that anyone believed this improperly circumscribed legislative power under the Elector Appointment Clause, even though “had the Constitution reserved special power to the state legislature to act outside of the legislative process in fulfilling an Article II role, the 1845 delegation to the state to act ‘by law’ would have been unconstitutional.”²⁸⁵

Finally, in 1861, in *Shiel v. Thayer*, the House considered the independent legislature doctrine and rejected it. Oregon held its congressional election in June 1860 in accordance with its constitution, which provided that “[g]eneral elections shall be held on the first Monday of June bienn[ially].”²⁸⁶ The Democratic candidate, George Shiel, defeated the Republican candidate. However, in November of that year, at the time of the presidential election, some citizens voted for a second Democratic candidate, Andrew Thayer. Thayer argued that Shiel’s election in June—held under the state constitution—was invalid, based on the independent state legislature doctrine:

[The Elections Clause] provides that the times, places, and manner of holding elections in the several States for Representatives in Congress, shall be prescribed by the Legislature of each State. There is no provision in the Constitution[] that a constitutional convention has the power or the right to fix the times, places, and manner of holding elections for Senators and Representatives. I hold . . . that this clause of the Constitution is imperative, and that a convention . . . for a State has no power to fix the time and place

282. DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 170, at 455–56.

283. CONN. CONST. of 1818, art. VI, § 7, *reprinted in* 1 Constitutions, *supra* note 29, at 544.

284. Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, *supra* note 22, at 1078 (quoting Act of Jan. 23, 1845, ch. 1, 5 Stat. 721).

285. *Id.* Congress’s assumption that “legislatures” had to prescribe “manner” regulation “by law” persisted after 1845. Weingartner, *supra* note 268, at 50–52.

286. OR. CONST. of 1857, art. II, § 14, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3002.

for holding elections for Representatives and Senators, but that they must be prescribed by the Legislature of the State.²⁸⁷

Thayer also argued that the Constitution's provision for holding general elections biennially did not expressly apply to congressional elections, and, indeed, that "nowhere in the constitution of the State is there any provision for the reelection of a Representative in Congress."²⁸⁸

The Committee of Elections, in a report authored by its chairman, Henry L. Dawes of Massachusetts, unanimously recommended that Shiel be given the contested seat.²⁸⁹ First, the Committee concluded that the Oregon constitution's provision for biennial "general elections" in June "was designed to embrace at least all such officers as were to be voted for by the people of the whole State, including a Representative in Congress."²⁹⁰ Second, the Committee noted that the state legislature, by considering legislation that would have changed the date of the congressional election from that outlined in the constitution "seems to have believed that it had the power to [make such a change]."²⁹¹ The Committee made clear that it disagreed with the legislature. In its words, the Committee had "no doubt that the constitution of [Oregon] has fixed [the election date] beyond the control of the legislature."²⁹²

During the floor debate, Representative Thaddeus Stevens of Pennsylvania announced that he agreed with the Committee's conclusion that Thayer had no right to the seat, but he argued that Shiel should not get the seat either.²⁹³ Stevens argued Shiel's election was invalid because, under the Elections Clause, "no [] power in a State[, besides the legislature,] has a right to prescribe" the time, place, and manner of a congressional election, including "the convention to frame the constitution."²⁹⁴ Dawes responded that Stevens' argument flew "in the face of all the precedents of this House,"²⁹⁵ and that, in his view, the Elections Clause,

287. CONG. GLOBE, 37th Cong., 1st Sess. 353 (1861).

288. *Id.*

289. H.R. REP. NO. 37-4 at 3 (1861) (reproducing the committee's report in *Shiel v. Thayer*).

290. *Id.* at 2. This finding was bolstered by the fact that the constitution had expressly set the time for the state's first congressional election as "the first Monday in June, 1858." OR. CONST. of 1857, Schedule, § 6, reprinted in 5 CONSTITUTIONS, *supra* note 31, at 3018.

291. H.R. REP. NO. 37-4, at 3; see CONG. GLOBE, 37th Cong., 1st Sess. 353 (1861).

292. H.R. REP. NO. 37-4, at 3.

293. CONG. GLOBE, 37th Cong., 1st Sess. 356 (1861).

294. *Id.*

295. *Id.* at 356-57.

[M]eant simply that [the time and place] should be fixed by the constituted authority of the State until Congress itself should fix a time for the election in all the States. As Congress has not fixed that time, it has said to every State “you may, by your constituted authorities, through whom you choose to speak in your law, fix the time.”²⁹⁶

Ultimately, the House sided with Dawes and the Elections Committee. Stevens proposed a resolution that neither Shiel nor Thayer was entitled to the seat, but this motion was defeated by a vote of 77–37.²⁹⁷ The House then voted to seat Shiel, though it did not record the vote tally.²⁹⁸

The Prevailing View Thesis fails to account for any of this pre-Civil War evidence. Of the many constitutional provisions which regulated “legislatures,” Professor Morley mentions only the Maryland constitutional amendment of 1810, which he discounts, erroneously, as relating only to “voter qualification issues . . . outside the scope of both the Elections Clause and the independent state legislature doctrine.”²⁹⁹ While Professor Morley notes the existence of *Shiel*, he fails to appreciate its relevance because of his mistaken belief that “[n]either the [Elections] Committee nor the [House] floor debate” considered the doctrine in that matter.³⁰⁰

296. *Id.* at 356.

297. *Id.* at 357.

298. *Id.*

299. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 39 n.169. Professor Morley’s comment is ignorant of the fact that the Maryland amendment explicitly regulated both the manner of appointing electors (by mandating popular elections) and the manner of electing both presidential electors and representatives (by specifying that voting in both kinds of elections would be “by ballot”). MD. CONST. of 1776, art. XIV (1810), *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1705.

300. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 52; *see id.* at 53 (incorrectly asserting that “the Elections Clause was not even discussed”); *id.* at 53 (“Had the [Elections] Clause been raised, the House would have had to explicitly grapple with its language and meaning.”). References to the debate over the doctrine in *Shiel* appear in several places in the historical record. *See* CHESTER H. ROWELL, 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 172 (1901) (quoting U.S. Const. art. I, § 4, cl. 1) (recounting how “[i]n the House it was claimed [in *Shiel*] that under the Constitution of the United States the time for an election (at least after the first election) can only be fixed by the legislature or by Congress” but a “resolution based on this principle was defeated by a vote of 37 to 77” after Representative Dawes “argued that the words of the Constitution, ‘by the legislature thereof,’ meant by the people, through any constituted authority”); H.R. REP. NO. 39–14, at 4 (1866) (dissenting report in *Baldwin v. Trowbridge* relying on Dawes’s argument during *Shiel v. Thayer*); *In re Op. to the Governor*, 103 A. 513, 515 (R.I. 1918) (referencing the debate in *Shiel v. Thayer*).

For this antebellum period, the Prevailing View Thesis appears to rely for support entirely on comments made at the Massachusetts constitutional convention of 1820 during a debate over whether the state constitution should require presidential electors and representatives to be chosen on a district basis.³⁰¹ Professor Morley's lead is that "Justice Joseph Story and Daniel Webster invoked the doctrine at the [convention], convincing delegates that including restrictions on congressional redistricting in the Massachusetts Constitution would violate the U.S. Constitution."³⁰² While there is some truth to this statement (Justice Story did invoke the doctrine), the rest is erroneous (Daniel Webster did not) or entirely speculative (the delegates had good reasons to reject the provision other than belief in the doctrine).

At the convention, the issue came up after the delegates voted to remove the outdated constitutional provision dating from 1780 which, prior to the adoption of the United States Constitution, had governed the appointment of the state's representatives to Congress.³⁰³ At that juncture, James T. Austin (a future Attorney General of Massachusetts and the son-in-law of Elbridge Gerry) proposed a new constitutional provision that would have required representatives and electors for president and vice president to be chosen by the people on a district basis, with reapportionment after every decennial census.³⁰⁴ Austin argued to the convention that election by districts was the best method, as "[i]t is only by dividing the state into small portions that there can be a fair expression of public opinion."³⁰⁵ On the other hand, with larger, presumably statewide districts, "the rights of the minority are destroyed."³⁰⁶

301. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 38 ("As early as the Massachusetts Constitutional Convention of 1820, it was understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections."); *id.* at 39 (identifying the 1820 convention as "among the earliest examples of the independent state legislature doctrine being expressly applied" without identifying any other examples from that period).

302. *Id.* at 14. Similarly, Professor Morley says that this episode "provides a stark example of how the independent state legislature doctrine was regarded when the issue was affirmatively raised and debated." *Id.* at 40.

303. See JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES 57 (Bos. Daily Advertiser 1821) [hereinafter MASSACHUSETTS CONVENTION OF 1820] ("[T]he . . . part of the [c]onstitution of this Commonwealth, having become inapplicable to the existing condition of . . . Massachusetts, ought to be expunged therefrom").

304. *Id.* at 57–58.

305. *Id.* at 59.

306. *Id.*

Austin wanted to constitutionalize district elections so as to “decide finally an important question” which was “continually occurring in the legislature,” each time causing “some degree of embarrassment and confusion.”³⁰⁷ Austin undoubtedly thought Massachusetts had, since the beginning of the Republic, repeatedly switched back and forth between the legislative appointment of presidential electors and district-based elections.³⁰⁸ He wanted to avoid constant “propositions . . . to change the mode of election”:

[Austin explained that he] did not wish to see these propositions renewed. Important elections of themselves afforded grounds enough of excitement, without that which arose from a difference of opinion about the mode of election. The commonwealth had been at times agitated by contending parties. There was now a calm—but the storm might burst out again. Let us take advantage of the favorable moment to settle an important principle. Let it be understood that representatives and electors are to be chosen by districts. When districts are settled let it be for ten years. Let there be no room for suspicion that the mode of election is determined upon from party motives.³⁰⁹

Austin also addressed Justice Story’s argument (detailed below) that the state constitution could not limit the power assigned to legislatures by the Elector Appointment Clause and the Elections Clause. Austin acknowledged that his proposed amendment would “limit [the legislature] in the manner of exercising their discretion,” but he saw that as perfectly appropriate because “[t]he Legislature [is] bound to exercise all [its] powers under the direction of the [state] constitution.”³¹⁰ Under constitutional first principles, “[t]he people possess the supreme power—they have a right to impose this restriction upon the Legislature, and the Legislature will have no right to question their authority.”³¹¹ Austin disagreed that limiting the

307. *Id.* at 58.

308. See EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 18, 20, 22–23, 56, 58 (2020); KEYSSAR, *supra* note 218, at 32 tbl.1.1 (documenting states’ historical method of electing presidential electors); *id.* at 66 (“[In 1812,] Massachusetts, continuing a dispute that had begun in 1808, found itself with a Republican senate and a Federalist lower house that could not agree on either a method of choosing electors or a map for congressional districts; in the end, an extra legislative session had to be convened to save the state from losing its electoral votes altogether.”).

309. MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 59.

310. *Id.* at 58.

311. *Id.*

discretion of the state legislature in the manner he suggested would violate the command of the United States Constitution; as he pointed out, “the Legislature will continue to direct.”³¹² However, Austin conceded that it would “unquestionably be a violation” if the state constitution gave “to the Governor and Council the power of regulating the elections.”³¹³

Justice Story opposed Austin’s proposal for two reasons. First, “it was contrary to the [C]onstitution of the United States,” and, second, even if constitutional, “its adoption [would be] wholly inexpedient.”³¹⁴ As to the first point—a version of the anti-constitution independent state legislature doctrine—Justice Story argued that the Elections Clause was an “express provision” for “the *manner* of choosing Representatives” for which state legislatures had “unlimited discretion They may provide for an election in single districts, in districts sending more than one, or by a general ticket for the whole state.”³¹⁵ Similarly, the Elector Appointment Clause gave “discretion as to the choice of Electors” to “the *Legislature* thereof,” which was “unlimited.”³¹⁶ According to Justice Story, Austin’s proposed amendment would improperly require the legislature to “surrender all discretion” in violation of its duty “to exercise its authority according to its own views of public policy and principle.”³¹⁷

Justice Story turned to his second point, the inadvisable “policy of the measure, even supposing it were constitutional.”³¹⁸ He did not want a constitutional pre-commitment to “limit *us* to a particular mode of choice, leaving all the rest of the United States free to adopt any other.”³¹⁹ Pre-committing to election by district, which would divide the state’s power, while other states reserved the right to use a general-ticket, winner-take-all approach, would mean that, “on the most important occasions we might be

312. *Id.* at 61.

313. *Id.*

314. *Id.* at 59.

315. *Id.*

316. *Id.* at 60. Historian Merrill Jensen criticized “the technique of argument” employed by Justice Story and others when they argued a different point: that the pre-Constitution Congress “represented the people of the United States as a whole, not the people of the several as represented in their state governments.” JENSEN, *supra* note 70, at 162. As Jensen described it, the “technique of argument” then employed by Justice Story and others was to “state their contention, or reiterate it, and by the use of italics to place undue emphasis on the portions of the documents which seemed to prove their arguments.” *Id.* Jensen disparaged this as “the technique of argument used by small boys.” *Id.* at 162–63.

317. MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 60.

318. *Id.*

319. *Id.*

deprived of all the influence to which our talents and character, and numbers, justly entitle us.”³²⁰ Justice Story warned against “bind[ing] ourselves to a mode of choice which would neutralize our votes and place us in the same situation as if we had no vote.”³²¹

Daniel Webster agreed with Justice Story’s policy argument.³²² While Webster was in favor of election by district, for it to work, that mode required universal adoption, which was unlikely in the absence of an amendment to the United States Constitution because “it is in the interest of every state, that every other state should be restrained to District elections of Electors, and herself left free.”³²³ Therefore, to protect “all the just and right power of our constituents,” Webster argued that Massachusetts “ought to retain the right of giving an undivided electoral vote, until others also

320. *See id.* (“The direct and necessary consequence of the measure now proposed is to perpetuate our own humiliation. Why does Virginia . . . choose her Electors for President by general ticket? Because she is determined that her Electors shall move in a solid column in the direction of the majority of the state.”).

321. *Id.* When Justice Story later wrote his Commentaries, he revisited this debate, but focused exclusively on the policy argument, without saying anything about the independent state legislature doctrine. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1466 (1833). Noting that two states continued to elect electors by district, Justice Story wrote that he was “surprise[d]” that the approach “should not long since have been wholly abandoned.” *Id.* Absent the practice of election by district “becom[ing] general throughout the Union,” the problem was that “[i]n case of any party divisions in a state, [electing by district] may neutralize its whole vote, while all the other states give an unbroken electoral vote.” *Id.*

322. Professor Morley incorrectly states that Daniel Webster “agreed” with Justice Story’s articulation of the independent state legislature doctrine. *See Morley, The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, supra* note 15, at 40. In fact, Webster began his speech by declining “to enter into the argument on the question of our *right* to make such a provision.” MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 60. Instead, it was “the *expediency* of it which had weight with him.” *Id.* At most, Webster thought there was a “general inexpediency of connecting the *state* Constitution with provisions of the *national* constitution” and that it would “tend[] to no good consequence” for a state constitution to regulate a power conferred on it by another constitution. *Id.*

323. *See MASSACHUSETTS CONVENTION OF 1820, supra* note 303, at 61. (“When we, therefore, tie up our own hands in this particular, by our own constitution, we do that, precisely, which those who wish a relative increase of *their own power*, would desire.”).

should agree to give up the same right.”³²⁴ To do otherwise would not “entitle ourselves to much character for foresight or sagacity.”³²⁵

The convention rejected Austin’s amendment, but it did not record the vote.³²⁶ The only three delegates who stated their position for the record on the independent legislature doctrine were Austin (who rejected the doctrine), Justice Story (who embraced it), and Webster (who declined to debate the point).

2. Constitutional Limitations on “Legislatures” During the Civil War

Because it provided a way to evade state constitutional limitations on soldier-voting in federal elections, the independent state legislature doctrine reached its high-water mark during the Civil War. However, the tide did not rise as high as the Prevailing View Thesis would have it. Even during the Civil War period, state constitutions continued to impose substantive limitations on state legislatures. Moreover, the Civil War soldier-voting cases were not nearly as strong an endorsement of the independent legislature doctrine as has been portrayed.

a. State Constitutions

When the Civil War threatened to disenfranchise Union soldiers who were absent from their home states fighting the war, several states amended their constitutions to prevent that from happening. Three of the amendments applied expressly to federal elections:

324. *Id.* Justice Story and Webster met before the convention to discuss tactics to resist constitutional change. Harlow Walker Sheidley, *Preserving “The Old Fabrick”: The Massachusetts Conservative Elite and the Constitutional Convention of 1820–1821*, 103 *PROC. MASS. HIST. SOC’Y* 114, 128 (1991). It was “not at all unusual for [them] to speak in support of each other at the climactic point of a debate.” *Id.* at 134. The alliance between Justice Story and Webster has been described by Justice Story’s biographer as “one of the most extraordinary in American law and politics.” R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC* 176 (1986). In 1820, while preventing Massachusetts from dividing its future electoral votes, the duo may have had their sights set on greater things. In the wake of their successes at the convention, conservatives like Justice Story and Webster “hoped to transfer their success to national politics, [with Justice Story] naively dreaming of the day when the ‘popularity’ Webster had earned at the convention would ‘carry him . . . to the presidency.’” Sheidley, *supra*, at 137 (quoting letter from Joseph Story to Jeremiah Mason (Jan. 21, 1821), in 1 *LIFE AND LETTERS OF JOSEPH STORY* 396 (William W. Story ed., 1851)).

325. MASSACHUSETTS CONVENTION OF 1820, *supra* note 303, at 61.

326. *See id.* at 57, 61 (“The question was then taken on Mr. Austin’s amendment and decided in the negative.”).

- Connecticut amended its constitution to guarantee that any qualified voter “absent from this state” because of service in the United States military would “have the same right to vote in an election of state officers, representatives in congress, and electors of president and vice president of the United States,” as he would have if he was present in the town of his residence at the time of the election.³²⁷
- Maryland’s new constitution of 1864 mandated that “[a]ny qualified voter . . . who shall be absent . . . by reason of being in the military service of the United States” was eligible to vote in the November 1864 elections, including elections “for presidential electors and for members of Congress.”³²⁸
- Rhode Island amended its constitution to guarantee that any qualified voter “absent from the State[] In the actual military service of the United States” would have the “right to vote in all elections in the State,” including “for electors of President and Vice-President of the United States [and] Representatives in Congress.”³²⁹

These constitutional amendments would have been unnecessary if the prevailing view in these states had been that state constitutions could not regulate federal elections.

Moreover, other states adopted soldier-voting constitutional amendments that did not contain explicit references to federal elections but were broad enough to encompass federal elections. This was so in New York, Pennsylvania, Michigan, and Kansas.³³⁰ By contrast, Maine and

327. CONN. CONST. of 1818, art. XIII (1864), *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 550. By its terms, the amendment was to expire “upon the termination of the present war.” *Id.*

328. MD. CONST. of 1864, art. XII, § 11, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1777–78.

329. R.I. CONST. of 1842, art. IV (1864), *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3235–36.

330. *See* N.Y. CONST. of 1846, art. II, § 1, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2675 (providing “in time of war no elector in the actual military service . . . shall be deprived of his vote by reason of his absence from such election district; and the [l]egislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside”); PA. CONST. of 1873, art. VIII, § 6, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3139 (“[S]uch [soldier-voters] may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.”); MICH. CONST. of

Missouri's soldier-voting amendments were limited to specified state elections but apparently this was because the state constitutional obstacles to soldier-voting in those states applied only to specified state elections.³³¹

West Virginia and Nevada both entered the Union during the Civil War. Both of their constitutions contained substantive limitations on how legislatures were to conduct federal elections, both explicit and implicit. West Virginia's constitution required congressional election by district and specified that each district "shall be formed of continuous counties, and be compact,"³³² and that "all elections" must be conducted "by ballot."³³³ Nevada's constitution specified the applicable manner of "all elections for United States Senators," including that "such elections shall be held in joint convention of both houses of the Legislature."³³⁴ It also specified election "by ballot" in "all elections,"³³⁵ and further provided that "[a] plurality of votes given at an election by the people shall constitute a choice, where not otherwise provided by this Constitution."³³⁶

b. Soldier-Voting Cases

The foundation of the Prevailing View Thesis consists of the Civil War soldier-voting cases arising in New Hampshire (1864) and the House of Representatives (*Baldwin v. Trowbridge* in 1866). Professor Morley describes

1850, art. VII, § 1, *reprinted in* 4 Constitutions, *supra* note 152, at 1975 (providing "in time of war, insurrection, or rebellion, no elector shall be deprived of his right to vote by reason of his service in the army or navy at such time, in this [s]tate or the United States"); KAN. CONST. of 1859, art. 5, § 3, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 1251 ("[T]he legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this state.").

331. The requirement in Maine that electors vote "in the town or plantation where his residence is so established," applied only to electors "for Governor, Senators, and Representatives." ME. CONST. of 1819, art. II, § 1, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1649. The 1864 soldier-voting amendment was framed accordingly. *Id.* at art. II, § 4, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1649. Missouri was similar. *See* MO. CONST. of 1865, art. II, §§ 18, 21, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2198 (stating electors for "all officers, State, county, or municipal . . . shall not vote elsewhere than in the election district of which he is at that time a resident," yet a "qualified voter . . . absent from the place of his residen[ce] by reason of being in the volunteer army of the United States, or in the militia force of this State, in the service thereof, or of the United States, whether within or without the State, shall, without registration, be entitled to vote in any election occurring during such absence").

332. W.V. CONST. of 1863, art. XI, § 6, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4031.

333. *Id.* at art. III, § 2, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4016.

334. NEV. CONST. of 1864, art. IV, § 34, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2409.

335. *Id.* at art. II, § 5, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2405.

336. *Id.* at art. XV, § 14, *reprinted in* 4 Constitutions, *supra* note 152, at 2423.

the New Hampshire case as “one of the nineteenth century’s clearest, most emphatic endorsements” of the doctrine,³³⁷ and the result in *Baldwin* as “powerfully support[ing]” the doctrine.³³⁸ These matters were also credited in similar fashion by some historical commentators,³³⁹ but not others,³⁴⁰ and, more recently, Chief Justice Roberts cited *Baldwin* in his dissenting opinion in *Arizona State Legislature*.³⁴¹ In fact, the New Hampshire matter likely had nothing to do with the doctrine, and *Baldwin* was hardly as enthusiastic an endorsement as has been assumed.

i. The New Hampshire Supreme Court’s Soldier-Voting Opinion

The New Hampshire Supreme Court’s 1864 opinion advised the New Hampshire Senate that a soldier-voting bill allowing soldiers to vote for presidential electors and congressional representatives would be constitutional if enacted.³⁴² However, the opinion should not be read as an endorsement of the independent state legislature doctrine.

337. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 42.

338. *Id.* at 51.

339. See JOSIAH HENRY BENTON, *VOTING IN THE FIELD, A FORGOTTEN CHAPTER OF THE CIVIL WAR* 11–12 (1915) (stating the view that constitutional amendments permitting soldier-voting were required for state but not federal elections, but noting that the distinction “does not appear to have been generally recognized at the time of the Civil War”); see also THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 599 & n.3 (2d ed. 1872) (relying on the Vermont and New Hampshire soldier-voting cases to suggest a soldier-voting statute in violation of a state constitution would be valid for federal elections). Notably, the first edition of Cooley’s treatise, published in 1868, had not mentioned the doctrine; rather, Cooley’s understanding then was that if a state constitution required a voter to participate at the place of his residence, then “any statute permitting voters to deposit their ballots elsewhere must necessarily be void.” THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 600 & n.1 (1st ed. 1868). In 1880, a different Cooley treatise stated that a state legislature’s statute “must control” over a conflicting state constitution. See THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 250–51 (1880) (citing *Baldwin* but omitting any discussion of the soldier-voting cases cited in his earlier treatise).

340. In 1875, George W. McCrary of Iowa, former chairman of the Committee on Elections (42nd Congress), published an election law treatise that included a description of the soldier-voting issue and the House of Representative’s decisions in *Baldwin* and *Shiel*. See GEORGE W. MCCRARY, *A TREATISE ON THE AMERICAN LAW OF ELECTIONS* §§ 109–111 (1875). McCrary declined to opine on whether “the reasoning in *Baldwin vs. Trowbridge* . . . [was] sound or not.” *Id.* at § 112.

341. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 837–38 (2015) (Roberts, C.J., dissenting).

342. *In re Op. of the Justs.*, 45 N.H. 595, 596 (1864).

A close examination of the New Hampshire matter reveals that no one involved identified any state constitutional provision that would even arguably conflict with the legislative proposal to permit soldiers to vote in the field for presidential elections and representatives in Congress.³⁴³ The year before, the court had opined that there were state constitutional provisions requiring votes to be cast at certain places that would preclude absentee voting in state elections, but those provisions applied to specifically enumerated state elections and did not, by their terms, apply to federal elections.³⁴⁴ In 1864, the question that the court struggled with was whether the *federal* Constitution prohibited soldier-voting in congressional elections by specifying that voters in congressional elections “shall have the qualifications requisite for electors of the most numerous branch of the State legislature.”³⁴⁵ If the state constitutional provisions requiring votes to be cast at certain places in state elections were “qualifications,” then by operation of the federal Constitution they would apply to congressional elections even though those state constitutional provisions did not, by their own terms, apply to congressional elections.³⁴⁶ The court ultimately concluded that the state constitutional requirements were not federal “qualifications,” and therefore that the state legislature could authorize soldier-voting in the field “untrammelled by the provision of the State constitution, which requires the elector of State representatives to give his

343. See generally *id.* (identifying no such conflict).

344. See *In re Op. of the Justices*, 44 N.H. 633, 635–36 (1863). The state constitutional provisions that might block soldier-voting by requiring voting “within the district” or “in the town or parish wherein he dwells” were not “all elections” provisions, but rather were limited by their terms to elections for specific state officials. See N.H. CONST. of 1792, § XIII (providing the structure for elections for state representative), reprinted in 4 CONSTITUTIONS, *supra* note 152, at 2477; *id.* § XXVIII (providing the structure for elections for state senators), reprinted in 4 CONSTITUTIONS, *supra* note 152, at 2479. This opinion was similar to the opinion issued in the Vermont soldier-voting case, in which the Vermont Supreme Court found the state constitution was “entirely silent” on federal elections. See *Op. of the Judges*, 37 Vt. 665, 676 (1864). But see Morley, *The Independent State Legislature*, *supra* note 62, at 536 n.284. (citing, erroneously, the Vermont soldier-voting case as an example of a state court applying the doctrine).

345. *Op. of the Justices*, 45 N.H. at 601 (quoting U.S. CONST. art. I, § 2).

346. See *id.* at 602 (“If the provisions of the [s]tate [c]onstitution make it a *qualification* of the voter for senators, within the meaning of the word *qualifications* as used in the Constitution of the United States, that the vote should be cast in the place where the voter resides, then the legislature have not constitutional power to authorize votes for [r]epresentatives to be given in other places than those where the voters dwell.”).

vote in the town or place wherein he resides.”³⁴⁷ Tellingly, the court’s discussion about the potential applicability of the federal qualifications clause did not apply to presidential elections, for the simple reason that the qualifications clause does not apply to presidential elections.³⁴⁸

The conclusion that neither the New Hampshire legislature nor the New Hampshire Supreme Court believed the state constitution was irrelevant by virtue of the Doctrine is confirmed by two additional facts. First, in the 1864 soldier-voting statute, which was solely purposed to permit soldier-voting in federal elections, the legislature specified the act “shall be of no effect, but shall become inoperative and void, if a majority of the supreme court shall determine it unconstitutional.”³⁴⁹ This requirement is what prompted the court’s review of the law’s constitutionality.

Second, the legislature also went to the court to confirm the law had been passed in accordance with the state constitution’s gubernatorial veto provision. Under that provision, no bill would become law unless it was either (a) approved by the governor or (b) not returned by the governor with his objections within five days after presented to him.³⁵⁰ The governor argued he returned the bill with his objections within the five-day period, but the court disagreed, explaining he had blown the deadline and, in accord with the constitution, the bill had therefore become law without his approval.³⁵¹

347. *Id.* at 605. *But see* Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 41–42 (assuming the court’s “untrammled” language was an invocation of the independent legislature doctrine).

348. *See In re Op. of the Justs.*, 45 N.H. 595, 601 (posing the question of “[w]hether the Constitution of the United States authorizes the State legislature to prescribe such places for holding elections of Representatives in Congress as are provided for in this bill”). In 1921, the New Hampshire Supreme Court revisited the question of whether the state constitutional place of voting restrictions were “qualifications” and expressed doubt about the conclusion it reached in 1864. However, the court again made clear that its concern did not extend to presidential elections, for which the qualifications clause had no potential application. *See In re Op. of the Justs.*, 113 A. 293, 299 (1921) (“The manner of voting prescribed by the bill is contrary to the state Constitution . . . they would be valid as to the election of presidential electors; we are unable to say the provisions would be held valid as to the election of the Senators and Representatives in Congress.”).

349. An Act to enable the qualified voters of this State engaged in the military service of the county to vote for electors of President and Vice President of the United States, and for Representatives in Congress, § 8, *reprinted in* LAWS OF THE STATE OF NEW HAMPSHIRE PASSED JUNE SESSION 3063 (Concord 1864). The act also required the governor “to obtain an opinion upon the constitutionality of the bill.” *Id.*

350. N.H. CONST. of 1792, § XLIV, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2482.

351. *See In re Op. of the Justs.*, 45 N.H. at 613–14; BENTON, *supra* note 339, at 208–12 (describing the governor’s attempt to veto the bill).

ii. The House Contested Election Case of *Baldwin v. Trowbridge*

Baldwin v. Trowbridge, the contested election case arising out of Michigan's 1864 congressional election, was not as strong an endorsement of the Doctrine as has been commonly thought.³⁵² In fact, it is incorrect to assume (as Chief Justice Roberts did in *Arizona State Legislature* and as others have as well) that all members of the House who voted in favor of Trowbridge did so because they agreed with the Doctrine.³⁵³

In the election, Rowland E. Trowbridge received more votes than Augustus C. Baldwin but only when counting the soldier vote cast outside of Michigan. Soldier-voting outside the state had been authorized by the Michigan legislature, but Baldwin argued the soldier-voting statute was unconstitutional because the Michigan state constitution prohibited such voting (as the Michigan Supreme Court had recently held in a dispute over a state election).³⁵⁴ The majority report of the Elections Committee, favoring Trowbridge, invoked the independent legislature doctrine and argued that the state constitutional requirement could not constrain the legislature's action in a federal election.³⁵⁵ The minority report rejected the Doctrine.³⁵⁶ After floor debate, a majority of the House voted in favor of

352. In this section, I take at face value the legal arguments made by various congressmen explaining their votes in *Baldwin*. Later in this Article, see *infra* Part.IV.B.1.b.iii, I examine the partisan motivations at work in that and other House contested election cases from the 1860s.

353. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 838, (Roberts, C.J., dissenting) (assuming "[t]he Committee decided, and the full House agreed" with the majority report's reasoning) (emphasis added). Justice Ginsburg's opinion also conflated the committee majority's report, which she described as its "ruling," with the House's vote including by describing the committee majority, as opposed to the House majority, as being "responsible for the decision." *Id.* at 818 (majority opinion). Professor Morley also assumes without basis that "[a] decisive majority of the House concluded that the Elections Clause required it to follow the state statute rather than the contrary state constitutional provision." Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 51.

354. *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 160 (1865).

355. See H.R. REP. NO. 39-13, at 3 (1866) (reproducing the majority report in *Baldwin v. Trowbridge*).

356. See H.R. REP. NO. 39-14, at 4-5 (1866) (reproducing the minority report in *Baldwin v. Trowbridge*). Among other things, the minority report recounted that the House had rejected the Doctrine a few years before in *Shiel v. Thayer*, and that Americans had "everywhere supposed that they had the power to fix a limitation upon the action of their legislature, in determining the times, places, and manner of holding elections for all offices." *Id.* at 3. Baldwin himself argued during debate in the House that "for three fourths of a century during which our Government has existed under the Constitution, no attempt has been made by any State Legislature, I believe, to make a distinction

Trowbridge, who retained his seat.³⁵⁷

Contrary to what has been assumed, support for the Doctrine was not “the only issue” upon which congressmen could have voted in Trowbridge’s favor.³⁵⁸ The majority report which advanced the Doctrine itself recognized it was not necessary to rely on the Doctrine because some House members might see no conflict between the Michigan soldier-voting law and the constitution.³⁵⁹ The best example of a House member voting for Trowbridge but rejecting the Doctrine was Representative Henry Dawes, who was the chairman of the Elections Committee. Dawes rose during the floor debate to make clear that while he agreed with the committee majority that Trowbridge was entitled to his seat, he did not “concur fully in the views set forth in the report . . . by which they arrive at that conclusion.”³⁶⁰ Dawes went on to explain that, contrary to the premise of both the majority and minority reports of the Committee, as well as the Michigan Supreme Court decision, the Michigan constitution did *not* require a voter to be “personally present” to vote.³⁶¹ Therefore, the soldier-voting law Baldwin alleged to be unconstitutional was “not in conflict with the constitution,” and the “whole argument . . . taken by [Baldwin and] the minority, fails.”³⁶² Moreover, this meant the majority report’s “idea that a Legislature can disregard the limitations of the State constitution” was not “necessary for the support of this case”; thus, Dawes could vote in favor of Trowbridge retaining his seat.³⁶³ Dawes made clear he rejected the “dangerous” doctrine articulated in the majority report and that, if he “entertained any doubt that the [Michigan soldier-voting] was constitutional,” he would vote in favor of seating Baldwin.³⁶⁴

between the two classes of electors [one for state and for federal elections].” CONG. GLOBE, 39th Cong., 1st Sess. 827 (1866).

357. CONG. GLOBE, 39th Cong., 1st Sess. 845.

358. Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 51 (stating *Baldwin* involved a “direct and dispositive conflict between a state constitutional provision and a state statute regulating a federal election”).

359. See H.R. REP. NO. 39-13, at 3 (1866) (“Now, the constitution of Michigan either fixes the place of holding the election or it does not. If it does not, there is no conflict between the law and the constitution, and the argument is at an end.”).

360. CONG. GLOBE, 39th Cong., 1st Sess. 821.

361. *Id.*

362. *Id.*

363. *Id.* at 821–22.

364. *Id.* at 822. Dawes lent further support to Trowbridge by stating that the *Baldwin* majority report did not conflict with the report Dawes authored in *Shiel*. *Id.* Although Dawes’s report in *Shiel* stated that a state constitution would override conflicting “manner” legislation, Dawes allowed that the

Dawes was not the only Trowbridge supporter to offer an alternative to the legal rationale articulated in the majority report. Representative Trowbridge himself argued there was no conflict between the soldier-voting law and the state constitution because the constitutional provision applied “[m]anifestly to the election of officers created by that constitution, and to no others.”³⁶⁵ This was not a frivolous argument, if only because the constitutional provision in question did not explicitly apply to federal elections,³⁶⁶ and the Michigan court decision recognizing the supposed conflict involved an election for “prosecuting attorney for the county of Washtenaw,” not a federal election.³⁶⁷ Representative Thomas Davis of New York explained he would be voting in favor of Trowbridge because he saw “no conflict” between the Michigan’s soldier-voting statute and the Michigan constitution, though he was less clear about his reasoning than Dawes or Trowbridge.³⁶⁸

The difficulty in discerning the legal “holding” of the House’s decision in *Baldwin* is highlighted by the reaction of the New York newspaper, *The World*. On February 20, 1866, *The World* decried the “utter shamelessness and illegality of the vote” in favor of Trowbridge. The paper asserted that there was “not a member of the House who voted to unseat Baldwin for any other reason than to sustain the decision of a partisan committee,” and that the majority’s “pretext[ual]” invocation of the independent state legislature doctrine was an “unspeakable effrontery” by “shameless partisans” that was “contrived to conceal a crime.” The paper reserved special disapprobation for “Cockchafer Dawes, Chairman of the Committee,” who had in “numerous cases of the same sort . . . recognized the correct legal principles” but now, in *Baldwin*, exhibited “corrupt inconsistency.”³⁶⁹

Six days later, having read the transcript of the debate, *The World* admitted it had done an “injustice to Mr. Dawes” by “suppos[ing] he [voted for Trowbridge] on the grounds [of the Committee’s majority report authored] by Mr. Scofield.” The transcript revealed “Mr. Dawes regarded the argument of Mr. Scofield as [an] absurdity.” It was clear Dawes voted for

language had been unnecessary because, in *Shiel*, the Oregon legislature had not passed any “manner” legislation at all, let alone conflicting “manner” legislation. *Id.* at 821.

365. *Id.* at 840.

366. MICH. CONST. of 1850, art. VII, § 1, reprinted in 4 CONSTITUTIONS, *supra* note 152, at 1956.

367. *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 135 (1865).

368. CONG. GLOBE, 39th Cong., 1st Sess. 844.

369. *The Case of Representative Baldwin*, WORLD, Feb. 20, 1866, at A4.

Trowbridge because “he did not think the State constitution in conflict with the provisions of the soldiers’ voting act of the Legislature.” *The World* found this argument “just a little less preposterous” but admitted it had done “Mr. Dawes the injustice of overlooking this difference, and he is entitled to have the distinction made in his behalf.”³⁷⁰

In one important respect, the majority report in *Baldwin* actually undercuts the Prevailing View Thesis. The very premise of the report’s invocation of the Doctrine was the assumption that the people of Michigan, in adopting their constitution of 1850, believed it was appropriate for state constitutions to regulate federal elections.

3. Constitutional Limitations on “Legislatures” in the Post-War Period

After the Civil War, Americans continued to adopt state constitutional provisions evidencing their belief that state constitutions could properly limit “legislatures” acting pursuant to the Elector Appointment and Elections Clauses. In the wake of the soldier-voting cases, the Doctrine existed as an argument that was invoked in state courts or House contested election cases. However, the argument did not gain traction in either forum, and it faded over time, as it was rejected by courts and seemingly forgotten by the House.

a. State Constitutions

The following state constitutional provisions adopted during this time period explicitly regulated “legislatures” with respect to federal elections.

- The Alabama constitution of 1867 provided that, after each new congressional apportionment, “the General Assembly shall divide the State into as many districts as it is allowed Representatives in

370. *Mr. Dawes and the Case of Baldwin, of Michigan*, WORLD, Feb. 26, 1866, at A4. The newspaper in Dawes’s home district in Massachusetts correctly recognized that Dawes voted with the majority “because he did not think the State constitution in conflict with the provisions of the soldiers’ voting act” but was dismissive of Dawes’s “no-conflict” argument and asked, “Would not Mr. Dawes be ashamed to use such *logic* as this before any Police Court in Berkshire?” *The Michigan Contested Election*, PITTSFIELD SUN, Mar. 1, 1866. I made the same mistaken assumption as *The World* in my 2001 article. See Smith, *supra* note 1, at 774 n.293 (reporting incorrectly that Dawes “sign[ed] on to the majority report in the *Baldwin* case”).

Congress, making such congressional districts as nearly equal in the number of inhabitants as may be.”³⁷¹

- In 1868, South Carolina’s new constitution provided that “Presidential electors shall be elected by the people.”³⁷²
- The Virginia constitution of 1870 required the state legislature to divide the state into congressional districts “which shall be formed, respectively, of contiguous counties, cities, and towns, be compact, and include, as nearly as may be, an equal number of population.”³⁷³
- Tennessee’s constitution of 1870 provided that citizens “included in any new county” established by the state would vote for members of Congress “with the county or counties from which they may have been stricken off.”³⁷⁴
- In 1873, Pennsylvania adopted a new constitution, which provided that “[t]he trial and determination of contested elections of electors of President and Vice President [as well as certain state offices] shall be by the courts of law.”³⁷⁵

371. ALA. CONST. of 1867, art. VIII, § 6, *reprinted in* 1 CONSTITUTIONS, *supra* note 29, at 147.

372. S.C. CONST. of 1868, art. VIII, § 9, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3298.

373. VA. CONST. of 1870, art. V, § 13, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3885. This provision was similar to those contained in the Virginia constitutions of 1830 and 1850, but without the “three-fifths” clause that had appeared in the earlier versions of the constitution. It also appeared in the Virginia constitution of 1902. VA. CONST. of 1902, art. IV, § 55, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3914.

374. TENN. CONST. of 1870, art. X, § 5, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3467.

375. PA. CONST. of 1873, art. VIII, § 17, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3140–41. When this provision was debated at the state constitutional convention in 1873, Delegate William Darlington sought to limit it to contested elections for state officers on the grounds that it was Congress, not a state court, who was supposed to address contested elections of electors and that, if courts were involved, it “would be very easy to protract the investigation and inquiry” such that “it might be put over beyond the time when [the electors] are to discharge their duties.” 5 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA: CONVENEED AT HARRISBURG, NOVEMBER 12, 1872; ADJOURNED NOVEMBER 27, TO MEET AT PHILADELPHIA, JANUARY 7, 1873, at 196 (Harrisburg, Benjamin Singerly 1873). Darlington’s motion to limit the provision was defeated after another delegate, C.R. Buckalew, argued the Elector Appointment Clause made the appointment of electors “a subject for State regulation, and for State regulation alone”; hence, Congress had “no power over the subject of the appointment or election of electors . . . the manner in which they shall be chosen, how returns shall be made, or how contests in

- In 1876, Colorado entered the Union with a constitution which required the state’s presidential electors to be chosen by the legislature in 1876 but “by direct vote of the people” in future presidential elections.³⁷⁶
- California’s constitution of 1879 regulated the manner in which the legislature could divide the state’s counties and cities into congressional districts, imposing requirements of contiguousness and compactness.³⁷⁷
- In 1879, Louisiana adopted a constitution which provided that “Presidential electors and member of Congress shall be chosen or elected in the manner at the time prescribed by law.”³⁷⁸
- Montana’s constitution of 1889 required the legislature to divide the state into congressional districts after each apportionment by Congress.³⁷⁹

regard to votes cast for them shall be tried.” *Id.* Buckalew also argued for the adoption of such provisions in every state because in any future presidential election, a “dispute in any one State with reference to the choice of electors may precipitate the people of the United States into a revolution.” *Id.* Just before the convention voted to approve the provision, a third delegate, Wayne MacVeagh, rose to explain why he was voting against it. *Id.* at 199–200. MacVeagh said he would have been “disposed to vote for it” if “the judges could have been made non-partisan,” but he disapproved of giving the “entire power of [the people’s] political action” into the hands of an “elective judiciary.” *Id.* at 200. MacVeagh went on to argue that the Constitution was “very specific” that electors “shall be appointed in such manner as the Legislature shall appoint,” and that this was because the Framers contemplated a “division of the powers of government between the legislative and the judicial branches” and sought to put the appointment power “into the legislative department as . . . a political question to be kept away from the judiciary.” *Id.* Samuel Wherry replied that the purpose of the proposed provision was not to “hand the political power of the government over to the judiciary” but to recognize “the principle that the right to hold office is a right to be determined by law, as any other right is to be determined.” *Id.*

376. COLO. CONST. of 1876, art XIX, Schedule, §§ 19–20, *reprinted in 1 CONSTITUTIONS, supra* note 29, at 512. For the 1876 election, the constitution specified that the legislature would provide for legislative appointment of electors “by act or joint resolution” and that “the approval of the governor thereto shall not be required.” *Id.* at 512.

377. CAL. CONST. of 1879, art. IV, § 27, *reprinted in 1 CONSTITUTIONS, supra* note 29, at 421.

378. LA. CONST. of 1879, art. 191, *reprinted in 3 CONSTITUTIONS, supra* note 34, at 1502. The same provision appeared in Louisiana’s constitution of 1898. LA. CONST. of 1898, art. 206, *reprinted in 3 CONSTITUTIONS, supra* note 34, at 1566.

379. MONT. CONST. of 1889, art. VI, § 1, *reprinted in 4 CONSTITUTIONS, supra* note 152, at 2310.

- The constitutions of both South Dakota and North Dakota of 1889 provided that the state's congressmen would be "elected by the state at large" until "otherwise provided by law."³⁸⁰
- The Wyoming constitution of 1889 required the state legislature to divide the state into congressional districts, mandated congressional districts composed of two or more counties be "contiguous" and "as compact as may be," and stated "[n]o county shall be divided" in the formation of the districts.³⁸¹
- In 1890, the Mississippi constitution stated the legislature "shall not elect any other than its own officers, State librarian, and United States senators" but clarified that "this section shall not prohibit the legislature from appointing presidential electors."³⁸²

In addition, many of the constitutions from the late nineteenth century contained "all elections" provisions, which regulated federal elections without specifically referring to them. Examples of such clauses requiring elections "by ballot" can be found in the constitutions of Virginia (1870), Pennsylvania (1873), Georgia (1868 and 1877), and Kentucky (1890).³⁸³

380. S.D. CONST. of 1889, art. XIX, § 1, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3388; N.D. CONST. of 1889, art. 18, § 214, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 2885.

381. WYO. CONST. of 1889, art. III, Apportionment, §§ 1, 3, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4126; WYO. CONST. OF 1889, art. VI, § 17, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 4134 (providing that Congressional elections were part of the "general elections" to be "held on the Tuesday next following the first Monday in November of each even year.").

382. MISS. CONST. of 1890, art. iv, § 99, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 2101.

383. VA. CONST. of 1870, art. III, § 2, *reprinted in* 7 CONSTITUTIONS, *supra* note 30, at 3876; PA. CONST. of 1873, art. VIII, § 4, *reprinted in* 5 CONSTITUTIONS, *supra* note 31, at 3139, 3152 (specifying other procedures as well, such as mandating that "[e]very ballot shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot"); GA. CONST. of 1868, art. II, § 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 825; GA. CONST. of 1877, art. II, § 1, par. 1, *reprinted in* 2 CONSTITUTIONS, *supra* note 35, at 845; KY. CONST. of 1890, § 147, *reprinted in* 3 CONSTITUTIONS, *supra* note 34, at 1336 ("[A]ll elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited."). As Michael Weingartner has documented, when debating reconstruction legislation in 1867, several senators, including Senator Oliver P. Morton of Indiana, discussed requiring re-admitted states to include in their post-War constitutions requirements that all elections, including congressional elections, be "by ballot," without anyone suggesting this would violate the Elections Clause. Weingartner, *supra* note 268, at 53–55, 54 nn.413–414.

b. Judicial Opinions

For the post-War period, the Prevailing View Thesis again ignores the existence of contrary state constitutional provisions, claiming instead that the state courts which “squarely confronted” the Doctrine in the nineteenth century “invariably accepted” it.³⁸⁴ This is incorrect. The cases Professor Morley cites do not support the argument, and he disregards the many cases that contravene it, in which state courts explicitly rejected the Doctrine.

Professor Morley cites three state court opinions in support of this argument. The first is the New Hampshire Supreme Court’s soldier-voting opinion (1864), which, as already discussed, very likely had nothing to do with the Doctrine. His reliance on the other two cases—from Mississippi (1873) and Rhode Island (1887)³⁸⁵—is similarly misplaced.

Although Professor Morley states the Mississippi Supreme Court “applied the doctrine” in 1873,³⁸⁶ that case plainly had nothing to do with the Doctrine.³⁸⁷ The case concerned who had been rightfully elected treasurer of Hinds County. All the court did was reject an argument that the constitution’s requirement that “all general elections . . . be holden every two years” (Article IV, Section 7) was violated when the state legislature effectively required the state to hold a general election every year by designating 1871 as the first year for resumed state elections and 1872 as the first year for congressional elections resumed after the state’s readmission to the Union.³⁸⁸ In rejecting the argument, the court reasoned that the state constitutional requirement applied to elections for state officers, not Congress, and, in any event, both sets of elections would, in fact, be biennial.³⁸⁹

Professor Morley also mischaracterizes the 1887 matter from Rhode Island. The Doctrine was not an “essential component” of the Rhode Island Supreme Court’s opinion,³⁹⁰ and the law in question did not “squarely violate[]” the state constitution.³⁹¹ Rather, the state House of Representatives requested the Rhode Island Supreme Court’s opinion on

384. Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 45.

385. *Id.* at 42–44.

386. *Id.* at 42.

387. *State v. Williams*, 49 Miss. 640, 664–65 (1873).

388. *Id.* at 665–66.

389. *Id.* at 666–67.

390. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, *supra* note 259, at 149.

391. Morley, *Rethinking the Right to Vote Under State Constitutions*, *supra* note 22, at 200.

whether the constitution's majority vote requirement for all elections "under this constitution"³⁹² applied to congressional, presidential, and certain local elections, or whether such elections could be conducted on a plurality basis, as had been the practice.³⁹³ The court advised that the majority vote requirement did not apply to any of the identified elections, explaining that elections "under this constitution" were limited to certain specified state elections "particularly provided for" in the constitution (e.g., governor, state legislature, and attorney general).³⁹⁴ The court also stated the state constitution could not in any event constrain the legislature's approach by virtue of the Elections Clause and the Elector Appointment Clause.³⁹⁵

The truth of the matter is, in these and subsequent cases described below, state courts were asked to entertain—and did entertain—the potential applicability of state constitutional provisions to federal elections. Doing so would have been unnecessary if the courts were adherents of the independent state legislature doctrine.

In 1892, in *McPherson v. Blacker*,³⁹⁶ the Michigan Supreme Court upheld the state legislature's decision to elect presidential electors using a district system instead of the general ticket.³⁹⁷ The court not only rejected the argument that the Federal Constitution somehow precluded the district system³⁹⁸ but also the argument that passage of the statute had violated the state constitutional requirement that "no law shall embrace more than one object."³⁹⁹ No one suggested that the Elector Appointment Clause gave the state legislature the right to disregard the state constitutional requirement.⁴⁰⁰

392. R.I. CONST. of 1842, art. VIII, § 10, *reprinted in* 6 CONSTITUTIONS, *supra* note 37, at 3231.

393. *In re Plurality Elections*, 8 A. 881, 881 (R.I. 1887).

394. *Id.* at 883.

395. *Id.* at 882 ("We think it doubtful . . . section 10 was intended to extend to elections of representatives to [C]ongress; but, if it was, to that extent it is, in our opinion, of no effect . . .").

396. *McPherson v. Blacker*, 52 N.W. 469 (Mich. 1892), *aff'd*, 146 U.S. 1 (1892).

397. *McPherson v. Blacker*, 52 N.W. 469, 472 (Mich. 1892), *aff'd*, 146 U.S. 1 (1892); *see generally* Peter H. Argersinger, *Electoral Reform and Partisan Jugglery*, 119 POL. SCI. Q. 499 (2004) (describing the partisan calculations that gave rise to the Michigan legislature's adoption of the district-based system and the subsequent litigation aimed at undoing the legislation); KEYSSAR, *supra* note 218, at 141 ("What transpired was not a debate regarding the merits of different modes of choosing electors but partisan warfare grounded in assessments of the electoral impact of abandoning the general ticket.").

398. *McPherson*, 52 N.W. at 470–73.

399. *Id.* at 470. For the state constitutional provision at issue, see MICH. CONST. of 1850, art. 4, § 20, *reprinted in* 4 CONSTITUTIONS, *supra* note 152, at 1948.

400. As is now well known, in rejecting the subsequent appeal of the federal questions, the Supreme Court block-quoted from an 1874 report by Senator Oliver P. Morton, including language in

In 1910, in *State ex rel. Schrader v. Polley*, the South Dakota Supreme Court rejected the argument that a state legislature could prescribe congressional “manner” regulations without abiding by the state constitutional referendum requirement.⁴⁰¹ The court held, notwithstanding the use of the word “legislature” in the Elections Clause, if the state constitution “has fixed limits, the Legislature cannot transcend them, but must act within the limits prescribed, and if it goes beyond them its action is to that extent absolutely void.”⁴⁰²

In 1918, the Rhode Island Supreme Court gave two advisory opinions to the state’s governor relating to the 1864 state constitutional amendment that gave soldiers absent from the state the right to vote for President and Congress.⁴⁰³ First, the court opined the amendment—dating from before the Seventeenth Amendment—could not be construed to give soldiers the right to vote in elections for U.S. Senators.⁴⁰⁴ Second, the court told the Governor that, given the history of the independent state legislature doctrine, it was “impossible to predict” how the Senate, acting as the judge of its own elections, might act if a senator was elected by absent soldiers in violation of the state constitution.⁴⁰⁵

In 1919, the Maine Supreme Court advised the governor of Maine that an act of the state legislature giving women the right to vote for President was subject to the state constitution’s referendum requirement.⁴⁰⁶ The court rejected the independent state legislature doctrine, concluding that the Electors Clause did not give the legislation “any superiority over or independence from the organic law of the state.”⁴⁰⁷

the report stating that the Article II powers of state legislatures “cannot be taken from them or modified by their State constitutions.” *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); see also Smith, *supra* note 1, at 775–77 (describing the dicta at length). Professor Morley argues the Supreme Court “enthusiastically endorsed” the independent legislature doctrine in *McPherson*, see Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 70, but this is not supported by any reasonable reading of the case. The circumstances of Senator Morton’s report have been discussed at length elsewhere, and I will not beat that dead horse any further. Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1836–37; Smith, *supra* note 1, at 777–79.

401. *State ex rel. Schrader v. Polley*, 127 N.W. 848, 849 (S.D. 1910).

402. *Id.* at 851–52.

403. R.I. CONST. of 1842, art. IV (adopted Aug. 1864), reprinted in 6 CONSTITUTIONS, *supra* note 37, at 3235–36.

404. *In re Op. to the Governor*, 102 A. 913, 914 (R.I. 1918).

405. *In re Op. to the Governor*, 103 A. 513, 516 (R.I. 1918).

406. *In re Op. of the Justs.*, 107 A. 705, 705 (Me. 1919).

407. *Id.* at 706.

This brings down the state court decisions to the time of the Supreme Court's 1920 decision in *Hawke v. Smith*.⁴⁰⁸ *Hawke* was the first of several Supreme Court decisions, described in more detail below, that together rejected the Doctrine.⁴⁰⁹

c. House Contested Election Cases

Professor Morley is also incorrect when he argues that, in contested election cases after *Baldwin v. Trowbridge*, the House “consistently embraced and applied” the Doctrine. In reality, the Doctrine did not carry the day in any contested election case after *Baldwin*.

In the first instance the Doctrine was invoked after *Baldwin*, the House voted *against* the contestant who would have benefited from the Doctrine. In 1874, the House considered whether to seat two congressional candidates from West Virginia elected in October 1872 (pursuant to an existing state statute specifying October as the time for electing congressmen) or two others who claimed to have been elected in August 1872 (pursuant to the state's 1872 constitution, which specified August as the time for electing “all officers, executive, judicial, county, or district, required by this constitution to be elected by the people”).⁴¹⁰ In the Elections Committee, three positions were staked out. First, the majority pointed out the new constitution did not, by its terms, purport to mandate congressional elections in August.⁴¹¹ Second, Representative R.M. Speer submitted a separate opinion in which he argued that, even if the new constitution called for congressional elections in August, this would have been a violation of

408. *Hawke v. Smith*, 253 U.S. 221 (1920).

409. See *infra*, Part IV.A. The frequency with which state courts had occasion to apply state constitutions to “manner” legislation in the late nineteenth and early twentieth centuries should not be overstated. It is true that there were numerous cases during that era in which state courts entertained state constitutional claims in the context of *state* elections. See Weingartner, *supra* note 268, at 42–43, 43 n.320 (identifying such state court cases from the 1860s to the 1920s); see also Samuel S.-H. Wang, Richard F. Ober, Jr., & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 J. CONST. L. 203, 253–57 (2019) (identifying such state court cases from the 1910s and 1920s). However, apart from the matters that I have summarized in the text, I am not aware of any other state court matters from the 1920s or earlier in which state constitutions were applied specifically to “manner” legislation. There were a number of such cases in the 1930s (see *infra* note 453) and subsequent to the 1930s (which are summarized in the two articles cited in this footnote).

410. See H.R. REP. NO. 43-7, at 1 (1874) (reproducing the majority report, concurring report, and minority report in *West Virginia Contested Elections*).

411. See *id.* at 5 (reproducing the majority report and explaining that the constitutional language specifying an August election “excludes, because it does not include, Representatives in Congress, who are not ‘required by this constitution to be elected by the people’”).

the state legislature's power to determine the timing of the election pursuant to the Elections Clause.⁴¹² Speer cited *Baldwin* as well as Justice Story's arguments at the 1820 Massachusetts Constitutional Convention.⁴¹³ Third, Representative G.W. Hazeltine dissented, arguing that the state statute did not adequately prescribe an October election but that the new constitution somehow *did* prescribe an August election and “[i]t makes no difference whatever, so far as the construction of the term ‘prescribe’ is concerned, whether the power making the prescription be the constitutional convention or the legislature.”⁴¹⁴ The House rejected the committee majority's view and upheld the August election allegedly conducted pursuant to the state constitution.⁴¹⁵ Professor Morley attempts to spin this matter as somehow supporting the Prevailing View Thesis, but the argument does not make sense.⁴¹⁶

The most that can be said in favor of the Prevailing View Thesis is that, on two occasions in 1880, the contestant on whose behalf the Doctrine was invoked did not lose. First, in *Donnelly v. Washburn*, the party invoking the Doctrine prevailed by default when the House never acted. Dueling reports of the House Committee on Elections discussed a number of issues arising out of the Minnesota congressional election, including whether to count ballots that were “numbered.”⁴¹⁷ The report in favor of the challenger,

412. *Id.* at 17 (reproducing the concurring report by Speer arguing that “The State constitution had not given to the legislature the power to say when Congressmen shall be elected, (for it did not have it to give,) and neither State constitution nor State convention could take it away”).

413. *Id.*

414. *Id.* at 23; *see also id.* at 24 (reproducing the minority report by Hazeltine arguing that the “constitutional convention had authority to prescribe a time, after its ratification, for the election of Representatives”).

415. *See* Muller, *supra* note 22, at 730 (citing ASHER C. HINDS, 1 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 522, at 660 (1907) [hereinafter HIND'S PRECEDENTS]). Professor Muller identified a similar matter (*Patterson v. Belford*) in which the House upheld an 1876 election held in Colorado pursuant to the state constitution. *See id.* at 730 (citing 1 HIND'S PRECEDENTS §§ 523–24, at 660–67); H.R. REP. NO. 45-15 (1877) (displaying majority and minority reports in *Patterson v. Belford*).

416. Professor Morley mischaracterizes this matter as one in which the House “expressly relied upon the [Doctrine] in resolving a dispute,” Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 55, and exhibited a “general consensus” in favor of the Doctrine. *Id.* at 59. While it is certainly true that during the debate several Congressmen agreed with Representative Speer's articulation of the Doctrine, *see id.* at 57–58 (citing comments made during floor debate), that position did not carry the day, and those elected in August—as allegedly required by the new state constitution—were the ones who were seated.

417. *See* H.R. REP. NO. 46-1791, at 17–18 (1880) (reproducing committee reports in *Donnelly v. Washburn*).

Ignatius Donnelly, argued numbered ballots should be thrown out because they vitiated secrecy, were tainted by intimidation against the Donnelly voters, and violated the state constitution's "all elections shall be by ballot" requirement (the state's supreme court had so held).⁴¹⁸ The other report favored the sitting member, William Washburn. Citing *Baldwin*, this report argued it did not matter if the numbered ballots violated the Minnesota constitution because, under the Elections Clause, the constitution had no applicability to congressional elections.⁴¹⁹ The committee could not reach a conclusion on the matter, and the House never voted on it; as a result, Washburn retained his seat.⁴²⁰

Second, in *Iowa Contested Election Cases*, the committee majority whose recommendation later prevailed in the full House invoked the Doctrine in its report—but only in passing to rebut an irrelevant collateral argument. That majority report concluded that Iowa had correctly applied a federal "manner" statute when the state held its 1878 congressional elections in October (as required by the applicable state statute) instead of November.⁴²¹ The federal statute required congressional elections in November unless—as the committee found with respect to Iowa—this would force a state to amend its constitution with respect to the election of "State officers" if the state wanted them to be elected at the same time as

418. *Id.* at 17–18 (reproducing report by Congressman Manning).

419. *Id.* at 58–59 (reproducing report by Congressman Keifer). Earlier in his career, Donnelly served three terms as a Republican member of Congress, first elected in 1862 by a margin attributed to the Minnesota soldier vote. Lynwood G. Downs, *The Soldier Vote and Minnesota Politics, 1862–65*, 26 MINN. HIST. 187, 197–98 (1945); *Donnelly, Ignatius 1831–1901*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/D000417> [<https://perma.cc/KZL7-N5LW>]. In 1866, during Donnelly's second term, he voted in favor of Trowbridge in *Baldwin v. Trowbridge*, 39th Congress, House, Vote 68, VOTEVIEW, <https://voteview.com/rollcall/RH0390068> [<https://perma.cc/H7P7-A8RK>]. Now, fourteen years later, in a contested election case to regain a seat in Congress, he found himself on the receiving end of the independent state legislature doctrine.

420. Muller, *supra* note 22, at 728. Evidence suggests that the Democratic majority in the House would have wanted to side with Donnelly (once a Republican but now a Greenbacker), over Washburn (a Republican), but Donnelly's effort before the Elections Committee was derailed at the last minute when an anonymous letter was unearthed which purported to be an attempt to bribe the chairman of the election committee (William Springer of Illinois) to vote in favor of Washburn in return for \$5,000. John D. Hicks, *The Political Career of Ignatius Donnelly*, 8 MISS. VALLEY HIST. REV. 80, 99–100 (1921). Although Donnelly denied any involvement in a false flag operation, "the suspicion settled into belief that Donnelly's chief counsel had taken this dishonorable means to show Springer that Washburn was really capable of offering a bribe," with the result that Washburn held his seat. *Id.*

421. See H.R. REP. NO. 46-19, at 2 (1880) (reproducing the majority and minority reports in *Iowa Contested Election Cases*).

congressmen.⁴²² For some reason, the majority felt compelled to explain that its blessing of the October date had nothing to do with what appears to be an irrelevant provision in the Iowa Constitution which had specified that the state's "first" congressional election after adoption in 1857 was to occur in the month of October.⁴²³ As the majority explained, in determining the correct date under the federal statute, the only relevant state constitutional provision was one that (a) concerned the election of "State officers" and (b) would have to be amended in order to achieve a uniform November election date. Moreover, the constitutional provision applied only to the "first" federal election after adoption in 1857, not to an election occurring in 1878.⁴²⁴ And, as if it needed another reason, the majority added "the time of electing members of Congress cannot be prescribed by the *constitution* of a State, as against an *act* of the legislature of a State or an *act* of Congress."⁴²⁵

More often during the late nineteenth century, the House considered state constitutional arguments without reference to the Doctrine, as if the Doctrine did not exist:

- In 1880, in *Curtin v. Yocum*, the House Elections Committee considered a bid to vacate Seth Yocum's election to Congress predicated on allegations that he received a number of votes from unregistered voters.⁴²⁶ Both the majority report in favor of vacating the election and the minority report supporting the election made arguments based on the Pennsylvania constitution.⁴²⁷ Both

422. *Id.* at 8–9, 17–18.

423. *Id.* at 18.

424. *Id.* at 15.

425. *Id.* at 18. Based on this last comment, Professor Morley describes *Iowa Contested Election Cases* as a matter in which the "House relied on the independent state legislature doctrine." Morley, *Federal Elections, and State Constitutions*, *supra* note 15, at 60; *see also* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, *supra* note 22, at 203 (stating that the House's decision in *Iowa Contested Election Cases* "reaffirmed" the independent state legislature doctrine). Professor Morley also identified a 1904 contested election case in which the committee report declined to address the contestants' arguments over the Doctrine because it was unnecessary to do so. *See* Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 46 n.228 (citing H.R. REP. NO. 58-1382 (1904) (reproducing the committee report in *Davis v. Sims*)).

426. *See* H.R. REP. NO. 46-345, at 1 (1880) (reproducing the majority report and minority report in *Curtin v. Yocum*).

427. *See id.* at 10 (reproducing the majority report, arguing that the election should be thrown out because Yocum's win was obtained "in violation of the constitution and mandatory statutes of Pennsylvania"); *id.* at 13 (reproducing the minority report, arguing that, by virtue of the state

sides assumed constitutional requirements applicable generally to “elections” applied to congressional elections.⁴²⁸

- In 1885, in *McLean v. Broadhead*, the House Elections Committee considered the validity of Missouri’s voter registration law under the Missouri constitution.⁴²⁹ The majority argued that the state legislature’s registration law was appropriate: “[t]he legislature, we think, had the right to go that far under the mandatory provisions of the constitution of Missouri requiring the passage of a registry law.”⁴³⁰ The minority argued the legislature’s registration law was an “attempt to add to the qualifications of a voter” that was “obnoxious to the constitution.”⁴³¹
- In 1886, in *California Contested-Election Cases*, the House Elections Committee rejected an argument that the California legislature’s “manner” statute for congressional elections was invalid because an amendment to it had not been read three times before enactment as required by the state constitution.⁴³² The committee explained that, per a decision of the California Supreme Court, that constitutional requirement did not apply to amendments.⁴³³ The committee further explained that its deference to the state

constitution, the legislature could not “pass a registry law whereby a voter shall be deprived of suffrage, if otherwise qualified, by reason of non-registration”).

428. In particular, both reports argued over the Pennsylvania constitution’s requirements that “[a]ll laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the State, but no elector shall be deprived of the privilege of voting by reason of his name not being registered.” PA. CONST. of 1873, art. VIII, § 7, *reprinted in* 2 JOURNAL OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA: CONVENEED AT HARRISBURG, NOVEMBER 12, 1872; ADJOURNED NOVEMBER 27, TO MEET AT PHILADELPHIA, JANUARY 7, 1873, at 1322 (Harrisburg, Benjamin Singerly 1873). The House followed the minority report’s recommendation in *Curtin v. Yocum*. See 2 HIND’S PRECEDENTS, *supra* note 415, § 941, at 223 (“[T]he minority views prevailed.”).

429. See H.R. REP. NO. 48-2613, at 2 (1885) (reproducing the majority report and minority report in *McLean v. Broadhead*).

430. *Id.* at 4.

431. *Id.* at 14. The House did not take any action in *McLean v. Broadhead*. See 2 HIND’S PRECEDENTS, *supra* note 415, § 996 at 381 (“The report was not acted on by the House.”).

432. See H.R. REP. NO. 49-2338 (1886) (reproducing committee report in *California Contested-Election Cases*).

433. *Id.* at 1–4.

court's construction of its own state's constitution was in line with the past practices of the Supreme Court and the committee itself.⁴³⁴

- In 1888, in *Frank v. Glover*, the House Elections Committee rejected an argument that the Missouri voter registration statute violated the Missouri constitution.⁴³⁵
- In 1896, in *Johnston v. Stokes*, the House Elections Committee concluded that South Carolina's voter registration statute violated the South Carolina state constitution.⁴³⁶
- In 1901, in *Davison v. Gilbert*, the House Elections Committee rejected arguments that the Kentucky congressional redistricting statute violated the Kentucky constitution and was not passed in the manner required by the Kentucky constitution.⁴³⁷
- In 1919, in *Gerling v. Dunn*, the House Elections Committee rejected various arguments that the "manner and method of conducting" a congressional election had violated New York statutory and constitutional law.⁴³⁸ The committee was of the view that the allegations were meritless, and also that the issues raised were better

434. *Id.* at 4. The House followed the committee's recommendation in *California Contested-Election Cases*. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 46 n.226 (citing 17 CONG. REC. 4381 (1886)).

435. See H.R. REP. NO. 50-1887 (1888) (committee report in *Frank v. Glover*). The House followed the committee's recommendation in *Frank v. Glover*. See 2 HIND'S PRECEDENTS, *supra* note 415, § 1011, at 427.

436. See H.R. REP. NO. 54-1229 (1896) (majority report and minority report in *Johnston v. Stokes*). The House followed the committee majority's recommendation in *Johnston v. Stokes*. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 67 (citing 28 CONG. REC. 5952 (1896)). Also in 1896, the House Election Committee considered whether the Virginia constitution's secret ballot requirement was violated by certain provisions of the state's election law. See Weingartner, *supra* note 268, at 60 & n.448 (discussing H.R. REP. NO. 54-1473 (1896) (reproducing the majority and minority reports in *Cornett v. Swanson*)).

437. See H.R. REP. NO. 56-3000 (1901) (committee report in *Davison v. Gilbert*). The committee's report expressed doubt that the Elections Clause gave Congress the power to overrule the manner in which a state chose to divide its representation in Congress. See *id.* at 2 (arguing that Congress has only "the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself"). The full House took no action in *Davison v. Gilbert*. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 45 n.219.

438. H.R. REP. NO. 65-1074 (1919) (committee report in *Gerling v. Dunn*).

left to the legislature or “to be determined and adjudicated by the courts of New York State and not by Congress.”⁴³⁹

- In 1922, in *Paul v. Harrison*,⁴⁴⁰ the House Elections Committee found that “there was such an utter, complete and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia involving the essentials of a valid election, that . . . there was no legal election in those precincts.”⁴⁴¹

No one in any of these cases suggested that the state constitution was irrelevant because of the independent state legislature doctrine. Professor Morley attempts to spin each of these matters as somehow supporting his argument that the Doctrine was the “prevailing view” in the nineteenth century, but, in each instance, his commentary is post-hoc lawyer argument bereft of any basis in the historical record.⁴⁴²

439. *Id.* at 2 (“It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution.”). The House followed the committee’s recommendation in *Gerling v. Dunn*. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 47 n.231 (citing 57 CONG. REC. 3578 (1919)).

440. H.R. REP. NO. 67-1101 (1922) (reproducing the majority report and minority report in *Paul v. Harrison*).

441. *Id.* at 9. The House followed the committee’s recommendation in *Paul v. Harrison*. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 48 n.233 (citing 64 CONG. REC. 545-47 (1922)).

442. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 67 (describing *Curtin v. Yocum* as having “recognized and enforced [a] restriction on the [Doctrine]” that distinguishes between state constitutional limits on voter registration statutes that effectively add to voter qualifications (which Professor Morley says are permissible) and other state constitutional limitations on “manner” legislation (which Professor Morley says are impermissible)); *id.* at 46 & n.229 (suggesting that in *McLean v. Broadhead*, “rather than invoking the doctrine” to avoid the state constitutional question, the House instead decided to “simply reject[] a state constitutional challenge on the merits”); *id.* at 46 (arguing that *California Contested-Election Cases* is “[c]onsistent with” the Doctrine because it is an example of the House “enforc[ing] state constitutions’ procedural requirements concerning the legislative process that legislatures had to follow,” which is different than the House “declin[ing] to enforce state constitutions’ substantive restrictions on the scope of legislatures’ authority over federal elections”); *id.* at 46 & n.229 (suggesting that in *Frank v. Glover*, “rather than invoking the doctrine” to avoid the state constitutional question, the House instead decided to “simply reject[] a state constitutional challenge on the merits”); *id.* at 67 (describing *Johnston v. Stokes* as an instance in which the House “observed” the “limitation” that Professor Morley sees on the Doctrine, pursuant to which it would be permissible for state constitutions to constrain voter registration statutes if they effectively add voter qualifications beyond those contained in the constitution); *id.* at 46 & n.229 (arguing that *Davison v. Gilbert* is an example of the House deciding to “simply reject[] a state constitutional challenge on the merits” instead of relying on the Doctrine);

In sum, the argument that the independent state legislature doctrine was widely accepted in the late nineteenth century is belied by the evidence that the Doctrine was more often either unknown, disregarded, or rejected. In *Baldwin* in 1866, at least some Republican members of Congress justified their vote based on the Doctrine, but it is not clear how widely that view was shared among that caucus. After *Baldwin*, the Doctrine never subsequently gained traction in either the House contested election cases or state courts.

IV. THE IRRELEVANCE OF NINETEENTH-CENTURY INVOCATIONS OF THE DOCTRINE

With a proper understanding of the history, we can now ask how, if at all, the nineteenth-century invocations of the Doctrine are relevant to constitutional interpretation? In other words, why are we even talking about it? Professor Balkin has noted that history often appears in legal arguments as an *enthymeme*, that is, “an argument with a suppressed premise.”⁴⁴³ The suppressed premise is “the theory of argument that justifies the use of history, or that makes the use of history salient and relevant.”⁴⁴⁴ Is there some unstated theory of how the Doctrine’s nineteenth-century history is relevant that we should be evaluating? When the suppressed premise that allegedly “bestow[s] authority on history” is identified, it “helps us better understand how to criticize and evaluate historical arguments on their own terms,” and determine whether the use of history is “good or bad, competent or incompetent.”⁴⁴⁵

The most famous constitutional “argument from history” is originalism. However, the Doctrine’s nineteenth-century history does not even tend to establish the Doctrine as the original understanding, and no one could seriously make that claim. As Justice Thomas once explained in similar circumstances, “[a]ctions taken by a single House of Congress in

id. at 47–48 (characterizing *Gerling v. Dunn* as an example of how, in the twentieth century, the House “reformulated” the Doctrine into a “discretionary refusal to consider state constitutional challenges” except for “extreme cases of pervasive, structural unfairness”); *id.* at 47–48 & n.233 (characterizing *Paul v. Harrison* as an “extreme case[] of pervasive, structural unfairness” in which the House enforced state constitutional provisions).

443. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 664 (2013) (citing Laura Kalman, 66 FORDHAM L. REV. 87, 114 (1997)).

444. *Id.*

445. *Id.* at 666, 668.

1887... shed little light on the original understanding of the Constitution.”⁴⁴⁶

Is the unstated argument that emergence of the Doctrine somehow “liquidated” the meaning of the Constitution,⁴⁴⁷ or that its subsequent cameos amounted to a “longstanding and seldom questioned practice” that now constitutes a post-Founding “gloss” on constitutional meaning?⁴⁴⁸ If so, the argument is meritless as a factual matter. The Doctrine did not exist at the Founding, it was never subsequently the “prevailing view,” it was invariably challenged when invoked, and, in the long run, it was rejected by the courts. If anything, the post-Founding history has confirmed the original understanding *against* the Doctrine.

446. *United States Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 915 (1995) (Thomas, J., dissenting).

447. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015) (“[A]ll agree that historical inquiries are necessary and appropriate to determine whether historical practice has ‘liquidated’ the meaning of otherwise vague or ambiguous constitutional provisions . . .”); *see generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (exploring the historical importance of constitutional liquidation).

448. Fallon, *supra* note 447, at 1775, 1778 (“longstanding historical practice can at least sometimes constitute a ‘gloss’ on constitutional language”; “glosses need not necessarily originate in the near aftermath of the Founding”). Michael Weingartner argues that the nineteenth and twentieth-century history has “liquidated” the meaning of the Elector Appointment and Elections Clauses *against* the independent state legislature doctrine. Weingartner, *supra* note 268. Putting aside questions about the “exact mechanics” of liquidation theory, *see* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49 (2019) (outlining the “harder questions” that will need to be answered if “if liquidation is to become or remain a part of constitutional interpretation today”), I would say that resort to liquidation theory is inapposite because the meaning of these clauses was clear to Americans at the Founding, at least with respect to whether laws created by “legislatures” were to be treated differently than other laws. *See id.* at 66–67 (discussing how liquidation theory can apply only when there is a “constitutional indeterminacy” remaining after “resorting to the sense in which the Constitution was accepted and ratified by the nation” (quoting James Madison) (internal quotation marks omitted)). Moreover, as explained later in the next section, the original understanding against the Doctrine has been reflected in Supreme Court precedent for about a century, such that subsequent consistent practice by other actors is not as constitutionally meaningful as it might otherwise be. *See* Joseph Blocher & Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L. J. ONLINE 1, 12 (2016) (explaining that constitutional interpretation based on historical practice is most significant in areas where judicial review is most limited, such as separation of powers, because, once the Supreme Court speaks on an issue, its “precedent is what governs—the practices no longer have the same independent significance”). Nevertheless, the historical consensus—that “manner” legislation should be treated no differently than any other legislation—is historical wisdom that should warn the Supreme Court away from disregarding the original understanding or jettisoning its own precedent. Moreover, the history is a red flag to the extent it suggests that the typical invocation of the Doctrine is motivated by base political purposes.

The last potentially relevant “argument from history” is *stare decisis*, the legal argument “for fidelity to precedent,” even if it is wrong.⁴⁴⁹ Most of the history reviewed previously concerned unsuccessful invocations of the Doctrine. The one nineteenth-century matter that somewhat resembles a judicial precedent, and is not an advisory opinion, is the House’s decision in the 1866 case of *Baldwin v. Trowbridge*. However, *Baldwin* should not be followed as precedent by a court, for two reasons. First, *Baldwin* was long ago overtaken by controlling Supreme Court precedent rejecting the independent state legislature doctrine. Second, *Baldwin* was the product of a decision-making system that lacked the process and judicial integrity that normally justifies and demands reliance on the decisions of past courts under the doctrine of *stare decisis*.

A. *The Modern Supreme Court Precedent That Answers the Question*

Baldwin cannot serve as precedent because it has been overtaken by Supreme Court precedent. That precedent begins in 1920, in *Hawke*, in which the Court held that, under Article V, a state legislature’s decision to ratify a proposed constitutional amendment did not have to be submitted to the people pursuant to the state constitution’s referendum mechanism.⁴⁵⁰ In so holding, the Court made clear that “the expression of assent or dissent to a proposed amendment” pursuant to Article V, for which “no legislative action is authorized or required,” is “entirely different” than the “legislative action” of passing “manner” legislation pursuant to the Elections Clause.⁴⁵¹ In 1932, in *Smiley v. Holm*,⁴⁵² the Court confirmed what it suggested in *Hawke*—the Elections Clause does not confer any authority on a state legislature to enact “manner” legislation “independently

449. *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

450. *See* *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that a state does not have “authority to require the submission of the ratification to a referendum under the state constitution”); *see also* *Leser v. Garnett*, 258 U.S. 130, 136–37 (1922) (rejecting the argument that legislative ratification of the Nineteenth Amendment was invalid because of failure to comply with state constitutional requirements). In 1916, the U.S. Supreme Court had rejected arguments that Congress’s own “manner” legislation could not recognize the Ohio constitutional referendum mechanism as part of the state’s legislative power for purposes of creating congressional districts pursuant to the Elections Clause. *Ohio ex. rel. Davis v. Hildebrandt*, 241 U.S. 565, 569–70 (1916). The Court also rejected as non-justiciable the argument that the presence of a constitutional referendum requirement “causes a State . . . to be not republican in form.” *Id.* at 569.

451. *Hawke*, 253 U.S. at 230.

452. *Smiley v. Holm*, 285 U.S. 355 (1932).

of the participation of the Governor as required by the state constitution with respect to the enactment of laws.”⁴⁵³

More than eighty years after *Smiley*, in *Arizona State Legislature*, the Court upheld an Arizona constitutional provision that could not be more contrary to the independent state legislature doctrine. The provision at issue—which was made part of the constitution through the citizen initiative process without any involvement of the “legislature”—“remove[d] redistricting authority from the Arizona Legislature and vest[ed] that authority in an independent commission” which is required to redistrict without any involvement of the “legislature.”⁴⁵⁴ In her opinion for the majority, Justice Ginsburg wrote, among other things, that “[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations . . . in defiance of provisions of the State’s constitution.”⁴⁵⁵

453. *Smiley*, 285 U.S. at 373. In *Smiley v. Holm*, 285 U.S. 355, 373 (1932), the U.S. Supreme Court reversed the Minnesota Supreme Court, which had held, citing *Hawke*, that a state legislature prescribing “manner” regulations pursuant to the Elections Clause should enjoy the same freedom from constitutional restraint as a state legislature deciding whether to ratify a constitutional amendment pursuant to Article V. *Minnesota v. Holm*, 238 N.W. 494, 499 (Minn. 1931). By contrast, the highest courts of Missouri and New York had held in January 1932 that the distinction that *Hawke* drew between “assent or dissent” under Article V and “legislative action” under Article I, Section 4 precluded the argument that the Elections Clause created independent legislatures, and those decisions were affirmed by the U.S. Supreme Court at the same time it reversed in *Smiley*. *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); *see also* *Brown v. Saunders*, 166 S.E. 105, 107 (Va. 1932) (following *Smiley*). Also, just before *Smiley*, the Illinois Supreme Court had struck down that state legislature’s Congressional redistricting plan as inconsistent with the requirements of “manner” legislation passed by Congress. *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932). The Illinois court added that the legislature had also violated the Illinois constitution’s requirement that all elections be “free and equal” by “giving every voter a voice approximately equal to that of every other voter.” *Id.* at 531–32. In response, a dissenting judge invoked the Doctrine, arguing that, because the state legislature was acting under the Elections Clause, it was “not limited by local constitutional provisions.” *Id.* at 534 (DeYoung, J., dissenting).

454. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015).

455. *Id.* at 817–18. This renders obsolete not only *Baldwin* and the other nineteenth-century invocations of the Doctrine, but also the twentieth-century court cases which relied on the Doctrine, *Commonwealth ex. rel. Dummit v. O’Connell*, 181 S.W.2d 691 (Ky. 1944), and *State ex. rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948). Those seeking a precedent to which we should return seem to prefer the nineteenth-century “precedent” of *Baldwin* to those more modern cases. As for the Kentucky case—the World War II soldier-voting case—it may have something to do with the Kentucky court’s acceptance of the proposition that “legislature” means a state’s “legislative authority,” including a referendum, *see O’Connell*, 181 S.W.2d at 695, or perhaps it is because the case—which contains the first articulation of the substance/procedure distinction—highlights that the distinction did not arise at the Founding, *see supra* note 17. As for the nineteenth-century case, it is likely considered too

Chief Justice Roberts wrote the dissent in *Arizona State Legislature*. He acknowledged that the Court's precedent required "manner" legislation to be enacted "in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto," but emphasized that this was true only "so far as it goes."⁴⁵⁶ He explained that there is "a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether" and that "imposing some restraints on the legislature" does not "justif[y] deposing it entirely."⁴⁵⁷ As to the constitutionality of a variety of existing state constitutional restrictions on "legislatures," such as provisions requiring voting to be "by ballot," the Chief Justice commented that they were "well outside the scope of this case" and that "none of them purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process."⁴⁵⁸

Finally, in *Rucho v. Common Cause*, Chief Justice Roberts, now writing for a majority of the Court, held that partisan gerrymandering claims are not justiciable in federal court.⁴⁵⁹ However, he took pains to point out that this holding did not "condemn complaints about [gerrymandering] to echo into a void."⁴⁶⁰ He explained that the "States . . . are actively addressing the issue on a number of fronts," and then listed specific state constitutional limitations on partisan gerrymandering by "legislatures," including the Florida Supreme Court's 2015 decision striking down the Florida "legislature's" congressional districting plan as a violation of the Florida constitution, as well as constitutional amendments in Colorado and Michigan creating "multimember commissions that will be responsible in

insubstantial to serve as the precedent. *See Marsb*, 34 N.W.2d at 287 (stating that the Elector Appointment Clause made it unnecessary to consider whether a statute prohibiting nomination of candidates for elector not affiliated with any party conflicted with the state constitution's requirement that "all elections shall be free").

456. *Ariz. State Legis.*, 576 U.S. at 841 (Roberts, C.J., dissenting).

457. *Id.* ("Under the Elections Clause, 'the Legislature' is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process.>").

458. *Id.* at 848.

459. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

460. *Id.* at 2507.

whole or in part for creating and approving district maps for congressional . . . districts.”⁴⁶¹

B. *The Failure as Precedent of Nineteenth-Century House Contested Election Decisions, Including Baldwin v. Trowbridge*

The fact that the Supreme Court has rejected *Baldwin's* articulation of the Doctrine is not the end of the story. Proponents of the Doctrine have made clear that, if they were Supreme Court Justices, they would overrule *Arizona State Legislature* and ignore the *Rucho* commentary.⁴⁶² This would clear the way for them to argue that (a) pre-*Arizona State Legislature* Supreme Court cases permitting state constitutional regulation of “legislatures” never extended to constitutional regulation of the “substance” of election law (but rather only procedure),⁴⁶³ and (b) the relevant precedent on the “substance” question is therefore *Baldwin v. Trowbridge*, the 1866 House contested election case which (at least in the minds of some participants)

461. *Id.* (citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (2015)). The majority in *Rucho* included all four Justices who recently expressed support for the independent legislature doctrine (Justices Thomas, Alito, Gorsuch and Kavanaugh). It is not clear how these four Justices would reconcile the *Rucho* opinion with support for the Doctrine. Derek Muller has suggested that they might attempt to draw a distinction between state courts enforcing “specific antigerrymandering or districting provision[s]” and “more open-ended state judicial involvement.” Derek Muller, *Rucho v. Common Cause and a Weak Version of the Claims in the North Carolina Partisan Gerrymandering Dispute*, ELECTION L. BLOG (Mar. 8, 2022), <https://electionlawblog.org/?p=128045> [<https://perma.cc/9GHY-Y84L>].

462. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 92 (arguing that the best “compromise approach” to implementing the Doctrine would involve the “reversal” of *Arizona State Legislature*); *id.* at 7 (dismissing *Rucho's* embrace of state constitutional limitations on gerrymandering as “dicta” that did “not consider possible objections under the U.S. Constitution”); Rappaport, *LAW & LIBERTY*, *supra* note 15 (“While the Supreme Court’s [decision in *Arizona State Legislature*] allows states to combat gerrymandering through popular referenda and redistricting commissions, it does so in an unconstitutional manner.”).

463. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 78 (arguing that Supreme Court cases before *Arizona State Legislature* merely required a legislature to “follow the legislative process set forth in its state constitution when regulating federal elections” but did not address “whether a state constitution may impose substantive limits on the content of [such] measures”); see also *Ariz. State Legis.*, 576 U.S. at 808, 841 (Roberts, C.J., dissenting) (acknowledging that the Court’s precedent required “manner” legislation to be enacted “in accordance with the State’s prescriptions for lawmaking, which may include the referendum and the Governor’s veto,” but emphasizing that this description of prior cases was true only “so far as it goes,” and insisting that the legislature “may not be cut out of that process”).

overrode a substantive state constitutional regulation as violative of the “legislature’s” rights under the Elections Clause.⁴⁶⁴

At least some members of the Supreme Court might give precedential effect to *Baldwin v. Trowbridge*.⁴⁶⁵ The dissenting opinion in *Arizona State Legislature*, authored by Chief Justice Roberts, would have done exactly that.⁴⁶⁶ Extending stare decisis to a House contested election decision like *Baldwin* would be novel,⁴⁶⁷ but commentators have suggested similar without giving it much thought.⁴⁶⁸

Giving precedential effect to the House’s nineteenth-century decisions as if they were judicial decisions would be a mistake. The approach is based on the assumption that the House “[took] on a judicial function and act[ed] in a judicial manner”⁴⁶⁹ when it decided these cases pursuant to its constitutionally prescribed role as “the Judge of the Elections, Returns and

464. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 92 n.551. If the Court went down this route, it might also make the mistake of characterizing the House’s decision in *Baldwin* as a reflection of the alleged nineteenth-century “prevailing view” portrayed in Professor Morley’s work.

465. See *Ariz. State Legis.*, 576 U.S. at 837 (Roberts, C.J., dissenting) (citing the majority report in *Baldwin* as “precedent . . . from Congress” reinforcing that “‘the Legislature’ refers to a representative body”).

466. *Id.* Similarly, Justice Ginsburg’s majority opinion cited to *Shiel v. Taylor* as precedent. *Id.* at 818–19.

467. In some cases before *Arizona State Legislature*, the Supreme Court referred to similar House contested election decisions as “precedent,” but on the basis that the House’s actions might reflect “the draftsmen’s intent” at the Founding. See *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“[T]he precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.”) (citing *Myers v. United States*, 272 U.S. 52, 175 (1926)); see also *United States Term Limits, Inc. v. Thornton*, 51 U.S. 779, 816–817 (1995) (emphasizing the relevance of “the first 100 years” of the House’s practices, particularly its 1807 debate over whether to seat William McCreery of Maryland); *id.* at 915 (Thomas, J., dissenting) (characterizing early House actions as potentially relevant to “the original understanding of the Constitution,” but dismissing the relevance of more recent House actions). By contrast, in *Arizona State Legislature*, Chief Justice Roberts cited the House’s decision in *Baldwin*, not as evidence of original intent, but as “precedent” in the stare decisis sense. He argued that, as the more recent precedent, *Baldwin* should control over the earlier precedent of *Shiel v. Thayer*. See *Ariz. State Legis.*, 576 U.S. at 839 (Roberts, C.J., dissenting) (“[T]o the degree that the two precedents are inconsistent, the later decision in *Baldwin* should govern.”).

468. See Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, *supra* note 15, at 51 (“[T]he precedent powerfully supports the independent state legislature doctrine.”); Muller, *supra* note 22, at 736.

469. See Muller, *supra* note 22, at 736 (“Congress is acting as judge in these election disputes; it takes evidence, holds hearings, and issues opinions, often citing its own precedents.”). Chief Justice Roberts also argued that *Baldwin* was “precedent” because the House was “[a]cting under its authority to serve as ‘Judge of the Elections, Returns and Qualifications of its own Members.’” *Ariz. State Legis.*, 576 U.S. at 837 (Roberts, C.J., dissenting) (quoting U.S. CONST. art. I, § 5, cl. 1).

Qualifications of its own Members.”⁴⁷⁰ However, upon examination, the historical evidence is contrary to the assumption that the House was acting in a “judicial manner” when it considered contested elections in the late nineteenth century, particularly the 1860s. The reality was much different. Deferring to such decisions as if they were judicial precedent would not promote the goals underlying the doctrine of stare decisis.⁴⁷¹

1. The Non-Judicial Character of the House’s Contested Election Decisions

a. The House Contested Election Procedure

In the latter half of the nineteenth century, there were several aspects of the House’s approach to deciding contested election cases that would have made it difficult for the House to act in a judicial manner.

First, the House lacked any meaningful procedure for litigating and deciding these matters. The only law governing the process was an 1851 statute which required the contestant, within thirty days after determination of the election, to give notice of “the grounds upon which he relies in the contest,” and the contestee to respond within another thirty days with an answer “admitting or denying the facts alleged therein” and “stating specifically any other grounds upon which he rests the validity of his election.”⁴⁷² Otherwise, the statute merely provided for document subpoenas and depositions “confined to the proof or disproof of the facts alleged or denied” and to be completed within sixty days of the answer.⁴⁷³ An 1873 amendment allowed for more time and better notice for depositions,⁴⁷⁴ and an 1887 amendment gave each contestant the right to

470. U.S. CONST. art. I, § 5, cl. 1.

471. Chief Justice Roberts was dismissive of acknowledging partisanship in *Baldwin* because it would require one to “regard as tainted every decision in favor of a candidate from the same party as a majority of the Elections Committee.” *Ariz. State Legis.*, 576 U.S. at 839 n.3.

472. An Act to prescribe the Mode of obtaining Evidence in Cases of Contested Elections, §§ 1–2, 9 Stat. 568 (1851).

473. *Id.* § 9, 9 Stat. at 570; see also Rammelkamp, *supra* note 251, at 423, 426; DEALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 313 (1916) (“There is neither appeal nor review.”). Rammelkamp describes the pre-1851 process as “fifty years of chaotic irregularity” and quotes from an argument made in Congress when the 1851 law was debated, in which a member described the then-existing process as “the greatest of all humbugs in this age of humbugs.” Rammelkamp, *supra*, at 425 (quoting CONG. GLOBE, 31st Cong., 2d Sess. 109 (1850)) (internal quotation marks omitted).

474. An Act supplemental to and amendatory of an Act entitled “An Act to prescribe the Mode of obtaining Evidence in Cases of contested Elections,” 17 Stat. 408 (1873).

file a “a brief of the facts and authorities relied on to establish his case,” which was then provided to the Elections Committee along with a printed record of the deposition testimony adduced by the parties.⁴⁷⁵ Beyond that, all questions of process were left to the unfettered discretion of the Elections Committee and, ultimately, the full House. There were no pre-trial proceedings, no trial, and no appeal.

Second, the limited process which did exist was not mandatory. As Israel Washburn of Maine explained on the House floor in 1858, “[t]he law of Congress of 1851 is nothing but the advice or suggestion of reasonable and intelligent and just men, as to the proper course to be taken It is nothing more. The law is not binding upon us.”⁴⁷⁶ Or, as Henry Dawes explained it in 1869, each iteration of the House “could dispense with any part [of any procedure previously adopted], or the whole of it, at pleasure.”⁴⁷⁷

Regulated by no law and bound by no precedent, each House takes up the investigation of each case, at full liberty to pursue it in the way then deemed most expedient or just, and conscious as it proceeds that all its decisions, interlocutory as well as final, are absolutely within its own control. It is at every step a law unto itself.⁴⁷⁸

According to Dawes, the result was “seldom in conformity to any of the rules and forms found by experience in ordinary courts best calculated to develop facts and secure justice.”⁴⁷⁹

Third, the House’s decision-making in any given case—both as to factfinding and applying the law—was largely opaque. Sometimes, the House effectively decided in favor of the sitting member by taking no action on a matter, or simply by postponing any decision until the end of the congressional term. And when a contested election came up for a House

475. An act relating to contested elections, 24 Stat. 445 (1887).

476. CONG. GLOBE, 35th Cong., 1st Sess. 562 (1858); *see also* Rammelkamp, *supra* note 251, at 427 (describing House’s view that it “may at any time constitutionally disregard both law and precedent” in deciding contested elections).

477. Henry L. Dawes, *The Mode of Procedure In Cases of Contested Elections*, 2 J. SOC. SCI. 56, 6 (1870) (“A Paper Read at the General Meeting of the American Social Science Association, at New York, October 26, 1869.”).

478. *Id.* at 1; *see also* Rammelkamp, *supra* note 251, at 427 (“[T]he most that can be said for the laws regulating the procedure is that they will not be disregarded ‘without good cause.’”); ALEXANDER, *supra* note 473, at 322 (“[A] disposition to ignore the act has long controlled the House.”) (providing examples).

479. Dawes, *supra* note 477, at 5.

vote, the vote was simply whether to seat the sitting member or the challenger, not whether the factual findings or legal reasoning of a particular committee report should be adopted. Only the committee members who signed the committee reports, and perhaps some others who spoke on the floor, went on the record with their reasoning. “If more than one issue [was] raised . . . one can never be sure on what basis the action was predicated.”⁴⁸⁰

Finally, congressmen were hardly in a position to act like judges. These were elected officials in the most political branch of government, tasked with adjudicating disputes that were inseparably intertwined with the spread between majority and minority parties in the House and thus the members’ own political power. The Committee of Elections could perhaps have been constructed in such a way as to temper the political pressures, but this was not the case. As Dawes explained, the “committee [was] appointed by the Speaker, under the same usage which govern[ed] the selection of all the other committees,” resulting in “a political committee . . . infected with an incurable disease” from its inception.⁴⁸¹ Moreover, many congressmen did not have the time, training or inclination to act like judges.⁴⁸²

b. The Experience of Henry Dawes in the 1860s

Was the House able to overcome the headwinds of this system—in which inherently political actors reached opaque decisions with minimal

480. Powell v. McCormack, 395 U.S. 486, 546 n.85 (1969) (quoting Note, *The Power of a House of Congress to Judge the Qualifications of its Members*, 81 HARV. L. REV. 673, 679 (1968) [hereinafter *The Power of a House of Congress*] (noting the difficulty in “[d]etermining the basis for a congressional action,” which, “unlike a reported judicial decision, contains no statement of the reasons for the disposition,” thus requiring “fall back on the debates and the committee reports”)) (internal quotation marks omitted).

481. Dawes, *supra* note 477, at 11; see also Thomas B. Reed, *Contested Elections*, 151 N. AM. REV. 112, 114 (1890) (noting that because “the party which organizes the House . . . appoints the majority of the Committee on Elections” there was “[p]robably . . . not a single instance on record where the minority was increased by the decision of contested cases”).

482. Reed, *supra* note 481, at 113 (“Men have no time to examine evidence, and no inclination.”); *id.* at 114 (opining that House members were “utterly unqualified . . . [and] utterly incapable” of acting “as ‘judges and not as partisans’”), *id.* at 115 (“[T]he incoming of an election case is a leave-of-absence for three-quarters of the House.”); SAMUEL W. MCCALL, THADDEUS STEVENS 106 (1899) (opining as to “obvious impossibility” of “the semblance of judicial fairness” from a body “composed of hundreds of members, of whom many were not lawyers, and of whom also not one in twenty would ordinarily have any knowledge of the evidence”); ALEXANDER, *supra* note 473, at 326 (“[M]embers often find it physically impossible, with their other duties, to give to the many cases the study necessary to their proper disposition.”).

procedure—to act in a “judicial manner?” The experience of Henry L. Dawes in the 1860s suggests not.

Dawes served as a Representative from Massachusetts from 1857 to 1875, and then as a Senator from 1875–1893. During the 37th through 40th Congresses (1861–1869), Dawes was the chairman of the Committee on Elections.⁴⁸³ He was a Republican, and a partisan, but had a reputation for independence and fairness which he attempted to fulfill in his role as chairman of that committee.⁴⁸⁴

In late 1869, after moving on from his role as Elections Committee chairman, Dawes authored a paper that was read at the general meeting of the American Social Science Association in October 1869, and then later published in the *Journal of Social Science*.⁴⁸⁵ The paper, entitled “The Mode of Procedure in Contested Elections,” has been described as “the wail of a chairman whose hands were tied behind his back by party dictation.”⁴⁸⁶ Dawes wrote:

All traces of a judicial character in [House contested election] proceedings are fast fading away, and the precedents are losing all sanction. Each case is coming to be a mere partisan struggle. At the dictate of party majorities the committee must fight, not follow, the law and the evidence; and he will best meet the expectations of his appointment who can put upon the record the best reasons for the course thus pursued. This tendency is so manifest to those in a situation to observe, that it has ceased to be questioned, and is now but little resisted. There is no tyranny like that of majorities, and efforts in the past to resist them, and to hold the judgments of the Committee of Elections up above the dirty pool of party politics, have encountered such bitter and unsparing denunciation, and such rebuke for treason to party fealty, that they are not likely often to be repeated. The fruit that follows such seed

483. *Dawes, Henry Laurens 1816–1903*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/D000148> [https://perma.cc/8K3K-S5J6].

484. Fred Herbert Nicklason, *The Early Career of Henry L. Dawes, 1816–1871*, at 291–92 (1967) (Ph.D. dissertation, Yale University) (on file with author) (“[P]artisan as [Dawes] was on many issues, the majority of his decisions [in election cases] were informed by a fairness that frequently transcended both party affiliation and personal friendship.”); see also Bruce Tap, “Union Men to the Polls, and Rebels to Their Holes”: *The Contested Election Between John P. Bruce and Benjamin F. Loan, 1862*, 46 CIV. WAR HIST. 24, 33 (2000) (“Although a Republican, [Dawes] was fiercely independent on some issues and was not afraid to challenge others within the Republican party.”); *The Committee of Elections*, SPRINGFIELD DAILY REPUBLICAN, Mar. 23, 1866 (describing Dawes as “about half the time . . . at loggerheads with the extremists of his party just because he won’t go contrary to right”).

485. Dawes, *supra* note 477, at 1.

486. Rammelkamp, *supra* note 251, at 435.

is too certain for doubt. The whole proceeding must sink into contempt. Self-respect, as well as legal attainment, will soon retire from service upon a committee required, in the name of law and under the cloak of judicial sanction, to do the work of partisans.⁴⁸⁷

Dawes concluded that the process had become “an engine of political parties working out their ends.”⁴⁸⁸

What Dawes described in his paper in 1869 reflected his lived experience in contested election cases in the 1860s. In the pages that follow, this Article pulls back the curtain on the House’s treatment of three issues that recurred during that decade: (i) application of the Incompatibility Clause to congressmen who held commissions as military officers, (ii) the effect of electoral improprieties in Missouri, and (iii) the independent state legislature doctrine. On these issues, it appears that the House’s determinations depended, not on the outcome of anything resembling a judicial process, but on the partisan bona fides of the “judges” and contestants.

i. The Incompatibility Clause

In 1860, William Vandever was re-elected as a Republican to the 37th Congress.⁴⁸⁹ After the war began, Vandever offered to furnish a regiment of Iowa volunteer infantry to the Union war effort, which President Lincoln accepted.⁴⁹⁰ In September 1861, Vandever and his forces were “mustered into in the service of the United States.”⁴⁹¹ This appointment created an issue under the Incompatibility Clause, which provides that “no person holding an office under the United States shall be a member of either House during his continuance in office.”⁴⁹²

Dawes’s Elections Committee, in a unanimous report, wrote that, “[h]owever much [the members of the committee] might honor Colonel Vandever for his noble conduct, they must judge his rights by the same law that is applicable to the most undeserving member of the House.”⁴⁹³ The Committee therefore “felt compelled to” recommended that Vandever

487. Dawes, *supra* note 477, at 9.

488. *Id.* at 68.

489. *Vandever, William 1817–1893*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/V000031> [<https://perma.cc/9LMR-JDAA>].

490. H.R. REP. NO. 37-68 (1862), at 1–2 (reproducing the committee report in *Byington v. Vandever*).

491. *Id.* at 2.

492. U.S. CONST. art. I, § 6.

493. H.R. REP. NO. 37-68, at 5.

was not entitled to his seat as of the day he was mustered into service.⁴⁹⁴ The Committee rejected Vandever's argument that he was simply an Iowa militia officer, not an officer of the United States, not least because the argument was contrary to two House precedents.⁴⁹⁵

Following receipt of the committee's report in April 1862, the House voted to postpone debate until the next session of Congress, effectively allowing Vandever to continue in both offices.⁴⁹⁶ Dawes reluctantly acceded to the postponement, noting his "apprehension" that the House's "appreciation and admiration for [Vandever's] patriotism and self-sacrifice" might lead it to "sacrifice a great important constitutional principle."⁴⁹⁷ However, Dawes allowed that the question might better be decided closer to the end of the term "under those circumstances which will secure for it the calmest deliberation and the fairest consideration."⁴⁹⁸

When the matter finally came up for debate in late January 1863—with only a couple of months remaining in the Thirty-Seventh Congress—Dawes presented the report of his committee. However, Elihu Washburne, the Radical Republican from Illinois, immediately sought a further one-month postponement, ostensibly as a courtesy to Vandever, who was absent fighting in the war.⁴⁹⁹ Dawes responded that nothing better illustrated the "incompatibility of the two offices" than the fact that Vandever could not "get a furlough from his commanding officer" in order to argue his own case in Congress.⁵⁰⁰ Dawes insisted that it was incumbent upon the House to affirmatively address the matter without further delay, no matter how unappealing. Washburne's motion to postpone was defeated, and the House, at Dawes's urging, voted to adopt the committee's resolution against Vandever.⁵⁰¹ The vote in favor of the resolution against Vandever was not recorded, but the immediately preceding vote rejecting Washburne's bid to delay had been 53–74. All thirty-four participating Democrats voted to proceed along with a number of Unionists, but the seventy-four Republicans split their vote, forty-eight to delay, twenty-six to proceed.⁵⁰²

494. *Id.*

495. *Id.* at 4.

496. CONG. GLOBE, 37th Cong., 2nd Sess. 2023 (1862).

497. *Id.* at 2022.

498. *Id.*

499. CONG. GLOBE, 37th Cong., 3rd Sess. 404 (1863).

500. *Id.*

501. *Id.* at 404–05.

502. *37th Congress, House, Vote 433*, VOTEVIEW, <https://voteview.com/rollcall/RH0370433> [<https://perma.cc/6G2U-PT4E>]. The fifty-three voting to delay consisted of forty-eight Republicans

But that was not the end of the matter. The next day Washburne rose again and asked the House to reconsider its prior vote against Vandever. To Dawes's surprise and dismay, the House, without any debate, reversed itself and voted 70–64 to reconsider the matter.⁵⁰³ Overnight, the Republicans had found sixteen more Republican votes—nine apparently switched their votes, seven who had not voted now did.⁵⁰⁴ Washburne then sought to postpone reconsideration on the merits until the last day of the congressional term and attempted to prevent Dawes from even speaking to the point.⁵⁰⁵

When Dawes regained the floor, he was furious. He lectured his fellow Republicans that there had been “no word from anyone questioning the soundness” of the principle that prevented Vandever from holding two offices at once. “The only question upon which I find myself . . . differing with my friends here is [whether] with the positive conviction in all our minds that such is the [correct principle] founded upon the strict law and the Constitution, it is of no such importance as requires us to adopt it.”⁵⁰⁶ Dawes went on to say that he had delayed bringing the matter forward for “as long as I could consistently with my duty,” and acknowledged that it had been “a hard vote” for everyone, but then he asked, “[a]re we to take it back to-day because of some mysterious influence which has been set to work in the last twenty-four hours[?]”⁵⁰⁷

Dawes's appeal to the law and principle was unavailing. The House voted with Washburne to postpone consideration of Vandever's status as congressman until the last day of the 37th Congress (March 3, 1863),

and five Unionists. *Id.* The seventy-four voting to proceed consisted of twenty-six Republicans, thirty-four Democrats, fourteen Unionists, two Constitutional Unionists, and one Independent Democrat. *Id.*

503. CONG. GLOBE, 37th Cong., 3rd Sess. 427–28 (1863)

504. 37th Congress, House, Vote 437, VOTEVIEW, <https://voteview.com/rollcall/RH0370437> [<https://perma.cc/53TQ-GR3B>]. The seventy voting to reconsider consisted of sixty-four Republicans, four Unionists, one Democrat, and one Constitutional Unionist. *Id.* The sixty-four voting against reconsideration consisted of thirty-two Democrats, seventeen Republicans, and fifteen Unionists. *Id.*

505. CONG. GLOBE, 37th Cong., 3rd Sess. 428 (1863). Washburne had “refused [Dawes] the floor at a time when, by parliamentary courtesy, he was entitled to it”; moreover, “the decision of the speaker to that effect was practically sustained by sixty of [Dawes's] republican brethren.” *General News Summary*, SPRINGFIELD REPUBLICAN WEEKLY, Jan. 31, 1863.

506. CONG. GLOBE, 37th Cong., 3rd Sess. 428 (1863)

507. *Id.* Washburne feigned that he had “no desire . . . to shirk any issue or any vote,” that he would “very likely” vote with Dawes, but that he wanted “all the time possible to consider this great constitutional question.” *Id.* at 429.

effectively mooting the matter, rejecting the Election Committee's recommendation, and avoiding any impact on Vandever's tenure as a congressman.⁵⁰⁸ In fact, even on March 3, the last day of the term, the House did not act on the matter.⁵⁰⁹

This event upset Dawes. The following week, "Van," the Washington correspondent of *The Springfield Republican*, reported "rumors" that "Mr. Dawes will resign his place as chairman of the committee on elections," explaining:

He was badly treated in the House the other day, his own political friends refusing him an opportunity to speak on the Vandever case. He was compelled to receive the help of democrats to give him his rights [to speak]. The fact is, too many of the republican members demand his services on the difficult election cases for their side, and them, after he has given them, they are not willing to give him the generous treatment to which he is entitled, whenever he disagrees with the majority of the republicans. To say the least, a man who does the party such eminent service as Mr. Dawes does at times—whenever party and principle agree—is at all times entitled to the most courteous treatment from his political friends.⁵¹⁰

"Van" had special insight into what was going on, as he was D.W. Bartlett, the clerk of the Elections Committee.⁵¹¹ In fact, Dawes did tender his resignation, but the House rejected it,⁵¹² and Dawes continued as chairman of the committee.⁵¹³

By contrast to how Vandever was treated in the 37th Congress, in the 38th Congress, the Republican majority in the House did not hesitate to apply—indeed, relished applying—the Incompatibility Clause to a different

508. *Id.* at 434. The vote was 78-68 and broke along party lines similar to Washburne's vote to reconsider, with the majority of 78 consisting of 70 Republicans, six Unionists, and two Democrats. *37th Congress, House, Vote 438*, VOTEVIEW, <https://voteview.com/rollcall/RH0370438> [<https://perma.cc/AG2U-Y5XE>]. The *Springfield Republican's* view was that the House, "by postponing the resolution till the last day of the session, ha[d] virtually declared that a man can hold a civil and military office at the same time." *News from Washington, Miscellaneous*, SPRINGFIELD REPUBLICAN, Jan. 24, 1863.

509. "[I]n the pressure of business on the last day of the session, it was not called up." H.R. REP. NO. 38-110 (1864) (reproducing the committee report regarding the "Military Appointment of Hon. F.P. Blair, Jr."), at 6.

510. *From Washington, Mr. Conway—Mr. Dawes*, SPRINGFIELD DAILY REPUBLICAN, Jan. 30, 1863.

511. Steven J. Arcanti, *To Secure the Party: Henry L. Dawes and the Politics of Reconstruction*, 5 HIST. J. MASS. 33, 37 n.22 (1977).

512. CONG. GLOBE, 37th Cong., 3rd Sess. 491 (1863).

513. *See id.* (recording the motion to reject the resignation of Mr. Dawes).

congressmen, Francis P. Blair, Jr. As described in the next section, the difference appears to have been, in contrast to Vandever, that Blair was despised by the Radical Republicans for his conservative views and actions.

ii. Electoral Improprieties in Missouri and the Incompatibility Clause Again

Missouri's congressional election for the 38th Congress, held on November 4, 1862, generated four disputed elections, all of which came to a head in the House in the spring of 1864. In three of the cases, the candidate who was more appealing (or less loathsome) to radicals in the House had been the apparent winner and was defending his seat: (1) Benjamin F. Loan (an "increasingly radical" Unconditional Unionist who had been serving as a brigadier general in the Missouri State Militia)⁵¹⁴ was defending against John P. Bruce (a "conservative Democrat" and "conditional unionist"),⁵¹⁵ (2) John W. McClurg (Unconditional Unionist)⁵¹⁶ was defending against Thomas L. Price (a Democrat),⁵¹⁷ and (3) Austin A. King (Democrat turned Unionist)⁵¹⁸ was defending against James H. Birch (formerly of the "proslavery wing of the Missouri Democratic party").⁵¹⁹ In the fourth case, it was the more conservative candidate, Francis P. Blair, Jr., who was defending his seat against the

514. Tap, *supra* note 484, at 25, 31; *see also* Loan, *Benjamin Franklin 1819–1881*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/L000384> [<https://perma.cc/GWS8-QR7X>] (noting that Loan was elected as an Unconditional Unionist to the 38th Congress and a Republican to the 39th and 40th Congresses).

515. Tap, *supra* note 484, at 25.

516. McClurg, *Joseph Washington 1818–1900*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/M000347> [<https://perma.cc/MT43-2D7P>] (noting McClurg was elected as an "Unconditional Unionist" to the 38th Congress and as a "Republican" to the 39th and 40th Congresses).

517. Price, *Thomas Lawson 1809–1870*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/P000532> [<https://perma.cc/RL49-ENM4>] (noting Price was elected as a Democrat in the 37th Congress and was a delegate to the Democratic National Convention in 1864 and 1868).

518. King, *Austin Augustus 1802–1870*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/K000194> [<https://perma.cc/5YFX-33Z3>] (noting that while King attended the Democratic National Convention in 1860 he was elected as a Unionist to the 38th Congress).

519. Mark M. Carroll, "All for Keeping His Own Negro Wench": Birch v. Benton (1858) and the Politics of Slander and Free Speech in Antebellum Missouri, 29 LAW & HIST. REV. 835, 844-45 (2011). Birch's opponent, Austin King, exclaimed on the House floor that "God only knows" what party Birch belonged to, as "he has belonged to every party known in Missouri" and "never belonged to one but to betray it." CONG. GLOBE, 38th Cong., 1st Sess. 2649 (1864).

candidate favored by radicals, Samuel Knox, who was running as an Unconditional Unionist.⁵²⁰

Dawes's nine-member Elections Committee took up the first three cases (*Loan*, *McClurg*, and *King*) at the same time in March 1864, as they raised broadly similar issues of alleged interference in the elections by the state militia in favor of the more radical-friendly candidates.⁵²¹ Although a Republican, Dawes joined all three Democrats on the committee, and one other Republican, to create a 5–4 majority in favor of nullifying all three elections. The committee minority, which would have ruled in favor of the sitting members, consisted of three Republicans and a Unionist.⁵²²

Dawes described the fallout from the committee vote in a letter to his wife the next day. “All of a sudden your husband’s popularity here has gone,” he wrote. “His vote in Com. of Elections yesterday decided a case by one majority against two of our friends in Missouri, and such a heap of indignation, vituperation and general cursing as was piled upon his poor head by our side of the House—was perfectly terrific.”⁵²³ The Springfield Republican’s “Van” reported similarly that there was a “bitter feeling among some of the radicals . . . against the republicans on the committee,” and that Dawes, in particular, had been “condemned [by the radicals] . . . with severity,” because he had voted “to send back to Missouri Loan and McClurg, radical republicans.”⁵²⁴

Following the committee votes, *Loan* was the first of the three cases brought to the full House for debate, and it became a test case for the other

520. See ALLAN G. BOGUE, *THE CONGRESSMAN’S CIVIL WAR*, 94 (Robert Fogel et al. eds., 1989) (“The Missouri radicals reviled Blair for his abandonment of Fremont and supported one of their own against him when he sought reelection to the House of Representatives from the St. Louis congressional district.”); see also Knox, *Samuel 1815–1905*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/K000297> [<https://perma.cc/B26S-W43Y>] (noting that Knox contested Blair’s seat as an Unconditional Unionist).

521. The contestants’ allegations are reproduced in H.R. MISC. DOC. NO. 38-13, at 2-3 (1863), H.R. MISC. DOC. NO. 38-16, at 2-3 (1863), and H.R. MISC. DOC. NO. 38-20, at 1-2 (1864).

522. See Tap, *supra* note 484, at 33. The majority of five consisted of Dawes (Republican, Massachusetts), Portus Baxter (Republican, Vermont), Daniel Voorhees (Democrat, Indiana), John Ganson (Democrat, New York), and James Spoak Brown (Democrat, Wisconsin). The minority of four consisted of Charles Upson (Republican, Michigan), Glenni Scofield (Republican, Pennsylvania), Nathaniel Smithers (Republican, Delaware), and Green Clay Smith (Unionist, Kentucky). *Id.*

523. Nicklason, *supra* note 484, at 292 (quoting Henry Dawes to Electa Dawes, Mar. 3, 1864) (internal quotation marks omitted).

524. *From Washington, Mr. Dawes in Trouble*, SPRINGFIELD WEEKLY REPUBLICAN, Mar. 8, 1864. Van’s report also made clear that the committee had voted the same way in all “three Missouri cases,” not just those involving the “radical republicans,” Loan and McClurg. *Id.*

two. The committee majority's report in *Loan*, authored not by Dawes but by New York Democrat John Ganson, pasted a series of excerpts from the challenger Bruce's evidence, credited all of it without analysis, and concluded that it amounted to "ample proof" that "a portion of the militia in certain localities," by "threats, violence, and by various modes of intimidation, so far interfered with the election as . . . to render [it] a nullity."⁵²⁵

At the other pole, the minority report, authorized by Republican Charles Upson of Michigan, dismissed all of Bruce's evidence as "hearsay statements, or vague rumors, or irrelevant and immaterial evidence," none of which was believable because it came from Bruce's "partisan supporters," many of whom were "confessedly disloyal or in sympathy with [the] rebels."⁵²⁶ *Loan* should retain his seat because, at worst, some "loyal voters" may have gotten "somewhat excited and indignant" when they saw men at the polls who had "recently been imbruing their hands in the blood of their neighbors," "destroying or plundering their property," or giving "aid and comfort to those who had been thus engaged."⁵²⁷ Neither report articulated any legal standard against which to judge the disputed evidence.

During the floor debate, Upson spoke first, for the committee minority. He contrasted Dawes and the committee majority—"these croakers and complainers, these libelers of our soldiers"—with the "citizen soldiery" who prized more than anyone "the freedom of elections" and the "purity of the ballot-box."⁵²⁸

When it was Dawes's turn to speak for the committee majority, he argued that it was the House's "duty to see to it that the election of its members is *free*."⁵²⁹ Dawes said that he understood the need for troops to protect elections in troubled places like Missouri, and he was "prepared to find abuses" by such troops and "look upon them as necessities."⁵³⁰ However, he could not countenance the "terror created by glittering bayonets and official orders and arrests," which had "pervaded every branch of business" during the election in question.⁵³¹ Moreover, Dawes was frank that he

525. H.R. REP. NO. 38-44, at 6-26, 29 (1864) (reproducing the majority report in *Bruce v. Loan* setting forth snippets of Bruce's evidence).

526. *Id.* at 43 (reproducing the minority report in *Bruce v. Loan*).

527. *Id.* at 44.

528. CONG. GLOBE, 38th Cong., 1st Sess. 2163 (1864).

529. *Id.* at 2167.

530. *Id.*

531. *Id.*

wanted to send a broader message about the integrity of President Lincoln and the Republicans, and thereby deny a talking point to “the gentlemen on the other side.”⁵³² By removing the Republican-favored candidate from the seat, the House would “bear testimony to the purity of purpose on the part of the Administration.”⁵³³ The purpose in having troops present was “not to secure the election of particular men, but . . . [to] keep[] treason away from the life and vitals of the Republic;” it was “not to carry an election, but to secure freedom of election.”⁵³⁴

After Dawes spoke, the radicals pounced.⁵³⁵ Kellian Whaley from West Virginia described the committee majority’s recommendation as a proposal “to ignore and disfranchise the loyal people of the border States of the South as well as two hundred thousand of their brave heroes now fighting in the field,” which was especially appalling coming from Dawes, who had a “reputation for talent, but none for gunpowder.”⁵³⁶ Thomas Eliot from Massachusetts said that the “terror” perceived by Dawes was in his “imagination.”⁵³⁷ Henry Winter Davis of Maryland would not accept either “maudlin lectures from the Democratic party” nor “Puritan lectures” from Dawes,⁵³⁸ and suggested that Dawes would have a tough timing explaining to his Massachusetts constituents why he had voted “to crush their friends, discredit their cause and weaken the hands of loyal men on the burning borders of the rebellion.”⁵³⁹

Loan himself launched a “venomous attack” on Dawes (perhaps in part because Dawes was absent when Loan spoke).⁵⁴⁰ Loan accused Dawes of putting Ganson up to write the majority report, instead of writing it himself, because Dawes knew the report would have to “disregard all pretense to honesty or fairness” in order to find against Loan.⁵⁴¹ Loan also called out Dawes for considering what was best for “the Administration” instead of “the law as applicable to the facts.”⁵⁴² Loan concluded that Dawes was “[a]

532. *Id.* at 2167.

533. *Id.*

534. *Id.* at 2167–68

535. See Nicklason, *supra* note 484, at 293 (“In the Loan case partisan Republicans severely differed with Dawes. Evading the issues, they attacked him directly.”).

536. CONG. GLOBE, 38th Cong., 1st Sess. 2169 (1864).

537. *Id.* at 2186.

538. *Id.* at 2191.

539. *Id.* at 2189.

540. Tap, *supra* note 484, at 37; Nicklason, *supra* note 484, at 293–94.

541. CONG. GLOBE, 38th Cong., 1st Sess. 2211.

542. *Id.* at 2212.

political guerrilla who flies a friendly flag that thereby he may the more safely and surely strike a fatal blow.”⁵⁴³ Did Loan later regret going too far in the heat of the moment? Apparently not, as he later had the *Globe*'s printer include a footnote in the *Globe* calling Dawes a “great liar and a dirty dog.”⁵⁴⁴

In the end, on May 10, 1864, the House decided that Loan should retain his seat, voting 59–71 against the Election Committee's recommendation.⁵⁴⁵ With Dawes absent, only one member of the Republican Party voted in support of the committee majority's recommendation to unseat Loan.⁵⁴⁶ By contrast, every Democratic vote was to unseat Loan.⁵⁴⁷

Historian Bruce Tap summarized the press reaction to the Loan case as being “highly critical of the Republican majority's decision”:

The *New York Times* wondered why a report was needed, since the House seemed predisposed to award the seat to the sitting member. The *Missouri Republican* described the entire proceeding as a farcical event characterized by pure partisanship. Despite evidence of electoral tampering, the dominant party would not allow itself to be deprived of a seat. “A report from a regular standing committee of the House . . . though based upon a full and impartial examination of all the facts, has been thrown aside by a set of drilled partisans who mock the very name of fairness.”⁵⁴⁸

The result in *Loan* carried over to both *King* and *McClurg*. On June 1, 1864, Dawes informed the House that he and the Committee had accepted the House's decision in *Loan* as “instruction” in *King* or “at least they look upon it as a *res adjudicata*.”⁵⁴⁹ The challenger, Birch, still tried to argue his case but was shortly cut off when it was observed that “there are not a dozen

543. *Id.*

544. *Id.* at 2212, 2360.

545. *Id.* at 2214.

546. *38th Congress, House, Vote 255*, VOTEVIEW, <https://voteview.com/rollcall/RH0380255> [<https://perma.cc/B5XY-EBEA>]. As Dawes was absent, the sole Republican vote was from Porteus Baxter of Maine, who was on the Elections Committee and had provided Dawes with the second Republican vote in committee. *Id.* The fifty-nine “yea” votes consisted of Baxter, forty-nine Democrats, four Unconditional Unionists, and five Unionists. *Id.* The seventy-one “nay” votes consisted of sixty-one Republicans, two Independent Republicans, and eight Unconditional Unionists. *Id.*

547. *Id.*

548. Tap, *supra* note 484, at 38 (alteration in original).

549. CONG. GLOBE, 38th Cong., 1st Sess. 2639.

gentlemen listening to this speech.”⁵⁵⁰ The sitting member, King, then spoke briefly. He focused less on the merits of the dispute than on making clear to the House that, although he was a former slaveholder and “southern man,” he supported “carrying on this war vigorously” until the “traitors lay down their arms and acknowledge the supremacy of the Constitution.”⁵⁵¹ The House took no action other than to discharge the Elections Committee from further consideration of the matter.⁵⁵² The same happened in *McClurg*, but with no debate.⁵⁵³

While the House was overruling Dawes and the Elections Committee in *Loan*, *McClurg*, and *King*, the stage was being set for a very different outcome in the fourth Missouri contested election case, *Knox v. Blair*.

By the spring of 1864, Frank Blair, a conservative Republican, was in an all-out political war with the radical wing of the party. Blair, whose prominent father was a close Lincoln adviser and whose brother was Lincoln’s Postmaster General, had first “won the enmity of Republican radicals” in 1861 when he was part of the effort to have General Fremont relieved as commander of the Western Department.⁵⁵⁴ In the November 1862 election, the radicals supported Blair’s opponent, Samuel Knox, but Blair was narrowly re-elected by a small margin.⁵⁵⁵ The 38th Congress did not begin until December 1863, and as that time approached “members of the Blair family were exploring the possibility of political realignment [and] running [Frank Blair] for Speaker on a conservative, border state platform.”⁵⁵⁶ In fact, Schuyler Colfax, aligned with the radicals, was elected Speaker, but only after the Republicans put down an attempt by the acting clerk of the House (Emerson Etheridge, a Unionist from Tennessee) to “place a conservative coalition of Democrats and border state Unionists in control of the House by invalidating the credentials of several Republican congressmen.”⁵⁵⁷ Although Blair did not come back to Washington until January 1864⁵⁵⁸—after the House was organized—Blair’s “enemies

550. *Id.* at 2640–45.

551. *Id.* at 2649.

552. *Id.* at 2650.

553. *Id.* at 2881.

554. BOGUE, *supra* note 520, at 93.

555. *Id.* at 94.

556. Herman Belz, *The Etheridge Conspiracy of 1863: A Projected Conservative Coup*, 36 J. SOUTHERN HIST. 549, 552 (1970).

557. *Id.* at 549.

558. WILLIAM E. PARRISH, FRANK BLAIR: LINCOLN’S CONSERVATIVE 186 (1998).

accused him of plotting with the Democrats to win the speakership” through this failed conspiracy.⁵⁵⁹

Blair’s conservative views on reconstruction and involvement in intra-party presidential politics deepened the rift between him and congressional Republicans.⁵⁶⁰ When the Treasury Secretary, radical Samuel P. Chase, was maneuvering to supplant President Lincoln as the party’s 1864 presidential candidate, Blair functioned as “‘hatchet man’ for the Administration.”⁵⁶¹ On February 1, Blair unsuccessfully introduced a resolution calling for a special committee to investigate the Treasury Department’s regulation of commerce with insurrectionist states.⁵⁶² On February 27, Blair followed up with a “blistering anti-Chase speech in the House that among other things charged widespread Treasury corruption in the issuance of cotton-trading permits.”⁵⁶³ “Many radical Republicans never forgave the Blair family for this climactic event in a series of intraparty dogfights which found the Blairs leading the conservative faction.”⁵⁶⁴

Meanwhile, Knox’s contested election case against Blair was percolating in the Elections Committee. The case turned on various alleged election improprieties, many involving soldiers, but none as alarming as those made in *Loan*, *McClurg*, and *King*.⁵⁶⁵ The allegations were almost beside the point. As Dawes explained to his wife, “Frank is very unpopular with our people . . . and they are resolved to turn him out right or wrong. I am expected by his friends to save him, and by ours to hoist him. And either way will create a storm.”⁵⁶⁶ Blair apparently had a false sense of security about the outcome of the case. He met with Dawes and the committee on March 3 and, according to his sister, showed very little concern as to the result.⁵⁶⁷

559. BOGUE, *supra* note 520, at 94.

560. *See id.* at 93–98 (describing the growing rift); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 714–715 (1988) [hereinafter MCPHERSON, *BATTLE CRY OF FREEDOM*]; Nicklason, *supra* note 484, at 296 (“[Blair] gave wide publicity to his conservative views on reconstruction and to his opposition to Salmon P. Chase, a prominent radical contender with Lincoln for the Republican presidential candidacy.”).

561. MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 560, at 714 (1988).

562. BOGUE, *supra* note 520, at 94.

563. MCPHERSON, *BATTLE CRY OF FREEDOM*, *supra* note 560, at 714.

564. *Id.* at 714–15.

565. *See* H.R. MISC. DOC. NO. 38-15 (1863) (reproducing Knox’s allegations); H.R. REP. NO. 38-66 (1864).

566. Nicklason, *supra* note 484, at 297 (quoting Henry Dawes to Electa Dawes, Mar. 21, 1864) (internal quotation marks omitted).

567. PARRISH, *supra* note 558, at 191, 195–96.

In addition to the contested election case brought by Knox, by late April the Elections Committee had also begun considering whether Blair should be unseated for violating the Incompatibility Clause. There were indications Blair was preparing to resume his post as major general in the army, which he had resigned to take his seat in Congress. On April 25, at Dawes's urging, the House requested the President to disclose whether Blair "now holds any appointment or commission in the military service of the United States," and, if so, when Blair accepted such office and whether he was now "acting under [its] authority."⁵⁶⁸ On April 28, President Lincoln responded that when Blair had returned from the field to resign as major general and assume his seat in the 38th Congress, the President and the Secretary of War had promised Blair that he could, at any time during the congressional session, "at his own pleasure, withdraw said resignation and return to the field."⁵⁶⁹ Lincoln further explained to the House that Blair had, in fact, "withdrawn" his resignation on April 23 so that he could be assigned the command of a corps.⁵⁷⁰

The House promptly requested copies of documents relating to Blair's circumstances, which the President produced on May 2.⁵⁷¹ Among the documents was a letter that Lincoln had sent to Blair's brother Montgomery (the Postmaster General) in November 1863, the month before the 38th Congress began.⁵⁷² In that letter, Lincoln had made clear his preference that Frank Blair should come to Washington for commencement of the 38th Congress, "put his military commission in my hands," "take his seat," and "aid to organize a House of Representatives which will really support the government in the war."⁵⁷³ Lincoln continued: "If the result shall be the election of [Blair] as Speaker, let him serve in that position; if not, let him retake his commission and return to the army."⁵⁷⁴ The revelation of Blair's "secret arrangement" with the President, "by which he was Member of

568. CONG. GLOBE, 38th Cong., 1st Sess. 1859–60 (1864); H.R. EX. DOC. NO. 38-77, at 1 (1864).

569. H.R. EX. DOC. NO. 38-77, at 1 (1864).

570. *Id.* In fact, when Lincoln in late April ordered the War Department to give Blair command of a corps in Sherman's army, he was initially told by Adjutant General E.D. Townsend that Blair could not resume his military office because he had previously resigned it. However, Lincoln persisted, whereupon Townsend proposed that, based on precedent, Blair could "withdraw" his resignation. PARRISH, *supra* note 558, at 192–93.

571. H.R. EX. DOC. NO. 38-80, at 7 (1864).

572. *Id.* at 1–2.

573. *Id.* at 2.

574. *Id.* (reproducing a letter from Abraham Lincoln to Montgomery Blair, Nov. 2, 1863).

Congress or Major-General, whichever he wished," only increased the radicals' suspicion of Blair.⁵⁷⁵

On May 5, Dawes reported to the House that the Elections Committee had voted in favor of Knox and against Blair.⁵⁷⁶ As in the recent *Loan* case, Dawes was again in a majority recommending that a sitting member be ejected from his seat because of election improprieties in Missouri. However, this time the sitting member was the conservative (and increasingly unpopular) Blair instead of the radical Loan, and the committee members re-aligned themselves accordingly. Dawes was now joined by all of the committee Republicans instead of the committee Democrats.⁵⁷⁷ The committee Republicans who had recently discounted all of the evidence of election improprieties in Missouri when used against Loan now credited such evidence when used against Blair, while the committee Democrats who had credited such evidence when used against Loan, now rejected it when used against Blair.⁵⁷⁸

The partisan split in the committee continued when the matter was perfunctorily debated in the full House on June 10. Dawes briefly recapitulated the majority report.⁵⁷⁹ The radicals who had excoriated Dawes a few weeks previously for suggesting that Loan be unseated were now silent. Indeed, not a single Republican spoke in defense of Blair. Democrat James S. Brown from Wisconsin (a member of the Elections Committee) pretended that he would "not undertake to interfere with [Republicans'] decision" to decide a contested election case based on "minor divisions which they have among themselves," before briefly criticizing the majority's decision to shift the burden of proof onto Blair to prove the validity of the disputed votes.⁵⁸⁰ Brown concluded by wondering aloud what "strange prejudice must have influenced the minds of the majority," and suggesting that the committee had improperly decided to unseat Blair on the basis of the contested election instead of the dual office-holder issue because the former resulted in the seat being awarded to Knox, while the

575. *Our Washington Correspondence*, NATIONAL ANTI-SLAVERY STANDARD, May 14, 1864 (reporting that "the feeling against Frank Blair [in the House] intensified" after he delivered "a most violent attack upon Mr. Chase and the Radicals of Missouri" and that revelation of his "secret arrangement" with the President "had added to his unpopularity").

576. H.R. REP. NO. 38-66 (1864) (reproducing the majority and minority reports in *Knox v. Blair*).

577. *Id.*

578. *Id.*

579. CONG. GLOBE, 38th Cong., 1st Sess. 2856-57 (1864).

580. *Id.* at 2858.

latter would have resulted in a new election in which voters would get to decide who their new representative would be.⁵⁸¹ Another one of the Committee's Democrats, John Ganson of New York, made a show of refusing to argue the merits of the matter because he had been forewarned that the Republican "side of the House had already made up its mind, before any discussion was had, that the sitting member was not entitled to his seat," and Ganson had "too much respect for [him]self" to participate in such a phony debate.⁵⁸²

The final vote was 82–32 against Blair, and he did not get the support of a single Republican.⁵⁸³ In a companion vote to decide whether Knox was now entitled to the seat, every Republican vote was in favor of Knox, and every Democratic vote was against him.⁵⁸⁴ Dawes wrote to his wife: "Frank Blair was *executed* in the House . . . and I was obliged to perform the ceremony. I hope the Missouri Radicals will now let me be."⁵⁸⁵

Just a few days later, on June 13, Dawes and the Elections Committee issued a second, seemingly redundant report against Blair.⁵⁸⁶ The committee again called for Blair to be dis-entitled from the seat, but now on the basis of the incompatible office issue.⁵⁸⁷ On this issue, the House adopted the committee's recommendation without any debate or recorded vote.⁵⁸⁸ The specific violation that the committee found was not the obvious one presented by Blair's recent resumption of duties as a major general. Instead, the committee found that Blair had disqualified himself from ever assuming his seat in Congress by not resigning his position in the army until January 1864, which was a few weeks after the 38th Congress convened in December 1863.⁵⁸⁹ Evidently, the Republican majority had

581. *Id.* ("[T]he committee, instead of . . . vacating the seat and referring the matter back to the people, have attempted to deprive the people of St. Louis of the right of electing their own member, and by the action of the House to substitute a member who never received a majority of the votes of that district.").

582. *Id.*

583. *38th Congress, House, Vote 327*, VOTEVIEW, <https://voteview.com/rollcall/RH0380327> [<https://perma.cc/77JL-DYGR>].

584. *38th Congress, House, Vote 328*, VOTEVIEW, <https://voteview.com/rollcall/RH0380328> [<https://perma.cc/8XN2-BNPS>].

585. Nicklason, *supra* note 484, at 298 (quoting Henry Dawes to Electa Dawes, June 11, 1864) (internal quotation marks omitted).

586. H.R. REP. NO. 38-110, at 1 (1864).

587. H.R. REP. NO. 38-110, at 1–3 (reproducing the committee report regarding the "Military Appointment of Hon. F.P. Blair, Jr.>").

588. CONG. GLOBE, 38th Cong., 1st Sess. 3389 (1864).

589. H.R. REP. NO. 38-110, at 10.

overcome the squeamishness they had in the prior Congress about enforcing the Incompatibility Clause (when the Representative holding an incompatible office had been Colonel Vandever instead of Blair).⁵⁹⁰

Even then, the Republicans in Congress were not done with Blair. By basing his disqualification from Congress on his failure to resign the military office before the Congress began—instead of his recent resumption of the military office—the Committee avoided any acknowledgement that he was entitled to resume the military office. This made it possible for spiteful Republicans in the Senate to pile on. In a report dated June 15, the Senate Judiciary Committee concluded that Blair could not even resume his military office. They found that Blair had given up that office, irrevocably, when he resigned in order to take his seat in Congress.⁵⁹¹ Per historian Allan Bogue, the Republicans had “worked out their own formula of double jeopardy for Frank Blair.”⁵⁹²

The House’s treatment of Blair was far from the judicial application of law to facts. Rather, in the words of one historian, the Elections Committee was used “to punish a recalcitrant member of the dominant party.”⁵⁹³ More than one newspaper described a radical republican “war” against Blair.⁵⁹⁴ It was clear that Blair had “no advocates and defenders among the republicans, his friends belonging exclusively to the opposition.”⁵⁹⁵ Simultaneous with Blair’s ejection from the House, the Republican convention met in Baltimore and voted overwhelmingly to exclude the conservative (pro-Blair) delegation from Missouri in favor of the radical (anti-Blair) delegation.⁵⁹⁶ The *New York Herald* observed, “the exclusion of

590. See *supra* Part IV.B.1.b.i.

591. SEN. REP. NO. 38-84, at 3 (1864).

592. BOGUE, *supra* note 520, at 99–100. As Bogue notes, Lincoln “found no reason to accept the Congressional position” and Blair “did not retire from the army until well after the Thirty-eighth Congress had adjourned for the last time.” *Id.*

593. Tap, *supra* note 484, at 33 n.19.

594. *Our Washington Correspondence*, BOSTON HERALD, May 5, 1864 (“A decided war is being inaugurated against Frank Blair. The House Election Committee will report against his seat in the House, and the Senate Military Committee are questioning the validity of his Major Generalship.”); *News from Washington, The Blair Case Ended*, WORLD, June 11, 1864 (“The war on the Blair interest achieved a decided success to-day. In the House, General Frank Blair was ousted from his seat, it being declared by the committee and the House that he held it illegally. In the Senate, it was decided by the Judiciary Committee at the same time, that his commission in the army was illegal and void.”).

595. *News from Washington*, NEW YORK HERALD, June 11, 1864.

596. PARRISH, *supra* note 558, at 197; see also MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 560, at 717 (“[W]ith the president’s covert sanction the convention made a gesture of conciliation

his delegation from the Baltimore Convention, and his own exclusion from Congress by republican votes, indicates that [Blair] has been formally read out of the republican party.”⁵⁹⁷

iii. The Independent State Legislature Doctrine

When the House of the 39th Congress took up *Baldwin v. Trowbridge* in early 1866, Dawes faced several competing considerations. Politically, the preferred outcome for Dawes and his fellow Republicans was clear, for two reinforcing reasons. First, the sitting member (Trowbridge) was a Republican, while his opponent (Baldwin) was a Democrat. Ruling against Trowbridge would effectively decrease the Republican majority by two. Second, Trowbridge’s margin of victory arose from the Michigan soldier vote, so undoing his victory as requested by Baldwin would be tantamount to disenfranchising the soldiers, which would have been anathema to any politician, but particularly Republicans in the wake of the Civil War.

Legally speaking, however, there was no clear path for Dawes to rule in Trowbridge’s favor. Trowbridge was arguing that the Michigan constitution’s place of voting provision was neutered by the independent state legislature doctrine, and, alternatively, that the provision was never intended to apply to federal elections because it did not expressly mention them. But five years earlier, Dawes had authored the Election Committee’s unanimous report in *Shiel*.⁵⁹⁸ In that case, Dawes had not only rejected the independent state legislature doctrine, but had also insisted that the Oregon constitution’s “general election” provision (which like the Michigan constitution did not mention federal elections) was intended to govern federal elections.⁵⁹⁹ Moreover, a third potential legal path to supporting Trowbridge, saying that the Michigan constitutional provision did not prevent soldier-voting, was seemingly foreclosed by the fact that the Michigan Supreme Court had held that it *did* prevent soldier-voting.⁶⁰⁰

Dawes ultimately decided to vote in favor of Trowbridge on the ground that the Michigan Supreme Court had gotten it wrong—the Michigan

to radicals by seating an anti-Blair delegation from Missouri which cast a token ballot for Grant before changing its vote to make Lincoln’s nomination unanimous.”).

597. *News from Washington*, NEW YORK HERALD, June 11, 1864.

598. See *supra* Part III.B.1; H.R. REP. NO. 37-4 (1861) (reproducing the committee’s report in *Shiel v. Thayer*).

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

600. *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865).

constitution did *not* prevent soldier-voting.⁶⁰¹ This allowed Dawes to maintain a principled stand against the independent state legislature doctrine and in favor of applying non-explicit state constitutional provisions to federal elections. Representative Marshall of Illinois attempted to call out Dawes on how he could disregard the Michigan Supreme Court's interpretation of its own constitution, but unfortunately cut Dawes off before Dawes could attempt to explain himself on that point.⁶⁰²

Dawes was not the only Republican who had voted against Thaddeus Stevens's invocation of the independent legislature doctrine in *Shiel*. Nine of the Republicans who had voted with Dawes in *Shiel* were still in Congress five years later and participated when the House decided Baldwin, and every one of them now supported Trowbridge.⁶⁰³ Other than Dawes, only three of them explained their positions, but each of those three now affirmatively embraced the independent legislature doctrine on the floor of the House, with little or no regard for reconciling that embrace with their prior vote in *Shiel*.

Of the three who explained themselves, the most bald-faced was perhaps Trowbridge himself, the Michigan contestee who was defending his seat. In *Shiel*, Trowbridge had voted "nay" when Thaddeus Stevens argued that Shiel's election was invalid because the time of his election had been set by the Oregon constitutional convention, not, as required by the Elections Clause, the state legislature.⁶⁰⁴ Now, with his own congressional seat on the line, Trowbridge made the same argument that Stevens had made:

Can language be plainer than this? The constitution of the State is not the Legislature of the State. The people, in convention by delegated forming their State constitution, are not the Legislature of the State. And I claim that under

601. See *supra* Part III.B.2.b.ii; CONG. GLOBE, 39th Cong., 1st Sess. 821 (1866).

602. CONG. GLOBE, 39th Cong., 1st Sess. 822 (1866).

603. Compare 37th Congress, House, Vote 40, VOTEVIEW, <https://voteview.com/rollcall/RH0370040> [<https://perma.cc/RH8F-HSAK>] (showing the *Shiel* vote), with 39th Congress, House, Vote 68, VOTEVIEW, <https://voteview.com/rollcall/RH0390068> [<https://perma.cc/5EB6-TDB5>] (reproducing the *Baldwin* vote). The nine Congressmen who voted against the Stevens resolution in *Shiel* in the 37th Congress but later supported Trowbridge in the 39th Congress were: John Bassett Alley (Massachusetts), Portus Baxter (Vermont), Samuel Beaman (Michigan), Henry Dawes (Massachusetts), Thomas Dawes Eliot (Massachusetts), Rowland Trowbridge (Michigan), John Rice (Maine), Samuel Shellabarger (Ohio), and Elihu Washburne (Illinois). *Id.*

604. CONG. GLOBE, 37th Cong., 1st Sess. 356 (1861) (reflecting Stevens arguing that Shiel's election was invalid because the Elections Clause "prevents any action" by a state constitutional convention by "expressly provid[ing] who shall fix the times and places of holding elections for Members of Congress"); *id.* at 357 (reflecting Trowbridge's "nay" vote against Stevens's resolution).

this clause of the Constitution of the United States no power in the State had any right to touch this subject at all except “the Legislature thereof.”⁶⁰⁵

Trowbridge claimed that he voted differently in *Shiel* because in that case the state legislature had performed its plenary role under the Elections Clause by “accept[ing] and acquiesc[ing]” to the constitutional provision and “pass[ing] no conflicting law.”⁶⁰⁶

Fernando Cortez Beaman of Michigan was another Republican who had voted against the independent state legislature doctrine in *Shiel*.⁶⁰⁷ Now, in *Baldwin*, he carried the torch for Trowbridge, his fellow Michigander, explaining that “when [the] framers used the word Legislature, they meant by that term precisely what it imports,” in “no latitudinarian sense,” and that it would do “great injustice to their intelligence and discrimination to suppose that when they used the word Legislature, they intended to imply constitutional convention, or people of the State.”⁶⁰⁸ Beaman—who conveniently made no reference to his contrary vote in *Shiel*—claimed that he was “not aware of any respectable writer or authority who [had] ever doubted” his construction of the Elections Clause.⁶⁰⁹

The third Republican in this group—Samuel Shellabarger of Ohio⁶¹⁰—argued that it was incorrect to say that the state legislature was “overrid[ing]” the state constitution “because the provision of the Federal Constitution names the Legislatures of the States simply as the mere instrumentality for fixing the places for elections of Federal officers.”⁶¹¹

The other Republicans who had voted against the Stevens resolution, but now voted in favor Trowbridge, did not explain the basis for their votes. Therefore, we can only speculate as to whether, and on what basis, they reconciled their support of Trowbridge with their past vote in *Shiel*.

605. CONG. GLOBE, 39th Cong., 1st Sess. 840.

606. *Id.* Dawes had opened the door to Trowbridge’s argument by admitting that the absence of a “conflicting law” was a distinction between the two cases, though Dawes maintained that it was a distinction without a difference because in no event could a legislature prescribe a time for an election in conflict with the time set forth in the state constitution. *Id.* at 821.

607. CONG. GLOBE, 37th Cong., 1st Sess. 357 (1861) (recording Beaman’s “nay” vote against the Stevens resolution in *Shiel*).

608. CONG. GLOBE, 39th Cong., 1st Sess. 817.

609. *Id.*

610. CONG. GLOBE, 37th Cong., 1st Sess. 357 (documenting Shellbarger’s “nay” vote against the Stevens resolution in *Shiel*).

611. CONG. GLOBE, 39th Cong., 1st Sess. 845.

The final vote in *Baldwin* was 30–108.⁶¹² All of the Democratic votes were for Baldwin, and all of the Republican votes were for Trowbridge.⁶¹³ By contrast, in 1861 when the House rejected Thaddeus Stevens' invocation of the Doctrine in *Shiel*, the Democrats had voted along party lines but the Republicans split their vote roughly in half.⁶¹⁴ Given the voting reversals and the positional flip-flopping, it is hard not to conclude that the difference in outcomes resulted from the fact that, in *Shiel*, the House was deciding whether to kick a Democrat out of his seat—leaving it open—whereas, in *Baldwin*, the House was deciding whether to replace a Republican with a Democrat. Moreover, it is equally hard to believe that the partisan breakdown of the vote in *Baldwin* reflected genuinely held legal views that were 100% correlated with a member's partisan affiliation. Rather, what happened in *Baldwin* appears to be something approaching “tribal partisanship.”⁶¹⁵

The press perceived lawless partisanship. After the Elections Committee voted in favor of Trowbridge, *The World* reported that, although “justice and equity were on Mr. Baldwin's side,” he “was a Democrat, and the committee went with their party” on a “strict party vote”;⁶¹⁶ the same paper later called the full House's vote an “illegal act” that was “justifiable by nothing better than an unscrupulous party necessity.”⁶¹⁷ *The Crisis* noted simply that “of course the Democrat was ousted and the Abolitionist retained by a strict party vote.”⁶¹⁸ *The New York Atlas* reported that although Baldwin was “the legally elected representative,” Trowbridge was “a disciple of

612. *39th Congress, House, Vote 68*, VOTEVIEW, <https://voteview.com/rollcall/RH0390068> [<https://perma.cc/78FG-TMN6>].

613. *Id.*

614. *37th Congress, House, Vote 40*, VOTEVIEW, <https://voteview.com/rollcall/RH0370040> [<https://perma.cc/5XS8-KCJW>].

615. See Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1798 (explaining “tribal partisanship” as politicians' favoring of policies purely because they benefit other members of their own party or harm political opponents).

616. *The Contested Seats*, WORLD, Feb. 1, 1866, at 6. Another paper complained that the committee was “going to give the seat to Trowbridge, [R]epublican, against Baldwin, Democrat” even though Baldwin “had a clear majority excluding the illegal soldier vote,” because “[p]arty with [the Republicans] is above law.” *Party Above Law*, DAILY E. ARGUS, Feb. 15, 1866.

617. *The Case of Representative Baldwin*, WORLD, Feb. 20, 1866, at 4. Similarly, the NORWICH AURORA called the House's decision “a gross violation of law . . . committed to enable the republican claimant to retain his seat.” *Depriving Democratic Representatives of Their Seats*, NORWICH AURORA, Mar. 3, 1866. *The Patriot* concluded that “[n]othing, really, seems to be too mean, despicable and unlawful for modern ‘Republicans’ to perform.” PATRIOT, Feb. 19, 1866.

618. *News of the Week, Congressional Proceedings*, CRISIS, Feb. 21, 1866.

Thad[deus] Stevens,” and “for that reason only, he is thrust into Mr. Baldwin’s seat.”⁶¹⁹ The *Pittsfield Sun* was more sarcastic, reporting that the Elections Committee, led by Henry Dawes (Pittsfield’s own representative), was “acting as a ‘Committee for Increasing the Radical Majority in the House by all means, fair or foul,’” and “merely carrying out the directions of the Radical leader in the House, Thad[deus] Stevens, and endeavoring to thwart the wishes of President Johnson.”⁶²⁰ The opposing, Republican, viewpoint was articulated by the *Detroit Tribune*, which noted that “[e]very person voting for Mr. Baldwin belonged to the Democratic Party, and would, of course, vote for him law or no law.”⁶²¹ The sense of partisan hypocrisy was heightened in *Baldwin* because it concerned soldier-voting: the Republican House majority’s decision to count the votes of Michigan soldiers appeared at odds with the prior decision of Republican judges on the Michigan Supreme Court that the soldier-voting law was unconstitutional,⁶²² and because support for soldier-voting broke along party lines.⁶²³

The newspaper references to Thaddeus Stevens are notable. Stevens had invoked the independent legislature doctrine in *Shiel* in hopes of denying either Democrat the seat in question.⁶²⁴ At about the time of *Baldwin*, he

619. *The Michigan Contested Election*, N.Y. ATLAS, Feb. 17, 1866, at 4.

620. *The Unseating of Mr. Voorbees*, PITTSFIELD SUN, Mar. 15, 1866.

621. *The Michigan Contested Election Case Decided*, DETROIT TRIB., Feb. 27, 1866 (“If there was any voting blindly and from partisan motives, it must have been on the Democratic side . . .”). The *Springfield Republican* made a similar point. See *The Committee of Elections*, SPRINGFIELD DAILY REPUBLICAN, Mar. 23, 1866 (“But it is amusing to hear the allegation that the republicans on the committee are actuated by their party feeling solely” when the Democrats cannot name “a single case in this Congress where the democratic members of the committee have voted with the republicans[.]”).

622. The House’s alleged disregard of the Michigan Supreme Court’s decision in *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865), was frequently cited as evidence that the Republican majority was acting in an egregiously partisan manner. See *The Case of Representative Baldwin*, WORLD, Feb. 20, 1866 (noting that the House Republicans disregarded the court’s decision even though “the Supreme Judges are all Republicans” and had been “unanimous with but one exception . . .”); *A Strange Decision*, TIMES-PICAYUNE, Feb. 27, 1866 (“It is well to observe that the Supreme Court of Michigan—which decided the vote to be unconstitutional—is composed of Republicans . . .”); *Congress Wiping Out States*, CRISIS, Mar. 28, 1866 (stressing that the court was “composed of Republican Judges”).

623. See DONALD S. INBODY, THE SOLDIER VOTE: WAR, POLITICS, AND THE BALLOT IN AMERICA 14 (2016) (“[T]he debate . . . always fell along political party lines. Republicans, assuming that soldiers would vote for Abraham Lincoln and the Republican Party, were in favor of such measures, while Democrats opposed the measures on the same assumption. Throughout the war, northern state legislatures that were dominated by Republicans passed soldier absentee voting of some sort while legislatures dominated by Democrats did not.”)

624. CONG. GLOBE, 37th Cong., 1st Sess. 356 (1861).

was heard to remark, in relation to another contested election case that unseated a Democrat, that “[t]his question may seem to some gentlemen to be a small matter, but in view of thick-coming events, *one vote may prove to be of great value here.*”⁶²⁵ This resonates with an oft-repeated anecdote about Stevens. In his autobiography, George F. Hoar recounted that Stevens, upon entering an Election Committee hearing, asked a Republican colleague “what was the point in the case,” and was told that there was “not much point to it” because both contestants were “damned scoundrels.” Stevens responded, “Well . . . which is the Republican damned scoundrel? I want to go for the Republican damned scoundrel.”⁶²⁶ Carl Schurz recounted the same anecdote in his autobiography, though in his version the contestants were “rascals” instead of “scoundrels.”⁶²⁷ According to Schurz, Stevens made the comment “not in jest, but with perfect seriousness,” as Stevens “would have seated Beelzebub in preference to the angel Gabriel, had he believed Beelzebub to be more certain than Gabriel to aid him in beating [President Johnson’s] reconstruction policy.”⁶²⁸

c. Other Experiences and Perceptions

The partisanship that Dawes experienced in the 1860s and described in his 1869 paper was also experienced by subsequent congressional leaders. In 1890, the incumbent Speaker of the House, Republican Thomas B. Reed of Maine, authored an article that appeared in *The North American Review*.⁶²⁹ Reed was more circumspect than Dawes, but similarly saw “but little to restrain partisanship,” complaining that contested election decisions “invariably increase[d] the majority of the party which organizes the House” and that there was “probably . . . not a single instance . . . where the minority was increased.”⁶³⁰ He concluded that the process as it then existed “is

625. *The Unseating of Mr. Voorbees*, *supra* note 620.

626. 2 GEORGE F. HOAR, *AUTOBIOGRAPHY OF SEVENTY YEARS* 268 (1903). According to Hoar, up until the time that he served on the Committee on Elections under the chairmanship of George W. McCrary, election cases were “determined entirely by party feeling,” as “[w]henver there was a plausible reason for making a contest the dominant party in the House almost always awarded the seat to the man of its own side.” *Id.* However, when Hoar was on the committee, it “determined to settle all the questions before it as they would if they were judges in a court of justice.” *Id.* Hoar himself claimed to have acted “with the same freedom from bias or prejudice with which it would have been my duty . . . if I had been sitting on the Bench of the Supreme Court of the United States.” *Id.* at 269.

627. 3 CARL SCHURZ, *THE REMINISCENCES OF CARL SCHURZ 1863–69*, at 216 (1908).

628. *Id.*; see also MCCALL, *supra* note 482, at 107 (recounting a version of this anecdote).

629. Reed, *supra* note 481, at 112.

630. *Id.* at 114–15.

unsatisfactory in results, unjust to members and contestants, and fails to secure the representation which the people have chosen.”⁶³¹

In 1895, Republican Samuel W. McCall from Massachusetts, the chairman of one of the three elections committees then in existence, authored a report in support of a bill that would have had the federal courts determine, subject to reversal by the House, who were the *prima facie* members of the House.⁶³² McCall’s report complained that the House’s system for deciding contested elections “barely maintains the form of a judicial inquiry” and is “thoroughly tainted with the grossest partisanship.”⁶³³ McCall continued:

There can be no question in the mind of anyone who carefully considers the recent history of contests in this House that they are generally decided on partisan grounds. The members of the majority of a committee and also of the House will be found voting, usually, on one side and the members of the minority on the other. That side is right which has the most votes, and the record of the last ten Congresses, which shows that 45 seats have been taken from the minority, and substantially none from the majority, is conclusive evidence that the decision is made by numbers and not according to law and justice.⁶³⁴

McCall submitted a similar report in 1896.⁶³⁵

Congressmen’s epigrams and anecdotes exhibit that it was conventional wisdom that House contested election cases were decided on a partisan basis. When Massachusetts Congressman George D. Robinson was asked what were “party questions,” he reportedly responded, “I know of none except election cases.”⁶³⁶ Similarly, Speaker Reed is said to have quipped that “[t]he House never divides on strictly partisan lines except when it is acting judicially.”⁶³⁷ John H. Rogers, a Democratic Representative from Arkansas, provoked laughter in the House when he said he would only

631. *Id.* at 117.

632. Rammelkamp, *supra* note 251, at 439–40.

633. H.R. REP. NO. 53-1669, at 2 (1895).

634. *Id.* at 3–4.

635. H.R. REP. NO. 54-2234, at 2–3 (1896) (quoting from the 1895 report); *see also* Rammelkamp, *supra* note 251, at 435 (arguing that these reports were not “partisan denunciations made in the heat of a debate” but rather “frank confessions of wrong-doing . . . [by] a Republican committee twice officially confessing to a Republic Congress”).

636. ALEXANDER, *supra* note 473, at 323.

637. ROBERT LUCE, LEGISLATIVE ASSEMBLIES: THEIR FRAMEWORK, MAKE-UP, CHARACTER, CHARACTERISTICS, HABITS, AND MANNERS 203 (1924).

support a resolution to publish an updated digest of contested election cases if it also mandated that anyone in the future who ventured to cite one of the digested cases “as either an authority, argument, or a precedent” would be “put in the penitentiary for the term of his natural life.”⁶³⁸

The House was also perceived by outsiders to be deciding contested elections on a partisan basis. In October 1868, the Secretary of the Navy, Gideon Welles, wrote in his diary that there were “villainous plans to cheat Representatives clearly and fairly elected by the Democrats out of their seats. Dawes and company will be ready to help the fraud, as they have lent themselves to great rascalities in the present Congress. They are destroying public confidence in popular government.”⁶³⁹ An 1873 guide to the “practical workings of affairs at Washington” explained that elected members of the minority party “not unfrequently” found their seats contested by an opponent “in sympathy with the party in power.”⁶⁴⁰ After being “startled by a report from the Committee on Elections that they are not entitled to their seats,” such members were then unseated, “not because Congress wishes to enforce the will of the people sending Representatives to Washington, but because it wishes to secure one more vote for the party in power.”⁶⁴¹ And when a case was “too clear to be decided on mere party grounds,” the same result was accomplished by delaying until the close of the session, “thus really excluding the rightfully chosen Member from his seat.”⁶⁴² Examples of the public perceiving partisanship in specific cases decided during the 1860s are set forth in the previous discussion of the experience of Henry Dawes during those years.

d. Quantitative Analysis by Jeffrey A. Jenkins

Scholars have sought to confirm, through statistical analysis, whether the House acted in as partisan a manner as the other evidence suggests it did. The most recent effort was by Jeffrey A. Jenkins, who in 2004 reviewed all 601 contested elections cases in the House from 1789 to 2002.⁶⁴³ Jenkins found that, in the cases involving a majority party candidate against the candidate of another party, the majority party candidate won only slightly

638. 22 CONG. REC. 2199 (1891).

639. 3 GIDEON WELLES, DIARY OF GIDEON WELLES 460 (1911).

640. EDWARD WINSLOW MARTIN, BEHIND THE SCENES IN WASHINGTON 7, 201–02 (1873).

641. *Id.* at 202.

642. *Id.*

643. Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 STUD. AM. POL. DEV. 112, 120 (2004).

more than half the decisions (50.2%).⁶⁴⁴ But Jenkins argues that this statistic alone⁶⁴⁵ is misleading because that population likely includes not only cases that are “ripe for partisan activity,” but also a large number of “frivolous” cases brought by majority party candidates who believed that they would be awarded a seat “simply by virtue of their majority party affiliation,” which were easily rejected by the Committee on Elections or the House.⁶⁴⁶ At the same time, “only serious cases will be brought by minority party candidates.”⁶⁴⁷ All of this would result in an overall majority win rate that, without further analysis, would understate partisan influence.

Jenkins developed several strategies to effectively “weed out” the “frivolous” cases and focus on those that were more “ripe for partisan activity.” First, Jenkins excluded the cases in which the House Committee on Elections was unanimous, i.e., he included only those cases in which the committee “split.”⁶⁴⁸ In those “split-committee” cases, the majority party candidate won nearly 70% of the decisions.⁶⁴⁹

As a second strategy, Jenkins focused on the subset of cases in which the House’s decision resulted in a contestant unseating a contestee (a “flip”), noting that “it is one thing for a majority to allow a minority member to retain his or her seat, while it is quite another for the majority to unseat one

644. *Id.* at 120. Jenkins excluded from this population the cases in which neither candidate was awarded the seat (because the seat was vacated), qualifications cases (in which there was no contestant in the case), and cases in which the contestee and the contestant were from the same majority party. *See id.* at 120 n.46 (listing the bases for exclusion of cases from the analysis).

645. Although the entire point of Jenkins’s analysis was that this 50.2% majority win percentage, alone, does not reflect the degree of partisanship in these decisions, legal scholars have cited that number, alone, as evidence that House members “forego tempting opportunities to pursue [tribal partisanship]” in contested elections, without noting Jenkins’s further analysis to the contrary. Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1840–41. Professor Levitt notes that there is “no justiciable rule precluding a partisan majority of the House . . . from simply unseating opposition winners” and the “structure of the House is certainly designed to promote majoritarian action.” *Id.* at 1840. He argues, therefore, that “rules and structure alone would suggest that 601 cases should favor the majority party’s claimant,” but, “in fact, only 50.2 percent of the decisions favored the majority party candidate.” *Id.* (citing Jenkins, *supra* note 643, at 120). Professor Muller cites Professor Levitt for the proposition that “[e]vidence suggests that Congress has generally resisted raw tribal partisanship in adjudicating election contests.” Muller, *supra* note 22, at 736. Both Levitt and Muller do, however, acknowledge partisanship in House election contests in the late nineteenth century. *See* Levitt, *The Partisanship Spectrum*, *supra* note 44, at 1840 (suggesting the inherent structure of the House fosters partisanship); Muller, *supra*, at 736 n.104.

646. *See* Jenkins, *supra* note 643, at 120–21 (noting that, “in fact, majority party claimants *do* contest at a significantly higher rate, bringing 72 percent of all cases”).

647. *Id.* at 121.

648. *Id.*

649. *Id.*

of its own in favor of a member of the minority.”⁶⁵⁰ He found that in 85.8% of the cases in which a contestee was unseated, the contestant who convinced the House to “flip” the seat was a member of the majority party.⁶⁵¹

As a third strategy, Jenkins focused on those cases in which the result was determined by a roll call vote, as opposed to voice vote or the House taking no action.⁶⁵² Jenkins found that 87.0% of the elections determined by roll call votes involved “party votes,” in which “at least 50 percent of one major party opposed at least 50 percent of the other major party.”⁶⁵³ Moreover, 17.1% of the roll call votes involved “perfectly-aligned party votes,” in which “all voting members of one party oppose all voting members of the other party.”⁶⁵⁴ Jenkins reported that results in the period 1861–1899 were “even more extreme” and supported the conclusion that it was a “particularly partisan era”: 94.6% of the roll call votes in that period involved “party votes,” and 20.7% involved “perfectly-aligned party vote[s].”⁶⁵⁵

Finally, Jenkins applied three models to assess individual vote choices in the roll call votes: a partisan model (member votes with majority of his party); an ideological model (member votes according to two “ideological ‘scores’”); and a naive model (member votes with the “winning” side).⁶⁵⁶ He found that the party model and the ideological model were about equally good at predicting voting (with the party model and the ideological model correctly classifying 92.7% and 93.4% of individual roll call votes, respectively) and significantly better than the naive model (which correctly classified 65.3% of votes).⁶⁵⁷

650. *Id.* Overall, Jenkins determined that for the entire period he studied, the contestee retained his seat in 67.7% of the cases, the contestant won in 21.3% of the cases, and the seat was vacated in 11% of the cases. *See id.* at 120 (displaying table of outcome statistics in contested election cases). Challengers were more successful during the late nineteenth century 1861–1899 (winning 28.7% of the time) than they were in the Antebellum period (winning 22.4% of the time); they were least successful in the twentieth century (winning only 10.8% of the time). *See id.* (reporting outcomes in contested election cases broken down by time period).

651. *Id.* at 121.

652. *Id.* at 121–23.

653. *Id.* at 123.

654. *Id.*

655. *Id.*

656. *Id.* at 123–25.

657. *Id.* at 124.

2. The Inapplicability of Stare Decisis to House Contested Election Decisions

In sum, the House's approach to deciding contested elections in the late nineteenth century was characterized by partisan decision-making and a deficit of legal process. Because of this, it would make little intuitive sense for a court to follow the House's decisions as if they were judicial precedent. Justice Ginsburg had this intuition in *Arizona State Legislature*, where she wrote that, given the evidently partisan result in *Baldwin*,⁶⁵⁸ and the House's apparent disregard of its own precedent in reaching that result, it was "not a disposition that should attract this Court's reliance."⁶⁵⁹ Her conclusion in this regard was perhaps "deeply undertheorized,"⁶⁶⁰ but the distance between her intuition and theory is not great. The intuition arises from a disconnect between the House's un-judicious decision-making process in these cases and the goals underlying the doctrine of stare decisis. The doctrine's purposes—the reasons why court are supposed to follow precedent—would not be furthered by treating the House's historical decisions as precedent.

Most fundamentally, following precedent is thought to "contribute[] to the actual and perceived integrity of the judicial process."⁶⁶¹ However, the House's decision-making in these cases—both actual and as perceived—was overtly partisan. It is hard to see how following precedent set through such a system would give society "faith in the even-handed administration

658. Justice Ginsburg perceived that the Elections Committee had voted in a partisan manner, even though she mistakenly believed that one of the two Democrats on the Elections Committee (William Radford of New York) voted in favor of Trowbridge. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 818 (2015) (stating that "all but one" of the committee who voted for Trowbridge was a Republican). Radford's name did not appear on the minority report along with the other Democrat on the committee (S.S. Marshall of Illinois), see H.R. REP. NO. 39-14, at 5 (1866) (indicating Marshall's signature but not Radford's), but as the *Congressional Globe* makes clear, Radford intended for his name to be on the minority report, see CONG. GLOBE, 39th Cong., 1st Sess. 819 (1866), and he voted against Trowbridge along with every other Democrat who voted, see *id.* at 845.

659. *Ariz. State Legis.*, 576 U.S. at 819. In dissent, Chief Justice Roberts responded that *Baldwin v. Trowbridge* could not be "dismissed as an act of partisanship" without similarly dismissing "every decision in favor of a candidate from the same party as a majority of the Elections Committee." *Id.* at 839 n.3 (Roberts, C.J., dissenting).

660. Muller, *supra* note 22, at 736.

661. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986)); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (explaining stare decisis as the foundation for why the public views the judiciary "as a source of impersonal and reasoned judgments"); *see also* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–70 (1988) (emphasizing the principles of certainty, reliance, equality, and efficiency as justifications for following precedent).

of justice” or support an impression that courts are providing that “serene and impartial uniformity which is the essence of the idea of law.”⁶⁶²

Moreover, *stare decisis* is also supposed to promote the “predictable, and consistent development of legal principles, foster[] reliance on judicial decisions,”⁶⁶³ and “expedite[] the work of the courts by preventing the constant reconsideration of settled questions.”⁶⁶⁴ The belief that following precedent will further these goals, is based on certain presumptions, often unstated, about both the court that generated the precedent—to which decision-making is effectively being outsourced⁶⁶⁵—and the precedent itself. Those presumptions are invalid with respect to the House’s late nineteenth-century approach to contested election cases.

First, *stare decisis* presumes that the precedent-generating court had, in common with the precedent-receiving court, certain features conducive to good decision-making, such that the precedent can serve as a “secure foundation”⁶⁶⁶ on which to build.⁶⁶⁷ However, the House system for

662. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 34–36 (1921) (“Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts . . . the method of philosophy must remain the organon of the courts if chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is the essence of the idea of law.”).

663. *Payne*, 501 U.S. at 827.

664. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652 (1999) (summarizing the policies supporting adherence to precedent as “economy, stability, and legitimacy”); *see also* CARDOZO, *supra* note 662, at 149 (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”).

665. Maltz, *supra* note 661, at 371–72 (noting view that “*stare decisis* simply transfers plenary decision making authority from . . . the contemporary judge [to] the predecessor judge who generated the relevant precedent”); *see also* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) (“Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others.”).

666. CARDOZO, *supra* note 662, at 149; *see also* Easterbrook, *supra* note 665, at 422–23 (presuming that precedent will have been produced by “generations of judges wrestling with hard questions” allowing “each judge to build on the wisdom of others”); J.C. WELLS, *A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS* § 594, at 541 (1879) (presuming that the precedent-generating court will supply “certain fixed land marks approaching correctness though not infallibly perfect”).

667. Normally, both the precedent-generating institution and the precedent-receiving institution are courts in the same legal system, and it is reasonable to assume that the earlier court had the same decision-making features as the later court. However, even in that context, there have been instances in which judges or commentators have challenged the presumption by arguing, for example, that “extraordinary pressures on the courts that rendered particular rulings should undermine those rulings’ claims to adherence.” Fallon, *supra* note 447, at 1791 (identifying instances of such arguments).

deciding contested election cases did not have these features.⁶⁶⁸ The decision-makers in the House did not hold judicial offices which impelled them to impartiality.⁶⁶⁹ To the contrary, House members held the most political of all federal positions, and operated within party structures, with none of the “institutional guarant[ees] against repercussions or retaliations” enjoyed by judges.⁶⁷⁰ Nor were the House decision-makers part of a judicial culture—involving “[t]he training of the judge . . . coupled with what is styled the judicial temperament”⁶⁷¹—that, at its best, inspires in judges in a “deep-felt need, duty, and responsibility for bringing out [just] result[s]”⁶⁷² that are “founded in the law rather than in the proclivities of

Of course, in some circumstances, a precedent-receiving court can overrule a bad precedent, though it is difficult to define when such circumstances are present. *See* Easterbrook, *supra* note 665, at 424 (“Doctrines with sufficiently bad pedigrees or sufficiently bad effects must go, but this is argument by weasel word—how bad is bad enough?”). To say that some precedent will be overturned is different than saying that the precedent-generating court’s decision should never have qualified as precedent in the first place because of some deficiency in that court’s decision-making process.

668. The House process was similar to a court process to the extent it involved lawyering. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 19 (1960) (acknowledging that in the court process, the “personnel are all trained and in the main rather experienced lawyers”); *id.* at 29 (“Issues [are] limited, sharpened, and phrased in advance.”); *id.* at 29–30 (pointing out that courts rely on “adversary argument by counsel”).

669. *See id.* at 46 (remarking how holding judicial office instills impartiality and the “doggedness with which it presses upon the officeholder a demand to be selfless”); *see also id.* at 46 (explaining that judicial office requires “not a passive but a positive and active attitude: the judge must be *seeking*, as best he can, to see the matter fairly, and with an eye not to the litigants merely, but to All-of-Us as well”). In *Powell v. McCormack*, the Supreme Court recognized that the absence of this feature was one reason why historical decisions by the House were of “quite limited” value in determining original intent. *See Powell v. McCormack*, 395 U.S. 486, 546 n.85 (1969) (“Unlike a court, which is presumed to be disinterested, in an exclusion case the concerned house [of Congress] is in effect a party to the controversy that it must adjudicate. Consequently, some members may be inclined to vote for exclusion though they strongly doubt its constitutionality.”) (quoting *The Power of a House of Congress*, *supra* note 480, at 679).

670. LLEWELLYN, *supra* note 668, at 32 (noting the feature of “judicial security” against “repercussions or retaliations because some person or persons may dislike the decision or find it wrong” and how this helps “eliminat[e] the incidence of fear or hope or secret favor”).

671. CARDOZO, *supra* note 662, at 176 (“The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions.”).

672. LLEWELLYN, *supra* note 668, at 23; *see id.* at 24 (“The deciding is done under an ideology which in older days amounted to a faith that there is and can be only one single right answer. This underlies such ideas as ‘finding the law’ and ‘the true’ rule, and ‘the’ just decision. I refer not merely to a manner of writing the opinion but to a frame of thought and to an emotional attitude in the labor of bringing forth a decision. Even judges who know with their minds that varying answers would be legally permissible will be found with a strong urge to feel that one alone among them must be *the* right one.”).

individuals.”⁶⁷³ Moreover, there is little reason to think that House members approached their decision-making—as courts generally do—with the understanding that “the context for seeing and discussing the question to be decided [was] to be set by and in a body of legal doctrine,”⁶⁷⁴ i.e., precedent,⁶⁷⁵ to be worked with “only by way of a limited number of recognized correct [doctrinal] techniques.”⁶⁷⁶ And House members—who did not have to explain the basis or reasoning for their decisions—did not act with the “discipline imposed on decision-making by the knowledge that [their] decision [would] function as precedent.”⁶⁷⁷ Thus, unlike judges, they were not “pushed to a form of neutrality” in which they would have to “articulat[e] standards that [they were] willing to live with in the future.”⁶⁷⁸

Second, *stare decisis* presumes that the decisions of the precedent-generating court, even if in some sense wrong or incorrect, will at least come in the form of an opinion—a written precedent—which memorializes the basis for the decision, including the operative facts and the controlling law.

673. *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986) (“[The doctrine of *stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

674. LLEWELLYN, *supra* note 668, at 20 (elaborating on the understanding among judges “that where there is no real room for doubt, that body [of doctrine] is to control the deciding; that where there is real room for doubt, that body of doctrine is nonetheless to guide the deciding; and that even when there is deep trouble, the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine”).

675. Stated differently, there is a presumption that the precedent-generating courts themselves felt bound to conform their decisions to precedent, and that this was beneficial to their decision-making. Being subject “to the test of congruence with the conclusions of those confronting the same problem” reduces “idiosyncratic conclusions” and “increases both the chance of the court’s being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges.” Easterbrook, *supra* note 665, at 423.

676. LLEWELLYN, *supra* note 668, at 21.

677. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1779 (2006) (“In deciding a particular case, a judge must provide reasons that will have precedential effect on later cases (both in the same court and in lower courts). Thus, the judge is pushed to a form of neutrality—not the neutrality of being value-free, but the neutrality of articulating standards that one is willing to live with in the future.”); see also *The Power of a House of Congress*, *supra* note 480, at 679 (explaining that “it may be unrealistic to suppose that many Congressmen seriously concern themselves with abstract and unresolved constitutional issues in the first place” and that “the likelihood of effective judicial review [of Congressional decisions] has undoubtedly been regarded a remote possibility”).

678. Farber, *supra* note 677, at 1180. Llewellyn also emphasized the salutary effect of the “felt pressure or even compulsion” to issue a published opinion “which tells any interested person what the cause is and why the decision—under the authorities—is right, and perhaps why it is wise.” LLEWELLYN, *supra* note 668, at 26. He argued that this instilled in the court issuing the opinion a “due measure of caution by way of contemplation of effects ahead.” *Id.*

The House, however, did not provide as much; it simply voted up or down, if it voted at all. The committee reports were more like legal briefs than judicial decisions. Obviously, the efficiency goal of stare decisis is not served if the precedent-receiving court has no reasonably discernible precedent to follow.⁶⁷⁹ Similarly, the goal of protecting reliance interests is not served if the original decision did not give society any reasonably discernible precedent to follow.⁶⁸⁰

V. CONCLUSION

The Constitution provides that a state's "legislature" is to "direct the manner" in which the state appoints its presidential electors and "prescribe the time, place, and manner" in which the state is to hold congressional elections. Does this language mean that the "legislature" is to make election law subject to (1) the state constitutional restraints and inter-branch checks and balances that normally apply to legislatures, or (2) the constitutionally-mandated lawmaking procedures that normally apply to legislatures, but not any substantive constitutional limitations or too much inter-branch interference? I believe that the former interpretation is the natural reading

679. See *Powell v. McCormack*, 395 U.S. 486, 546 n.85 (1969) ("Determining the basis for a congressional action is itself difficult; since a congressional action unlike a reported judicial decision, contains no statement of the reasons for the disposition, one must fall back on the debates and the committee reports. If more than one issue is raised in the debates, one can never be sure on what basis the action was predicated.") (quoting *The Power of a House of Congress*, *supra* note 480, at 679).

680. If the House were a foreign court, it is unlikely that its judgments in these matters would be respected by a court in the United States. Under the common law and state statutes, a domestic court may not recognize a foreign court's judgment if the judgment was rendered "under a judicial system that does not provide impartial tribunals and procedures compatible with due process of law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987); see also Ronald A. Brand, *Federal Judicial Center International Litigation Guide, Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 510 (2013) (explaining that this mandatory ground for non-recognition is also contained in the 1962 and 2005 versions of the Uniform Foreign Money-Judgments Recognition Act). Examples of evidence that could support a non-recognition conclusion as to a judicial system include evidence that "judgments are rendered on the basis of political decisions rather than the rule of law," Uniform Foreign-Country Money Judgments Recognition Act § 4 cmt. 12 (2005), or "[e]vidence that the judiciary was dominated by the political branches of government or by an opposing litigant," RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

of the text, and it is supported by precedent.⁶⁸¹ However, others apparently disagree and would overrule the precedent.⁶⁸²

By looking to history, originalism promises a neutral way to choose between competing interpretations of the Constitution. Part II of this Article revisited the Founding generation's original understanding of the Elector Appointment and Elections Clauses. The history demonstrates beyond cavil that the Founding generation understood that "legislatures" would operate as normal legislatures, not independent legislatures, with respect to both procedure and substance. Part III of this Article revisited the nineteenth-century history of the Doctrine and debunked the notion that the Doctrine ever became the "prevailing view" after the Founding—in truth, the Doctrine never amounted to much of anything. And, finally, Part IV of this Article demonstrated that the invocations of the Doctrine that occurred episodically in the nineteenth century are irrelevant under any form of recognized constitutional interpretation.⁶⁸³

681. By focusing in this Article on the Doctrine's lack of historical support, I do not mean to suggest that the Doctrine has any good basis in text, precedent, or other considerations. Others have addressed those topics better than I ever could, including in the recent *tour de force* by Dean Vikram Amar and Professor Akhil Amar. Amar & Amar *supra* note 63. For a recent analysis of how the Doctrine presumes without basis that state "legislatures" intend to evade state constitutions, as well as the potentially unforeseen consequences of the Doctrine, see Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322 [<https://perma.cc/7MZ6-HRJP>]. For a pithy explanation of why the non-originalist rationales offered in support of the Doctrine are nonsense, see Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041062 [<https://perma.cc/W3E7-HF6H>]. For confirmation that the Doctrine would be a twenty-first century departure from not only the Founding but almost all prior historical practice, see Weingartner, *supra* note 268.

682. One can reject the Doctrine without endorsing the result in *Arizona State Legislature*, in which the Supreme Court upheld the Arizona constitution's assignment of the re-districting function to an independent commission that operates without any involvement of the "legislature." It is one thing to confidently say that a "legislature" must operate within the constraints set by its constitution (as I do here), but it is quite another to say that the constitution need not involve the "legislature" at all (as the Court did in *Arizona State Legislature*). See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 848 (2015) (Roberts, C.J., dissenting) (arguing the line is crossed when there is "an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process").

683. Mostly, the Doctrine as presently conceived by certain Justices would simply serve as a vehicle for the Supreme Court to overrule disfavored state court interpretations of state law. See *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from denial of stay) ("[I]here must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections.") However, at other times, interest in the Doctrine may be giving expression to a legitimate concern about mid-election state manipulation of federal election law. However, the Doctrine is a spectacularly overbroad tool to address that concern.

Sometime soon, the burden of deciding this question will fall on the Justices of the Supreme Court. In Robert Penn Warren's *All the King's Men*, the protagonist, Jack Burden, a student of American history, imagines for a time that his conduct is dictated by "the Great Twitch," the "pulse in the blood and the twitch of the nerve, like a dead frog's leg in the experiment when the electric current goes through."⁶⁸⁴ The Great Twitch meant that "nobody had any responsibility for anything," and it relieved Burden, "because it meant that he could not be called guilty of anything."⁶⁸⁵ This Article demonstrates that there is no Great Twitch—sparked by the electric current of originalism or some other argument from history—which commands the independent state legislature doctrine. No history, from the Founding or subsequently, relieves us of the burden of making sense of our Constitution in light of our nation's complicated past and ongoing aspirations, including our desire to continue democratic self-government. We all live, like Burden, with "the agony of will."⁶⁸⁶ And so the Justices of

It sweeps within its purview any alleged departure from the handiwork of the "legislature," irrespective of whether it occurs long before, shortly before, or during the election, and irrespective of its effect on voters and candidates who actually have an interest in the election. Instead of enforcing "respect" for "legislatures," we should be focusing on how mid-election changes in law may affect the constitutional rights of people by creating fundamental unfairness and/or detrimental reliance in elections. See generally Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U.L. REV. 691 (2001) (analyzing how courts have dealt with such issues). Some have suggested that the Elector Appointment and Elections Clauses can be read as a federal policy against mid-election "new law," apparently even when no person's constitutional rights have been violated. See Michael L. Wells and Jeffrey Netter, *Article II and the Florida Election Case: A Public Choice Perspective*, 61 Md. L. Rev. 711, 722 (2002) (arguing that the Elector Appointment Clause is "the appropriate vehicle for applying the "rules-of-the-game norm"). If so, it should be done without grafting onto those clauses the Doctrine and its inapposite fetishization of "legislatures," disparagement of state courts, and disregard of state constitutions. See Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1932–34 (2003) (explaining that, if the Elector Appointment Clause is interpreted to allow the Supreme Court to determine whether there has been a "material" change in state law governing presidential elections, the "Independent Legislature' grounded separation of the state election-law context from its state-court judicial interpretation does little or no work"); Amar & Amar *supra* note 63, at 56–57 (explaining that any federal interest in avoiding state manipulation of federal election law would "constrain not just state courts but also elected state legislatures and other state governmental entities"). And great care would need to be taken in defining what would constitute a "material" change in law, lest, as in 2020, every alleged "irregularity" in a state's election administration give rise to a claim that the Constitution has been violated. See *id.* at 60 (suggesting what might constitute a sufficiently egregious change-in-law to justify federal court intervention).

684. ROBERT PENN WARREN, *ALL THE KING'S MEN* 466 (1946).

685. *Id.* at 656–57.

686. *Id.* at 657.

the Supreme Court must sometime soon, as they always have and always will, “go into the convulsion of the world, out of history into history and the awful responsibility of Time.”⁶⁸⁷

687. *Id.* at 661.