

PEOPLE ≠ LEGISLATURE

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In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹ the Supreme Court considered whether a commission, established by popular initiative, could draw congressional districts. Like other states, Arizona had stripped such power away from its legislature in order to overcome the partisan infighting and self-dealing that arises when politicians draw their own electoral districts.² Arizona's scheme, however, seemed to run counter to the plain text of Article I, Section 4 of the U.S. Constitution, which vests the regulation of congressional elections in "each State by the Legislature thereof."³

On behalf of a 5-4 majority, Justice Ruth Bader Ginsburg held that the Constitution's Elections Clause did not refer solely to an institution, distinct from the people, with the power to make laws—what common sense typically might consider a "Legislature."⁴ Instead, the Court concluded that the Framers used "Legislature" to refer to *any* entity authorized to make laws.⁵ According to the Court, the Framers would have understood "Legislature" to mean the "power that makes laws"—following the first edition of Samuel Johnson's *Dictionary of the English Language*, published in 1755.⁶ Because the people are the ultimate source of all power, they can establish a separate lawmaking body with plenary legislative authority, employ voter initiatives as a method of popular lawmaking, and delegate specialized legislative authority to a redistricting commis-

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1. 135 S. Ct. 2652 (2015).

2. See, e.g., Bruce Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1831 (2012); Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997 (2005).

3. U.S. CONST. art. 1, § 4.

4. See *Ariz. State Legislature*, 135 S. Ct. at 2671.

5. *Id.*

6. *Id.* (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755)).

sion. As the Court put it, “the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do so.”⁷ The Court believed that permitting the people to redistrict kept true to its Election Clause precedents.⁸ In sum, the Court essentially held that the people of Arizona, when acting via initiative, are a “Legislature” under the Elections Clause.

Though *Arizona State Legislature* relied upon text, structure, history, and precedent in reaching this conclusion, we believe these methods yield a different result. We agree that a “Legislature” is “[t]he power that makes laws,”⁹ with “power” a synonym for an “entity.” Thus, a “Legislature” is an entity that makes law. But not every entity that makes laws is a legislature. When a dictator makes laws unilaterally, he or she is not a legislature. Similarly, when the people make laws, be they statutes or constitutions, they are not a legislature. So although all legislatures are lawmakers, not all lawmakers are legislatures.

In a way, the Court read the word “Legislature” out of the Elections Clause. If that Clause had provided that the methods for holding federal elections “shall be prescribed by each State,” rather than “shall be prescribed in each State by the Legislature thereof,” the majority’s reading would have been plausible. Given the Election Clause’s actual wording, however, the Court should have read Article I, Section 4 to give effect not only to “State” but to “Legislature” as well. After all, a commonly accepted rule of interpretation strongly suggests that every word in the Constitution be given meaning.¹⁰

The reference to a particular state institution—“the Legislature”—seems quite meaningful when we consider other uses of “State” that omit reference to a particular institution. For instance, a clause in Article I, Section 8 reserves to the “state[s]”

7. *Id.*

8. *See id.* at 2666–68, 2673.

9. *Id.* at 2671 (quoting 2 THOMAS SHERIDAN, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755)).

10. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (“If possible, every word and every provision . . . is to be given effect. . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

the power to appoint officers of state militias and to train the militia.¹¹ This leaves it to the states to determine which of their institutions ought to appoint officers and train militia members. In other instances, the Constitution bars certain acts by a state, which prohibits every entity of a state from taking the measure. By use of the words “No state shall,” Article I, Section 10 and the Fourteenth Amendment¹² impose limits applicable to all entities that are properly seen as the state, including legislative, executive, and judicial institutions. As a matter of doctrine, the “No state shall” bars apply to the decisions and actions of a people of a state when they make the laws.¹³

Defenders of the result in *Arizona State Legislature* may suppose our reading of the Elections Clause rests on an unduly narrow view of the constitutional text to the exclusion of other legitimate sources of meaning. But reading “Legislature” to refer only to state assemblies, and not to the peoples of the states, more cleanly fits within the structure of Article I, Section 4. It also makes better sense of the use of the word “Legislature” in other parts of the Constitution. While there may be reasons not to apply “intratextualism” across the original Constitution and its amendments, those objections have far less force when interpreting multiple uses of the same word within the original Constitution itself.¹⁴

Finally, reading the Elections Clause as empowering only state assemblies comports best with the surrounding history of the Framing and Ratification of the Constitution. Interpreters, of course, may reject a resort to such history because it seems uncertain, unduly freezes constitutional meaning in place, or privileges a small elite in 1787 over today’s electorate. We think, however, that original meaning has special relevance here. First, both the majority and dissent in *Arizona State Legislature* turn to history to confirm their readings of constitutional

11. U.S. CONST. art. I, § 8, cl. 16.

12. See U.S. CONST. amend. XIV, § 1.

13. See, e.g., *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636–37 (2014).

14. For the debate over intratextualism in constitutional interpretation, compare Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999), with Adrian Vermeule & Ernest Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000).

text and precedent.¹⁵ No Justice denied the relevance of the materials from the Constitutional Convention, the public debates in the Federalist and Anti-Federalist papers, or the state ratifying conventions. Second, in separation of powers and federalism cases such history has heightened importance for the Court, possibly because case law is thin or because the constitutional provisions at stake do not seem to demand changing meanings to accommodate changing times. Third, the Court has not raised questions about the dead hand of the past in such cases perhaps because provisions such as the Elections Clause create the structure by which democracy operates. If the Constitution's electoral rules evolve independent of the original understanding, there will be no fixed, external source that sets the rules of the political game, thereby undermining one of a constitution's core purposes.¹⁶

This Article proceeds in three parts. Part I discusses the facts and background of *Arizona State Legislature*. Part II analyzes the text and structure of the Elections Clause in the context of the Constitution as a whole. Part III addresses the history of the drafting and ratification of the Constitution and raises several questions that arise because of the Court's mistaken reading of the Clause.

I. ARIZONA STATE LEGISLATURE

Arizona State Legislature addressed Arizona's efforts to remedy the problems of partisan gerrymandering. Article I, Section 2 of the Constitution apportions representation in the House using state population, with the Fourteenth Amendment purging Section 2's odious "3/5ths" Clause. Article I, Section 4 lodges power over federal elections with the state legislatures, subject to override by Congress:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by

15. See *Ariz. State Legislature*, 135 S. Ct. at 2671–72 (citing eighteenth-century dictionaries, records of the Constitutional Convention, and records of the Massachusetts state ratifying convention); *id.* at 2684–85 (Roberts, C.J., dissenting) (citing records of the Constitutional Convention, Federalist Papers, and state ratification debates).

16. Cf. Larry Alexander & Fredrick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

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.¹⁷

The Elections Clause permits (but does not require) states to create House districts as a means of electing their Representatives. By statute, Congress has required states to draw such districts.¹⁸ Typically, though not invariably, states redraw their districts in the wake of the federal census every 10 years.

Redistricting creates the prospect of partisan gerrymandering. If one political party dominates a state's lawmaking process, it can draw new districts to favor itself beyond its proportion of the statewide electorate. In particular, a state legislature can draw many districts where the majority party's advantage is firm, but slight, while concentrating the minority party's voters into fewer districts where they will prevail by large margins. In modern times, line drawers can use past voter data and computer programs to draw congressional (and state) districts that give the majority considerable electoral advantages.¹⁹ Judge Robert Bork once served as a special master in the drawing of Connecticut congressional districts. He remarked that he could have drawn districts to yield almost any desired partisan outcome. The chair of the Connecticut Democratic party later congratulated Bork because the map favored the former's party.²⁰

Politicians have drawn electoral districts for partisan advantage from the very beginnings of the Republic. The word "gerrymandering" itself comes from an attack on Elbridge Gerry, one of the delegates to the Constitutional Convention and later Vice President under James Madison, for state senate districts drawn in Massachusetts while he served as governor.²¹ One of the districts, critics said, resembled a salamander because of its long, sinuous shape: hence gerrymandering. But Gerry did

17. U.S. CONST. art. I, § 4, cl. 1.

18. See 2 U.S.C. § 2c (2012).

19. See, e.g., THE POLITICAL BATTLE OVER CONGRESSIONAL REDISTRICTING (William J. Miller & Jeremy D. Walling eds., 2013). For an analysis of the normative and constitutional differences between state legislative and federal congressional political gerrymanders, see Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (2004).

20. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 88–89 (1990).

21. See GEORGE A. BILLIAN, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 317–24 (1976).

not invent the practice—colonial politicians can claim that honor.²² During the Constitutional Convention, Madison argued that legislatures could manipulate districts for partisan purposes. State legislatures would “mould their [election] regulations as to favor the candidates they wished to succeed.”²³ After the Constitution’s ratification, Patrick Henry proved Madison’s point by gerrymandering a district in a failed attempt to prevent Madison’s election to the first Congress.²⁴

The practice is alive and well today. In *Vieth v. Jubelirer*,²⁵ for example, the Supreme Court confronted a redistricting plan drawn by the General Assembly of Pennsylvania after the 2000 census.²⁶ Although Republicans constituted roughly fifty percent of the statewide electorate, they leveraged their majority in the state legislature to generate a plan to produce thirteen to fourteen Republican Representatives out of nineteen seats in Pennsylvania’s House delegation.²⁷

For many years, partisan gerrymandering served as a prime example of the type of state action immune from judicial review. Under the political question doctrine, in the words of *Nixon v. United States*,²⁸ courts avoid questions that show either a “textually demonstrable constitutional commitment of the issue to a coordinate political department” or “a lack of judicially discoverable and manageable standards for resolving it.”²⁹ Judges and scholars have often concluded that no objective rules could distinguish between constitutional and unconstitutional district lines.³⁰ But in *Baker v. Carr*,³¹ notable for its summary of the polit-

22. See ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 26–30 (1907).

23. 2 RECORDS OF THE FEDERAL CONVENTION 1787, 241 (Max Farrand ed., 1911) (statement of James Madison).

24. See Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia’s 1788 Congressional Districting*, 9 EARLY AM. STUDIES 781, 782–83 (2011).

25. 541 U.S. 267 (2004)

26. *Id.* at 272–73.

27. See *id.* at 368 (Stevens, J., dissenting).

28. 506 U.S. 224 (1993).

29. *Id.* at 228 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

30. See, e.g., Peter Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987). One of us has argued that gerrymanders, of whatever sort, pose no constitutional problem. See Larry Alex-

ical question doctrine, the Court found justiciable an Equal Protection challenge to Tennessee districts.³²

Twenty years later, in *Davis v. Bandemer*,³³ a plurality of the Supreme Court held that partisan gerrymandering might no longer fall within the political question doctrine, though it could not define a workable test.³⁴ In *Vieth*, a plurality of the Court tried to reverse *Bandemer*, but Justice Kennedy concurred separately, refusing to hold that partisan gerrymanders were non-justiciable.³⁵ Nevertheless, for want of a satisfactory test for finding partisan gerrymanders unconstitutional, federal judicial remedies seem unobtainable.³⁶

Given the unavailability of federal judicial remedies, opponents have turned to state political processes. Some states, Arizona among them, have transferred the power to draw congressional districts from their legislatures to commissions or other supposedly nonpartisan entities. In 2000, Arizona's voters used the initiative process set out in the state constitution to create a new method for districting. Proposition 106 gave the Arizona Independent Redistricting Commission (AIRC) sole authority under state law to create new district boundaries after the decennial census.³⁷ Every ten years, the majority and minority leaders of the state legislature choose four members of the AIRC from a slate provided by the state judicial nominating commission; the four then pick a fifth member to serve as chair. Like federal independent agencies, Proposition 106 requires partisan balance on the AIRC and provides protections for its members from removal by the governor and the legislature. Other states have given their commissions less authority by

ander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1 (2008).

31. 369 U.S. 186 (1962).

32. *Id.* at 237.

33. 478 U.S. 109 (1986).

34. *Id.* at 125–27.

35. *Vieth*, 541 U.S. at 308–10 (Kennedy, J., concurring in judgment).

36. In contrast, the Court clearly believes that racial gerrymanders are justiciable. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993).

37. ARIZ. CONST. art. IV, pt. II, § 1.

opening their plans to popular referendum for approval³⁸ or giving them only an advisory role to the state legislature.³⁹

While the *Arizona State Legislature* Court recognized that these mechanisms might reduce the harms of partisan gerrymandering, it did not base its decision on any purported gains in social welfare. Instead, the majority opinion upheld the transfer of redistricting power away from the state legislature on grounds of popular and state sovereignty. According to Justice Ginsburg's opinion, our federal system requires that states "retain autonomy to establish their own governmental processes," and grants discretion to states to experiment with different solutions to difficult problems.⁴⁰ It should be noted that four of the five Justices in the majority had shown little enthusiasm for federalism in previous election law cases, such as *Shelby County v. Holder*.⁴¹ But as part of this newfound appreciation for federalism, the Court looked with approval upon the right of the people of a state to utilize direct democracy. Quoting James Madison, John Locke, the Declaration of Independence, and Alexander Hamilton, Justice Ginsburg argued that the Constitution establishes the principle that the people are "the font of governmental power."⁴² "[T]he animating principle of our Constitution," the Court observed, is that "the people themselves are the originating source of all powers of government."⁴³

According to the Court, because popular sovereignty requires deference to state choices regarding governmental structure, the Constitution's text should not be read to obstruct such democratic processes. The Elections Clause should not freeze into place "federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."⁴⁴ But the majority still faced the task of construing the phrase "each State by the Legislature thereof" to include the initiative, which its creators designed to evade legislatures allegedly captured by special interests. To overcome this obstacle, the majority read the

38. See, e.g., CAL. CONST. art. XXI, § 2(e).

39. See, e.g., N.Y. LEGIS. LAW § 83-m (2011).

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

41. 133 S. Ct. 2612 (2013) (invalidating portions of Section 5 of the Voting Rights Act of 1965).

42. *Ariz. State Legislature*, 135 S. Ct. at 2674–75.

43. *Id.* at 2671.

44. *Id.* at 2673.

constitutional language at a high level of abstraction. Besides relying upon Samuel Johnson's *Dictionary of the English Language*, which defined a legislature as, among other things, "[t]he power that makes laws,"⁴⁵ the Court also cited two dictionaries that appeared *after* the Constitution's ratification and a fourth whose influence upon the Framers is unknown.⁴⁶

Dr. Johnson's definition bears closer examination because his dictionary is commonly thought to be the most influential of its time and constitutes a key piece of evidence for the majority. Often considered one of the most important dictionaries in history, Johnson illustrated his definitions with quotations from English authors and even the popular press of his day. Johnson's entry supplied a quote from Matthew Hale's 1713 *History of the Common Law*, which states: "without the concurrent consent of all three parts of the *legislature*, no law is or can be made."⁴⁷ Taken from Joseph Addison's 1744 *Freeholder* essays, the second illustration stated, "in the notion of a *legislature* is implied the power to change, repeal, and suspend laws in being, as well as to make new laws."⁴⁸ Johnson's third illustration came from Jonathan Swift's 1708 *Sentiments of a Church of England Man*: "By the supreme magistrate is properly understood the legislative power; but the word magistrate seeming to denote a single person, and to express the executive power, it came to pass that the obedience due to the *legislature* was, for want of considering this early distinction, misapplied to the administration."⁴⁹ Of these illustrations, none explicitly equated "legislature" with the people or even the highest lawmaking source. Hale and Swift used the term in reference to a specific institution distinct from the people. While Addison's essay could be read as using "legislature" to refer to a power rather than an entity, he did not signal that any entity that wields lawmaking power is a "legislature."

45. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1188 (1st ed. 1755).

46. *Ariz. State Legislature*, 135 S. Ct. at 2671 (citing THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 1797); NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed., 1763)).

47. JOHNSON, *supra* note 45.

48. *Id.*

49. *Id.*

Another foundation of the Court's opinion was a desire to respect precedent. As the Court observed, the Framers could not have anticipated direct democracy because the initiative and referendum "were not yet in our democracy's arsenal."⁵⁰ These two mechanisms first appeared in the South Dakota Constitution of 1898 and the Oregon Constitution of 1902, and presently exist in at least twenty-one state constitutions. The Court has steadfastly refused to invalidate direct democracy. When corporations first challenged the initiative as a violation of Article IV, Section 4's Guarantee Clause,⁵¹ the Court found the issue to be a non-justiciable political question.⁵²

In subsequent cases, the Court has upheld the use of direct-democracy mechanisms on the merits. In *Davis v. Hildebrant*,⁵³ for example, the Court sustained the Ohio Constitution's use of popular referendum to approve or reject acts of the state legislature. According to *Davis*, the referendum "was a part of the legislative power of the State" and the Elections Clause did not stand in its way.⁵⁴ Just four years later, in *Hawke v. Smith*,⁵⁵ however, the Court held that Ohio could not use its referendum to ratify amendments to the U.S. Constitution.⁵⁶ According to the Court, even though Congress has "recognized the referendum as part of the legislative authority of the State," ratification of a constitutional amendment "is not an act of legislation within the proper sense of the word," and hence still must be performed by the state legislature as required by Article V.⁵⁷

In *Smiley v. Holm*,⁵⁸ the Court approved a state's choice to use the normal legislative process, rather than legislative action alone, for redistricting. Minnesota's regular method for enacting statutes included a gubernatorial veto. The Constitution's delegation of this power to the legislatures of the states did not

50. *Ariz. State Legislature*, 135 S. Ct. at 2672.

51. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

52. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

53. 241 U.S. 565 (1916).

54. *Id.* at 567.

55. 253 U.S. 221 (1920).

56. *Id.* at 230-31.

57. *Id.* at 229-30.

58. 285 U.S. 355 (1932).

mark the latter as the only institution that could participate. According to the Court, redistricting “involves lawmaking in its essential features and most important aspect,” rather than performing functions that call on the state legislature to act alone, as with ratification of constitutional amendments or the choice of U.S. Senators before adoption of the Seventeenth Amendment.⁵⁹ The *Arizona* Court relied on *Smiley*, arguing that precedent had already recognized that a State could redistrict according to the process by which it made other laws. The Constitution’s grant of authority to “each State by the Legislature thereof” did not mean the state legislature alone, but instead meant the legislative process, whatever its contours.⁶⁰

The Court also relied on the purpose of the Elections Clause. After recognizing state authority to regulate the times, places, and manner of congressional elections, the Clause declares that “Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”⁶¹ According to the majority, “the dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the ways States enact legislation.”⁶² There is little doubt that influential framers such as James Madison and Alexander Hamilton believed Congress needed such power in order to prevent a faction from magnifying its control through gerrymandering electoral districts. “Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed,” James Madison said in the Constitutional Convention.⁶³ “The inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.”⁶⁴ Giving Congress the power to regu-

59. *Id.* at 366.

60. *Ariz. State Legislature*, 135 S. Ct. at 2667.

61. U.S. CONST. art. I, § 4.

62. *Ariz. State Legislature*, 135 S. Ct. at 2672.

63. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 241 (statement of James Madison).

64. *Id.* For a broader discussion of the ratification evidence, see Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST’L L. 1 (2010).

late or override electoral law would enable it to prevent (or counteract) malapportionment and gerrymandering of congressional districts.

Congress made use of this right, but not to halt or curb gerrymandering. During the second half of the nineteenth Century, as the *Arizona State Legislature* Court observed, Congress assumed that the traditional legislature of each state would be drawing districts.⁶⁵ But in 1911, Congress eliminated any reference to “legislature”, thereby accommodating states that might choose to redistrict via initiatives and referenda.⁶⁶

Summing up, Arizona voters had “sought to restore” the core principle that the voters choose legislators and not the other way around.⁶⁷ Given the Constitution’s devotion to popular sovereignty, the Court concluded that the Constitution “is not reasonably read to disarm States from adopting modes of legislation that places the lead rein in the people’s hands.”⁶⁸

II. THE ELECTIONS CLAUSE: TEXT AND STRUCTURE

There are deep textual and structural problems with the Court’s interpretation of the Elections Clause. Moreover, the Court erroneously supposes that its holding privileges direct democracy. In fact, the Court’s rationale gives states carte blanche to strip away authority from the most representative branch—the state legislature—and vest it in any person or entity. This Part highlights these challenges and reveals that the Court’s opinion does not necessarily advance popular law-making. Part II.A. considers the Constitution’s commandeering of state entities. Occasionally, the Constitution conscripts, empowers, and obliges states as a whole. More often, however, it directly calls upon particular state branches for federal service. Part II.B. argues that the Elections Clause is not susceptible to the Court’s reading that “Legislature” means any entity that makes laws. Part II.C. shows that the Court’s definition of “Legislature” creates severe textual difficulties when

65. See *Ariz. State Legislature*, 135 S. Ct. at 2668 (citing Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734).

66. *Id.* at 2669.

67. *Id.* at 2677 (citing Mitch Berman, *Managing Gerrymandering*, 83 TEXAS L. REV. 781, 781 (2005)).

68. *Id.* at 2672.

applied to other uses of the word in the Constitution. Part II.D. maintains that the Court's praise of popular sovereignty is irrelevant because under the Court's rationale, non-democratic, elitist entities may serve as a state's Elections Clause "Legislature." Part II.E. addresses the Court's conclusion about Election Clause delegations and its failure to consider whether the AIRC was the Arizona Legislature.

A. *Constitutional Commandeering of the States*

Writing as *Publius*, James Madison noted that the "State Governments may be regarded as constituent and essential parts of the federal government."⁶⁹ Among other provisions, he had in mind the Elections Clause, which authorizes the state regulation of federal legislative contests. The symbiotic relationship between the federal and state governments varies because the Constitution conscripts the states in myriad ways.

We agree with the Court that the Constitution affords states *some* flexibility in their institutional arrangements. In particular, when the Constitution vests powers and responsibilities with the "State" without designating a specific branch, federal respect for state separation of powers is at its maximum. In these cases, the Constitution is indifferent as to which state entities exercise the authority or satisfy the duty. That question of allocation is wholly left to state law.

We already have mentioned the militia clauses as an example where the Constitution allows states to determine which entities may exercise federal powers. In that case, state entities will appoint militia officers and train the militia. Another example is the Equal Suffrage Clause of Article V, which declares that a "State" may consent to the deprivation of its equality of Senate suffrage.⁷⁰ Because Article V does not specify which state institution must grant consent, we believe it leaves that allocational matter to state law. States, via their constitutions or statutes, may decree that such consent may be given by the Legislature, the Governor, the people via initiative, or by some other state agent or entity.

More often, the Constitution is best read as vesting powers or responsibilities with particular state entities. For instance,

69. THE FEDERALIST No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).

70. U.S. CONST. art. V.

state “legislatures” can call for a constitutional convention,⁷¹ ratify proposed amendments,⁷² consent to their state’s division,⁷³ and declare the manner of selecting presidential electors.⁷⁴ In the past, they also could appoint a state’s senators.⁷⁵ In other provisions, the Constitution imposes federal tasks upon state executive authorities, such as the issuance of writs of election when there is a vacancy in the House.⁷⁶ Finally, the Supremacy Clause binds state judges,⁷⁷ meaning that they must enforce federal law in preference to state law.

Faithful readers ought to respect the Constitution’s expressions and variations. When the Constitution cedes flexibility to the states, the latter have choices. For example, the federal government does not usurp state autonomy regarding which entities will appoint militia officers. Similarly, a state may decide that only the people, acting via popular initiative, may consent to a deprivation of its equal Senate suffrage. Federal entities must respect that allocation, one that rests on the implicit flexibility ceded by Article V’s exact wording. At the same time, we ought to pay heed when the fair meaning of the Constitution suggests grants of powers and duties to specific state entities. We should not read references to state executives as if they were references to any state entity. Similarly, we ought to be loath to read state “legislatures” as interchangeable with “states.”

When it comes to the Elections Clause, the Founders could have vested authority with the “States,” permitting them to decide which entities would enjoy Election Clause power. Yet they did not. Instead, they chose to specify the institution—the “Legislature”—that may regulate the time, place and manner of federal legislative elections.

71. *Id.*

72. *Id.*

73. U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

74. U.S. CONST. art. II, § 2, cl. 2.

75. U.S. CONST. art. I, § 3, cl. 1.

76. U.S. CONST. art. I, § 2, cl. 4.

77. U.S. CONST. art. VI, § 2.

B. “Legislature” in the Elections Clause

Aware that the Elections Clause empowers the “Legislature” not the “State[s]” generally, the *Arizona* Court maintained that any entity that exercises legislative power is the “Legislature” of a state because it has “[t]he power that makes laws.”⁷⁸ We agree that a “Legislature” is an entity “that makes laws.” Yet it does not follow that every entity that makes law is necessarily a Legislature. Though a German shepherd is a dog, not all dogs are German shepherds.

To begin with, the Court’s reading effectively reads “Legislature” out of the Elections Clause. Under its reading *anyone* exercising federal elections authority automatically is a “Legislature.” In other words, the Court interprets the Clause to provide that whomever or whatever exercises federal elections authority on behalf of a state necessarily is a “Legislature” for purposes of the Clause, a reading that renders “Legislature” superfluous.

As used in the Constitution, “Legislature” refers to a multi-member lawmaking body that is distinct from the people. Given this definition, someone can make laws and not be a “Legislature.” While every “Legislature” is a “power that makes law,” not every entity empowered to make law constitutes a “Legislature.” Though a firefighter combats fire, not every man, woman, or child who puts out a kitchen blaze or a campfire is a firefighter. Our definition, one which tracks conventional understandings, both modern and eighteenth-century, ensures that the word “Legislature” serves a function in the Election Clause.

Consider an absolute monarch with power to make laws. An executive sovereign would not be a “Legislature” in its eighteenth-century sense. Though some revolutionary state executives could impose temporary embargoes and hence wielded legislative power, no one would have called them a “legislature.”⁷⁹ What of the people of a state? We do not believe that the people, acting collectively to make laws, were recognized as a “Legislature” in the eighteenth century. Nor do we believe that the people could serve as the “executive” or the “judiciary.”

78. *Ariz. State Legislature*, 135 S. Ct. at 2671.

79. See Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1383 (2013).

In the eighteenth century, these bodies were generally understood as being separate from the people. John Locke described the “executive” as the entity, empowered by the people, to punish miscreants pursuant to the laws.⁸⁰ Locke also said: “the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws.”⁸¹ Locke’s claim assumes that the people ceded legislative powers to a set of officials distinct from themselves. And though the people could, in a manner of speaking, judge disputes, we doubt that the people, acting collectively, were formal adjudicators.⁸²

Admittedly, many regarded the people as the ultimate sovereign from which all government powers derived. In extraordinary moments, powers might revert to the people because of some abuse or abdication of those powers. But when those powers were deposited back into the hands of the people, the latter always vested them in new institutions, ones hopefully better suited to their exercise. So while the people were the source of the executive, legislative, and judicial powers, they were not executives, legislators, or judges. Nor were the people the executive branch, the legislature, or the judiciary.

Political tracts of the era reflect this separation. The Declaration of Independence complained that the Crown had refused to accommodate “large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.”⁸³ Again, legislatures were distinct from the people they served. Or consider the writings of Thomas Tudor Tucker, who described the legislature as consisting of the “representatives of the people”⁸⁴ and refuted the idea that the acts of the legislature

80. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 398 (Peter Laslett ed., Cambridge Univ. Press 1963).

81. *Id.* at 382.

82. The role of jurors advances our claims. Though jurors judge certain questions in court, they are not “judges.” We are making the same sort of claim with respect to the people. Even though the people made constitutions in the eighteenth century, they were not seen as the “legislature” of a state.

83. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

84. Philodemus, *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice* (1784), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 612, 623 (Charles S. Hyneman & Donald Lutz eds., 1983). Tucker was a physician and politician who served in the South Carolina

ought to be understood as the acts of the people themselves.⁸⁵ Tucker wrote that a state constitution should proceed from the people, supersede the acts of the “Legislature,” and be “unalterable by any authority but the express consent of a majority of the citizens.”⁸⁶ Like the Declaration, Tucker conceived of the people and the legislature as distinct entities, with the latter serving as agents of the former.

Although the *Arizona State Legislature* majority was correct in noting that initiatives and referenda were unknown at the founding, it was mistaken in its conceptualization of that fact’s relevance to the question at hand. As Tucker made clear, the people could make another form of law, *constitutional law*, as they had done in approving the Massachusetts Constitution of 1780.⁸⁷ With the popular ratification of the federal Constitution, the people’s role as lawmakers reached a continental scope. Yet even as the peoples of the 13 states were ratifying (making) the supreme law of the land and thereby creating a subordinate federal legislature, the people themselves were not a super “legislature.”

Recourse to constitutional purpose supports, rather than defeats, the argument that “Legislature” refers to a multi-member institution, distinct from the people, that makes laws. The Elections Clause has a two-fold purpose. First, it vests the power to set the times, places, and manner of elections in the most representative branch of state government. The Framers specifically selected the state legislature because they believed that the legislature was the most directly accountable to the people due to regular elections.⁸⁸ The majority’s reasoning runs directly counter to this purpose because it would permit a state to vest redistricting authority in a body that is unaccountable to the people, such as a judge with good-behavior tenure or a private party.

state assembly, the Continental Army, the Continental Congress, the House of Representatives, and the Department of Treasury.

85. *Id.* at 627.

86. *Id.*

87. WILLI PAUL ADAMS, *THE FIRST AMERICAN STATE CONSTITUTIONS* 91 (Rita & Robert Kimber trans., 1980).

88. *See, e.g.*, *THE FEDERALIST* No. 60, at 369–70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that legislatures’ actions would be checked by a “fear that citizens, not less tenacious than conscious of their rights, would flock from the remotest extremes . . . to the places of election[] to overthrow their tyrants”).

Second, as both the majority and dissent recognize, the Elections Clause established a crucial override on the state legislatures. As Federalists argued during the ratification, without some federal authority over federal elections, the states might destroy the federal government simply by choosing not to hold congressional elections.⁸⁹ The second part of the Elections Clause gives Congress the ability to preserve itself by ordering elections in cases where states refused. The Framers anticipated the worry of modern-day reformers that an entrenched state minority might use its control over a state legislature to perpetuate and extend its power through its congressional delegation. But the Framers' remedy did not consist of a grant of authority to the state governments (or even their people) to strip away federal elections power from the legislature and vest it elsewhere. Rather the Constitution provides a single remedy for state election skulduggery, including gerrymandering: congressional action.

Put a different way, the Framers recognized the possibility that local factions could manipulate federal elections to distort their representative nature or undermine the national government. But their solution to such problems did not consist of vesting authority in the States to determine who, within a state, may regulate federal elections. Rather, the Elections Clause designated state legislatures—the most popular branches—to regulate the time, place, and manner of elections for Congress and authorized a congressional, rather than a state, corrective to any state legislative self-dealing.

C. *Intratextualism and "Legislature"*

As Akhil Amar has observed, the Court has long used "intratextual" approaches to interpret the Constitution.⁹⁰ In *McCulloch v. Maryland*, for example, Chief Justice Marshall rightly concluded that "Necessary" in the Necessary and Proper Clause was less restrictive than "absolutely necessary" found in Article I,

89. THE FEDERALIST No. 59, at 361 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.").

90. See Amar, *supra* note 14.

Section 10.⁹¹ Marshall's point is that differences in wording often matter. We agree.

By the same token, where the same word is used throughout a single document, there should be a strong presumption that the word has the same meaning throughout. As Chief Justice John Roberts' dissent aptly pointed out, the Constitution uses the phrase "legislature" of a State seventeen times, and in every instance outside the Elections Clause, the Constitution employs it to refer to a multi-member institution distinct from the people.⁹² Article I begins by defining the House of Representatives as members chosen by voters who "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."⁹³ Obviously, electors do not choose the people of a state, even when the latter serve as lawmakers via the initiative process. Here the "State Legislature" is clearly distinct from the people (the "Electors").

Article I's discussion of senatorial vacancies continues in the same vein: "the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."⁹⁴ The people do not "meet" when they make laws by initiative; they vote across the state in various polling stations and by absentee ballot.

Substituting "power that makes laws" for "legislature" throughout the Constitution yields jarring and incongruous results. Most obviously, Article I, Section 3 originally declared that the "Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six Years."⁹⁵ The Seventeenth Amendment, ratified in 1913, authorized the direct election of Senators. If *Arizona State Legislature's* understanding of "legislature" had prevailed throughout the Constitution's history, however, no Seventeenth Amendment would have been necessary. Each state simply could have transferred its power to choose Senators from the established legislature to another "Legislature," namely the people acting through direct election. Instead, two-thirds of each chamber of

91. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819).

92. 135 S. Ct. at 2682 (Roberts, C.J., dissenting).

93. U.S. CONST. art. I, § 2.

94. U.S. CONST. art. I, § 3.

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

Congress approved the amendment and three-quarters of the states ratified it. As the Chief Justice exclaimed in his *Arizona State Legislature* dissent, “What chumps!”⁹⁶

Similarly, the closest analogue to the Elections Clause suggests that *Arizona State Legislature* rests on a distorted reading. If the Elections Clause relies upon an expansive reading of “Legislature” in the selection of members of Congress, we should expect a similar meaning to prevail in the selection of a coordinate branch. But such a reading fails. In selecting the President, the Constitution relies upon electors, what we today call the “Electoral College.”⁹⁷ Article II, Section 1 mandates that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁹⁸ We are aware of no one who has argued that “Legislature” here means “lawmaking power” or “lawmaking institution” or that the people, acting through initiative, may direct the appointment of presidential electors. If a state’s people wish to exercise the authority of Article II, section 1, a change akin to the Seventeenth Amendment is requisite. If our reading of Article II, Section 1 is correct, the Court was clearly mistaken in arguing that the Elections Clause should not be read “to single out federal elections as the *one area* in which States may not use citizen initiatives as an alternative legislative process.”⁹⁹ After all, elections of the President are an area where citizen initiatives may not be used “as an alternative legislative process”¹⁰⁰ and hence the Elections Clause would not be the only federal elections provision that bars the use of citizen initiatives.

Given the Court’s endorsement of federalism, one might expect that its reading would fit with some of the federalism pro-

96. *Ariz. State Legislature*, 135 S. Ct. at 2677 (Roberts, C.J., dissenting).

97. In truth, the Constitution does not establish an electoral college because electors do not gather together in one place. Rather the Constitution requires electoral colleges, that is, a gathering of electors in each state. Early discussions of presidential elections spoke of these “electoral colleges.” See SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 51 (2015).

98. U.S. CONST. art. II, § 1, cl. 2.

99. *Ariz. State Legislature*, 135 S. Ct. at 2673 (emphasis added).

100. *Id.*

visions of the original Constitution. But these provisions also treat legislatures as institutions distinct from the people. Article IV guarantees the States protection against Invasion, “and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”¹⁰¹ Again, this provision would make no sense under *Arizona State Legislature’s* reading because the people of a state do not convene as a body. Similarly, reading Article V’s amendment process as if a state’s people may serve as a state’s “Legislature” is farfetched. Under Article V, state legislatures can call for a constitutional convention and ratify proposed amendments. These provisions have never been understood to allow popular initiatives to call for a convention or to approve amendments, as the majority itself recognizes.¹⁰² The Court’s concession is fatal to its argument. According to Justice Ginsburg’s logic of popular sovereignty, there is no reason to allow the people to choose redistricting plans (or create a redistricting commission) but simultaneously bar them from calling for a constitutional convention or approving constitutional amendments. The Court cannot explain why popular sovereignty prevails in the Election Clause but peters out in Article V.

Tellingly, the Court could not identify a single constitutional provision that accommodates a swap of “power that makes laws” for “legislature.” Of course, it is possible that the Elections Clause adopts a distinctive definition of “Legislature.” But nothing in the text or context of the Elections Clause suggests a unique usage of “Legislature.”

To be sure, intratextualism has its limitations. As Adrian Vermeule and Ernest Young have argued, there are good reasons to resist the commonsense notion that the same words should have the same meaning throughout the Constitution. Different electorates adopted parts of the Constitution at different times and with different purposes. For example, the Framers of the Fourteenth Amendment may have understood the Privileges or Immunities Clause to safeguard substantive rights (including the incorporation of much of the Bill of Rights), even though a similar phrase in Article IV, Section 2 (“privileges and immunities”)

101. U.S. CONST. art. IV, § 4, cl. 2.

102. See *Ariz. State Legislature*, 135 S. Ct. at 2666–68.

seems to have been focused on equality, namely obliging states to treat out-of-state citizens as they treat their own citizens.¹⁰³

These valid concerns about intertemporal lawmaking, however, do not undermine the principle of intratextual consistency on this question. The Framers ratified the Elections Clause as part of the original Constitution of 1787. It was drafted as part of the same process that yielded many other provisions that use “legislature.” Indeed, a single committee, the Committee of Style, took all of the Constitutional Convention’s proposals and worked them into a single, unified draft.¹⁰⁴ The Convention approved the document as a whole and sent it to the States for ratification, where it could only receive an up-or-down vote without amendment. While the product of a two-stage lawmaking process, one perhaps more collective than any other public act in U.S. history, the 1787 Constitution does not suffer from the differences of lawmaking times and electorates that afflict intratextualism as applied to the amended Constitution. Nothing in the Elections Clause undermines the strong presumption that identical phrases used multiple times in the original Constitution ought to have a uniform meaning.

D. State Autonomy vs. Popular Lawmaking

Although *Arizona State Legislature* praises initiatives and referenda, its reading of “Legislature” to mean any institution that makes laws does not privilege direct democracy. Instead, the Court’s reasoning categorically endorses state autonomy over the locus of federal elections authority. When a state constitution vests electoral lawmaking authority with the people, the people can exercise it via direct democracy. But, of course, a state constitution need not grant redistricting authority to the people to be exercised via initiative or referendum. If a state constitution vests that authority elsewhere, say in a governor, the judiciary, or an independent commission, no extralegal popular initiative or referenda could lawfully exercise that districting authority. While a state may choose to vest its Elections Clause authority with the people, it also could choose to vest it in institutions far less accountable than the legislature. This

103. See Vermeule & Young, *supra* note 14, at 764–66.

104. See generally PETER CHARLES HOFFER, FOR OURSELVES AND POSTERITY: THE PREAMBLE TO THE FEDERAL CONSTITUTION IN AMERICAN HISTORY (2013).

renders hollow the Court's praise of popular sovereignty, which plays no real role in the Court's logic.

Given *Arizona State Legislature's* rationale, had the Arizona Constitution vested federal districting authority in a private oil company or a foreign government, either would have qualified as a "Legislature" under the Elections Clause. Hence, either British Petroleum or Vladimir Putin could serve as Arizona's Legislature for purposes of the Elections Clause and exercise complete authority not only over redistricting but also over any question relating to the time, place, and manner of holding Arizona's federal elections for Congress.

E. The AIRC: A Legislative Delegate or a "Legislature?"

The Court upheld the AIRC's ability to draw districts for Arizona based on its conclusions that the people of Arizona were the "Legislature" for purposes of the Elections Clause and that the people could delegate their Election Clause authority to the AIRC. The delegation claim is questionable. The Court also overlooked a possibility more favorable to the AIRC.

With little analysis, the Court concluded that the Legislature (in this case the people) could delegate its Election Clause authority because counsel for the Arizona State Legislature conceded the question in oral argument.¹⁰⁵ This was a hasty approach to a difficult question, namely whether the Elections Clause permits delegations. Although state law generally may permit a state assembly to delegate lawmaking authority, that state law rule cannot determine whether the *Elections Clause* permits state legislatures to delegate their *federal* constitutional authority over elections.

While the Court spoke of the legislature (the people of Arizona) delegating "legislative authority over redistricting" to the AIRC, it never considered whether the *AIRC was the Arizona Legislature* for redistricting purposes. Given the Court's conclusion that state constitutions may determine who is a "Legislature" by conveying lawmaking power, the Court could have entertained the possibility that the AIRC was a "Legislature" no less than the Arizona State Legislature.

Had the Court been tempted to conclude that the AIRC was the "Legislature," it would have had to decide several issues.

105. See *Ariz. State Legislature*, 135 S. Ct. at 2671.

Among them would have been whether a “Legislature” could consist of no more than five legislators, none of whom were elected by the people.

A holding that the AIRC was a “Legislature” would have been more consistent with the conventional sense of a “Legislature” as a multi-member lawmaking body distinct from the people. Moreover such a reading would have fit better with the Constitution’s numerous provisions predicated on the view that legislatures are multi-member bodies, distinct from the people, which periodically convene, make laws, and recess.

III. THE ORIGINAL UNDERSTANDING OF THE ELECTIONS CLAUSE

This Part focuses on eighteenth-century usage and commentary as evidence of the Election Clause’s meaning. We believe that the Founders consistently differentiated the people from their legislatures. The latter served the former and the former were not seen as the latter.

Before the Framers gathered to draft a constitution, Americans spoke of the legislature and the people as distinct entities. This understanding finds clear expression in the revolutionary state constitutions. Those constitutions are replete with references that treat state legislatures as consisting of chambers of representatives that meet periodically, pass laws, and serve the people. The Georgia Constitution provided that, “The legislature of this State shall be composed of the representatives of the people.”¹⁰⁶ Similarly, the North Carolina Declaration of Right provided that “the people have a right . . . to apply to the Legislature, for the redress of grievances.”¹⁰⁷ The Massachusetts Constitution speaks of “the people” investing authority in “their legislature” to require “public worship” and fund “public protestant teachers.”¹⁰⁸ Each of these references treated the people as principals and the legislatures as their agents. We are unaware of state constitutional provisions that intimate, much less declare, that the people could be considered a “legislature.”

The Elections Clause arose in this context. The Clause apparently emerged from the proceedings of the Committee of De-

106. GA. CONST. of 1777, art. II.

107. N.C. CONST. of 1776, Declaration of Rights, art. XVIII.

108. MA. CONST. of 1780, Part I, art. III.

tail¹⁰⁹ because the records of the Philadelphia Convention do not mention a predecessor. From its inception, the power to establish “the time, place, and manner” of federal elections was lodged in each state “legislature.”¹¹⁰

Though there was no discussion of whether the people could serve as a “Legislature” under the Clause, debate surrounding the Clause strongly suggested that “Legislature” was thought of as an entity distinct from the people. While discussing the Elections Clause, Madison noted that the people would elect the House and the state legislatures the Senate.¹¹¹ He also said that federal legislative control over federal elections did not create problems because the power would be partially vested in representatives chosen by the same people who selected the state legislatures.¹¹² His uses of “legislature” were distinct from the people themselves.

Madison’s statements here echoed a familiar theme throughout the Convention. Delegates repeatedly distinguished the people of a state from the legislature of a state. The difference surfaced most prominently with respect to Congress. The Virginia Plan called for two chambers, one selected by the people of the States and the other selected by the first federal chamber from nominees approved by the state legislatures. When the first House was taken up on May 31, 1787, some (like Roger Sherman) favored election by the state legislatures rather than by the people.¹¹³ Over his objection, the delegates retained popular election. When they took up the second chamber, some unsuccessfully moved to have state legislatures choose the members of the second chamber rather than merely nominate several names.¹¹⁴

This dispute between those favoring election by the state legislatures and those favoring popular election resurfaced on June 6 and 7. Some delegates insisted that the people needed to be represented because, under the new system, federal laws would act immediately upon the people and popular represen-

109. See 2 RECORDS OF THE FEDERAL CONVENTION 179 (Max Farrand ed., 1911).

110. *Id.*

111. *Id.* at 240 (statement of James Madison).

112. *Id.* at 241.

113. 1 RECORDS OF THE FEDERAL CONVENTION 48 (Max Farrand ed., 1911) (statement of Roger Sherman); *id.* (statement of Elbridge Gerry).

114. *Id.* at 51.

tation would foster allegiance to the new government.¹¹⁵ Others argued that state legislative election would ensure the selection of wise, talented, and “distinguished characters,”¹¹⁶ help attach state governments to the federal system,¹¹⁷ and enable state governments to better defend themselves from federal encroachments.¹¹⁸ Some delegates split the difference, asserting that one branch ought to be popular and the other selected by the state legislatures, because representation of both constituents was “essential to the success of the project.”¹¹⁹

Behind this disagreement lay a sharp sense that the people of a state and its legislature had somewhat different interests. State legislatures would be more anxious to defend their own legislative prerogatives while the peoples of the States would be less concerned with preserving divisions of power between the federal and state governments.¹²⁰ It is hardly news that the governed and their governors have distinct interests.

Admittedly, the debates at the Philadelphia Convention do not decisively speak to the precise question at issue in *Arizona State Legislature*. Even as delegates repeatedly distinguished the people from the legislature, they never said anything unmistakably signaling that the “Legislature” of the Elections Clause was necessarily distinct from the people. Even if delegates generally used “Legislature” in contradistinction to the “people,” that pattern does not conclusively establish that “Legislature,” as used in the Elections Clause, necessarily excluded the people of the state.

Fortunately, more illuminating discussions took place after the Convention concluded. In the states, the Elections Clause became a cause of concern, as Anti-Federalists asked why Congress had to enjoy superseding authority over state regulation of federal elections.¹²¹ Could not state legislatures be trusted to

115. *Id.* at 132–33 (statement of James Wilson).

116. *Id.* at 150, 156.

117. *Id.* at 132, 156.

118. *Id.* at 155 (statement of Col. George Mason).

119. *Id.* at 143 (statement of Roger Sherman).

120. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1399–1400 (1997).

121. See Vox Populi, *Massachusetts Gazette*, 30 October, in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168–69 (John P. Kaminski et al. eds., 2005).

craft federal election rules, asked Anti-Federalists? Elected national representatives would further the interests of the state governments and their people. Given this, congressional authority over federal elections served no real purpose and could only be used for mischief.¹²²

Federalists answered that state legislatures might sabotage federal elections. They might misuse their election authority to undermine the popular branch of the legislature—the House—and thereby strengthen the Senate, the body that represented the state governments.¹²³ The result would be that the “people” would receive poor or no representation at the federal level. The solution was supervening congressional authority over federal elections. Such power could thwart or nullify state legislative attempts to weaken the popular branch of Congress.¹²⁴

The Federalists’ reply (and the perceived need for a federal remedy) assumed that the people of the state could do nothing themselves and that they could not assume the status of a “Legislature.” The people of the state needed Congress to intervene to solve the problem because, in the face of an Elections Clause that vested authority in state legislatures, the people seemingly had no means of directly curbing state legislative self-dealing. Only Congress could correct the legislation passed by state legislators.¹²⁵ As one American put it, without supervening congressional authority “the people can have no remedy” for conniving state legislators.¹²⁶

But the people were not truly impotent, asserted the Anti-Federalists. The people could engage in electoral self-help. An-

122. *See id.* at 170 (noting that Congress might hold House elections for Massachusetts in one town, Boston).

123. *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 326, 402–03 (John P. Kaminski et al. eds., 2005); 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1213, 1217 (John P. Kaminski et al. eds., 2005).

124. *See* Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 193, 197 (John P. Kaminski et al. eds., 2005).

125. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 303 (Jonathan Elliot ed., 2d. ed. 1888) (people can petition federal government to alter inconvenient time and place rules created by a state legislature).

126. 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1213, 1218 (John P. Kaminski et al. eds., 2005).

ti-Federalists never argued that the people could assume direct authority by acting as the “Legislature” of a state and thereby assure, by superseding state legislation, that the people of a state had a voice in the House. Rather Anti-Federalists pointed out that the people could hold accountable those state legislators who had crippled, obstructed, or manipulated a state’s representation in the House.¹²⁷ The punishment would come via popular refusal to reelect representatives. The people had their own means of defending their ability to elect representatives to the House and did not need Congress to intercede on their behalf. Given this popular capacity to engage in electoral self-help, the Elections Clause’s grant of superseding authority served no sound purpose and might instead be used in troubling ways. For instance, members of the House might use the authority to insulate themselves by creating rules designed to thwart popular will in the States. Representatives might gerrymander state districts to ensure their continued election to the House. Or Congress might decree that elections for the House be held in inconvenient locations (“places”), thereby depressing voter turnout. Holding Pennsylvania’s elections for the House in Pittsburgh would have affected election outcomes, because Pittsburgh in 1788 was far removed from Philadelphia and other population centers.

Like the Federalist argument in favor of superseding congressional authority, the Anti-Federalist rejoinder also was premised on the notion that state legislatures were entities distinct from the people. The fear that the people would throw state legislators out of office would deter the latter from crippling the people’s ability to freely choose their Representatives.

In the course of discussing the Elections Clause, no one supposed that the people of a state could directly make the time, place, and manner rules for conducting federal elections. Neither the Federalists nor Anti-Federalists made such a claim, likely because the word “Legislature” most commonly brought to mind the image of a multi-member body, distinct from the people who selected them. After quoting the Elections Clause,

127. FEDERAL FARMER No. 12 (Jan. 12, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1020, 1027 (John P. Kaminski et al. eds., 2005); THE REPUBLICAN FEDERALIST No. VI, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 833, 836–37 (John P. Kaminski et al. eds., 2005).

one writer put it this way: “The plain meaning and understanding of which I take to be this, that Congress gives liberty to the assemblies of each state to make [time, place and manner] regulations But if [the state assemblies] do not improve it to their liking, [Congress] can alter it at pleasure, except the place of choosing.”¹²⁸ As the writer made clear, “Legis-
“Legislature” in the Elections Clause was not shorthand for *any* entity that wielded legislative power. It was a reference to the state assemblies that wielded legislative power.

CONCLUSION

“Legislature,” as used in the Elections Clause and elsewhere in the Constitution, does not refer to any entity that makes laws. Neither a dictator nor a common law court is a legislature even though both are a “power that make laws.” Instead, “Legislature” refers to a discrete body that makes laws, namely a multi-member institution, distinct from the people.

The Court’s willingness to endorse what appears to be a one-off definition of “Legislature” reflects an avid desire to curb partisan gerrymandering. To test our claim, imagine what the Court would have said of the following hypothetical. Suppose, in a fit of disinterested lawmaking the likes of which have been seen only rarely, a state legislature delegated its Election Clause authority over districting to an entity wholly independent of the legislature. But suppose that this state’s people, using an initiative, override the state delegation because they believe the state legislature ought not shirk its responsibility to make crucial regulatory decisions on federal elections.

In this hypothetical, would the same Justices hold that the people may supersede the state legislature and reestablish a system where politicians may gerrymander? We doubt it. In this hypothetical, we think the Court would have been strongly inclined to follow the everyday, dominant meaning of “Legislature” — namely a multi-member assembly, elected by the people, with power to make laws.

If we are right, the Court’s opinion reflects an overwhelming longing to preserve a system of districting that curbs partisan

128. Letter from Massachusetts, reprinted in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 373, 376 (John P. Kaminski et al. eds., 2005) (emphasis omitted).

gerrymandering. Today a malleable interpretation of “Legislature” has the effect of curbing gerrymandering. Tomorrow a more conventional interpretation may do the same. But having the meaning of “Legislature” turn on such considerations is no way to decide cases. We the People elect legislators to form a legislature. Though we the People are supreme lawmakers, we are not a legislature.