LIQUIDATING THE INDEPENDENT STATE LEGISLATURE THEORY

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Following the 2020 presidential election, an obscure and potentially revolutionary constitutional theory reemerged. The so-called "independent state legislature" theory posits that the Constitution vests state legislatures with plenary power to craft rules for congressional elections and to direct the appointment of presidential electors, unbound by state constitutions and free from review by state courts. Though the Supreme Court rejected this theory in the past, four Justices signaled their seeming approval in 2020, and, in 2022, the Court granted certiorari to resolve the question in Moore v. Harper, *to be decided this term.*

The debate over the independent state legislature theory pits textual arguments against the longstanding practice of states throughout our history. Every state constitution dictates the procedure by which state legislatures may enact election laws, and state constitutions are full of provisions which regulate nearly every aspect of federal elections from voter registration to congressional redistricting to absentee voting. Nearly all of these provisions were enacted with the affirmative participation of state legislatures, and since the Founding they have, through state court review, constrained the authority of state legislatures when enacting election laws.

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This Article operationalizes this history by applying James Madison's analytical framework of "constitutional liquidation," recently endorsed by the Supreme Court in Chiafalo v. Washington *to resolve whether states could control the votes of presidential electors. This framework posits that the meaning of indeterminate constitutional text may be liquidated—that is, settled—by longstanding and broadly accepted historical practice. Applying that framework here reveals that, while the Constitution's text may be unclear as to the role of state constitutions in regulating federal elections, subsequent practice and the acquiescence of state legislatures, Congress, and the public has settled the Constitution's meaning and rejected the independent state legislature theory.*

INTRODUCTION

Following the 2020 presidential election, an obscure and potentially revolutionary constitutional theory reemerged. According to the so-called "independent state legislature" (ISL) theory, the Constitution, through Article I, Section 4 (the Elections Clause) and Article II, Section 2 (the Electors Clause), vests state legislatures with plenary power to craft rules for Congressional and Presidential elections unbound by state constitutions and free from review by state courts.[1] This theory, repeatedly rejected by the Supreme Court,[2] was roused from its slumber by a wave of litigation that pitted state legislatures against their constitutions. In the months before the election, the COVID-19 pandemic and concerns over in-person voting prompted numerous challenges to state election laws

1. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 16 (2020).

2. *See infra* Part I.B.

that limited absentee and early voting or imposed onerous signature match or witness requirements.[3] Roughly half of these challenges were brought in state courts under state constitutions,[4] many of which include election and voting rights provisions that go far beyond those found in the U.S. Constitution.[5] The Pennsylvania Supreme Court, for example, extended the absentee ballot deadline based on the state constitution's guarantee that elections shall be free and equal.[6] Meanwhile, changes to election rules made by governors, secretaries of state, and elections boards were challenged as usurping the exclusive power of state legislatures.[7] After election day, the theory took on a troubling new dimension as supporters of former President Trump called for Republican-controlled legislatures in states won by Joe Biden to reject the electors chosen by voters and instead appoint their own slates of pro-Trump electors.[8] While no alternate electors were appointed and efforts to invoke the ISL theory in court were unsuccessful, four Justices signaled their willingness to consider at least some version of the theory,[9] including Justice Alito, who suggested the Pennsylvania

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3. *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 273 (2020) (collecting cases); Eugene D. Mazo, *Voting During a Pandemic*, 100 BOSTON L. REV. ONLINE 233, 294–96 (2020) (same).

4. *See COVID-Related Election Litigation Tracker*, STAN.-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu [https://perma.cc/JF8D-R5E8].

5. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104 (2014).

6. *See* Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 371 (Pa. 2020).

7. *See* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 101, 118–19 (forthcoming 2022) (listing four categories of Elections Clause challenges and collecting cases).

8. *See* Lawrence Lessig & Jason Harrow, *State Legislatures Can't Ignore the Popular Vote in Appointing Electors*, LAWFARE (Nov. 6, 2020), *https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors* [https://perma.cc/TL78-9P72].

9. *See* Democratic National Committee v. Wisconsin State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (arguing that under the Electors Clause state courts may not "rewrite state election laws."); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting) (noting that "under the Federal Constitution, only the state 'Legislature'" may enact election laws).

Supreme Court's extended absentee ballot deadline may have violated the Elections Clause.[10] The Court will address the ISL theory directly during October Term 2022 in *Moore v. Harper*, a case in which the North Carolina Supreme Court struck down the congressional district map passed by the state legislature based on a number of state constitutional provisions.[11]

Proponents of the ISL theory rely primarily on the textual argument that when the Elections and Electors Clauses grant authority to "the Legislature" of each state, they refer solely and exclusively to institutional representative legislative bodies.[12] This novel reading, however, conflicts with over two hundred years of historical practice. Since the Founding, state constitutions have regulated nearly every aspect of federal elections, from voter registration and balloting to congressional redistricting and election administration.[13] Most of these election-related provisions were presented by state legislatures and approved by voters. For centuries, these provisions have constrained both the process and the substance of state election laws.

This Article contends that this longstanding practice, spanning all fifty states and with only scattered exceptions throughout history, has settled the meaning of the Elections and Electors Clauses and foreclosed the ISL theory. It draws on James Madison's analytical framework of "constitutional liquidation," under which the meaning of unclear or ambiguous constitutional text may be liquidated—i.e., settled—by a "regular course of practice."[14] The Supreme Court

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10. *See* Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 1 (2020) (statement of Alito, J.).

11. Docket No. 21-1271; *see also* Harper v. Hall, 868 S.E.2d 499, 535–47 (N.C. 2022).

12. *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 855–59 (2015).

13. *See infra* Part III.B.

14. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al, eds. 2009).

has increasingly looked to historical practice to resolve constitutional ambiguities,[15] including in election law.[16] Most recently, the Court explicitly adopted a liquidation framework in *Chiafalo v. Washington* to settle whether states may control the votes of members of the Electoral College.[17]

Following the Court's lead, this Article examines the debate over the ISL theory through the liquidation framework. Part I provides background on the Clauses, the Supreme Court's doctrine, and the theory's 2020 reemergence. Part II explores how settled historical practice informs the Court's interpretation of the Constitution and how the Court has applied liquidation in election cases, including *Chiafalo*. Part III then applies the liquidation framework to the ISL theory and concludes that, while the Constitution's text is not dispositive, the subsequent history is. Since the Founding, there has been a consistent, deliberate practice of state constitutions regulating federal elections and constraining state legislatures. This longstanding practice enjoys the acceptance of courts, Congress, the public, and even state legislatures themselves. This strongly suggests the meaning of the Elections and Electors Clauses has been settled in favor of state constitutional constraints and that the ISL theory should, once again, be rejected.

I. BACKGROUND

A. The Clauses

The Constitution empowers states to regulate federal elections in two places. First, the Elections Clause of Article I provides that "[t]he Times, Places and Manner" for congressional elections "shall be prescribed in each State by the Legislature thereof . . . ."[18] Second, the Electors Clause of Article II empowers states to "appoint, in such Manner as the Legislature thereof may direct, a Number of

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15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).
18. U.S. CONST. art. I, § 4.

Electors"[19] to cast votes for president and vice president.[20] Both Clauses refer to state legislatures using identical language, suggesting each confers authority in the same manner and with the same effect—if any—on the power of state constitutions to constrain state legislatures.[21]

1. The Elections Clause

The Elections Clause empowers states to regulate the "Times, Places and Manner" of congressional elections, with the caveat that "Congress may at any time by Law make or alter such Regulations . . . ."[22] Congress's power under the Elections Clause is thus coextensive with that of the states. The Constitution does not define the terms "Times," "Places," or "Manner," but the Supreme Court has held that their "substantive scope is broad"[23] and that they "embrace authority to provide a complete code for congressional elections," including "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns . . . ."[24] This authority overlaps with several state constitutional provisions.[25]

A thornier question is whether the Elections Clause confers the power to regulate voter qualifications, which nearly all state constitutions do.[26] On the one hand, Article I's Qualifications Clause states that voters in House elections "shall have the Qualifications

19. U.S. CONST. art. II, § 1, cl. 2.

20. *See* U.S. CONST. amend. XII.

21. *See* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1062 (2021) ("What is true of the delegation to the 'Legislature' for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors.").

22. U.S. CONST. art. I, § 4, cl. 1.

23. Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 8 (2013).

24. Smiley v. Holm, 285 U.S. 355, 366 (1932).

25. *See infra* Part III.B.

26. *See* Douglas, *supra* note 5, at 101–02.

requisite" for state legislative elections.[27] In light of this specific language, the Supreme Court has stated in dicta that the more general Elections Clause does not extend to voter qualifications.[28] On the other hand, in *Oregon v. Mitchell*, the Court upheld amendments to the Voting Rights Act that lowered the minimum voting age from twenty-one to eighteen for congressional elections.[29] Four Justices would have upheld the amendments under the Fourteenth Amendment,[30] but Justice Black's controlling opinion upheld it under the Elections Clause, writing that "the powers of Congress to regulate congressional elections[] includ[e] the age and other qualifications of the voters . . . ."[31] Despite the Court's more recent statements,[32] *Mitchell* has not been overturned and remains good law.[33] Congress has also imposed a citizenship requirement for presidential and congressional elections and required states to allow military and overseas citizens to vote for Congress.[34] The line between a voter

27. U.S. CONST. art I, § 2, cl 1. The Seventeenth Amendment applies the same requirement to U.S. Senate elections. *See id.* amend. XVII, cl. 1.

28. *See Inter Tribal Council*, 570 U.S. at 16 ("One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly."); *see also* Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) ("It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control.").

29. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

30. *See id.* at 117-118 (Opinion of Black, J.).

31. *Id.* at 122. *See also id.* at 124 ("Congress has ultimate supervisory power over congressional elections.").

32. In dicta, a majority of the Supreme Court in *Inter Tribal Council* suggested that "the Elections Clause empowers Congress to regulate *how* federal elections are held but not *who* may vote in them." *Inter Tribal Council*, 570 U.S. at 16.

33. Richard L. Hasen, "*Too Plain for Argument?": The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NW. U. L. REV. 253, 262 (2008) (noting that *Mitchell* "remains good law unless overruled by the Court").

34. *See* 18 U.S.C. § 611 (2018) (citizenship requirement); 52 U.S.C. § 20302(a) (2018) (overseas requirement). While neither provision has been challenged in court, some commentators have criticized them. *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 441–44 (2016) (unconstitutionality of overseas voting

qualification and a "Manner" regulation may also be blurry.[35] Requiring voters to register or pay a poll tax may be a qualification, but laws laying out specific payment or registration procedures go further and regulate the "Manner" of elections.[36] Given that the Elections Clause confers the same substantive power on states and Congress, these same considerations arguably govern a state's power to regulate voter qualifications for federal elections.

2. The Electors Clause

While the Elections Clause empowers states and Congress to regulate the time, place, and manner of congressional elections,[37] the Electors Clause addresses only the "Manner" of appointing presidential electors.[38] Though this text may appear to confer a narrower authority,[39] the Supreme Court has construed the power conferred

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requirement); Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 447–48 (2017) (unconstitutionality of citizenship requirement).

35. Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, BOSTON U. L. REV. 317, 318 (2019).

36. *See infra* note 309 and accompanying text.

37. U.S. CONST. art. I, § 4, cl. 1.

38. U.S. CONST. art. II, § 1, cl. 2.

39. *See* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 54 (2021) ("As a textual matter, the Electors Clause is plainly narrower than the Elections Clause.").

by the Electors Clause as coextensive with that granted by the Elections Clause,[40] holding that the Clause grants states "plenary authority to direct the manner of appointment."[41] The use of the word "Manner" in both clauses suggests as much with respect to manner regulations.[42] The fact that the Electors Clause does not refer to regulations of the "Times" and "Places" of appointment has never been understood to limit a state's ability to regulate these aspects of presidential elections; rather, the omission of "Times" and "Places" is likely just a reflection of the fact that a state may choose to appoint electors through a manner other than an election.[43]

Likewise, while Article II's text only allows Congress to set the time for choosing electors,[44] the Supreme Court has interpreted Congress's power as coextensive with states.[45] In *Ex parte Yarbrough*, the Court upheld a portion of the Ku Klux Klan Act crimi-

40. *See* Oregon v. Mitchell, 400 U.S. 112, 124 & n.7 (1970) (plurality opinion) (holding that "[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections," and explaining that "inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible," one that "arises from the nature of our constitutional system of government and from the Necessary and Proper Clause"). *See also* Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 891 (2002) ("[T]he [Electors Clause] power is fully coextensive with Congress's sweeping authority to regulate *in any way* the 'Manner' of House and Senate elections.").

41. McPherson v. Blacker, 146 U.S. 1, 25 (1892).

42. *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1750–51 (2002) ("There is little reason to suppose that the word "Manner" in [the Elections Clause] has a substantially different meaning from the word "Manner" in [The Electors Clause].").

43. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (noting that a State may choose to "select the electors itself" rather than hold an election and may at any time "take back the power to appoint electors").

44. U.S. CONST. art. II, § 1, cl. 5.

45. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 895 (1995) (Thomas, J., dissenting) ("[T]he treatment of congressional elections in Article I parallels the treatment of Presidential elections in Article II.").

nalizing conspiracies to intimidate voters from supporting congressional candidates or presidential electors.[46] In *Burroughs v. United States*, the Court upheld the financial disclosure and reporting requirements of the Federal Corrupt Practices Act, holding that Congress "undoubtedly" possesses the power "to safeguard [a presidential] election from the improper use of money to influence the result."[47] And when the *Mitchell* Court upheld Congress's lowering of the voting age to eighteen, it did so for both congressional and presidential elections, explaining that "it cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[48]

There is a stronger case that voter qualifications fall within the Electors Clause's scope.[49] While the Qualifications Clause addresses qualifications for voters in congressional elections, it makes no reference to—and thus does not limit—qualifications to vote for presidential electors.[50] This suggests the "Manner" of appointing

46. *Ex parte* Yarbrough, 110 U.S. 651, 658, 660–62 (1884); (noting that the Elections Clause grants Congress the "power to protect the elections on which its existence depends from violence and corruption," and extending this same authority to presidential elections). This same statute also includes a private right of action, codified today at 42 U.S.C. § 1985(3), to which *Yarbrough*'s holding also likely applies. *See* Michael Weingartner, *Remedying Intimidating Voter Disinformation Through § 1985(3)'s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 99–100 & n.109 (2021) (citing Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145, 153–54 (2020)).

47. Burroughs v. United States, 290 U.S. 534, 544–45 (1934) (expressly rejecting the argument that Congress's authority under the Electors Clause is "limited to determining 'the time of choosing the electors'" as overly narrow and explaining that the power to regulate presidential elections to protect the integrity thereof "in no sense invades any exclusive state power").

48. Oregon v. Mitchell, 400 U.S. 112, 124 (1970).

49. *See* Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 89 (2021) (explaining that the Electors Clause "includes the power to define the body of voters that chooses presidential electors").

50. U.S. CONST. art. I, § 5, cl. 1. *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. OF CONST. L. 1, 21 (2010) (arguing that the Electors Clause is "the counterpart to the provision in Article I authorizing the states to set the qualifications of persons choosing the House of Representatives").

electors under the Electors Clause includes the power to decide voter qualifications.[51]

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Despite their textual differences, the Elections and Electors Clauses share two important features. First, each confers the same substantive power on States and Congress. Second, each delegates that power to States in an identical manner. To the extent either disrupts the status quo of state legislatures as constrained by state constitutions, they do so in the same way and to the same degree.

B. *The Doctrine*

Current Supreme Court doctrine rejects the ISL theory's literalist reading of the Elections and Electors Clauses and has consistently held that a state legislature's power to craft rules for federal elections is constrained by state constitutions. In *Ohio ex rel. Davis v. Hildebrant*, the Court considered a provision of the Ohio Constitution allowing citizens to nullify acts of the legislature by popular referendum.[52] Such a referendum was used to overturn Ohio's redistricting plan, and a group of voters sued claiming the Elections Clause granted the state legislature exclusive authority over redistricting.[53] The Supreme Court rejected this argument and upheld

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51. If the Electors Clause grants Congress the power to set voter qualifications in presidential elections, two structural arguments suggest it should have the same authority over congressional elections despite the Qualifications Clause. First, following *Mitchell*, it makes little sense for Congress to have greater power over presidential elections than over congressional elections. Second, congressional and presidential elections are conducted simultaneously, and the Supreme Court has already held that the Congress may make laws affecting state elections held concurrently with federal elections. *See Ex parte Yarbrough*, 110 U.S. at 662; Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 17 (2007) ("[T]he Elections Clause has long been interpreted to give Congress power over so-called 'mixed elections'—that is, to permit Congress to regulate all aspects of an election (or an electoral process) used even in part to select members of Congress."). It thus follows that Congress may regulate "mixed" congressional and presidential elections, including as to setting voter qualifications.

52. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 566 (1916).

53. *Id.* at 566–67.

the referendum.[54] Four years later, in *Hawke v. Smith*, the Court held this same Ohio referendum could not be used to block ratification of the Eighteenth Amendment[55] and stated that ratification was "entirely different" from States' Elections Clause authority.[56]

That difference was clarified in *Smiley v. Holm*, which asked whether the Minnesota legislature's congressional redistricting plan was subject to a gubernatorial veto per the state constitution.[57] The Supreme Court held that it was, and explained that the Constitution confers upon state legislatures a variety of different functions, including an "electoral" function when selecting Senators (prior to the adoption of the Seventeenth Amendment), a "ratifying" function for proposed Constitutional Amendments, and a "consenting" function with respect to lands acquired by the United States.[58] Because these functions go beyond ordinary lawmaking, they are not subject to state constitutional limits.[59] But, the Court explained, when a state legislature enacts laws under the Elections Clause it is engaged in ordinary lawmaking and therefore subject to the usual constraints.[60] Thus, while a state constitution may not restrict a state legislature's ratification function,[61] a state's redistricting plan—an act of ordinary lawmaking—remains subject to a governor's veto.[62]

The Court reaffirmed the power of state constitutions to constrain state legislatures in *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*.[63] There, the people of Arizona had

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54. *Id.* at 569.
55. Hawke v. Smith, 253 U.S. 221, 225 (1920).
56. *Id.* at 231.
57. Smiley v. Holm, 285 U.S. 355, 363 (1932).
58. *See id.* 365–66.
59. *Id.* at 369.
60. *Id.* at 367–68 (holding the Elections Clause did not "endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the state has provided").
61. *See* Hawke v. Smith, 253 U.S. 221, 231 (1920).
62. *See Smiley*, 285 U.S. 372–73.
63. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 793 (2015).

adopted a state constitutional amendment via ballot initiative establishing an independent redistricting commission.[64] The Arizona legislature challenged the Commission's map, arguing that the Elections Clause precluded any entity other than it from redistricting.[65] The Court rejected this argument, holding that the term "Legislature" under the Elections Clause included the initiative process as established by the Arizona Constitution.[66] Thus, state constitutions could both constrain and remove the authority of state legislatures. *AIRC* generated significant scholarly debate and a strong dissent by Chief Justice Roberts.[67] But four years later in *Rucho v. Common Cause*, all nine Justices embraced state constitutions, state courts, and independent redistricting commissions as valid means of curbing excessive partisan gerrymandering.[68]

Proponents of the ISL theory, however, claim to find support in a different set of Supreme Court decisions. The first of these, *McPherson v. Blacker*, is frequently cited as controlling precedent for its discussion—in dicta—of the role of state constitutions under the Electors Clause.[69] Decided in 1892, *McPherson* involved a challenge to the Michigan legislature's decision to elect presidential electors by district, rather than on a winner-take-all basis.[70] The claim was that this scheme violated the Electors Clause, which required "[e]ach state" to appoint presidential electors, rather than subdivisions of a state.[71] The Supreme Court disagreed, explaining that the Electors Clause "leaves it to the legislature exclusively to define the method" of appointing electors.[72] *McPherson*'s holding thus does

64. *Id.* at 792.
65. *Id.*
66. *Id.* at 793.
67. *See id.* at 824–50 (Roberts, C.J., dissenting).
68. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (opinion of Roberts, C.J.); *id.* at 2524 (Kagan, J., dissenting).
69. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 516 (2021).
70. McPherson v. Blacker, 146 U.S. 1, 4–5 (1892).
71. *Id.* at 9.
72. *Id.* at 36.

not address state constitutions at all. In dicta, however, the Court wrote that, while state legislatures ordinarily must exercise "legislative power under state constitutions as they exist," the express delegation of authority under the Electors Clause "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power."[73] But the Court did not elaborate on the nature of such a limitation, and the surrounding context does not suggest that the Court embraced the ISL theory; a few pages later, the Court cited with approval federal statutes that required states in special circumstances to appoint electors "by law;" that is, via the ordinary lawmaking process laid out in state constitutions.[74]

Proponents of the ISL theory also point to *Bush v. Palm Beach County Canvassing Board* (*Bush I*), decided after the 2000 presidential election.[75] The Court vacated the Florida Supreme Court's decision requiring election officials to include votes from recounts requested by Al Gore.[76] The Florida Supreme Court had construed the state's election code based in part on the Florida Constitution's right to vote.[77] The Supreme Court explained, though, that when a state enacts laws governing the selection of presidential electors it is "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" from the Presidential Electors Clause.[78] The Court cited *McPherson*'s "limitation" on how much a state constitution could "circumscribe" the state legislature, but declined to rule on the matter, instead remanding the case so the Florida Supreme Court could clarify the extent to which it had relied on the state constitution.[79]

Before this could be resolved, the Florida Supreme Court issued another opinion ordering a manual recount in certain counties, this

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73. *Id.* at 25.
74. *Id.* at 40–41. *See also* Levitt, *supra* note 21, at 1064.
75. Bush v. Palm Beach Cnty. Canvassing Board, 531 U.S. 70 (2000).
76. *See* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000).
77. *See Bush I*, 531 U.S. at 77 (quoting *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1236-37).
78. *Id.* at 76.
79. *Id.* at 76 (quoting *McPherson*, 146 U.S. at 25).

time based on state law with no reference to the state constitution.[80] In *Bush v. Gore* (*Bush II*), a divided Supreme Court stayed the recounts based on the Fourteenth Amendment and thus never reached the Electors Clause issue.[81] Chief Justice Rehnquist, however, wrote a concurring opinion that embraced a form of the ISL theory under which the Electors Clause not only precluded state constitutional limits on state legislatures but also prohibited state courts from departing too far from the plain text of state election laws.[82] The rest of the Court, however, did not embrace this view, which drew sharp dissents from four Justices.[83]

In sum, the Court has consistently held that state legislatures remain constrained by state constitutions when they exercise authority under the Elections and Electors Clauses, and neither *McPherson* nor *Bush I* demonstrate a departure from that doctrine or an embrace of the ISL theory.

C. The Debate

Although a majority of the Supreme Court rejected the ISL theory in *AIRC*, and all nine Justices endorsed state constitutions as a check on state legislatures in *Rucho*, this does not appear to have resolved the matter. The 2020 election breathed new life into the debate, with four Justices signaling their willingness to consider some version of the theory. In an appeal from the Pennsylvania Supreme Court's decision to extend the absentee ballot deadline, Justice Alito—joined by Justices Thomas and Gorsuch—wrote that the Elections and Electors Clauses confer authority "on state legislatures, not state courts," and that they "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct

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80. *See* Gore v. Harris, 772 So. 2d 1243, 1248 (Fla. 2000).

81. Bush v. Gore, 531 U.S. 98, 110–11 (2000).

82. *See id.* at 111, 113 (Rehnquist, C.J., concurring).

83. *Id.* at 123 (Stevens, J., dissenting); *id.* at 130–31 (Souter, J., dissenting); *id.* at 141 (Ginsburg, J., dissenting); *id.* at 148 (Breyer, J., dissenting).

of a fair election."[84] Likewise, in an appeal from the Fourth Circuit's decision to leave in place a consent agreement with the North Carolina Board of Elections to extend the state's absentee ballot receipt deadline, Justice Gorsuch wrote that a state elections board had no authority to "(re)writ[e] election laws" enacted by the state legislature, and that doing so "offend[s] the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators."[85] And in an appeal from a federal district court's decision to change Wisconsin's absentee ballot deadline, Justice Kavanaugh cited Chief Justice Rehnquist's *Bush II* concurrence for the proposition that "state courts do not have a blank check to rewrite state election laws for federal elections" and argued that "a state court may not depart from the state election code enacted by the legislature."[86]

These Justices were not alone. The Eighth Circuit held in *Carson v. Simon* that "the Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state," and that "this vested authority is not just the typical legislative power exercised pursuant to a state constitution."[87] Likewise, three Fourth Circuit judges wrote in dissent that the Elections and Electors Clauses grant power "to a specific entity within each State: the 'Legislature thereof,'" and that the only check on this power lies with Congress, not state courts.[88] Litigants in other cases attempted to invoke the theory with less success.[89] And while most scholars

84. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (mem.) (statement of Alito, J.).

85. Moore v. Circosta, 141 S. Ct. 46, 47-48 (2020) (mem.) (Gorsuch, J., dissenting).

86. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 (2020) (mem.) (Kavanaugh, J., concurring).

87. Carson v. Simon, 978 F.3d 1051, 1059–60 (8th Cir. 2020).

88. Wise v. Circosta, 978 F.3d 93, 111–12 (4th Cir. 2020) (en banc) (Wilkinson, Agee, and Neimeyer, J.J., dissenting).

89. *See, e.g.*, Complaint for Emergency Injunctive Relief, Hotze v. Hollins, No. 4:20-cv-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020) (alleging a violation of the Elections Clause in a challenge to a county allowing drive-in voting); Verified Complaint for Emergency Injunctive and Declaratory Relief, Trump v. Kemp, No. 1:20-cv-05310, 2020

rejected the theory following *Bush II*,[90] some commentators have recently come to defend it.[91]

The Supreme Court will have the opportunity to address the debate over the ISL theory during October Term 2022 when it decides *Moore v. Harper*.

II. CONSTITUTIONAL INTERPRETATION AND SETTLED PRACTICE

Proponents of the ISL theory commonly rely on textual arguments.[92] Opponents largely point to precedent and Founding-era history[93] while noting how adopting the theory would disrupt our electoral system.[94] Missing from this discussion, however, is what should be most obvious: state legislatures already *are* constrained

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WL 7872546 (N.D. Ga. Dec. 31, 2020) (alleging Georgia's Governor and Secretary of state violated the Electors Clause by certifying the state's presidential election results).

90. *See* 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, 1045 (2000); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2002).

91. *See* Morley, *supra* note 69. *But see* Richard Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001).

92. *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 824–850 (2015) (Roberts, C.J., dissenting); Morley, *supra* note 12.

93. *See* Larry D. Kramer, *The Supreme Court in Politics*, *in* THE UNFINISHED ELECTION OF 2000, at 105, 122 (Jack N. Rakove ed., 2001) (noting a lack of historical evidence supporting the ISL theory); Schapiro, *supra* note 90, at 672 (arguing the ISL theory "does not rest on firm foundations of text, precedent, or history"); Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 354 (2003); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001) ("as a matter of historical practice, state legislatures were not understood at the [Founding] to be more 'independent' by virtue of Article II . . . than they were when acting pursuant to any other source of authority."); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1194 n. 135 (2007) ("there is not historical support for the significance of the language in [the Electors Clause].").

94. *See* Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690 (2016) (arguing the "consequences would be both bizarre and disastrous" if the Court were to adopt the ISL theory).

by state constitutions when they enact election laws and have been since the Founding. Every state constitution dictates the procedure by which election laws must be enacted, and state constitutions are full of provisions relating to nearly every aspect of federal elections, from voter qualifications and registration to congressional redistricting and the minutiae of election administration.[95] These provisions—nearly all of which were enacted with the active and affirmative involvement of state legislatures[96]—have not only regulated federal elections directly but have also, through state court review, constrained state legislatures' exercise of their authority under the Elections and Electors Clauses for centuries.

What to make of this tension? Where practice conflicts with clear constitutional text, we would expect the text to prevail.[97] But where the text is unclear, the Supreme Court has long relied on historical practice to settle constitutional meaning.[98] Some scholars have termed this practice "historical gloss,"[99] after Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* and his contention that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on 'executive power' vested in the President."[100] Others ground the practice in James Madison's concept of "constitutional liquidation,"[101] which posits that indeter-

95. *See infra* Part III.B.

96. *See infra* Part III.C.

97. *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) ("[T]o the extent later history contradicts what the text says, the text controls."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004).

98. *See* United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915); *Ex parte* Grossman, 267 U.S. 87, 118-19 (1925); The Pocket Veto Case, 279 U.S. 655, 689 (1929); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

99. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417 (2012).

100. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

101. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

minate constitutional text "might require a regular course of practice to liquidate and settle [its] meaning."[102] Because gloss and liquidation look to the practice of government actors, they have been most commonly employed to resolve separation-of-powers disputes.[103] But the Court has also looked to historical practice to resolve constitutional ambiguities related to elections. Most recently in *Chiafalo v. Washington*, the Court explicitly invoked Madisonian liquidation to settle whether states could cabin the discretion of presidential electors.[104] This Part discusses the Supreme Court's recent embrace of Madisonian liquidation and what that analysis entails before focusing on how the Court has applied liquidation to interpret the Constitution's various election-related provisions.

A. Settled Practice and the Liquidation Framework

The Supreme Court has often relied on historical practice to guide its interpretation of unclear constitutional text. Recently, the Court has embraced Madisonian liquidation as a specific framework for doing so.[105] In 2014, the Court in *National Labor Relations Board v. Noel Canning* interpreted the Recess Appointments Clause, which

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102. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al. eds., 2009).

103. *See* Joseph Blocher & Margaret Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L.J. ONLINE 1 (2017); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 3 (2020).

104. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).

105. The degree to which Madisonian liquidation differs from related frameworks, such as historical gloss, is the subject of some debate. *See* Bradley & Siegel, *supra* note 103 at 39–59; Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015). Professor Baude identifies at least two ways in which liquidation may be distinct from other forms of historical analysis. First, he observes that liquidation, unlike some forms of historical gloss, requires a threshold finding of textual indeterminacy. Second, he notes that under a liquidation analysis the relevant historical practice must be the result of constitutional deliberation, rather than mere action. *See Baude*, supra note 101, at 64. Theoretical differences aside, the Court's most recent pronouncements on the use of history to resolve ambiguous constitutional text have largely embraced liquidation over other methods. *See, e.g.*, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022).

provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate."[106] Justice Breyer, writing for the majority, invoked Madisonian liquidation and characterized the Court's past reliance on historical practice as "continually confirm[ing] Madison's view."[107] After determining that the text was ambiguous as to whether it referred to inter- or intrasession recesses,[108] the Court looked to the history of intrasession recess appointments and the Senate's lack of opposition to conclude that the Clause addressed both types of vacancies.[109] This focus on text, historical practice, and acceptance by institutional actors laid out a basic framework for Madisonian liquidation.

Since then, the Court has applied the same framework to the President's recognition power,[110] the Appointments Clause,[111] and Congress's subpoena power.[112] Of the many scholars who have explored constitutional liquidation,[113] Professor William Baude provides the most thorough treatment of its requirements and application.[114] Examining the writings of James Madison, he identifies three elements of a liquidation analysis: (1) a discrete textual indeterminacy, (2) a deliberate course of practice reflecting constitutional reasoning, and (3) acquiescence by institutional actors and the public.[115]

106.. NLRB v. Noel Canning, 573 U.S. 513, 520 (2014); *see also* U.S. CONST. art. II, § 2, cl. 3.

107.. *Noel Canning*, 573 U.S. at 525 (collecting cases).

108. *See id.* at 528.

109. *Id.* The Court invalidated the specific appointments at issue because it held a three-day recess was too short to trigger the Clause, again relying on historical practice. *See id.*

110. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015).

111. *See* Financial Oversight and Management Board for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659.

112. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020).

113. *See* Fallon, *supra* note 105; Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); Paul G. Ream, Note, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017).

114. *See* Baude, *supra* note 101.

115. *See id.* at 13–21.

B. Liquidation and Election Law

Much of the discussion around liquidation has focused on separation-of-powers disputes, where historical practice and acquiescence by government actors are front and center.[116] Recently, some commentators have explored whether other areas of constitutional law, such as individual rights, might also be amenable to a liquidation analysis.[117] And since the Supreme Court's decision in *Chiafalo*, scholars such as Professors Guy-Uriel Charles and Luis Fuentes-Rohwer have begun to examine liquidation's role in election law.[118] This Section helps build on this progress by providing an account of how election-related constitutional provisions can be liquidated, one informed by the Supreme Court's own practice.

There are several reasons why liquidation is an appropriate framework to resolve election-related constitutional ambiguities. First, because elections occur regularly, there is an ample historical record from which to ascertain whether a given practice is longstanding and consistent. Second, because elections are open and contested, there is strong incentive to challenge any perceived constitutional infirmities, so we may be confident that a settled course of practice is the result of deliberation and acceptance. Third, because elections depend on widespread public involvement, popular acquiescence is also ascertainable.

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116. *See* Blocher & Lemos, *supra* note 103; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2016); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015); Bradley & Siegel, *supra* note 103.

117. *See* Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U.L. REV. 701 (2019); Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, GEORGE MASON UNIVERSITY LEGAL STUDIES RESEARCH PAPERS SERIES, LS 21-06 (2021).

118. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo, *Constitutionalizing Historical Gloss in Law & Democratic Politics*, DUKE LAW SCHOOL PUBLIC LAW & LEGAL THEORY SERIES No. 2020-68 (2020). Rebecca Green provides another example, also inspired by the *Chiafalo* decision. *See* Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. &. POL'Y REV. 53 (2020).

Cases that considered state constitutions under the Elections and Electors Clauses have emphasized historical practice. *McPherson* dedicated several pages to reviewing the various ways in which states had historically appointed presidential electors to hold Michigan's scheme constitutional.[119] The Court emphasized that "no question has ever arisen as to the constitutionality of either" a statewide or a district-based scheme[120] and thus construed the Electors Clause based on settled historical practice—i.e., liquidation.[121] The *Smiley* Court also endorsed a form of liquidation, holding that where the Constitution is ambiguous, "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning"[122] and describing the settled and "uniform" practice of state election laws being subject to a governor's veto.[123] Likewise, the *AIRC* court looked to historical practice to hold that the term "Legislature" under the Elections Clause can include a ballot initiative.[124] The Court emphasized that, while "[d]irect lawmaking by the people was 'virtually unknown when the Constitution of 1787 was drafted,'" the practice "gained a foothold" by the early twentieth century.[125] While *AIRC* did not rely solely on historical practice, the weight it gave to the history of direct lawmaking illustrates how a novel or still-emerging practice may be sufficiently settled for liquidation purposes.

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119. *See* McPherson v. Blacker, 146 U.S. 1, 28–35 (1892) (discussing appointment scheme dating back to the late 18th Century).

120. *Id.* at 33 (quoting 1 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1466 (1833)).

121. *See* NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (citing *McPherson* as an early example of Madisonian liquidation).

122. *See* Smiley v. Holm, 285 U.S. 355, 369 (1932).

123. *Id.* at 369–371.

124. *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 793–96 (2015).

125. *Id.* at 793–94 (quoting DONOVAN & BOWLER, AN OVERVIEW OF DIRECT DEMOCRACY IN THE AMERICAN STATES, IN CITIZENS AS LEGISLATORS 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998).

The Supreme Court has also looked to settled practice to interpret other ambiguous constitutional provisions as they relate to elections. In *Burson v. Freeman*, the Court considered a First Amendment challenge to a Tennessee law prohibiting campaign speech within 100 feet of a polling place on election day.[126] After designating the area around polling places a public forum, a plurality looked to historical practice to determine whether the state had a compelling interest in protecting voters and "the necessity of restricted areas in or around polling places."[127] The history revealed the vulnerability of voters to intimidation and undue influence.[128] In response, states adopted secret ballots and regulated election speech near polling places.[129] This practice persisted throughout the twentieth century, and the plurality noted that "all 50 States . . . settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments."[130] This "widespread and time-tested consensus" demonstrated that such laws satisfied strict scrutiny.[131]

The *Burson* plurality relied on historical practice as part of its strict scrutiny analysis, but Justice Scalia, who provided the crucial fifth vote, went further. In his view, the history cited by the plurality didn't just demonstrate the necessity of such laws; it also reflected a shared understanding that "the streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate," and that content-based restrictions there need only be "reasonable and viewpoint neutral."[132] In other words, historical practice had settled the meaning of the First Amendment with respect to polling places.

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126. Burson v. Freeman, 504 U.S. 191 (1992).
127. *Id.* at 199–200.
128. *Id.* at 200–02.
129. *See id.* at 202–04.
130. *Id*. at 205–06.
131. *Id.* at 206.
132. *Id.* at 215, 216 (Scalia, J., concurring).

In 2016's *Evenwel v. Abbott*, a group of voters challenged Texas's legislative districting plan, arguing that the Fourteenth Amendment's equal protection clause required apportionment based on voter-eligible population, rather than total population.[133] The Supreme Court rejected this argument based not only on history and precedent, but also the "settled practice" of using total population, which "all 50 States and countless local jurisdictions have followed for decades, even centuries."[134] While *Evenwel* did not hold that the Constitution *required* apportionment based on total population, it may still be read as liquidating what the Constitution does *not* require—that is, apportionment based on eligible voter population.[135]

Most recently, the Supreme Court adopted a liquidation framework in *Chiafalo v. Washington*, which concerned whether, under the Electors Clause and the Twelfth Amendment,[136] States could subject presidential electors to fines or removal if they did not vote for their party's preferred candidate.[137] This question pitted the Constitution's text—which many argued envisioned electors exercising discretion[138]—against the longstanding practice of electors adhering to the will of the political parties and the voters who select them.[139] Justice Kagan, writing for the Court, resolved the issue by invoking Madisonian Liquidation.[140]

Justice Kagan began with the text of the Electors Clause, which "gives the States far-reaching authority over presidential electors,

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133. Evenwel v. Abbott, 136 S. Ct. 1120 (2016).

134. *Id.* at 1132.

135. *See id.* at 1132–33 ("Because history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population.").

136. U.S. CONST. amend. XII.

137. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).

138. *See* Charles & Fuentes-Rohwer, *supra* note 118, at 5; THE FEDERALIST NO. 68, at 410–14 (Alexander Hamilton) (Clinton Rossiter ed., 2003); Stephen M. Sheppard, *A Case for the Electoral College and for Its Faithless Elector*, 2015 WIS. L. REV. ONLINE 1, 7–8 (2015).

139. *See Chiafalo*, 140 S. Ct. at 2328 (noting only 180 faithless votes out of over 23,000).

140. *Id.* at 2326.

absent some other constitutional constraint."[141] This authority, she continued, included placing conditions on appointment, such as a residency requirement or a pledge to vote for their party's nominee.[142] Absent any contrary constitutional provision, states are free to enforce such pledges.[143] The faithless electors, however, argued that three pieces of text provided for elector discretion. First, they argued the use of the term "Electors"—which the Constitution also uses to describe individual voters—connotes choice.[144] Second, they argued that the Twelfth Amendment's requirement that electors shall "vote . . . for President and Vice President," likewise connotes discretion.[145] Third, they argued that the Twelfth Amendment's directive that electors vote "by Ballot" suggests both secrecy and discretion, both of which "conflict[] with any notion of state control over the vote of an elector."[146] In short, if states could control the votes of presidential electors, then "the electors would not be 'Electors,' and their 'vote by Ballot' would not be a 'vote.'"[147]

But where the faithless electors saw the constitutional text as clear, Justice Kagan saw indeterminacy. As she explained, the terms "elector," "vote," and "ballot" "need not always connote independent choice."[148] She offered hypothetical examples of "electors" who lack meaningful choice but whose "ballots" might nonetheless be considered "votes," such as "a person [who] always votes in the way his spouse, or pastor, or union tells him to," a person casting a proxy ballot for another, or a person who votes in an election in which they have "no real choice because there is only one name on

141. *Id.* at 2324.

142. *Id.*

143. *Id.*

144. *See* Consolidated Opening Brief for Presidential Electors at 23–26, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (Nos. 19-465, 19-518).

145. *See id.* at 26–29.

146. *Id.* at 29–31.

147. *Id.* at 31.

148. *Chiafalo*, 140 S. Ct. at 2325.

a ballot."[149] To Justice Kagan, these examples illustrated that "although voting and discretion are usually combined, voting is still voting when discretion departs."[150] She concluded that "the Framers did not reduce their thoughts about electors' discretion to the printed page," and the Constitution's "sparse instructions [take] no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be."[151]

In light of this indeterminacy, Justice Kagan turned to history and Madison's belief that "a regular course of practice can liquidate & settle the meaning of disputed or indeterminate terms & phrases."[152] She recounted the practice of electors voting in accordance with a state's wishes, starting with the first contested presidential election, in which would-be electors declared their support for specific candidates and "all but one elector did what everyone expected, faithfully representing their selectors' choice of presidential candidate."[153] She then explained how the Twelfth Amendment "embraced this new reality [by] both acknowledging and facilitating the Electoral College's emergence as a mechanism not for deliberation but for party-line voting."[154] She noted that "courts and commentators . . . recognized the electors as merely acting on other people's preferences" and that state legislatures "dropped out of the picture" by allowing voters to choose presidential electors and by "enact[ing] statutes requiring electors to pledge that they would squelch any urge to break ranks with voters."[155] To the extent that there have been faithless electors, Justice Kagan argued, these have been "anomalies only," representing "just one-half of one percent of the total" number of Electoral College votes.[156] In light of this

149. *Id.*
150. *Id.*
151. *Id.* at 2326.
152. *Id.* (citing Letter to S. Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908)) (internal quotation marks omitted).
153. *Id.*
154. *Id.* at 2327.
155. *Id.* at 2327–28.
156. *Id.* at 2328.

longstanding practice, Justice Kagan concluded that a state may "instruct[] its electors that they have no ground for reversing the vote of millions of its citizens."[157]

Chiafalo presents the Court's clearest endorsement of liquidation to interpret election-related constitutional provisions. As Professors Charles and Fuentes-Rohwer have acutely observed, however, it does more than that.[158] Consider what Justice Kagan's textual analysis tells us about liquidation in practice. Though Justice Kagan twice claims that both "[t]he Constitution's text and the Nation's history . . . support allowing a State to enforce an elector's pledge,"[159] her textual analysis at best finds the text to be indeterminate.[160] It is history, not text, that is doing the real work in this opinion.[161] *Chiafalo* is thus instructive on how indeterminate text must be before liquidation is appropriate.[162] Justice Kagan's responses to the textual arguments put forth by the faithless electors—strained hypotheticals about coerced votes, proxy voting, and Soviet sham elections—are hardly irrefutable.[163] *Chiafalo* illustrates that liquidation's textual indeterminacy requirement may pose a lower hurdle and that historical practice can settle constitutional meaning even where the text may tilt the other way.

Consider also Justice Kagan's historical analysis. One question raised by the liquidation framework is how consistent a practice must be to liquidate constitutional meaning.[164] As Justice Kagan notes, faithless electors, though rare, are not unheard of: there have

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157. *Id.*

158. *See generally* Charles & Fuentes-Rohwer, *supra* note 118.

159. *Chiafalo*, 140 S. Ct. at 2323–24; *see also id.* at 2328 ("The Electors' constitutional claim has neither text nor history on its side.").

160. *See id.* at 2326.

161. *See* Charles & Fuentes-Rohwer, *supra* note 118, at 14.

162. *See* Baude, *supra* note 101, at 66 ("A theory dependent on constitutional indeterminacy naturally prompts the question: What makes a constitutional provision indeterminate?").

163. *See* Charles & Fuentes-Rohwer, *supra* note 118, at 14. ("*Chiafalo* cannot be justified on textualist grounds and quite frankly *Chiafalo* is not a textualist case.").

164. *See* Baude, *supra* note 101, at 16–17 (noting Madison's use of various terms, from "regular" and "continued" to the more restrictive "uniform").

been 180 faithless votes cast since the Founding.[165] One commentator has argued these votes pose a serious obstacle to *Chiafalo*'s analysis.[166] But the Court was clear that occasional "anomalies" do not defeat an otherwise consistent pattern.[167] This is most obvious where such anomalies go unchallenged,[168] but remains true even where a court or a body such as Congress acquiesces in the anomaly.[169] *Chiafalo* thus endorses a functionalist approach to liquidation that does not require perfect adherence.

Finally, consider what *Chiafalo* tells us about liquidation's third requirement, acceptance, and which actors must acquiesce in a practice to give it legitimacy. The Court looked to electors themselves, of course, but also to courts, contemporary commentators, Congress, and state legislatures.[170] The Court also credited the beliefs of individual voters, including one voter in the 1796 election who declared that "'[W]hen I voted for the [Federalist] ticket, I voted for John Adams . . . do I chuse [sic] [a presidential elector] to determine for me whether John Adams or Thomas Jefferson is the fittest man for President of the United States? No—I chuse [sic] him to *act*, not to *think*.'"[171] This analysis comports with Professor Baude's view that liquidation requires that a settled practice be accepted by both government actors and the public.[172]

In short, *Chiafalo* not only confirms that Madisonian liquidation is an appropriate framework for interpreting election-related constitutional provisions, but also provides important insights into

165. *See Chiafalo*, 140 S. Ct. at 2328.

166. *See* Green, *supra* note 118.

167. *Chiafalo*, 140 S. Ct. at 2328.

168. *See id.* (stressing that, while Congress has counted every faithless elector's vote, "only one has ever been challenged").

169. *See id*. (emphasizing that "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years" and that "Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one").

170. *See id.* at 2327–28.

171. *Chiafalo*, 140 S. Ct. at 2326 n.7 (citing Gazette of the United States, Dec. 15, 1796, p.3. col. 1 (emphasis in the original)).

172. *See* Baude, *supra* note 101 at 18–20.

how a liquidation analysis should be carried out in the context of election law.

III. LIQUIDATING THE ROLE OF STATE CONSTITUTIONS

Professor Baude identifies three elements of the liquidation framework: (1) a discrete textual indeterminacy; (2) a course of deliberate practice by institutional actors reflecting constitutional reasoning; and (3) settlement of the textual indeterminacy through institutional and popular acquiescence to the practice.[173] The Supreme Court in *Chiafalo* examined each of these elements with respect to the Electors Clause and the Twelfth Amendment.[174] This Part follows the Court's lead and applies the same liquidation framework to the Elections and Electors Clauses and concludes that their practical meaning has been settled in favor of state legislatures remaining constrained by state constitutions.

A. Textual Indeterminacy

The first step in discerning the role of state constitutions under the Elections and Electors Clauses is to determine, to the extent possible, the text's original meaning.[175] ISL theory proponents argue that the text permits state legislatures to regulate federal elections free from state constitutional constraints.[176] This Section, however, demonstrates that the Clauses are indeterminate as to the role of state constitutions and that, while an "independent state legislature" interpretation is plausible, the text, history, and purpose of the Clauses also support an interpretation under which state legislatures remain constrained by state constitutions.

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be

173. *See id.* at 13–18.

174. *See supra* notes 137–172 and accompanying text.

175. *See* Baude, *supra* note 101 at 13–16; Whittington, *supra* note 97, at 608–10 (2004); Lawrence B. Solum, *the Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 306 (2015).

176. Morley, *supra* note 1, at 18.

prescribed in each State by the *Legislature* thereof."[177] Similarly, the Electors Clause provides that "[e]ach State shall appoint [presidential electors] in such Manner as the *Legislature* thereof may direct."[178] Neither clause references state constitutions nor state courts. Two question thus arise: first, what is the meaning of the term "Legislature," and second, are these "Legislatures" subject to state constitutional constraints?

1. Defining "Legislature"

To what, exactly, does the term "Legislature" refer to under the Elections and Electors Clauses? One interpretation is that the term refers exclusively to elected multi-member bodies that exercise general lawmaking authority.[179] This definition would exclude other state entities such as governors and courts along with ballot initiatives and independent redistricting commissions.[180] An alternative interpretation is that the term refers to a state's general lawmaking authority as established and constrained by state constitutions. This interpretation has been embraced by the Supreme Court throughout the twentieth century.[181]

Plausible arguments can be made that the text of the Clauses supports either interpretation. Most eighteenth-century dictionaries defined the word "legislature" simply as "the power that makes

177. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

178. U.S. CONST. art. II, § 1, cl. 2.

179. *See* Morley, *supra* note 12 at 863 (arguing the term "legislature" refers to "a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets for limited periods of time, and then enters into recess").

180. *See id.* (arguing the Elections Clause precludes regulation by any "state-level entity or process" that does not meet the definition of legislature).

181. *See supra* Part II.B.

laws."[182] Some, however, recognized that "legislature" often referred to an institutional lawmaking body.[183] This ambiguity is mirrored in Founding-era debates over the Elections Clause, where the term "legislature" was often used interchangeably with the terms "state" or "state government."[184] In Virginia, for instance, one delegate noted how the "State Legislature" might fail to select a place for holding elections, but later discussed how Congress might alter election rules "established by the *States*."[185] Likewise, James Madison discussed the dangers associated with placing authority to regulate federal elections "exclusively under the control [sic] of the State Governments," while elsewhere referring to the "State Legislatures."[186] In other states, debates contemplated institutional legislatures.[187] Original meaning thus does not foreclose either a broad or a narrow interpretation.

But the Clauses are not the only places where state legislatures appear in the Constitution; they also appear seventeen times in various contexts.[188] Most other mentions refer specifically to institutional legislatures,[189] including provisions empowering state legislatures to select Senators[190] and ratify Constitutional

182. *See, e.g.*, *Legislature*, 2 *A Dictionary of the English Language* (1st ed. 1755) ("The power that makes laws").

183. *Id.* (offering as an example: "Without the concurrent consent of all three parts of the legislature, no law is or can be made").

184. *See* Brief of the Brennan Center for Justice as Amicus Curiae in Support of Appellees at 6–7, Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 576 U.S. 787 (2015) (No. 13-1314) (discussing a survey of founding era documents in which "the terms 'state' and 'state government' were used roughly half the time in reference to the first part of the Elections Clause").

185. *See* IX THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 920 (John P. Kaminski et al. eds., 2009) [hereinafter DOCUMENTARY HISTORY] (emphasis added).

186. *See* X *id.* 1260.

187. *See* Natelson, *supra* note 50 at 31.

188. *See AIRC*, 576 U.S. at 829 (Roberts, C.J., dissenting).

189. *See* Morley, *supra* note 12, at 855-59.

190. U.S. CONST. art. I, § 3, cl. 1 (providing that Senators from each state shall be "chosen by the Legislature thereof").

Amendments.[191] Several Founding-era documents discussing these provisions interpreted the term "legislature" as referring to institutional bodies.[192] Some commentators have advanced an intratextualist[193] argument that the term "Legislature" should be given the same meaning in the Elections and Electors Clause.[194]

Others, however, caution against intratextualism on the grounds that different provisions of the Constitution were "enacted at different times, in different circumstances, and for different reasons," and even the original unamended Constitution is the product of various "tradeoffs, political battles won and lost, and compromised ideals."[195] Regulating federal elections is different than selecting Senators; debates over the former focused on Congress's authority to supersede state laws,[196] while debates over the latter focused on the need for different forms of federal representation.[197] So while references to institutional legislatures may provide some useful

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191. U.S. CONST. art. V (providing that amendments shall be valid "when ratified by the Legislatures of three fourths of the several States").

192. *See* Federal Farmer, *Letter XII* (Jan. 12, 1788) (describing legislatures as bodies comprised of "two branches"). *See also* 1 CHANCELLOR JAMES KENT, COMMENTARIES ON AMERICAN LAW 261–62 (John M. Gould ed., 14th ed. 1896) (describing state legislatures "in the true technical sense, being the two houses acting in their separate and organized capacities"). Several of the Federalist Papers similarly use the term "legislature" in reference to the institutional bodies. *See* THE FEDERALIST NO. 27, at 174–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing "State legislatures" as "select bodies of men"); *id.* NO. 60, at 368 (Alexander Hamilton) (contrasting "State legislatures" with "the people").

193. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing in favor of interpreting "a contested word or phrase that appears in the Constitution" by looking to that word's meaning elsewhere in the document).

194. *See* Morley, *supra* note 12 (making this argument in detail); *AIRC*, 576 U.S. at 829 (Roberts, C.J., dissenting) ("The unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way.").

195. *See* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731, 742 (2000).

196. *See* Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1030–40 (2005).

197. *See* David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1050–52 (2014).

context, a one-size-fits-all definition of "legislature" may not reflect how the term was understood in different contexts. At a minimum, the historical record casts sufficient doubt on the intratextualist reading of the term "legislature" to warrant a turn to history.[198]

2. Legislatures: Independent or Constrained?

Even if we assume that the Elections and Electors Clauses refer specifically to institutional legislatures, the question remains whether those legislatures are subject to state constitutional constraints when they regulate federal elections. One interpretation is that the Clauses grant state legislatures exclusive and plenary power, free from state constitutional constraints. A less dramatic interpretation is that the Clauses simply delegate power to state legislatures to regulate federal elections via their ordinary lawmaking authority.

Again, plausible arguments can be made in support of either interpretation. If, as discussed above, the term "legislature" refers to a state's general lawmaking authority, then the Clauses empower state governments, rather than institutional legislatures. This comports with the drafting history. An early draft of the Elections Clause provided that "[e]ach state shall prescribe the time and manner of holding elections" for the federal legislature,[199] and the record provides no explanation for the insertion of the term "legislature" into the final version.[200] This insertion may not have been significant, as the text of the Elections Clause provides that election rules "shall be prescribed in each *State* by the Legislature *thereof*,"[201] suggesting that the Clause treats legislatures as creations *of*, and

198. This is especially so in light of the relatively low bar for textual indeterminacy in cases like *Chiafalo*. *See* supra notes 148–151 and accompanying text.

199. *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 146 (Jonathan Elliot ed. 1836) [hereinafter ELLIOT'S DEBATES].

200. Greene, *supra* note 196, at 1031 (noting "no recorded debate over the Clause until after it emerged from the Committee of Detail").

201. U.S. CONST. art. I, § 4 (alteration in original).

thus constrained *by*, the states.[202] This understanding aligns with the Framers' experience. The Constitution was drafted and ratified against a backdrop of state constitutions that empowered and constrained state legislatures,[203] and there is no indication the Framers sought to upset the balance of power within states.

One argument in favor of the "independent" interpretation is that, because federal offices derive their power from the Constitution, states lack inherent power to regulate federal elections. Any such power must therefore come from the Constitution, the text of which appears to grant this power exclusively to institutional legislatures.[204] But even if the text of the Clauses singles out institutional legislatures, it is not clear that the Clauses were understood as a grant of power to states. Many saw the Elections Clause, with its built-in Congressional veto, as taking power *away* from the states.[205] Viewed this way, the Elections Clause, like the Qualifications Clause,[206] limits states' sovereign authority.[207] Justice Thomas has argued that states do have inherent power to regulate federal elections and that the Elections Clause "does not delegate any authority to the States," but "simply imposes a duty upon them" to

202. *See* Bush v. Gore, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting) (emphasizing the words "State" and "thereof" in the Presidential Electors Clause and suggesting the Clause requires "solicitude . . . to the legislature's sovereign").

203. *See* Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, 48 FED. LAW. 27, 31 (2001).

204. *See* Morley, *supra* note 1 at 6.

205. *See* Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1220 (2012) ("the founding generation, and in particular the Anti-Federalists, recognized that the Elections Clause deprived the states of their sovereign authority over elections.").

206. U.S. CONST. art. I, § 2, cl. 2.

207. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 806 (1994) ("Even if we believed that States possessed as part of their original powers some control over congressional qualifications . . . the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.").

hold congressional elections.[208] While this argument has not yet persuaded a majority of the Court,[209] it nonetheless offers a plausible alternative reading of the Clauses.

But even if the Clauses are affirmative grants of power, it does not necessarily follow that this power is unconstrained by state constitutions. Proponents of the ISL theory again make an intratextualist argument: the Constitution assigns state legislatures various functions in the federal system, including the selection of Senators[210] and the ratification of constitutional amendments,[211] most of which are not subject to state constitutional constraints.[212] As the argument goes, the use of similar language in the Elections and Electors Clauses suggests that state legislatures' power to regulate federal elections is similarly unconstrained.

This intratextualist approach, however, conflicts with the Constitution's treatment of Congress. As with state legislatures, the Constitution assigns various functions to Congress, some of which, like the impeachment power or the power to judge the qualifications of its members, are subject neither to a Presidential veto nor judicial review.[213] For the most part, however, the functions assigned to Congress must be exercised according to the usual constitutional

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208. *Id.* at 862 (Thomas, J., dissenting). *See also* Chiafalo v. Washington, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring) (arguing the use of the term "shall" in the Presidential Electors Clause "expressly requires action by the States" and that "[t]his obligation to provide the manner of appointing electors does not expressly delegate power to States").

209. *See Chiafalo*, 140 S. Ct. at 2324 (holding the Presidential Electors Clause "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint"); Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [congressional] elections . . . only within the exclusive delegation of power under the Elections Clause."); U.S. Term Limits v. Thornton, 514 U.S. at 805 ("[I]n certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.").

210. U.S. CONST. art. I, § 3.

211. U.S. CONST. art. V.

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

213. *See* U.S. CONST. art. 1, §§ 2, 3, and 5.

constraints. If the term "Congress" is used throughout the Constitution to signal both independent and constrained functions, we should presume the same is true of references to state legislatures.

This is particularly so of the Elections and Electors Clauses, which confer power on Congress and state legislatures simultaneously. It would be anomalous, without some explicit textual cue, for the Clauses to confer a constrained power on one but not the other.

The Elections and Electors Clauses grant authority to Congress as well as state legislatures, but Congress's power under the Clauses is clearly subject to the usual constitutional constraints.[214] The Elections Clause provides that Congress may "make or alter" rules governing congressional elections, but that it must do so "by law."[215] Compare this with other congressional functions, such as impeachment or the power to judge the qualifications of members, which are not subject to constitutional constraint nor judicial review.[216] The respondents in *Smiley* seized upon the fact that the term "by law" seemingly applies only to Congress to argue that state legislatures were not so constrained, but the Supreme Court explained that "the inference is strongly to the contrary," and that, because the lawmaking power is "the same whether it is performed by [the] state or national legislature . . . the use of the phrase ["by law"] places the intent of the whole provision in a strong light."[217] This inference is even stronger in light of Article II, which provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes."[218] Article II does not require Congress to do so "by law," but there is no indication that

214. *Cf.* Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 66-67 (2021), https://perma.cc/5JB2-4KFP; Levitt, *supra* note 21 at 1063 n.39.

215. U.S. CONST. art. I, § 4.

216. *See* Reed v. County Comm'rs, 277 U.S. 376, 388 (1928) (noting that under Article I, Section 5, each house of Congress "is fully empowered, and may determine such matters without the aid of the [other house] or the Executive or Judicial Department").

217. Smiley v. Holm, 285 U.S. 355, 367 (1932).

218. U.S. CONST. art. II, § 1, cl. 5.

Congress may regulate the appointment of Electors free from federal constitutional constraints. As another example, the Twenty-Third Amendment provides that the District of Columbia "shall appoint [presidential electors] in such manner as Congress may direct" without using the term "by law,"[219] but this power is also exercised through the ordinary lawmaking process.[220] It is thus reasonable to read the Elections Clause as requiring state legislatures to also enact election laws through the ordinary lawmaking process, constrained by state constitutions.

The Electors Clause may also be read as constraining state legislatures. Unlike the original Article I, Section 3, which gave state legislatures the unconstrained power to "chuse" Senators, Article II gives state legislatures only the power to "direct" the manner of their appointment.[221] This language mirrors Article V of the Articles of Confederation, which provided that Congressional delegates "shall be annually appointed in such manner as the legislature of each State shall direct."[222] This language, in effect when the Constitution was drafted and ratified, was not understood to confer independence on state legislatures; when the Articles took effect, eight out of ten state constitutions regulated the selection of congressional delegates, as did three of the four state constitutions adopted after the Articles were proposed.[223] The use of similar language in Article II suggests a similar understanding. Moreover, unlike Article V, the Electors Clause provides that "[e]ach State shall appoint [electors] in such Manner as the Legislature thereof *may* direct."[224]

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219. *See* U.S. CONST. amend. XXIII.

220. *See* Pub. L. 87-389, 75 Stat. 817 (1961) (providing that the District of Columbia's electors be provided by popular vote).

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

222. *Compare* ARTICLES OF CONFEDERATION of 1781, art. V, *with* U.S. CONST. art. II, § 1.

223. *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. U. L. REV. 731, 755 nn. 157–58 (2001) (collecting relevant provisions of state constitutions before and after the Articles of Confederation were enacted).

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

The use of the permissive "may"—particularly when read alongside the mandatory "shall" in the same clause—strongly implies that the state legislature's role is neither exclusive nor independent of other state organs.

In sum, while intratextualism presents a plausible basis for the ISL theory when focusing solely on references to state legislatures, a closer reading provides a strong textual basis to conclude that both the Elections and Electors Clauses in fact provide for constrained state legislatures. Under the Elections Clause, state legislatures, like Congress, must enact "regulations" and do so "by law"—that is, subject to the ordinary substantive and procedural constitutional constraints. And under the Electors Clause, a State's manner of appointing presidential electors "may"—not "shall"—be directed by the state legislature, implying that other branches of state governments retain a role in the process.

3. Purpose and Drafting History

Generally, it is the Constitution's text, rather than the purpose its authors may have had in drafting it, that is given legal effect.[225] As illustrated above, however, the text of the Clauses is indeterminate with respect to the role of state constitutions. In cases such as this, the intent of the drafters may help shed light on the text's original meaning.[226]

a. The Elections Clause

At the Philadelphia Convention and state ratifying conventions, the Elections Clause proved controversial, generating significant debate.[227] This debate focused on the allocation of authority between States and Congress, including whether Congress would have the power to make or alter state election laws.[228] The allocation

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225. *See* Whittington, *supra* note 97, at 610 (2004).

226. *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 921 (2017).

227. *See* Natelson, *supra* note 50, at 23 (noting that because the Elections Clause was so controversial, "the historical record contains a massive number of references to it").

228. *Id.* at 23–40.

of power *within* a state, including the role of state constitutions, was not addressed.[229]

The first purpose of the Elections Clause was to impose upon states an affirmative duty to conduct federal elections.[230] As Alexander Hamilton observed in Number 59 of *The Federalist*, "[A]n 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."[231] If a state wanted to sabotage the federal government, it needed only to refuse to elect Representatives.[232] Federalists cited Rhode Island's refusal to send delegates to the Confederation Congress as an example of this danger.[233] Proponents of the Elections Clause made this self-preservation argument repeatedly in the state ratifying conventions.[234] The Elections Clause, by dictating that the time, place, and manner of electing Representatives "*shall* be prescribed," safeguards against this threat.

The second purpose of the Elections Clause was to divide authority between the states and Congress to prevent either from enacting election laws designed to favor certain candidates and thwart the

229. *See* Morley, *supra* note 1, at 27 ("The history of the Elections Clause . . . is silent on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections").

230. *See* Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 8 (2013) (describing the Elections Clause as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.").

231. THE FEDERALIST NO. 59, at 361 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (writing that without a constitutional check, the states "could at any moment annihilate [the federal government] by neglecting to provide" for elections).

232. *See id.*

233. *See A Landholder (Oliver Ellsworth), Letter IV*, Nov. 26, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 231, 233–34 (citing the case of Rhode Island).

234. *See* 2 ELLIOT'S DEBATES, *supra* note 199, at 326 (statement of John Jay at the New York ratifying convention) (expressing concern that "the states [might] neglect to appoint representatives" and signaling the need for "some constitutional remedy for this evil"); *id.* at 24 (statement of Caleb Strong at the Massachusetts ratifying convention) ("[I]f the legislature of a state should refuse to make [election rules], the consequence will be, that the representatives will not be chosen, and the general government will be dissolved.").

popular will. For the Anti-Federalists, assigning Congress ultimate authority over the manner of its own selection posed a significant threat. A congressional majority, they argued, could replace state election laws with new ones designed to entrench itself in power.[235] While some theories offered for how Congress might achieve this—extending term limits,[236] imposing new qualifications,[237] or altering the mechanism for selecting Senators[238]—were clearly foreclosed by the Constitution's text, others were more plausible. By manipulating the time and location of elections—such as by holding elections during harvest time[239] or solely in urban centers[240]—Congress could favor certain groups. Likewise, Congress could mandate at-large

235. *See Centinel, Letter VIII*, PHILA. INDEP. GAZETTEER, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 185, at 231, 232 ("[T]hat which gives Congress the absolute controul [sic] over the time and mode of its appointment and election . . . may establish hereditary despotism . . .").

236. *See Samuel*, INDEP. CHRON., Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 185, at 678, 680 ("And there is nothing to hinder, but ample provision made, for Congress to make themselves perpetual. For by Art. I, Sect. 4 the Congress may at any time, make and alter the time, place and manner of choosing Representatives; and the time and manner of choosing Senators.").

237. *See Cornelius*, HAMPSHIRE CHRON., Dec. 18, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 185, at 410, 413 ("By this Federal Constitution, each House is to be the judge, not only of the elections, and returns, but also of the *qualifications* of its members; and that, without any other rule than such as they themselves may prescribe.").

238. *See* Letter from Samuel Osgood, to Samuel Adams (Jan. 5, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 185, at 263, 265 ("[I]f Congress should determine, that the People at large, or a certain Description of them, should vote on the Senators, it would only be altering the Manner of choosing them—If this be true, Congress will have the exclusive Right of pointing out the Qualification of the Voters for Senators . . . .").

239. *See* Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 185, at 240, 241 ("Congress may establish a place, or places, at either the extremes, center, or outer parts of the states; *at a time and season too, when it may be very inconvenient to attend*; and by these means destroy the rights of election . . . .") (emphasis added).

240. *See Vox Populi*, MASS. GAZETTE, Oct. 30, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 185, at 168, 170 (suggesting Congress might direct "that the representatives of this commonwealth should be chosen all in one town, (Boston, for instance) on the first day of March"); *Cornelius*, *supra* note 237, at 410, 413–14 (similar).

elections,[241] adopt plurality-victor rules,[242] or institute voice voting[243] to entrench a dominant faction. The Anti-Federalists wanted to weaken congressional authority or limit it to instances where states neglected to provide for elections.[244] Ultimate authority over federal elections, they argued, should lie with the states, which were closer to the people and elected more frequently.[245]

Federalists, however, saw state legislatures as the greater threat. As James Madison observed at the Philadelphia Convention, state legislatures had equal incentive to craft election laws favoring their own interests and candidates.[246] One concern was malapportionment.[247] At the Massachusetts ratifying convention, Judge Francis Dana and Rufus King pointed to Connecticut and South Carolina, where representatives were apportioned by municipal corporation rather than population, along with efforts by the Rhode Island legislature to enact a similar scheme.[248] Likewise, in Virginia, James Madison cautioned that "[s]ome states might regulate the elections

241. *See* 2 ELLIOT'S DEBATES, *supra* note 199, at 327 (reporting remarks of Melancton Smith at the New York ratifying convention).

242. *See* Federal Farmer, *Letter III*, Oct. 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 31.

243. *See Centinel III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 59.

244. *See* Federal Farmer, *supra* note 192, at 318 ("[A]t most, congress ought to have power to regulate elections only where a state shall neglect to make them.").

245. *See* Letter from William Symmes, Jr., to Peter Osgood, Jr. (Nov. 15, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 107–16 (stating that he did not think Congress would have the wisdom to make regulations within the states); *Vox Populi*, *supra* note 240, at 170 ("And it is a little remarkable, that any gentleman should suppose, that Congress could possibly be in any measure as good judges of the time, place and manner of elections as the legislatures of the several respective states.").

246. *See* 5 ELLIOT'S DEBATES, *supra* note 199, at 401.

247. *See* 2 *id.* at 27 (arguing state legislatures might "make an unequal and partial division of the states into districts for the election of representatives").

248. *See id.* at 49 (remarks of Judge Francis Dana); *id.* at 50–51 (remarks of Rufus King).

on the principles of equality, and others might regulate them otherwise."[249] These were not idle concerns; at the Philadelphia Convention, the South Carolina delegation sought to remove Congress's authority altogether to preserve their state's existing apportionment scheme.[250] Because state legislatures also controlled the means for their own election, Federalists argued such mischief could not be remedied without congressional oversight.[251]

Federalists felt Congress was the safest place to vest ultimate authority over federal elections. The diversity and national character of the House would prevent its capture by any one faction,[252] and the careful system of checks and balances between the House and the Senate provided a defense against abuse not present in the state legislatures.[253] As Theophilus Parsons noted at the Philadelphia Convention, the interests of the people and of the states were pitted against one another in the House and Senate, and election laws that unfairly benefitted one chamber would be rejected by the other such that no law "would ever obtain the consent of both branches of the legislature, but such as did not affect their neutral rights and the balance of government."[254] Thus, while both the states and Congress might be tempted to manipulate election laws to anti-republican ends, the relatively unchecked state legislatures had the

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249. 3 *id.* at 367.

250. *See* 5 *id.* at 401 (motion by Charles Pinckney and John Rutledge of South Carolina); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 223–24 (1996).

251. *See* 6 DOCUMENTARY HISTORY, *supra* note 185, at 1213, 1218 (arguing that, without congressional authority, "the people can have no remedy" against state electoral manipulations); 4 Elliot's Debates at 303 (noting that if the people dislike a state's election laws, "they can petition the general government to redress this inconvenience.").

252. *See* THE FEDERALIST NO. 60, at 367 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The dissimilarity in the ingredients which will compose the national government . . . must form a powerful obstacle to a concert of views in any partial scheme of elections.").

253. *See* 2 ELLIOT'S DEBATES, *supra* note 199, at 26–27 (Theophilus Parsons) ("These two branches . . . have different constituents, and as they are designed as mutual checks upon each other, and to balance the legislative powers, there will be frequent struggles and contentions between them.").

254. *Id.*

greater opportunity to do so. In the end, the Federalists prevailed; Congress would have ultimate authority not only to alter state election laws, but also to make its own.[255]

The Elections Clause had two major purposes: ensuring states held federal elections and dividing authority over federal elections between the states and Congress. Both purposes reveal an overriding concern with unchecked authority over elections and a distrust of state legislatures in particular.[256] Thus, while these debates do not mention state constitutions specifically, it is hard to imagine the Framers intended the Elections Clause to eliminate this important check on state legislatures; when the Federalists spoke of the checks on Congress's Elections Clause authority, they referred to federal courts and the federal constitution.[257] Read broadly, the Elections Clause serves to impose additional checks on state legislatures, not to remove existing ones.

b. The Electors Clause

As with the Elections Clause, there is no indication the Electors Clause was intended to grant state legislatures exclusive and unconstrained authority over presidential elections.[258] There was no mention of state constitutions.[259] Rather, debates over the Electors

255. *See* 5 *id.* at 402 (amendment proposed by George Read of Delaware and agreed to by the Convention).

256. As Jamal Greene notes, the distrust of state legislatures demonstrated by Madison and others at the Philadelphia Convention may not reflect the broader views of the Framers or ratifiers. *See* Greene, *supra* note 196, at 1033. However, as he notes, the almost completely unchecked power the Elections Clause assigns to Congress is "difficult to justify . . . without adopting at least part of Madison's rationale." *Id.* at 1034.

257. *See* 4 ELLIOT'S DEBATES, *supra* note 199, at 71 (statement of John Steele at the North Carolina ratifying debates) ("The judicial power of [the federal] government is so well construed as to be a check . . . [i]f the Congress makes laws inconsistent with the Constitution, independent judges will not uphold them.").

258. *See* Smith, *supra* note 223, at 743 ("[T]here is no indication in the historical record that the [Electors Clause] was originally understood to grant independence to state legislatures.").

259. *See id.* ("At the Constitutional Convention, the Founders did not specifically address whether state legislatures operate independently of their constitutions when they

Clause centered on the more vexing question of how to elect the President.[260] During the Convention, delegates debated and voted down various methods, with most of the discussion focused on either direct popular election or selection by Congress.[261]

While popular election was more democratic,[262] opponents raised two primary concerns. First, they doubted whether voters would be able to make an informed decision or reach a national consensus.[263] Second, they worried a national popular election would favor larger and northern states over smaller and southern ones.[264] On the other hand, legislative appointment risked making the President dependent upon Congress.[265] The Electoral College answered both sets of concerns. Electors could be more informed, their numbers could be weighted to protect states' interests, and because they "would meet once and then forever dissolve," Presidential independence was ensured.[266]

But once the Convention settled on an Electoral College, the question shifted to how electors would be chosen. A similar debate emerged between those who favored popular election and those who favored legislative appointment, with no clear consensus.[267] Proposals were made under which electors would be "chosen by

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exercise their Article II powers."); James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections,* 27 Law & Contemp. Probs. 495, 502 (1962)("The point simply did not occur to [the Framers].").

260. *See* RAKOVE, *supra* note 250, at 259.

261. *See* CLINTON L. ROSSITER, 1787: THE GRAND CONVENTION 198–200 (1969).

262. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 80 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS] (statement of James Wilson) (arguing popular election "would produce more confidence among the people . . . than an election by the national Legislature").

263. *See* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 40 (1986).

264. *See* Smith, *supra* note 223, at 749; RAKOVE, *supra* note 250, at 259.

265. *See* Slonim, *supra* note 263, at 37–38.

266. *See* RAKOVE, *supra* note 250, at 259–60; *see also* Smith, *supra* note 223, at 748–50 (discussing the debates).

267. *See* Smith, *supra* note 223, at 748–756.

the people,"[268] "chosen by the State Executives,"[269] "appointed by the Legislatures of the States,"[270] or chosen by "the Legislatures of the States."[271] Finally, just two weeks before the end of the Convention, a new proposal was put forward, which, borrowing the familiar language of the Articles of Confederation, would have electors "appoint[ed] in such manner as [the] Legislature may direct."[272] There was no meaningful discussion over this change.[273] The delegates simply adopted the language and proceeded to the more dramatic question of what to do if the College did not produce a majority.[274] Likewise, during the ratification debates, the mechanics of the Electoral College were eclipsed by other issues, and there was no discussion of state constitutions.[275]

This history does not suggest any clear overriding purpose behind the Electors Clause. Rather, the Clause was a compromise between several competing interests, none of which is furthered by insulating state legislatures from state constitutional constraints.[276] What is clearest from the historical record is that the text of the Electors Clause was indeterminate even as it was adopted[277] and ratified.[278]

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268. 2 FARRAND'S RECORDS, *supra* note 262, at 55–56.

269. *Id.* at 57.

270. *Id.*

271. *Id.* at 112.

272. *Id.* at 493–94.

273. *Id.*

274. *Id.* at 500–29.

275. *See* Smith, *supra* note 223, at 746.

276. *See id.* at 754.

277. *See id.* at 732–33, 745 ("[I]t is difficult to know precisely what the language of [the Electors Clause] meant to the Framers, let alone the extent to which they thought it put limitations on state constitutions.").

278. *See id.* at 747 ("Thus, even in the most basic sense, the meaning of the words 'in such manner as the legislatures thereof may direct' was unclear to the Ratifiers.").

The foregoing inquiry into the text, history, and purpose of the Elections and Electors Clauses reveals two points. First, textual arguments can be made in favor of either an independent or a constrained view of state legislatures under the Elections and Electors Clauses. Not only is the term "Legislature" amenable to more than one interpretation, but both the Clauses themselves and related constitutional provisions can be read to support either position. Second, neither the legislative history nor purpose resolves this indeterminacy. While reasonable minds may differ as to which set of arguments is most persuasive, the Supreme Court's reasoning in *Chiafalo* reminds us that textual indeterminacy does not require more than a plausible argument on either side.[279] Here, both interpretations are more than plausible, and thus the requirement is met.

B. Course of Deliberate Practice

Following *Chiafalo*'s lead, the liquidation analysis's second prong looks for a course of deliberate practice.[280] Here, two practices are relevant. First is the practice of states—via state legislatures and their citizens—enacting state constitutional provisions to regulate federal elections. Second is the practice of state courts reviewing state election laws under those provisions. Both practices enjoy a long and nearly uniform pedigree. While some commentators point to scattered departures from the norm during the late nineteenth century, under a liquidation framework, even if the issue was at one time briefly contested, a century of settled subsequent practice is more than sufficient to liquidate the Clauses' meaning.[281]

279. *See supra* notes 159–163 and accompanying text.

280. *See* supra notes 152–169 and accompanying text; *cf.* Baude, *supra* note 101, at 16–17.

281. In *Bruen*, the Supreme Court reaffirmed that liquidation is an appropriate framework "'where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic.'" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014)). But the Court has also looked to historical practices to shed light on constitutional text "even when that practice began after the founding era." *Noel Canning*, 573 U.S. at 525

1. State Constitutions Regulating Federal Elections

From the beginning, state constitutions have regulated both the procedure and substance of federal elections. After the federal constitution was ratified, several states adopted new constitutions, which included election provisions and some of which explicitly regulated federal elections. In 1792, for instance, Delaware adopted a new constitution under which congressional representatives would be "voted for at the same Places where Representatives in the State Legislature are voted for, and in the same Manner."[282] Other provisions applied to both state and federal elections alike; nearly every state constitution set out voter qualifications,[283] and most included express protections for the right to vote or guarantees of free and equal elections.[284]

Many of these provisions went beyond general principles and regulated specific aspects of election administration, such as whether votes would be cast by ballot or by voice. The 1790 Pennsylvania constitution, for example, required that "[a]ll elections shall be by ballot,"[285] as did the constitutions of at least four other states.[286] This was one of the most important, and most contested, issues of election administration in the post-Founding era, with

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(citing Mistretta v. United States, 488 U.S. 361, 400–01 (1989)) (looking to historical practice after 1877); Dames & Moore v. Regan, 453 U.S. 654, 684 (1981) (looking to historical practice after 1952); The Pocket Veto Case, 279 U.S. 655, 689–90 (1929) (giving "great weight" to post-founding practice); *Ex parte* Grossman, 267 U.S. 87, 118–19 (1925) (looking to post-Founding practice to construe the constitution). *See also* Baude, *supra* note 101, at 59–63 (discussing the relevance of post-Founding practice and whether and to what extent early practice ought to be privileged in a liquidation analysis).

282. DEL. CONST. of 1792, art. VIII, § 2.

283. *See id.* art. IV, § 1; PA. CONST. of 1790, art. III, § 1; N.J. CONST. of 1776, art. IV; GA. CONST. of 1777, art. IX; MD. CONST. of 1776, art. XIV (amended 1810) (guaranteeing suffrage to all free white male citizens).

284. *See* DEL. CONST. of 1792, art. I, § 3; PA. CONST. of 1790, art. IX, § 5; GA. CONST. of 1777, art. X; KY. CONST. of 1792, art. XII, § 5; KY. CONST. of 1799, art. X, § 5; N.H. CONST. of 1792, art. XI; VT. CONST. of 1793, ch. 1, art. VIII; VT. CONST. of 1793, ch. 2, § 34; TENN. CONST. of 1796, art. XI, § 5.

285. PA. CONST. of 1790, art. III, § 2.

286. *See* GA. CONST. of 1789, art. IV, § 2; KY. CONST. of 1792, art. III, § 2; TENN. CONST. of 1796, art. III, § 3; OHIO CONST. of 1803, art. IV, § 2.

many concerned about the potential for fraud in ballot voting and for undue influence in voice voting.[287] Nonetheless, when states like Georgia and Kentucky sought to change these rules and switch to voice voting, they did so via the formal amendment process.[288] Other provisions encouraged voting, such as Georgia's imposition of a monetary penalty for those abstaining from elections,[289] while others protected voters by privileging them from arrest during elections so long as they were innocent of treason, felony, or breach of the peace.[290]

The next flurry of state constitutional development occurred during the Jacksonian and antebellum periods when several states made significant changes to their constitutions, some for the first time since the Founding.[291] These new state constitutions continued to regulate important aspects of election administration, such as voting by ballot or *viva voce*,[292] but also expanded into new areas. The Kentucky constitution set the hours of voting for all elections,[293] while California's constitution instituted a plurality-winner rule.[294] State constitutions also regulated federal elections in new ways. Maryland amended its constitution in 1810 to guarantee to every

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287. *See* RAKOVE, *supra* note 250 at 204.

288. *See* GA CONST. of 1798, art. IV, § 2 ("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 ("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*.").

289. GA. CONST. of 1777, art. XII.

290. *See* PA. CONST. of 1790, art. III, § 3; KY. CONST. of 1792, art. III, § 3; DEL. CONST. of 1792, art. IV, § 2; TENN. CONST. of 1796, art. III, § 2.

291. Until this point, several states operated under their pre-ratification constitutions. *See* VA. CONST. of 1776; N.J. CONST. of 1776; N.Y. CONST. of 1777; N.C. CONST. of 1776. Others, like Connecticut and Rhode Island, had no constitutions until this period. *See* CONN. CONST. of 1818; R.I. CONST. of 1843.

292. *See* OHIO CONST. of 1803, art. IV, § 2; LA. CONST. of 1812, art. VI, § 13; ALA. CONST. of 1819, art. III, § 7; MICH. CONST. of 1835, art. II, § 2; TEX. CONST. of 1845, art. VII, § 6; CAL. CONST. of 1849, art. II, § 6; MINN. CONST. art. VII, § 5 (renumbered from art. VII, § 6 in 1974); N.Y. CONST. of 1821, art. II, § 4; VA. CONST. of 1830, art. III, § 15; PA. CONST. of 1838, art. III, § 2; KY. CONST. of 1850, art. VIII, § 15.

293. *See* KY. CONST. of 1850, art. VIII, § 16.

294. *See* CAL. CONST. of 1849, art. XI, § 20.

free white male citizen the right to vote in all federal elections.[295] In 1838, Florida's Constitution provided that "[r]eturns of elections for members of Congress . . . shall be made to the secretary of state, in manner to be prescribed by law."[296] In 1842, Rhode Island specified that votes in congressional elections be "by ballot."[297] Congressional reapportionment was an area of particular focus, with state constitutions instituting districting criteria including compactness,[298] population equality,[299] and respect for county boundaries.[300]

State constitutions continued regulating federal elections throughout the Civil War. When West Virginia and Nevada entered the Union during the war, their constitutions included provisions related to voting by ballot, plurality winner rules, and congressional districting.[301] Several states also amended their constitutions to allow soldiers fighting in the war to vote while absent from their home states. Three of these applied explicitly to both federal and state elections,[302] while another four referred to elections generally and without further specification.[303]

Reconstruction saw another flurry of activity as Congress conditioned the readmission of former Confederate states on, among

295. *See* MD. CONST. of 1776, art. XIV (1810) ("[E]very free white male citizen . . . shall have a right of suffrage . . . in the election . . . for electors of the President and Vice-President of the United States, for Representatives of this State in the Congress of the United States, for delegates to the general assembly of this State, electors of the senate, and sheriffs.").

296. FLA. CONST. of 1838, art. VI, § 16. *See also* FLA. CONST. of 1865, art. VI, § 12.

297. *See* R.I. CONST. of 1842, art. VIII, § 2.

298. *See* VA. CONST. of 1850, art. IV, § 14.

299. *See* VA. CONST. of 1830, art. III, § 6.

300. *See* VA. CONST. of 1830, art. III, § 6; IOWA CONST. of 1846, art. IV, LEGISLATIVE DEPARTMENT, § 32; CAL. CONST. of 1849, art. IV, § 30.

301. *See* W. VA. CONST. of 1863, art. XI, § 6; *id.* art. III, § 2; NEV. CONST. art. IV, § 34 (repealed 2004); *id.* art. II, § 5; *id.* art. XV, § 14.

302. *See* CONN. CONST. of 1818, amend. XIII (1864); MD. CONST. of 1864, art. XII, § 11; R.I. CONST. of 1842, amend. IV (1864).

303. *See* N.Y. CONST. of 1846, art. II, § 1 (as amended in 1864); PA. CONST. of 1790, art. III, § 4 (1864); MICH. CONST. of 1850, art. VII, § 1 (as amended in 1866); KAN. CONST. art. V, § 3 (as amended in 1864) (eliminated by revision).

other things, adopting new state constitutions providing for universal male suffrage.[304] This same period saw new constitutions and amendments related to congressional districting[305] and popular election of presidential electors,[306] among other election-related provisions.[307]

Following Reconstruction, several southern states adopted new state constitutions with the explicit aim of circumventing the Fifteenth Amendment and restricting Black suffrage.[308] Beginning with Mississippi in 1890 and ending with Georgia in 1908, these new constitutions established poll taxes, literacy tests, grandfather clauses, and onerous registration rules and procedures.[309] While some of these provisions related solely to voter qualifications, many detailed the specific manner in which qualifications were to be assessed and voters registered.[310] Other provisions imposed direct regulations of time, place, or manner, including providing for

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304. Act of Mar. 2, 1867, Pub. L. No. 39-153, § 5, 14 Stat. 428, 429 (1867).

305. *See* ALA. CONST. of 1867, art. VIII, § 1; VA. CONST. of 1870, art. V, §§ 12–13; TENN. CONST. art. X, § 5; CAL. CONST. art. IV, § 27 (repealed 1980); MONT. CONST. of 1889, art. VI, § 1; S.D. CONST. art. XIX, § 1; N.D. CONST. of 1889, art. IV, § 11 (renumbered from art. XVIII, § 214) (amended 1960) (held unconstitutional 1964); WYO. CONST. art. III, §§ 47, 49 (amended 1967; renumbered from APPORTIONMENT, §§ 1, 3 in 1938).

306. *See* S.C. CONST. of 1868, art. VIII, § 9; PA. CONST. art. VII, § 13 (renumbered from art. VIII, § 17, in 1967); COLO. CONST., SCHEDULE, §§ 19–20; LA. CONST. of 1879, art. CXCI.

307. *See* VA. CONST. of 1870, art. III, § 2; PA. CONST. art. VII, § 4 (renumbered from art. VIII in 1967); GA. CONST. of 1868, art. II, § 1; KY. CONST. § 147 (replacing voice voting with election "by secret official ballot" for all elections).

308. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 301–02 (2000) (explaining that restoration of white supremacy in the south was the "avowed purpose" of these new constitutions).

309. *See* MISS. CONST. of 1890, art. XII, §§ 243–244 (repealed 1975); VA. CONST. of 1902, art. II, §§ 18–23; GA. CONST. of 1877, art. II, § 1 (1908); *id.* art. VII, § 2.

310. *See* VA. CONST. of 1902, art. II, §§ 18–23.

voting by ballot,[311] which in the late nineteenth century was effective in disenfranchising illiterate Blacks.[312] Importantly, while these states also enacted discriminatory statutes, they relied on state constitutions to ensure black disenfranchisement would endure.[313]

Around the turn of the century, the ballot initiative emerged as the dominant means of state constitutional change. In forty-nine states, state legislatures may refer a proposed amendment to voters for their approval, and in sixteen states, voters may, by gathering a certain number of signatures, place an amendment on the ballot without the involvement of the state legislature.[314] Through these two mechanisms, states have adopted constitutional amendments

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311. *See* ALA. CONST. art. VIII, § 179 (repealed 1996).

312. In an extreme example, South Carolina's "Eight-Box Ballot Law" was designed to disenfranchise illiterate black voters by requiring them to deposit ballots for individual offices in separate labeled boxes. *See* CHARLES L. ZELDEN, VOTING RIGHTS ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 75 (2002).

313. *See* Pildes, *supra* note 308, at 301 n.29 (describing constitutional disenfranchisement as "the capstone to the elimination of black political participation" and explaining that constitutional provisions "cast disfranchisement into the most endurable and symbolically significant legal form").

314. *See* Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB POL'Y 295, 302 & n.27 (2008).

concerning nearly every aspect of federal elections, including registration,[315] primaries,[316] ballots,[317] voting machines,[318] absentee voting,[319] voter ID,[320] and election integrity.[321] Several of these amendments explicitly constrain state legislatures, either by enacting new

315. *See* TEX. CONST. art. VI, § 4 (amended 1966) (amended by election through Texas Proposition 4 in 1891 to authorize the state legislature to provide for voter registration in cities); CONN. CONST. amend. X (adopted by election through Connecticut Question 2 in 1976) (pre-registration for 17-year-old citizens); OR. CONST. art. II, § 2 (amended 1932) (amended by election through Oregon Measure 5 in 1927 to require a voter be duly registered in order to vote); MD. CONST. art. I, § 2a (adopted by election through Maryland Question 2 in 2018 providing for same day registration).

316. *See* ARIZ. CONST. art. VIII, § 10 (amended by election through Arizona Proposition 103 in 1998).

317. *See* CAL. CONST. art. II, § 1 (as written in 1924) (renumbered and amended in 1976) (adopted by election through California Proposition 18 in 1924 providing for voting by ballot); N.D. CONST. art. II (renumbered from art. V in 1979) (adopted by election through North Dakota Amendment 2 in 1978); ARK. CONST. amend. 50, § 3 (repealed by election through Arkansas Proposed Amendment 1 in 2002 authorizing legislature to provide for secrecy in voting).

318. *See* KY. CONST. § 147 (amended 1945) (amended by election through the Kentucky Voting Machines Referendum of 1941).

319. *See* ME. CONST. art. IV-1, § 5 (amended by election through Maine Amendment 1 in 1921 to allow absentee voting); CAL. CONST. art. II, § 1 (as written in 1928) (renumbered and amended in 1976) (amended by election through California Proposition 18 in 1928 to allow absentee voting for civil and congressional service); ME. CONST. art. II, § 4 (amended by election through Maine Amendment 6 in 1951 to allow absentee voting for the armed forces and incapacitated persons); CONN. CONST. of 1818, amend. IX (adopted by election through Connecticut Question 5 in 1962 to allow absentee voting for servicemembers); N.D. CONST. art. II (renumbered from art. V in 1979) (amended by election through North Dakota Amendment 2 in 1978 to provide for absentee voting); CONN. CONST. of 1818, amend. XXXIX (adopted by election through Connecticut Question 1 in 1932) (same); MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 3 in 1954) (same); KY. CONST. § 147 (amended by election through Kentucky Absentee Voting Referendum in 1945) (same).

Other amendments have expanded absentee voting to new groups of voters. *See* CAL. CONST. art. II, § 1 (as written in 1922) (renumbered and amended in 1976) (amended by election through California Proposition 22 in 1922) (military); FLA. CONST. of 1885, art. IV, § 2 (amended by election through Florida Amendment 2 in 1960) (same); MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 1 in 1918) (same); MO. CONST. of 1875, art. VIII, § 9 (amended by election through Missouri Issue 11 in 1920) (same); MD. CONST. art. I, § 3

substantive rights for voters,[322] setting out rules for certain types of elections,[323] or taking power from the legislature and giving it to an independent redistricting commission.[324]

State constitutions have regulated federal elections and constrained state legislatures since the Founding. As elections evolved and states embraced direct democracy, the number and variety of election-related provisions in state constitutions increased. This longstanding practice, consistent across states, eras, and substantive areas of election law, demonstrates a deliberate course of action construing the practical meaning of the Elections and Electors Clauses.

(renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 6 in 1956) (disabilities); MASS. CONST. amend. LXXVI (adopted by election through Massachusetts Question 4 in 1944) (same); MASS. CONST. amend. CV (adopted by election through Massachusetts Question 3 in 1976) (religion); CONN. CONST. of 1818, amend. XII (adopted by election through Connecticut Question 3 in 1964) (same); PA. CONST. art. VII, § 14 (amended by election through Pennsylvania Question 1 in 1985 for poll workers and religion) (amended by election through Pennsylvania Question 3 in 1997 to further expand absentee voting).

320. *See* MO. CONST. art. VII, § 11 (adopted by election through Missouri Amendment 6 in 2016); ARK. CONST. art. III, § 1 (amended by election through Arkansas Issue 2 in 2018); N.C. CONST. art. VI, §§ 2, 3 (amended by election through North Carolina Voter ID Amendment in 2018).

321. *See* MD. CONST. art. I, § 6 (renumbered from art. 1, § 3 in 1978) (amended by election through Maryland Amendment 4 in 1913).

322. *See* ILL. CONST. art. III, § 8 (adopted by election through Illinois Right to Vote Amendment in 2014); CAL. CONST. art. II, § 2.5 (adopted by election through California Proposition 43 in 2002).

323. *See* ARIZ. CONST. art. VII, § 17 (adopted by election through Arizona Proposition 101 in 1962).

324. *See* WASH. CONST. art. II, § 43 (amended by election through Washington Senate Joint Resolution 103 in 1983); MONT. CONST. art. V, § 14 (amended by election through Montana Measure C-14 in 1984); HAW. CONST. art. VI, § 2 (amended by election through Hawaii Question 1 in 1992); IDAHO CONST. art. III, § 2 (amended by Idaho Senate Joint Resolution 105 in 1994); N.J. CONST. art. II, § 2 (adopted by election through New Jersey Public Question 1 in 1995); COLO. CONST. art. V, § 44 (amended by election through Colorado Amendment Y in 2018); VA. CONST. art. II, § 6 (amended by election through Virginia Question 1 in 2020); ARIZ. CONST. art. IV-2, § 2 (amended by election through Arizona Proposition 106 in 2000); CAL. CONST. art. XXI (amended by election through California Proposition 20 in 2010).

2. State Court Review of Laws Regulating Federal Elections

The clearest evidence that state legislatures are constrained by state constitutions is the practice of state courts reviewing state election laws. Some of the earliest conflicts between state constitutions and election laws passed by state legislatures arose during the Civil War, when several states enacted soldier absentee voting laws in violation of state constitutional provisions requiring ballots be cast in person.[325] Some state supreme courts struck down these laws,[326] while others construed state constitutions to avoid conflict.[327]

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325. *See* Smith, *supra* note 223, at 765.

326. *See* Bourland v. Hildreth, 26 Cal. 161 (Cal. 1864); *In re* Opinion of the Judges, 30 Conn. 591 (Conn. 1862); People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127 (Mich. 1865); *In re* Opinion of the Justices, 44 N.H. 633 (N.H. 1863). *See also* Smith, *supra* note 223, at 765-67.

327. *See* Morrison v. Springer, 15 Iowa 304 (Iowa 1864); Lehman v. McBride, 15 Ohio St. 573 (Ohio 1863); State *ex rel.* Vandler v. Main, 16 Wis. 422 (Wis. 1863). A year after holding a soldier voter law unconstitutional, the New Hampshire Supreme Court changed course, holding that state legislatures could regulate the manner of elections "untrammeled" by the state constitution. *See In re* Opinion of the Justices, 45 N.H. 595, 605 (N.H. 1864). A few decades later, however, the New Hampshire Supreme Court changed course again and held that a soldier voting bill would be invalid under the state constitution as to state elections, though the Court expressed no view as to whether the law would be valid as to the election of members of Congress. *See In re* Opinion of the Justices, 113 A. 293, 299 (N.H. 1921).

From the Civil War through the early twentieth century, state courts consistently reviewed laws regulating federal elections, including laws relating to congressional redistricting,[328] voter registration,[329] absentee voting,[330] secret ballots,[331] and voting machines,[332] thus rejecting by implication the ISL theory. In contrast, only a handful of state courts embraced the ISL theory.[333] After the "one person, one vote" apportionment cases of the 1960s, chal-

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328. *See* Brown v. Saunders, 166 S.E. 105, 107 (Va. 1932) ("When a State legislature passes [a Congressional] apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court, when properly raised."); Moran v. Bowley, 179 N.E. 526, 531–32 (Ill. 1932); Schrader v. Polley, 127 N.W. 848, 851 (S.D. 1910); Carroll v. Becker, 45 S.W.2d 533, 536–37 (Mo. 1932).

329. City of Owensboro v. Hickman, 14 S.W. 688, 689–90 (Ky. 1890); Franklin v. Harper, 55 S.E. 2d 221 (Ga. 1949); Southerland v. Norris, 22 A. 137 (Md. 1891).

330. *See* Chase v. Lujan, 149 P.2d 1003, 1010–11 (N.M. 1944) (striking down absentee voting law); Baca v. Ortiz, 61 P.2d 320 (N.M. 1936) (same); Jones v. Smith, 165 Ark. 425 (Ark. 1924) (upholding a state absentee voting law); Straughan v. Meyers, 187 S.W. 1159 (Mo. 1916) (same).

331. *See* DeWalt v. Bartley, 24 A. 185 (Pa. 1892) (upholding secret ballot law).

332. *See* Morrison v. Lamarre, 65 A.2d 217 (R.I. 1949) (law providing for "master levers" on voting machines did not violate state constitution). *See also* Constitutionality of statutes providing for the use of voting machines. 66 A.L.R. 855 (1930) (describing similar challenges).

333. *See* State v. Williams, 49 Miss. 640 (Miss. 1873) (state legislatures may schedule congressional elections notwithstanding contrary state constitutional provisions); *In re* Plurality Elections, 8 A. 881 (R.I. 1887) (state constitutional provision requiring a majority vote did not constrain the state legislature); Beeson v. Marsh, 34 N.W.2d 279, 285–87 (Neb. 1948) (state constitution did not apply to laws concerning appointment of presidential electors); Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (state constitution could not restrict state legislature's power to permit absentee voting); Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) (state legislatures not subject to state constitutional limits when deciding the manner of choosing presidential electors).

lenges to legislative redistricting plans under state constitutions became more common,[334] along with some challenges to congressional redistricting.[335] In recent years, since *Bush II* drew new attention to the nuts and bolts of election administration, the number of election law cases has more than doubled,[336] including numerous challenges brought under state constitutions.[337] Over the past two decades, state courts have reviewed state election laws relating to every aspect of federal elections, including redistricting,[338] Voter

334. *See* Samuel S.H. Wang, Richard F. Ober Jr., & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 253–56 (2019) (listing cases striking down redistricting maps under state constitutions).

335. *See, e.g.*, Assembly V. Deukmejian, 639 P.2d 939, 950 (Cal. 1982) (explaining how California's congressional district map violated both the federal and state "one person, one vote" requirements).

336. *See* Richard L. Hasen, *The Supreme court's Shrinking Election Docket 2001-2010: A Legacy of* Bush v. Gore *or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 327 (2011).

337. *See* Joshua A. Douglas, *State Judges and the Right to Vote,* 77 OHIO ST. L.J. 1, 13–32 (2016) (describing various challenges under state constitutions since 2000).

338. Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n, No. CA-CV 07-0301 (Ariz. Ct. App. Apr. 20, 2008); Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002); People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003); *In re* 2003 Apportionment of the State Senate and U.S. Cong. Dists., 827 A.2d 844 (Me. 2003); LeRoux v. Sec'y of State, 640 N.W. 2d 849 (Mich. 2002); Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002); Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006); League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018); Pearson v. Koster, 359 S.W.3d 35 (Mo. 2012); League of Women Voters of Florida v. Detzner, 172 So.3d 363 (Fla. 2015); Johnson v. State, 366 S.W.3d 11 (Mo. 2012).

ID,[339] felon disenfranchisement,[340] voting machines,[341] polling hours,[342] absentee voting,[343] voter registration,[344] ballot access,[345] and campaign finance.[346] Finally, even as the ISL theory was invoked in the 2020 election cases, state courts reviewed an unprecedented number of state election laws under state constitutions.[347]

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339. *See In re* Request for Advisory Op. Concerning Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007); League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758 (Ind. 2010); Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011); City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013); League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302 (Wis. 2014); Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (per curiam); Applewhite v. Commonwealth, No. 330 M.D.2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014).

340. *See* League of Women Voters of Cal. v. McPherson, 52 Cal. Rptr.3d 585 (Ct. App. 2006); May v. Carlton, 245 S.W.3d 340 (Tenn. 2008); Chiodo v. Section 43.24 Panel, 846 N.W. 2d 845 (Iowa 2014); Snyder v. King, 958 N.E.2d 764 (Ind. 2011); Madison v. State, 163 P.3d 757 (Wash. 2007) (en banc).

341. Favorito v. Handel, 684 S.E.2d 257 (Ga. 2009); Andrade v. NAACP of Austin, 345 S.W.3d 1 (Tex. 2011); Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009).

342. State *ex rel.* Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410 (Mo. Ct. App. 2000); Republican Party of Ark. v. Kilgore, 98 S.W.3d 798 (Ark. 2002) (per curiam).

343. Sheehan v. Franken, 767 N.W.2d 453 (Minn. 2009) (per curiam); *In re* Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223 (Pa. 2004); Townson v. Stonicher, 933 So.2d 1062 (Ala. 2005).

344. Guare v. State, 117 A.3d 731 (N.H. 2015) (per curiam).

345. Nader for President 2004 v. Md. State Bd. of Elections, 926 A.2d 199 (Md. 2007); Walsh v. Katz, 953 N.E.2d 753 (N.Y. 2011)

346. Colo. Ethics Watch v. Senate Majority Fund , LLC, 269 P.3d 1248 (Colo. 2012); State v. Green Mountain Future, 86 A.3d 981 (Vt. 2013).

347. *See, e.g.*, Aguilera v. Fontes, No. CV 2020-014562, 2020 WL 11273092 (Ariz. Super. Ct. 2020); League of United Latin Am. Citizens of Iowa v. Pate, 950 N.W.2d 204 (Iowa 2020); Alaska Center Education Fund v. Fenumiai, No. 3AN-20-08354CI (Alaska Super. Ct. 3d Dist. 2020); Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions, 610 S.W.3d 911 (Tex. 2020); Arnett v. N.C. Bd. of Elections, No. 20 CVS 00570 (Gen. Ct. Just., Super. Ct. Div., Duplin Cnty. 2020); Ryan v. Benson, No. 20-000198-MZ (Mich. Ct. Claims 2020); State v. Ctr. for Tech. & Civic Life, No. 21-670, 671, 2022 WL 946604 (La. Ct. App. 2022); MOVE Tex. Action Fund v. DeBeauvoir, No. 03-20-00497-CV (Tex. Ct. App.); Middleton v. Andino, 488 F. Supp. 3d 261 (D.S.C. 2020); *In re* Hotze, 610 S.W.3d 909 (Tex. 2020); *In re* McCarty, 598 S.W.3d 485 (Tex. App. 2020); Ohio Democratic Party v. LaRose, 159 N.E.3d 1241 (Ohio Ct. App. 2020); League of Women Voters of Del., Inc. v. Dep't of Elections, 250 A.3d 922 (Del Ch. 2020); American Women v. Missouri, No.

C. Settlement

The final requirement for liquidation to occur is settlement, which requires that a longstanding practice achieve "sufficient uniformity" to put any significant interpretive debate to rest.[348] The *Chiafalo* court looked to both the acquiescence of institutional actors and the public's sanction of a given practice.[349] This Section examines each in turn.

1. Institutional Acquiescence

Whether a given interpretation of the constitution's text has been settled depends in part on whether it has been accepted by the relevant government institutions.[350] Here, there is evidence of acceptance by both institutions contemplated by the Clauses: state legislatures and Congress.

a. State Legislatures

The clearest evidence of settlement occurs when the losing side of an interpretive debate concedes and accepts the interpretation embraced by longstanding practice.[351] Here, the institution with the most to lose from a constrained interpretation of the Elections and Electors Clauses are the state legislatures themselves. But rather

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20AC-CC00333 (Mo. Cir. Ct. 2020); Republican State Comm. of Del. v. Dep't of Elections, 250 A.3d 911 (Del. Ch. 2020); Grossman v. Secretary of the Commonwealth, 151 N.E.3d 429 (Mass. 2020); LaRose v. Simon, No. A20-1040, A20-1041, 2020 Minn. LEXIS 577 (Aug. 12, 2020); Am. Fed. of Tchr. v. Gardner, No. 216-2020-CV-0570 (N.H. Super. Ct. 2020); N.C. All. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 N.C. Super. LEXIS 27 (N.C. Super. Ct. 2020); Duggins v. Lucas, 431 S.C. 115 (S.C. 2020); Stringer v. North Carolina, No. 20-CVS-05615 (N.C. Super. Ct. 2020); W. Native Voice v. Stapleton, No. DA 20-0394, 2020 Mont. LEXIS 2334 (Mont. 2020); Sterne v. Adams, No. 20-CI-00538 (Ky. Cir. Ct. 2020); All. for Retired Am. v. Dunlap, No. CV-20-95 (Me. Super. Ct. 2020); Lay v. Goins, No. M2020-0083-SC-RDM-CV (Tenn. 2020); NAACP Pa. State Conf. v. Boockvar, No. 364-MD-2020 (Pa. Commw. Ct. 2020); Fisher v. Hargett, 604 S.W.3d 38 (Tenn. 2020).

348. *See supra* notes 170–172 and accompanying text. *Cf.* Baude, *supra* note 101 at 18.

349. *See* Baude, *supra* note 101, at 18–19.

350. *See id.* at 18.

351. *See id.*

than railing against state constitutions, state legislatures have long accepted that they remain subject to state constitutional constraints when they enact laws under the Elections and Elections Clauses.

State legislatures have, for instance, long complied with state constitutional provisions subjecting all laws—including those governing federal elections—to a governor's veto. At the Founding, only the Massachusetts and New York Constitutions included a veto.[352] In the leadup to the first presidential election 1788, Massachusetts presented its first law providing for the selection of Presidential electors to Governor Hancock for his signature.[353] Likewise, New York presented its first law providing for the election of federal Representatives to the Council of Revision—consisting of the governor, the chancellor, and two members of the state supreme court—for its approval.[354] As more state constitutions adopted vetoes, election laws remained subject to gubernatorial approval,[355] and in 1932, the Supreme Court in *Smiley v. Holm* observed that this "uniform practice" had gone unchallenged ever since.[356] This practice continues to this day, with election laws routinely being presented to—and often vetoed—by governors. State legislatures have also long accepted state constitutional constraints beyond the veto. Before the Massachusetts, New York, and New Hampshire legislatures passed their first laws under the Elections Clause, each debated whether their respective state constitutions required them to

352. *See* N.Y. CONST. of 1777, art. III; MASS. CONST. of 1780, ch. I, § I, art. II. *See also* John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 474–75 (1917).

353. *See McPherson*, 146 U.S. at 29; Smith, *supra* note 223, at 760.

354. *See* Smith, *supra* note 223, at 760–61.

355. *See* Commonwealth of Pennsylvania, Vetoes by the Governor of Bills and Resolutions Passed by the Legislature Session of 1915, 449-50 (1915) (vetoing bill to reorder names of presidential candidates on the ballot).

356. Smiley v. Holm, 285 U.S. 355, 370 (1932) (citing Koening v. Flynn, 258 N.Y. 292, 300 (N.Y. 1932)) ("The uninterrupted practice in all of the states has been to create congressional districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be.").

do so via joint or concurrent session.[357] This pattern of deference to state constitutions demonstrates state legislatures' acquiescence.

But state legislatures have done more than acquiesce; they have actively embraced state constitutional regulation of federal elections. For well over a century, state legislatures have drafted and enacted new election-related constitutional amendments. Nearly every state makes use of legislatively-referred amendments, which are first passed by the state legislature and then presented to voters for their approval.[358] As ballot initiatives supplanted conventions as the primary means of state constitutional amendment, state legislatures began referring amendments related to voter qualifications, such as universal male suffrage,[359] residency requirements,[360] poll taxes,[361] and enfranchisement of women,[362] along with amendments focused on the time, place, and manner of elections, including voter registration[363] and voting by ballot.[364]

Beginning in the Progressive Era, state legislatures referred a wide variety of election-related amendments to voters. In addition

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357. *See* Smith, *supra* note 223, at 761–764; *id.* at 761 n. 194.

358. *See* Krislov & Katz, *supra* note 314 at 298.

359. *See* IOWA CONST. art. II, § 1 (amended by election through Iowa Amendment 1 in 1868).

360. *See* MINN. CONST. art. VII, § 1 (amended by election through Minnesota Amendment 1 in 1868).

361. *See* ARK. CONST. art. III (amended 1954) (amended by election through Arkansas Amendment 9 in 1908).

362. *See* COLO. CONST. art. VII, § 2 (amended 1989) (adopted by election through Colorado Women's Suffrage Amendment in 1893); IDAHO CONST. art. VI, § 2 (amended by election through Idaho Women's Suffrage Amendment in 1896).

363. *See* TEX. CONST. art. VI, § 4 (amended 1966) (amended by election through Texas Proposition 4 in 1891).

364. *See* CAL. CONST. art. II, § 5 (amended by election through California Amendment 2 in 1896).

to setting citizenship,[365] poll tax,[366] literacy,[367] and residency requirements,[368] and extending the franchise to women,[369] these amendments provided for absentee voting,[370] voter registration,[371] out-of-precinct voting,[372] and protections against vote-buying and corruption.[373] Through the mid and late twentieth century, state

365. *See* WIS. CONST. art. III, § 1 (amended by election through Wisconsin Question 4 in 1908); NEB. CONST. art. VI, § 1 (renumbered from art. VII, § 1 in 1920) (amended by election through Nebraska Amendment 1 in 1918); OR. CONST. art. II, § 2 (amended by election through Oregon Measure 1 in 1914).

366. *See* ARK. CONST. art. III (amended 1954) (amended by election through Arkansas Amendment 11 in 1926).

367. *See* OR. CONST. art. II, § 2 (amended by election through Oregon Measure 1 in 1924).

368. *See* ME. CONST. art. II, § 1 (amended by election through Maine Amendment 2 in 1919).

369. *See* TEX. CONST. art. VI, § 2 (amended by election through Texas Proposition 1 in 1921); ARK. CONST. art. III (amended 1954) (amended by election through Arkansas Amendment 8 in 1920); KAN. CONST. art. V (amended by election through Kansas Women's Suffrage Amendment in 1912); CAL. CONST. art. II, § 1 (as written in 1922) (renumbered and amended in 1976) (amended by election through California Proposition 4 in 1911); S.D. CONST. art. VII, § 2 (amended by election through South Dakota Women's Suffrage Amendment in 1918); OKLA. CONST. art. III, § 1 (amended by election through Oklahoma Question 97 in 1918); MICH. CONST. of 1908, art. III, § 1 (amended by election through Michigan Women's Suffrage Amendment in 1918); N.Y. CONST. of 1894, art. II, § 1 (amended by election through New York Amendment 1 in 1917); NEV. CONST. art. II, § 1 (amended by election through Nevada Women's Suffrage Amendment in 1914); MONT. CONST. of 1889, art. IX, § 2 (amended by election through Montana Amendment 1 in 1914); WASH. CONST. art. VI, § 1 (amended by election through Washington Women's Suffrage Amendment in 1910).

370. *See* ME. CONST. art. IV-1, § 5 (amended by election through Maine Amendment 1 in 1921 to allow absentee voting); CAL. CONST. art. II, § 1 (as written in 1922) (renumbered and amended in 1976) (amended by election through California Proposition 22 in 1922); MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 1 in 1918); MO. CONST. of 1875, art. VIII, § 9 (amended by election through Missouri Issue 11 in 1920).

371. *See* OR. CONST. art. II, § 2 (amended by election through Oregon Measure 5 in 1927).

372. *See* CAL. CONST. art. II, § 1 (as written in 1924) (renumbered and amended in 1976) (adopted by election through California Proposition 18 in 1924 providing for voting by ballot).

373. *See* MD. CONST. art. I, § 6 (renumbered from art. 1, § 3 in 1978) (amended by election through Maryland Amendment 4 in 1913).

legislatures referred amendments that expanded absentee voting,[374] permitted the use of voting machines[375] and secret ballots,[376] provided for elections to fill Congressional vacancies,[377] and lowered the voting age.[378] On no less than seven occasions, state legislatures have referred amendments to take away their own power over congressional redistricting and transfer it to an independent commission.[379]

Even today, state legislatures look to state constitutions to regulate federal elections. In recent years, three states—Missouri, Ar-

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374. *See* MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 6 in 1956) (disabilities); MASS. CONST. amend. LXXVI (adopted by election through Massachusetts Question 4 in 1944) (same); MASS. CONST. amend. CV (adopted by election through Massachusetts Question 3 in 1976) (religion); CONN. CONST. of 1818, amend. XII (adopted by election through Connecticut Question 3 in 1964) (same); PA. CONST. art. VII, § 14 (amended by election through Pennsylvania Question 1 in 1985 for poll workers and religion).

375. *See* KY. CONST. § 147 (amended 1945) (amended by election through the Kentucky Voting Machines Referendum of 1941).

376. *See* COLO. CONST. art. VII, § 8 (amended by election through Colorado Measure 1 in 1946).

377. *See* ARIZ. CONST. art. VII, § 17 (adopted by election through Arizona Proposition 101 in 1962).

378. *See* GA. CONST. art. II, § 1 (amended by election through Georgia Amendment 6 in 1943); ALASKA CONST. art. V, § 1 (amended by election through Alaska Amendment 1 in 1970); MASS. CONST. amend. XCIV (adopted by election through Massachusetts Question 3 in 1970); MONT. CONST. art. IV, § 2 (amended by election through Montana Amendment 3 in 1970); ME. CONST. art. I, § 2 (amended by election through Maine Amendment 1 in 1970); NEB. CONST. art. VI, § 1 (amended by election through Nebraska Amendment 1 in 1970).

379. *See* WASH. CONST. art. II, § 43 (amended by election through Washington Senate Joint Resolution 103 in 1983); MONT. CONST. art. V, § 14 (amended by election through Montana Measure C-14 in 1984); HAW. CONST. art. VI, § 2 (amended by election through Hawaii Question 1 in 1992); IDAHO CONST. art. III, § 2 (amended by Idaho Senate Joint Resolution 105 in 1994); N.J. CONST. art. II, § 2 (adopted by election through New Jersey Public Question 1 in 1995); COLO. CONST. art. V, § 44 (amended by election through Colorado Amendment Y in 2018); VA. CONST. art. II, § 6 (amended by election through Virginia Question 1 in 2020).

kansas, and North Carolina—referred amendments to voters to impose Voter ID requirements,[380] while the Illinois legislature referred to voters an amendment designed to preclude voter ID laws.[381] Following the 2020 election and the COVID-19 pandemic, several state legislatures placed new election-related amendments on the ballot. In 2021, New York unsuccessfully referred amendments that would have changed congressional redistricting criteria and provided for no-excuse absentee voting and same-day registration.[382] The 2022 election saw legislatively-referred amendments relating to early voting[383] and primaries,[384] and, in perhaps the most extreme example of a constraint on state legislatures, the Alabama legislature referred an amendment for 2022 that prohibits itself from changing any election law within six months of a general election.[385]

Implicit in every effort to refer an election-related amendment to voters is the recognition that those amendments will be binding. That state legislatures continue to submit amendments to voters, rather than pass ordinary legislation, reflects their understanding of state constitutions as constraining legislative authority. Consider, for example, the many instances in which state legislatures referred amendments to voters seeking an affirmative *grant* of authority to pass new types of election-related legislation,[386] or where

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380. *See* MO. CONST. art. VII, § 11 (adopted by election through Missouri Amendment 6 in 2016); ARK. CONST. art. III, § 1 (amended by election through Arkansas Issue 2 in 2018); N.C. CONST. art. VI, §§ 2, 3 (amended by election through North Carolina Voter ID Amendment in 2018).

381. *See* ILL. CONST. art. III, § 8 (adopted by election through Illinois Right to Vote Amendment in 2014).

382. *See* Proposal 1 (2021), S.B. 8833, 2019–20 Reg. Sess. (N.Y. 2020); Proposal 3 (2021), S.B. 1048, 2019–20 Reg. Sess. (N.Y. 2019), Proposal 4 (2021), S.B. 1049, 2019–20 Reg. Sess. (N.Y. 2019).

383. *See* CONN. CONST. art. VI, § 7 (amended by election through Connecticut Question 1 in 2022) (approved).

384. *See* Hawaii State and Local Primary Voting for 17-Year-Olds (2022), S.B. 2178, 31st Leg. (Haw. 2022).

385. *See* Amendment 4 (2022), H.B. 388, 2021 Reg. Sess. (Ala. 2021) (approved).

386. *See* TEX. CONST. art. VI, § 4 (amended 1966) (amended by election through Texas Proposition 4 in 1887 and Texas Proposition 4 in 1881) (voter registration); CONN.

state legislatures turned to referenda, rather than ordinary legislation, to change or repeal election-related constitutional provisions.[387] Or consider instances where state legislatures referred amendments with judicial review explicitly in mind; in 2018, the Arkansas legislature referred a Voter ID amendment to voters after the state supreme court struck down an earlier Voter ID statute,[388] and in 2014, the Illinois legislature referred an amendment designed to preclude Voter ID and other restrictive voting laws.[389] All these examples demonstrate state legislatures' acceptance both that state constitutions are binding and that courts will apply them to review state laws regulating federal elections.

CONST. of 1818, amend. XXXIX (adopted by election through Connecticut Question 1 in 1932) (absentee voting); KY. CONST. § 147 (amended by election through Kentucky Absentee Voting Referendum in 1945) (same); MD. CONST. art. 1, §§ 1, 3 (amended by Maryland Question 1 in 2008) (early voting); *id.* art. I, § 6 (renumbered from art. 1, § 3 in 1978) (amended by election through Maryland Amendment 4 in 1913) (election integrity); *id.* art. I, § 4 (renumbered from art. 1, § 2 in 1978) (amended by election through Maryland Question 5 in 1972) (limit for felons and mentally disabled); *id.* art. I, § 2A (adopted by election through Maryland Question 2 in 2018) (same-day registration); ARK. CONST. amend. 39 (adopted by election through Arkansas Amendment 39 in 1948) (voter registration). *See also* CONN. CONST. art. VI, § 7 (amended by election through Connecticut Question 1 in 2022) (early voting).

387. *See* ME. CONST. art. II, § 1 (amended by election through Maine Amendment 1 in 1965) (removing bar on pauper voting); MASS. CONST. amend. XCV (adopted by election through Massachusetts Question 3 in 1972) (same); WYO. CONST. art. VI, § 6 (amended by election through Wyoming Amendment B in 1996) (removing bar on voting by mentally ill unless judged to be mentally incompetent); IDAHO CONST. art. VI, § 3 (amended by Idaho House Joint Resolution 7 in 1982) (removing disqualifications; *id.* art. VI, § 2 (amended by Idaho House Joint Resolution 14 in 1982) (removing qualifications); ALASKA CONST. art. V, § 1 (amended by election through Alaska Amendment 2 in 1970) (eliminating English proficiency requirement); N.J. CONST. art. II, § 1 (amended by election through New Jersey Public Question 4 in 2007) (changing competency requirement).

388. *See* ARK. CONST. art. III, § 1 (amended by election through Arkansas Issue 2 in 2018); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014).

389. *See* Illinois Right to Vote Amendment, H.R.J. Res. 52, 98th Gen. Assemb. (Ill. 2014); http://www.sj-r.com/article/20140408/NEWS/140409416 [https://perma.cc/27NP-9QKN] (noting that the Amendment's primary sponsor described its purpose as "prevent[ing] the passage of inappropriate voter-suppression laws and discriminatory voting procedures").

b. Congress

The Elections and Electors Clauses grant Congress final authority to make or alter laws regulating federal elections. Implicit in this authority is Congress's responsibility to carefully consider state election laws and to make changes as needed. Understanding how Congress has exercised this authority provides insight into its understanding of the relationship between state legislatures and state constitutions, and there is ample historical evidence that Congress has long accepted that state constitutions may regulate federal elections and constrain state legislatures.

i. Acts of Congress

When Congress has exercised its own authority under the Elections and Electors Clauses, it has implicitly recognized that state legislatures remain subject to the ordinary lawmaking process as laid out in state constitutions. Congressional redistricting provides one example. In 1862, Congress exercised its Elections Clause authority to require contiguous single-member districts, as opposed to at-large elections.[390] The 1862 Act also included a provision permitting Illinois to elect one representative at large, with the state's thirteen other Representatives being elected "as now prescribed by law in said State . . . ."[391] As Congress recognized, those districts had previously been prescribed "by law"—that is, according to the requirements of the Illinois constitution.[392] Likewise, the 1862 Act and others over the following decades continued to recognize that

390. *See* Apportionment Act of 1862, ch. 170, 12 Stat. 572. Congress also required single-member districts in 1842, but this requirement was dropped in the 1850 Apportionment Act before being restored in 1862. *See* Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1850, 9 Stat. 433.

391. Apportionment Act of 1862, ch. 170, 12 Stat. 572.

392. *See* An Act to Establish Thirteen Congressional Districts, and to Provide for the Election of Representatives to the Congress of the United States, Under the Census of the Year One Thousand Eight Hundred and Sixty (1861).

congressional districts had been drawn by state legislatures "as provided by law."[393]

To eliminate any doubt, Congress in 1911 eliminated the statutory reference to redistricting by a state "legislature" and replaced it with language stating that Representatives were to be elected "by the districts now prescribed by law until such State shall be redistricted *in the manner provided by the laws thereof* . . . ."[394] This change reflected the fact that many state constitutions allowed for lawmaking by direct initiative. As Senator Burton, the sponsor of the change, explained:

> It was very natural in 1890, and even in 1900, that a provision should be incorporated that the State should be redistricted "by the legislature thereof," because that was the only law-making power; but since then a new method of making laws has been devised, and we can not afford to cling either to obsolete phraseology or, in our dealing with the States, to adhere to obsolete methods—that is, to ignore their methods of enacting laws.[395]

To ignore these new methods and require states to redistrict only through the state legislature, Senator Burton explained, would be "to fix one inflexible way" among the many constitutionally-permissible means of redistricting.[396] Other members of Congress did not dispute that initiatives and referenda were appropriate mechanisms through which states could enact election laws; rather, they questioned whether the change in language was necessary at all, as

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393. *See* Apportionment Act of 1862, 12 Stat. 572; Apportionment Act of 1883, 22 Stat. 6; Apportionment Act of 1873, 17 Stat. 28; Apportionment act of 1893, 26 Stat. 736; Apportionment Act of 1901, 31 Stat. 734.

394. *See* Apportionment Act of 1911, 37 Stat. 14.

395. 47 Cong. Rec. 3508 (1911) (statement of Sen. Burton)

396. *Id.* at 3507 (statement of Sen. Burton).

the earlier language did not preclude a state legislature from submitting a new district map to the people in a referendum.[397] In response, proponents of the change pointed to the many states in which the legislature played no role at all in the initiative process.[398] They emphasized that in these states the people's right to referendum and initiative "does not come from the legislature at all," but rather from state constitutions.[399] Congress, of course, enacted the change and has used the new language to this day.[400]

In *Hildebrant*, the Supreme Court read this language as Congress's recognition of referenda and initiatives "as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws."[401] Similarly, in *Smiley* the Court explained that because "Congress had no power to alter" the Elections Clause, the changed language in the 1911 Act "could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by" the Clause to the state constitution.[402] And in *AIRC*, the Court reaffirmed that the purpose of the 1911 Act was "to recognize the legislative authority each State has to determine its own redistricting regime," including regimes that excluded the legislature.[403]

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397. *Id.* at 3508 (statement of Sen. Shively) (noting that the earlier language "does not prohibit the legislature from arranging the districts by referendum of the act of the people").

398. *See id.* (statement of Sen. Clapp) ("The law of the State in that case does not require the legislature to submit anything to the people. The right of the people under the initiative and referendum . . . is absolutely independent of the legislature.").

399. *Id.* (statement of Sen. Works).

400. *See* 1941 Apportionment Act, 55 Stat. 761-762 (providing redistricting procedures "[u]ntil a State is redistricted in the manner provided by the law thereof"); 2 U.S.C. §2a(c) (same).

401. 241 U.S. at 569. *See also* Hawke v. Smith, 253 U.S. 221, 230–31 (1920) (noting the *Hildebrandt* Court held "that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress was not unconstitutional").

402. Smiley v. Holm, 285 U.S. 355, 372 (1932).

403. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 812 n.22 (2015).

Another example is 3 U.S.C. § 2, which provides that if a state is unable to select presidential electors after Election Day, "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." Though this language at first glance seems to suggest that Congress intended to commit the task of choosing backup electors to state legislative bodies, the legislative history in fact reveals the opposite to be true; Congress only empowered state legislatures to make this choice in accordance with the regular lawmaking process.[404] As Professor Levitt has explained, when Congress originally enacted the statute that would become 3 U.S.C. § 2 in 1845, it did not refer to state legislatures at all, but rather provided that "electors may be appointed . . . *in such manner as the State shall by law provide*."[405] As in the 1911 Apportionment Act, Congress in 1845 recognized that the Electors Clause granted power to the States and that such power could only be exercised "by law" according to state constitutions.[406] But while the changed language in the 1911 Act reflected Congress's conscious recognition of the role of state constitutions, there is no indication the change to the 1845 language was the result of any serious consideration by Congress.[407] Rather, the change was made by a commission charged with recodifying federal statutes into what would become the Revised Statutes of 1873.[408] No explanation was provided for the changed language.[409] Thus the only language em-

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404. *See* Levitt, *supra* note 21, at 1071.

405. Act of Jan 23, 1845, Pub. L. No. 28-1, 5 Stat. 721 (emphasis added). *See also* Levitt, *supra* note 21, at 1076.

406. *See* Levitt, *supra* note 21, at 1078 ("There was no suggestion in the 1845 federal statute that the state legislature had any authority whatsoever beyond its capacity as a lawmaking body, unless state law assigned it that role.").

407. *See id.* at 1078–79 ("[T]here is little contemporaneous evidence that the change was intended to reflect a considered alteration in the body empowered to choose electors.").

408. *See id*. at 1079.

409. *See id.* at 1081 ("The commissioners tasked with revision gave no indication of any reason for making the change . . . .").

braced by Congress is that of the 1845 Act, which suggests that Congress accepted that the power conferred upon state legislatures by the Electors Clause was constrained by state constitutions.[410]

ii. Direct Review of State Constitutional Provisions

Congress's acceptance is also evident from its review and approval of state constitutions. Article IV, Section 3 of the Constitution grants Congress the power to admit new states to the Union.[411] Congress has generally done so by passing an enabling act laying out the process by which a territory can hold a constitutional convention to draft a state constitution.[412] These enabling acts required new state constitutions to include specific provisions as a condition of admission.[413] These conditions covered a wide range of substantive matters, from restrictions over land use to language requirements, civil rights, and family law.[414] In addition to these upfront conditions, Congress also reviewed and debated proposed new state constitutions to determine if they were consistent with the Constitution's guarantee of a republican form of government.[415]

Suffrage and political rights were among the most important issues Congress considered when reviewing state constitutions. In the years leading up to the Civil War, Congress debated whether to

410. *See id.* at 1086 ("The implication is that, at least in 1845, Congress thought that allowing states to direct the manner of appointing electors by law, and allowing the state legislature to direct the manner of the appointment of electors, amounted to the same thing: normal state lawmaking power and constraint.").

411. *See* U.S. CONST. art. IV. § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . .").

412. *See, e.g.*, Ohio Enabling Act §§ 1, 4–5, 2 Stat. 173 (1802); Louisiana Enabling Act §§ 1–4, 2 Stat. 641 (1811); Illinois Enabling Act §§ 1, 3–4, 3 Stat. 429 (1818); Omnibus Enabling Act, 25 Stat. 676 (1889).

413. *See, e.g.*, Louisiana Enabling Act § 3, 2 Stat. 641 (1811).

414. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 130–31 (2004).

415. *See* Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 596 (1949).

permit clauses in the Michigan and Minnesota constitutions granting suffrage to aliens.[416] After the Civil War, Congress conditioned the readmission of Confederate states on their including universal male suffrage at all elections in their new constitutions.[417] The Senate also considered at length whether to make voting by ballot as opposed to *viva voce*—the prototypical "manner" regulation—a condition of readmission. Senator Charles Drake of Missouri offered an amendment to the 1867 Reconstruction Act requiring readmitted state constitutions to provide that in "all elections by the people the electors shall vote by ballot."[418] In his view, enshrining the secret ballot in state constitutions was necessary to ensure elections remained free from the undue influence *viva voce* voting enabled.[419] Implicit in Senator Drake's proposal was the understanding that state constitutional provisions regulating the manner of elections would constrain state legislatures, and despite considerable debate over the amendment there was no suggestion this was not the case.[420] To the contrary, those present agreed they had the same

416. *See id.* at 583–85.

417. *See* Biber, *supra* note 414, at 140–41.

418. *See* CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (amendment of Sen. Drake). The original amendment offered by Senator Drake conditioned readmission on state constitutions requiring voting by ballot "in all elections by the people for State, county, or municipal officers." *See id.* at 99. The debate, however, focused on Congressional elections. *See id.* at 100 (statement of Sen. Drake) (discussing what to do if "a State, after having formed is constitution and entered into this compact, should send up representatives here elected by a *viva voce* vote, in direct defiance of its own contract with this Government"). After two days of debate, Senator Drake modified the text of his amendment after it had "been suggested to [him] that if it were adopted in its terms it might not include elections for members of Congress." *Id.* at 165.

419. *See id.* at 99 (statement of Sen. Drake) (emphasizing that without this amendment southern states would "form their constitutions and they will perpetuate *viva voce* voting in every one of these States; and when you have got that perpetuated in their constitution, good bye to the will of the loyal people of these States . . .").

420. *See id.* at 164(statement of Sen. Stewart) ("There are a great many things these people ought to put into their constitutions which are matters of substance. I presume they ought to provide in their constitutions for a judiciary system; I presume they ought to provide in their constitutions for a Legislature; I presume they ought to provide var-

power to require state constitutions to provide for voting by ballot as to require them to provide for universal suffrage.[421] Rather, they disagreed only as to whether Congress could require a state to agree to not change its constitution after admission[422] and whether it was proper to add new conditions at the eleventh hour.[423] If ever there was a moment to suggest that such a condition would violate the Elections Clause, this was it.

Of equal significance is the fact that Congress never rejected any state constitutional provision regulating federal elections. Most of

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ious other things in their constitutions. The question is shall we make an entire constitution for them because there are material things which it is proper to put in a constitution?").

421. *See id.* at 103 (statement of Sen. Morton) ("We can prescribe the conditions upon which we will admit a State. We can say 'You shall put universal suffrage in the constitution,; or 'You shall put voting by ballot in the constitution, or we will not receive you.'); *id.* at 164 (statement of Sen. Yates) ("[W]e have just as much power and the same right under the Constitution to say that voting shall be by ballot as to say that these States shall provide in their constitutions that negroes shall vote at all.").

422. *See id.* at 103 (statement of Sen. Morton) (arguing that Congress could impose voting by ballot as a condition of readmission but that "after the State has been received, it is at liberty then to amend its constitution in any manner . . ."). Senator Conkling raised this constitutional question and debated whether such an agreement could be enforced. *See id.* at 100-01. In response, Senator Drake emphasized Congress's authority to judge its members' qualifications and to reject any Representatives elected by *viva voce* vote. *See id.* at 100 (statement of Sen. Drake).

423. *See id.* at 101 (statement of Sen. Trumbull) (arguing that additional conditions would not be "acting in good faith"); *id.* at 102 (statement of Sen. Wilson) ("I am for the ballot instead of the *viva voce* mode of voting . . . but I do not wish to make this new mode of voting a condition precedent to restoration. I fear this people will think we are trifling with them. I fear that our friends everywhere will think we are seeking here now grounds of difference rather than a reasonable plan of adjustment if we insist on making questions of this character conditions of the final restoration of these States to their practical relations."); *id.* at 164 (statement of Sen. Williams) ("At the last session of Congress we adopted a bill in which we provided that upon certain terms and conditions these States should be entitled to representation in Congress, and now we propose to add another condition, and we propose to make the mere mode of voting a question upon which shall turn the restoration of this Union."); *id.* at 164 (statement of Sen. Stewart) ("Nine of the ten States do [voting by secret ballot] now and will continue to do it undoubtedly, and Virginia very likely will change her constitution and adopt that form, so that there is not even a pretense of necessity for Congress acting a part which will be regarded as bad faith.").

the thirty-seven state constitutions approved by Congress contained provisions related to the manner of voting.[424] Others regulated the timing of elections,[425] imposed majority- or plurality-winner rules,[426] guaranteed free and equal elections,[427] or required state

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424. *See* ALA. CONST. of 1819, art. III, § 7 ("[I]n all elections by the people, the electors shall vote by ballot until the General Assembly shall otherwise direct."); ALASKA CONST. of 1956, art. V, § 3 ("Secrecy of voting shall be preserved."); ARIZ. CONST. of 1912, art. VII, § 1 ("All elections by the people shall be by ballot . . . ."); ARK. CONST. of 1836, art. IV, § 8 ("All elections shall be *viva voce*, until otherwise directed by law . . . ."); CAL. CONST. of 1849, art. II, § 6 ("All elections by the people shall be by ballot."); COLO. CONST. of 1876 art. VII, § 8 ("All elections by the people shall be by ballot . . . ."); FLA. CONST. of 1838, art. VI, § 17 ("[I]n all elections by the people, the vote shall be by ballot."); HAW. CONST. of 1950 art. II, § 4 ("Secrecy of voting shall be preserved . . . ."); IDAHO CONST. of 1890, art. VI, § 1 ("All elections by the people must be by ballot."); ILL. CONST. of 1818, art. II, § 28 ("All votes shall be given viva voce . . . ."); IND. CONST. of 1816, art. II, § 13 ("All elections shall be by ballot . . . ."); IOWA CONST. of 1846, art. III, § 6 ("All elections by the people shall be by ballot."); KAN. CONST. of 1862, art. IV, § 1 ("All elections by the people shall be by ballot . . . ."); KY. CONST. of 1792, art. III, § 2 ("All elections shall be by Ballot."); LA. CONST. of 1812, art. VI, § 13 ("In all elections . . . the vote shall be given by ballot."); ME. CONST. of 1820, art. II, § 1 ("[E]lections shall be by written ballot.") MICH. CONST. of 1835 art II, § 2 ("All votes shall be given by ballot . . . ."); MINN. CONST. of 1857, art. VII, § 6 ("All elections shall be by ballot . . . ."); MISS. CONST. of 1817, art. III, § 3 (requiring that the first election after admission "be by ballot."); MONT. CONST. of 1889, art. IX, § 1 ("All elections by the people shall be by ballot."); NEV. CONST. of 1864, art. II, § 5 ("All elections by the people shall be by ballot . . . ."); N.M. CONST. of 1911, art. VII, § 5 ("All elections shall be by ballot."); OHIO CONST. of 1802, art. IV, § 2 ("All elections shall be by ballot."); OKLA. CONST. of 1907, art. III, § 6 ("In all elections by the people the vote shall be by ballot . . . ."); OR. CONST. of 1857, art. II, § 15 ("[I]n all elections by the people, votes shall be given openly, or viva voce . . . ."); S.D. CONST. of 1889, art. VII, § 3 ("All votes shall be by ballot . . . ."); TENN. CONST. of 1796, art. III, § 3 ("All Elections shall be by ballot."); UTAH CONST. of 1895, art IV. § 8 ("All elections shall be by secret ballot."); WASH. CONST. of 1889, art. VI, § 6 ("All elections shall be by ballot."); W. VA. CONST. of 1863, art. III, § 2 ("In all elections by the people the mode of voting shall be by ballot."); WIS. CONST. of 1848, art. III, § 3 ("All votes shall be given by ballot . . . ."); WYO. CONST. of 1889, art. VI, § 11 ("All elections shall be by ballot . . . . All voters shall by guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.").

425. *See e.g.*, ARK. CONST. of 1836, art. IV, § 8 (setting general elections for the "first Monday in October, until altered by law"); HAW. CONST. of 1950, art. II, § 8; KAN. CONST. of 1859, art. IV, § 2.

426. *See e.g.*, ARIZ. CONST. of 1912, art. VII, § 7.

427. *See e.g.*, ARK. CONST. of 1836, art. II, § 5; ILL. CONST. of 1818, art. VIII, § 5.

legislatures to enact primary, registration, or absentee voting laws,[428] among others provisions.[429] In many newly admitted states, the first federal elections were held under rules laid out in these original state constitutions because no state legislature yet existed to prescribe new ones.[430] Congress approved of all these provisions, and explicitly blessed the practice in an 1850 election contest.[431] This acceptance demonstrates that, though Congress scrutinized other provisions, those regulating federal elections were uncontroversial.

iii. Resolution of Contested House Elections

Congress's acquiescence can also be gleaned by looking to its resolution of contested House elections. The Constitution confers on each chamber of Congress the sole authority to judge the qualifications of its members.[432] From time to time, disputed elections have involved conflicts between state constitutions and laws passed by state legislatures. It is important not to overstate the value of these cases in discerning Congress's views as an institution. When Congress resolves a disputed election, it does not sit as a court, nor is it constrained by law or precedent.[433] The Supreme Court has ob-

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428. *See e.g.*, ARIZ. CONST. of 1912, art. VII, §§ 10, 12; FLA. CONST. of 1838, art. VI, § 2; HAW. CONST. of 1950 art. II, § 4. Notably, the original Texas constitution prohibited the legislature from requiring voter registration before later being amended. *See* TEX. CONST. of 1876, art. VI, § 4 ("[N]o law shall ever be enacted requiring a registration of the voters of this State").

429. *See e.g.*, IOWA CONST. of 1846, art. XII, § 7 (declaring that any country [sic] attached to a county for judicial purposes shall also be attached for election purposes); HAW. CONST. of 1950, art. II, § 8 (requiring at least forty-five days between primary and general elections).

430. *See, e.g*, ARIZ. CONST. of 1912, art. VII, § 11; CAL. CONST. of 1849, Schedule § 12; COLO. CONST. of 1876, art. VII, § 7; IOWA CONST. of 1846, art. XII, § 6.

431. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, at 544–45 (2022); *See also* CONG. GLOBE, 31st Cong. 1st Sess. 1779–89, 1795 (1850).

432. *See* U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the judge of the elections, returns and qualifications of its own members").

433. For a lengthy discussion of the non-judicial nature of contested House elections, *see* Smith, *supra* note 431, at 546–75.

served that the partisan nature of contested elections limits the degree to which we should rely on the reasoning in any one case.[434] Nonetheless, a review of these cases demonstrates Congress's consistent deference to state constitutions.

State constitutions featured in some of the earliest contested House elections, and in each case, there was no doubt they controlled. In 1791, James Jackson contested the election of Anthony Wayne, arguing that several voters had cast their ballots outside of their home counties in violation of the Georgia Constitution, which required that voters "have resided six months within the county."[435] The House voted to unseat Wayne, and there was no suggestion Georgia's constitution did not control.[436] In 1804, Representative William Hoge of Pennsylvania resigned his seat in Congress, prompting a special election, which was challenged on the ground that the Pennsylvania legislature had not yet enacted laws

434. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 818–19 (2015) (noting that "it was perhaps not entirely accidental" that the declared winner of one such contested election "belonged to the same political party as all but one member of the House Committee majority responsible for the decision").

435. 3 ANNALS OF CONG. 463 (1792); *see also* GA. CONST. of 1789, art. IV, § 1. The Honest Elections Project, in its amicus brief filed in *Moore v. Harper*, argues that this historical contest is irrelevant to the ISL theory because the "residency requirement came from a provision of the Georgia constitution that spelled out voter qualifications." Brief of Amicus Curiae Honest Elections Project in Support of Petitioners at 11, *Moore v. Harper*, 142 S. Ct. 2901 (2022). The essence of the challenge, however, was not that the out-of-county voters were not qualified, but rather that they voted in the wrong place. *See* 3 ANNALS OF CONG. 460–61 (1792). This is apparent from the fact that, in 1791, Georgia's congressional elections were at-large, with each voter casting three ballots for candidates residing in each of three districts; *see also* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS 1788-1997 3 (1998). Thus, while Jackson's challenge cited the Georgia constitution's voter qualifications provisions, the constitutional rule dictating *where* qualified voters must cast their ballots was in fact a time, place, or manner regulation squarely within the ambit of the Elections Clause.

436. *See* 3 ANNALS OF CONG. 472 (1792). *See also* Smith, *supra* note 431, at 492.

providing for Congressional special elections.[437] In response, Representative William Findley[438] observed that every part of the special election had been provided for by law: the U.S. Constitution authorized the Governor to call a special election,[439] laws enacted by the Pennsylvania legislature established elections officers and their duties, and "the constitution of Pennsylvania prescribe[d] the manner that citizens shall vote, by ballot."[440] The House agreed the election was valid, and voted for the winner to retain his seat.[441]

Throughout the nineteenth and twentieth centuries, the House operated with the understanding that state constitutions were controlling. In several cases, the House scrutinized state election laws for compliance with state constitutions.

- In *Miller v. Thompson* (1850), the House considered the validity of votes cast in an Iowa county that had been split into a different congressional district from its neighbor in violation of the state constitution.[442] There was no question during debate that the state constitution controlled.[443]

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437. *See* 14 ANNALS OF CONG. 839 (1804).

438. Findley's views likely carried special weight; before being elected to Congress, Findley had been a delegate to the Pennsylvania Constitutional Convention, where he helped draft the portion of the Pennsylvania Constitution requiring that all elections be "by ballot" alongside James Wilson, who helped draft the Elections Clause. *See* Smith, *supra* note 431, at 488 n.188.

439. *See* U.S. CONST. art. I, § 2 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall Issue Writs on Election to fill such Vacancies.").

440. *See* 14 ANNALS OF CONG. 849–50 (1804).

441. *See id.* at 857–58.

442. 1 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 819, at 1062 (1907) [hereinafter HIND'S PRECEDENTS].

443. *See* CONG. GLOBE, 31st Cong., 1st Sess. 1301 (1850) (statement of Rep. Leffler) ("The rule upon which this case must be decided was laid down in the Constitution of the United States and in the constitution of the State of Iowa."); *id.* at 1306 (statement of Rep. Thompson) ("Could they vote in either of the two counties? This cannot be so, because the [Iowa] constitution required the voter to vote in the county in which he resided."); *id.* at 1310 (statement of Rep. Strong) ("The manner having been prescribed [in Article III, Section 6 of the Iowa constitution], it having been declared that the vote should be by ballot, a man had no constitutional privilege to vote in any other way.").

- In *McLean v. Broadhead* (1884) and *Frank v. Glover* (1888), the House determined that, because registration was not a voter qualification, Missouri's registration law did not violate the state's constitution.[444]
- In *Johnston v. Stokes* (1896), the House determined that a portion of South Carolina's voter registration law did violate the state constitution but upheld the election as the number of affected votes would not have changed the outcome.[445]
- In *Davison v. Gilbert* (1901), the committee determined that Kentucky's Congressional redistricting statute had been passed in accordance with the state constitution.[446]
- In *Gerling v. Dunn* (1919), the committee rejected the argument that using voting machines in a congressional election violated the New York state constitution because "[v]oting machines have been in use in New York State for many years, authorized by its constitution, provided for by its legislature, and sanctioned by its courts."[447]
- In *Paul v. Harrison* (1921), the House invalidated a Virginia election based on numerous state constitutional violations, writing that "there was such an utter, complete, and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia . . . that there was no legal election in those precincts."[448]
- In *Huber v. Ayres* (1951), the committee found that Ohio election boards had violated the state constitution by not rotating the names of candidates on the ballots, though the House declined to overturn the election.[449]
- In *Macy v. Greenwood* (1952), the committee considered a claim that New York voters had been registered in violation of

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444. *See* H.R. Rep. No. 48-2613, at 2–5 (1885); H.R. Rep. No. 50-1887 (1888).
445. *See* H.R. Rep. No. 54-1229, at 14 (1896).
446. *See* H.R. Rep. No. 56-3000, at 4 (1901); *See id.* at 2.
447. *See* H.R. Rep. No. 65-1074 (1919).
448. *See* H.R. Rep. No. 67-1101, at 9 (1922).
449. *See* H.R. Rep. No. 82-906 (1951).

the state constitution but found insufficient evidence to support the challenge.[450]

Often, the House deferred to state supreme court decisions to decide whether state election laws were valid:

- In *Curtin v. Yocum* (1879), the House considered whether a Pennsylvania statute permitting unregistered voters to cast a ballot if they attested to their qualifications conflicted with a new amendment to the state constitution providing that "no elector shall be deprived of the privilege of voting by reason of his name not being registered."[451] The Pennsylvania Supreme Court had not yet interpreted the new provision, but the majority found that the statute had been "enacted to give effect" to the new amendment and found no conflict.[452] The minority was divided as to whether a conflict existed, but agreed the state constitution controlled.[453]
- In *California Contested Election Cases* (1886), a California congressional redistricting statute was challenged for not having been "read on three several days in each house" as required by the state constitution.[454] The committee adopted the view of the California Supreme Court, explaining that such deference was "well-established".[455]
- In *Cornett v. Swanson* (1896), the House considered a claim that Virginia's secret ballot law violation the state constitution by disenfranchising illiterate voters.[456] The Committee deferred

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450. *See* H.R. Rep. No. 82-1599, at 6 (1952).
451. *See* H.R. Rep. 46-345, at 2–4 (1880); PA. CONST. of 1873, art. VIII, § 7 (1873).
452. *See* H.R. Rep. No. 46-345, at 5–6 (1880).
453. *See id.* at 13 (describing the 1874 statute as "repugnant" to the 1873 constitutional provision "which would seem to limit the power of the legislature to disfranchise an elector for nonregistration who is otherwise qualified"); *id.* at 21 (views of Reps. Field, Overton Jr., and Camp) ("We think, however that the registry law of 1874 is a valid law under the constitution of 1873.").
454. *See* H.R. Rep. No. 48-2613 (1885); CAL. CONST. of 1874, art. IV, § 15 (1874).
455. *See* H.R. Rep. No. 48-2613, at 4 (1885).
456. *See* H.R. Rep. No. 54-1473 (1896).

to the Virginia Supreme Court, which had upheld the law; a minority agreed that the Virginia constitution controlled but felt the Virginia Supreme Court's decision was dictum.[457]

- In *Davis v. Sims* (1904), Tennessee's secret ballot law was alleged to have violated the state constitution's "free and equal" elections clause because it only applied to some voters.[458] In reaching its decision, the House Committee examined at length decisions by the Kentucky, Virginia, Michigan, Massachusetts, and Pennsylvania supreme courts interpreting similar provisions in their state constitutions.[459]

In a few cases, candidates tried to invoke the ISL theory to argue state constitutions could not constrain state legislatures. *Shiel v. Thayer* (1862) is one example.[460] When Oregon was admitted to the Union in 1859, its constitution provided for a congressional election to be held in June 1860, at which George Shiel was elected.[461] At the presidential election held that November, however, Andrew Thayer received the most votes and claimed the June election was invalid because under the Elections Clause "a convention for a State has no power to fix the time and place for holding elections for Representatives and Senators, but that they must be prescribed by the Legislature of the State."[462] The House Committee, though, had "no doubt that the constitution of [Oregon] has fixed [the election date] beyond the control of the legislature."[463] On the House floor, the argument was raised that "no other power in a State" other than the legislature "has a right to prescribe" the time, place, or manner of a congressional election.[464] Representative Dawes, the chairman of the Committee, argued this flew "in the face of all the precedents

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457. *See id.*
458. *See* H.R. Rep. No. 58-1382 (1904); TENN. CONST. art IV, §1.
459. *See* H.R. Rep. No. 58-1382, at 7–9.
460. *See* H.R. Rep. No. 37-4 (1861).
461. *See id.* at 1; OR. CONST. of 1857, art. II, § 14.
462. CONG. GLOBE, 37th Cong., 1st Sess. 353 (1861).
463. *See* H.R. Rep. No. 37-4, at 3.
464. CONG. GLOBE, 37th Cong., 1st Sess. 356 (remarks of Rep. Stevens).

of this House" and that the Elections Clause assigned authority not to the legislative body alone, but to the "constituted authority of the State," which included a constitutional convention.[465]

Likewise, in *West Virginia Contested Elections* (1874), the Committee considered whether to seat candidates elected in August under the state constitution or in October pursuant to a state statute.[466] The majority determined that the state constitution simply didn't regulate congressional elections, but Representative Speer went on to argue that the state legislature should control regardless.[467] A minority rejected this argument, arguing that "it makes no difference whatsoever" whether a "constitutional convention or the legislature" sets a congressional election.[468] Ultimately, the House rejected Speer's view, seating the winners of the election held under the state constitution.[469]

In each of these cases, spanning over a century, the House either rejected the ISL theory or assumed state constitutions controlled. Professor Morley, however, has argued that several of these cases evince Congress's embrace of the theory, despite coming out against the candidate who would have benefitted from its application.[470] He also points to a few nineteenth century cases in which the candidate who invoked the theory did not lose, though these cases are equivocal at best as to Congress's views.

Baldwin v. Trowbridge (1866) involved a conflict between the Michigan constitution, which required voters to cast their ballots "in the

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465. *Id.* at 356–57. The Committee considered a similar issue in *Patterson v. Belford* in 1876 regarding a Colorado election held shortly after the state was admitted to the Union. *See* H.R. Rep. No. 45-15 (1877). As in *Shiel*, the House upheld the election held under the state constitution. *See* 1 HIND'S PRECEDENTS, *supra* note 442, §§ 523–24, at 660–67.

466. *See* H.R. Rep. No 43-7 (1874).

467. *See id.* at 5, 17.

468. *See id.* at 23.

469. *See* 1 HIND'S PRECEDENTS, *supra* note 442, § 522, at 660.

470. *See* Morley *supra* note 1, at 48. For a detailed rebuttal, *see* Smith, *supra* note 431, at 500–02.

township or ward" in which they were registered, and an 1864 statute providing for absentee voting by soldiers.[471] Augustus Baldwin argued the 1864 statute was unconstitutional and that therefore soldier votes cast for Rowland Trowbridge should not have been counted.[472] The majority presented two rationales in favor of Trowbridge. First, there was no conflict between the soldier-voting law and the state constitution.[473] Second, under the Elections Clause, the state constitution could not constrain the legislature.[474] The minority rejected the latter ground, citing the House's decision in *Shiel* just four years earlier.[475] While the House voted to seat Trowbridge,[476] the floor debate reveals that many who voted to seat Trowbridge opposed the ISL theory. Representative Dawes, the Committee chair, said he voted for Trowbridge because he saw no conflict between the soldier-voting law and the Michigan constitution, and emphasized that if there were a conflict he would have voted in favor of Baldwin and the state constitution.[477] Trowbridge himself argued there was no conflict.[478] In light of both the support for an alternative rationale and the opposition to the ISL theory, *Baldwin* simply does not demonstrate that Congress abandoned its longstanding acceptance of the role of state constitutions in regulating federal elections.

In *Iowa Contested Election Cases* (1880), the House considered a federal statute that required states to hold congressional elections

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471. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3460 (1866).

472. *See id.*

473. *See* H.R. Rep. No. 39-13, at 3 (emphasizing that if the Michigan constitution did not "fix[] the place of holding the election . . . there is no conflict between the law and the constitution and the argument is at an end.")

474. *See id.*

475. *See* H.R. Rep. No. 39-14, at 3 (stressing that Americans "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.").

476. *See* CONG. GLOBE, 39th Cong, 1st Sess. 845 (1866).

477. *See id.* at 822. Representative Davis also saw no conflict between the statute and the constitution. *See id.* at 844.

478. *See id.* at 840.

in November unless doing so required amending their constitutions regarding state elections.[479] Iowa's constitution required state officers and members of Congress to be elected simultaneously, so Iowa held its 1878 election in October as provided in the state constitution.[480] The Committee concluded that Iowa's election was proper.[481] The Committee clarified that its decision was not based on the provision of Iowa's constitution that set the date of the state's first congressional election in October of 1858, but nonetheless stated that "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."[482] In short, while the ISL theory made a brief appearance, it was only in an aside about a constitutional provision already deemed irrelevant.

In another case, *Donnelly v. Washburn* (1880), the Committee considered a claim that unnumbered ballots in a Minnesota election violated the state constitution's requirement that "all elections shall be by ballot" as interpreted by the Minnesota Supreme Court.[483] The majority agreed and determined that the votes should not be counted.[484] The minority cited *Baldwin* and argued the Minnesota constitution did not apply to federal elections.[485] Ultimately, the House never voted on the matter.[486] Thus, while Washburn kept his seat, it cannot be inferred that Congress as an institution embraced the minority's reasoning.

2. Popular Acceptance

Nearly every constitutional provision that regulates federal elections was enacted with voters' approval, signaling its acceptance of

479. *See* H.R. Rep. No. 46-19, at 8–9 (1880).
480. *Id.* at 3–6.
481. *Id.* at 17–18.
482. *See id.* at 18.
483. *See* H.R. Rep. No. 46-1791.
484. *Id.* at 32.
485. *See id.* at 59.
486. *Id.*

the public's role in constraining state legislatures. In 49 states, legislatively referred amendments must be approved by voters.[487] In 18 states, voters may place amendments on the ballot with enough signatures—usually at least eight percent of the total votes cast for Governor in the prior election—and approve them without the legislature's involvement.[488] Some states also require that amendments win a certain percentage of overall votes, a supermajority of votes, or a majority of votes in successive elections.[489]

Over the past century, voters have initiated and adopted several state constitutional provisions regulating federal elections. Some were adopted in response to state supreme court rulings; in Arkansas, for instance, voters amended the state constitution to allow for voting machines after the state supreme court declared them unconstitutional.[490] Others were adopted in response to unpopular laws enacted by state legislatures. In 1949, Republican voters who feared Ohio's "straight ticket" ballot law would prevent Senator Robert Taft's reelection successfully initiated an amendment to repeal it;[491] similarly, in 1977, Ohio Republicans initiated an amendment to repeal the Democrat-controlled legislature's same-day registration law.[492] Voters have also turned to the initiative where state legislatures were unable to make needed changes. In 1964, when the Twenty-Fourth Amendment outlawed poll taxes in federal elections,[493] Arkansas was left without a voter registration system for

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487. *See* Krislov & Katz, *supra* note 314, at 298.

488. *See id.* at 315. In some states, signatures must also come from a minimum number of the state's counties to ensure broad geographic support. *Id.*

489. *See id.* at 317.

490. *See* ARK. CONST. amend. LIV; Special, *Women Press Drive in Arkansas to Legalize the Voting Machine*, N.Y. TIMES, Mar. 18, 1962, at 52.

491. *See* OHIO CONST. amend. II; Special, *Ohio Vote Decision Could Assist Taft*, N.Y. TIMES, Nov. 6, 1949, at 39; Special, *Straight Ballot Outlawed in Ohio*, N.Y. TIMES, Nov. 9, 1949, at 17.

492. *See* Abe S. Zaiden, Special, *Repeal of Ohio's Instant Voter Registration Law Eyed*, WASH. POST, Aug 27, 1977, at A5.

493. *See* U.S. CONST. amend. XXIV.

federal elections.[494] The state legislature scrambled to pass a new system, but the Arkansas Supreme Court held it conflicted with the state constitution, leaving the state with different registration systems for state and federal elections.[495] In response, voters initiated and adopted an amendment creating a permanent registration system for all elections, which remains in effect today.[496]

In recent decades, voters have successfully initiated amendments addressing election administration,[497] establishing substantive rights,[498] requiring Voter ID,[499] creating independent redistricting commissions,[500] and setting congressional redistricting criteria.[501] Voters have also placed several election-related amendments on the ballot which, though unsuccessful, demonstrate the public's embrace of state constitutions as a mechanism for regulating elections.[502] Following the 2020 election, voters worked to place an unprecedented number of election-related amendments on the ballot.

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494. *See* Calvin R. Ledbetter Jr., *Arkansas Amendment for Voter Registration without Poll Tax Payment*, 54 ARK. HIST. Q. 134, 138 (1995).

495. *See id.* at 148–50.

496. *See id.* at 159–61; ARK. CONST. amend. LI.

497. MICH. CONST. art. II, § 4 (amended by election through Michigan Proposal 3 in 2018) (providing straight-ticket voting, automatic registration, same-day registration, and no-excuse absentee voting); OR. CONST. art. II, § 2 (amended by election through Oregon Measure 13 in 1986) (30-day cutoff for voter registration).

498. CAL. CONST. art. II, § 2.5 (adopted by election through California Proposition 43 in 2002).

499. MISS. CONST. art. XII, § 249A (adopted by election through Mississippi Initiative 27 in 2011).

500. MICH. CONST. arts. IV–VI (amended by election through Michigan Proposal 2 in 2018); CAL. CONST. art. XXI (amended by election through California Proposition 20 in 2010); ARIZ. CONST. art. IV-2, § 2 (amended by election through Arizona Proposition 106 in 2000).

501. FLA. CONST. art. III, §§ 20, 21 (adopted by election through Florida Amendment 6 in 2010).

502. *See generally* Amendment 1, Nebraska Direct Primaries and Nonpartisan Elections (Neb. 1924); Initiative 30, Colorado Voter Registration (Colo. 2002); Proposition 39, California Reapportionment Commission (Cal. 1984); Proposition 14, California Redistricting Commission (Cal. 1982); Initiative 36, Colorado Selection of Presidential

For the 2022 election, signatures were collected for proposed amendments related to registration,[503] early voting,[504] ranked-choice voting,[505] voter ID,[506] absentee voting,[507] primary elections,[508] lines at polling places,[509] and even procedures for counting ballots.[510] This ongoing public engagement demonstrates the continuing popular acceptance of state constitutions as a vital check on state legislatures' regulation of federal elections.

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As the above discussion illustrates, the three elements of Professor Baude's liquidation framework are satisfied. The Elections and Electors Clauses are indeterminate as to the role of state constitutions. Since the Founding, however, state constitutions have consistently constrained state legislatures when it comes to federal elections, and this deliberate course of practice has remained al-

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Electors (Colo. 2004); Proposition 62, California Top-Two Primaries (Cal. 2004); Proposition 77, California Changes to Legislative and Congressional Redistricting (Cal. 2005); Amendment 4, Ohio Redistricting Commission (Ohio 2005); Amendment 2, Ohio Absentee Voting for All Electors (Ohio 2005); Measure 90, Oregon Open Primaries (Or. 2014); Proposition 121, Arizona Top-Two Primaries (Ariz. 2012); Amendment 2, Minnesota Voter Identification (Minn. 2012).

503. Initiative #21-9921, California Voter Identification and Registration Requirements Initiative (Cal. 2022).

504. H.J.R. 59, Resolution Approving an Amendment to the State Constitution to Allow for Early Voting (Conn. 2021).

505. Initiative #21-01, Florida General Election Ranked-Choice Voting Initiative (Fla. 2022); Missouri Top-Four Ranked-Choice Voting Initiative (Mo. 2022).

506. Proposition 309, Voter Identification Requirements for Mail-In Ballots and In-Person Voting Measure (Ariz. 2022); Initiative #21-9921, California Voter Identification and Registration Requirements Initiative (Cal. 2022).

507. Proposition 309, Voter Identification Requirements for Mail-In Ballots and In-Person Voting Measure (Ariz. 2022).

508. Initiative #21-01, Florida General Election Ranked-Choice Voting Initiative (Fla. 2022); South Dakota Top-Two Primary Initiative (S.D. 2022).

509. Initiative #21-9921, California Voter Identification and Registration Requirements Initiative (Cal. 2022).

510. Proposition 309, Voter Identification Requirements for Mail-In Ballots and In-Person Voting Measure (Ariz. 2022).

most completely uniform to the present day. Finally, state legislatures, Congress, and the public have all demonstrated their acquiescence to and active participation in this state of affairs.

CONCLUSION

The text of the Elections and Electors clauses is silent as to the role of state constitutions, but the subsequent history is anything but. Since the Founding, state constitutions have both directly regulated federal elections and constrained state legislatures' exercise of their authority under the Clauses.[511] This constraint has been both procedural and substantive in nature. Over time, the historical trend has been for state constitutions to take on a greater role in regulating the time, place, and manner of federal elections. In the past century and a half, nearly every election-related state constitutional provision was either approved and presented to voters by state legislatures or placed on the ballot and enacted by voters directly.[512] Together, this evidence demonstrates both a course of deliberate practice and a significant degree of institutional and popular acceptance, including by state legislatures themselves. This suggests that the meaning of the Elections and Electors Clauses with respect to state constitutions has been settled in favor of constraint.

This inquiry also provides another illustration of how historical practice and unwritten constitutional norms combine to construct constitutional meaning. To date, most of the commentary discussing historical practice and constitutional liquidation has focused on separation-of-powers issues.[513] As the Supreme Court's recent decision in *Chiafalo* demonstrates, however, longstanding practice

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511. See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 135 S. Ct. 46 (2014).

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

513. *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016).

may also establish constitutional rules in the context of law and democracy.[514] Since the Founding, state constitutions have become important safeguards of free elections and voting rights. Recognizing the role they have assumed in our constitutional system is vital to the preservation of those protections.

514. Chiafalo v. Washington, 140 S. Ct. 2316 (2020).