The Constitutionality of Citizen Initiative for Reforming the Presidential Election System.

by Mark Bohnhorst
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Mark Bohnhorst, Chair, Presidential Elections Team, Minnesota Citizens for Clean Elections. The views expressed are my own. I am grateful to independent scholar Michael Rosin for three reviews of drafts and numerous helpful critiques and suggestions and to DePaul University Law School Distinguished Emeritus Research Professor Stephen Siegel for review and for help with historical materials.

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This is an analysis of the constitutionality of using citizen initiative to enact the national popular vote interstate compact, the voter choice ballot proposal, or other reforms relating to presidential elections. Following a summary of the analysis and an introduction, the paper turns to the following: the plain meaning of relevant constitutional texts (Part I); the development of popular sovereignty from the Founding to 1892 (Part II); the seminal McPherson decision (Part III); case law under Article I, from 1892 to Arizona State Legislature (Part IV); the role of the "Independent Legislature Doctrine" in Bush v. Gore (Part V); the Arizona State Legislature case, with a critique of CJ Roberts' dissent (Part VI); the Chiafolo faithless electors case (Part VII); and applying the law to specific proposals for reform (Part VIII).

Summary

The plain language of the Constitution vests greater discretion in states with regard to appointment of electors ("Legislature may direct manner" of appointment") than with regard to establishing an election code for elections to Congress ("Legislature shall prescribe manner" of conducting elections). Under the plain language of the Tenth Amendment, when the Constitution does not require a particular state action (e.g., through use of the term "shall"), power is reserved to the States and the people.

In the century between ratification of the Tenth Amendment and the foundational Article II McPherson decision, it became commonplace for the people to exercise what had previously been considered a prerogative of the legislature—namely, approval of state constitutions and of amendments to state constitutions. Frequently, state constitutions approved by the people also reserved to the people the power to approve legislation on important subjects.

In a lengthy passage, the McPherson decision (1892) examined the relationships among the state, the legislature, legislative power, and the state's constitution. Four times, the Court stated that legislative power is subject to a state's constitution. It observed that under a state constitution power could be reposed elsewhere than in the legislature itself.

In dicta, the Court stated that the language of Article II creates some "limitation" on "circumscribing" "legislative power," but it did not elaborate. The 1886-87 Congressional floor debates on the Electoral Count Act (ECA) suggest some of the parameters. A law that violated the state constitution would be presumptively invalid. Likewise, actions that violated the constitution—the appointment of electors who had not been chosen in an election required by the law and constitution—would circumscribe legitimate legislation. The law provided an incentive for states to create judicial or quasi-judicial forums to resolve disputes about the legality of ballots, and preserved, in limited form, Congress' power to refuse to count electors in a range of circumstances.

The McPherson court also set out a lengthy historical narrative. It was careful to explain that this was justified because the plain language of Article II could be considered ambiguous. The Court set forth the history and summarized the result; it neither "approved" nor spoke with "favor" about it.

The last historical item was a long quotation from an 1874 Senate Report—an advocacy document intended to put the Electoral College in the most unfavorable light possible. The Report asserted that state legislatures could resume appointment of electors at any time, the state's constitution and laws notwithstanding. These portions of the

Report are the foundation stone of the Independent Legislature Doctrine, a doctrine that was in effect rejected as to Article II in 1887, when the ECA became law. (See generally, Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U. L. Rev. 731 (2001) ("Smith) . jhttps://ir.law.fsu.edu/lr/vol29/iss2/14 The Report is not consistent with the McPherson court's own discussion of the relationship among states, legislatures and state constitutions.

During the Twentieth Century, Congress again rejected the Independent Legislature Doctrine—this time as to Article I—when in 1911 it amended the federal statute governing redistricting for the express purpose of allowing states to use initiative and referendum in determining the manner of redistricting under Article I. On three occasions, unanimous United States Supreme Court decisions under Article I also rejected the doctrine. In 1915, the Hildebrandt case specifically allowed use of referendum to nullify a legislative redistricting plan.

The Independent Legislature Doctrine was revived in the briefing in Bush v. Gore. The Bush team and Florida Legislature amici represented to the Court that the McPherson court had cited the 1874 Report "with approval;" this was not the case. Although the Court did not decide the Article II issues that had been briefed, it included a quotation from the 1874 Report in the per curium opinion, thus elevating that document to wholly undeserved prominence.

Chief Justice Roberts' dissent in Arizona State Legislature was premised on the Independent Legislature Doctrine. An amicus curiae brief from the Coolidge-Reagan Foundation cited the 1874 Senate Report and other sources and argued that the case be decided on this basis. The dissent asserted that McPherson had "emphasized" that its decision was based on a plain text analysis, that a passage from the 1874 report was part of the plain text analysis and that this passage represented the Court's own "explanation." None of these assertions was true.

Justice Ginsberg's majority opinion in Arizona State Legislature clearly rejected the Independent State Legislature Doctrine as applied to Article I redistricting cases. (The majority did not cite or discuss the Article II

law.) The case extended the result in Hildebrandt from referendum to citizen initiative.

One of the majority's arguments was that state constitutions contain a great many provisions that govern elections, with many of these provisions having been enacted through citizen initiative. To prohibit use of these state constitutional provisions in Article I elections would be absurd and chaotic. (The same would be true for Article II elections.)

In reply, Chief Justice Roberts staked out a middle position. The initiative measure adopted in Arizona had excluded the legislature from the process altogether. C|J Roberts conceded that initiative can be used under Article I, since it is part of the state's law-making machinery, but he argued the legislature must retain some role:

> Put simply, the state legislature need not be exclusive in congressional districting, but neither may it be excluded.

This year's faithless electors case, Chiafolo, brings renewed focus on the Tenth Amendment, as well as on the term "Manner" of appointment. Justice Thomas' concurring opinion interprets "Manner" in Article II quite narrowly; Article II requires only that legislatures set the "approach" to appointing electors. The Tenth Amendment reserves to the states discretion to determine all other matters pertaining to appointment of electors, without regard to Article II.

Over two centuries of historical development and case law provide three possible answers to the question of whether use of citizen initiative to achieve Article II reform is permitted. Current law is the Ginsberg/Arizona State Legislature view, which understands "legislature" to mean "legislative power as defined in the state's constitution." Initiative is available to implement all reforms under this approach.

An extreme contrary view is the Independent State Legislature Doctrine. This has never been adopted by the Supreme Court, and it has been rejected by Congress and several unanimous Supreme Court decisions. Implicit in this doctrine is that initiative is not available to adopt any reforms.

Under the middle ground represented by the Arizona State Legislature dissent and the Chiafolo concurrence, states have broad latitude to implement reforms by way of initiative, so long as they do not exclude the legislature entirely in setting the "approach" for appointing electors. The Citizen Choice Ballot appears to fall clearly on the side of reforms that would pass muster under the middle ground. It is less clear whether the Interstate Compact would be permitted.

Introduction.

The US Constitution, Article II, Section 1, cl 2 provides for selection of Electors for President and Vice President as follows:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . .

Opponents of use of citizen-sponsored ballot initiatives argue that the term "Legislature" in Article I (and by extension in Article II) precludes a State from permitting its citizens to exercise direct, popular sovereignty on the subject of the Manner of conducting congressional elections (and by extension to the Manner of appointment of Electors). The most significant expression of this view as to Article I is CJ Roberts' dissent in Arizona State Legislature—discussed below—which includes a one paragraph summary of the Supreme Court's decision in McPherson, the Supreme Court's seminal Article II decision. Roberts argues that use of the term "Legislature" means that only state legislative bodies may direct the Manner in which elections for Congress are conducted (by implication, this would apply to appointment of electors as well). Robert's dissent is grounded in the Independent State Legislature Doctrine, which holds that under the Article I and II elections and electors clauses, state legislatures exercise authority delegated to them directly by the United States Constitution and that this delegation precludes (or significantly limits) state constitutions from constraining state legislatures in their exercise of legislative power.

With respect to Article I, the opposite view was authoritatively articulated by the Supreme Court majority in Arizona State Legislature.

The majority did not discuss Article II or respond to CJ Roberts' analysis of McPherson. Its analysis of the Article I cases, however, is identical to that of the leading proponents of the Interstate Compact for national popular vote for president, Dr. John Koza, et al, set forth in *Every Vote Equal* (4th Ed. 2013) (*EVE*).

EVE, Chapter 8, "The Initiative Process and the National Popular Vote Compact," pp. 297-341, includes an in depth analysis (current through 2012) of how the term "Legislature" is used in various places in the US Constitution and of how the courts and others have understood and construed the term since the 1790s. The results are summarized on page 332:

"In summary, present-day practice by the states, actual practice by the states at the time the U.S. Constitution took effect, legal commentary, and court decisions are consistent in supporting the view that the word **'legislature'** in Article II, section I, clause 2 of the U.S. Constitution. . . means **the state's lawmaking process**--a process that includes the state's Governor and the state's voters in states having citizen-initiative and protest-referendum procedures."

As the *EVE* analysis points out, some uses of the term "Legislature" in the Constitution do refer to legislative bodies as such, operating independently from the law-making provisions of their constitutions, while others refer to the entire law-making function of the State. As, the Supreme court explained in 1932, in Smiley v. Holm, 285 U.S. 355 (1932):

"[W]henever the term 'legislature' is used in the Constitution, it is necessary to consider **the nature of the particular action in view."** *Id.* 310. (emphasis supplied).

I. Plain Meaning Analysis.

A. Article II, Sec. 1.

The starting point for determining "the nature of the particular action" is the plain meaning of the words of the Constitution. Important words

include, not only the nouns, but action verbs (which define the "action in view") and the contextual relationship between the verbs and the nouns.

Article II, Sec.1, cl. 2 provides in relevant part:

"Each **State shall appoint**, in such **Manner** as the **Legislature** thereof **may direct**, a Number of Electors. . . "

The operative terms are "Legislature," "State," "appoint," "direct," "may," "shall" and "Manner."

The search is for the "meaning" of the words, not just the "definitions." As Justice Thomas acknowledged only this year, "terms may not always have the same exact meaning throughout the Constitution. . ." Chiafalo v. Washington, (concurring), Slip Op. at 5. As former Chief Justice and renowned legal scholar Oliver Wendell Holmes put it:

"We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true."

One begins with the term "Legislature." In simplest terms, "legislature" means a representative legislative body that exercises legislative power. Scratch the surface, however, and, in the context of the US Constitution, "legislature" can mean two very different "things."

"Legislature" can mean a legislative body that is obligated or authorized by the US Constitution to take specific actions—irrespective of and with no obligation to the other organs of state government, and, because the obligation or authorization originates in the US Constitution, without regard to any conflicting provisions of the state's own constitution. Both EVE, and CJ Roberts' dissent in Arizona State Legislature detail all of these uses of the term "legislature." The type of legislative power exercised in each and every one of these cases has nothing to do with law-making.

Alternately, "legislature" can be "defined as" or "mean" a representative body that acts on behalf of the state by making laws through the exercise of legislative law-making power—a power that exists only

within and as part of the state and operates in conjunction with the executive and judicial organs of the state and is subject to the state's constitution. One core question is whether Articles I and II, in their parallel uses of the term "Legislature," mean a body exercising law-making legislative power.

"State" means one of the (now) 50 states of the United States.

"Appoint" is discussed, definitively, in McPherson v. Blacker, 146 U.S. 1, 27 (1892):

> It has been said that the word "appoint" is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination. (emphasis supplied)

"Appoint" clearly refers to a specific act—repeated every four years, to be sure, but a completed act each time it happens. Furthermore, the US Constitution does not command "the Legislature" to appoint; it commands "the State" to appoint. Thus the plain language indicates that whatever Article II requires the Legislature to do, the Legislature is to act as part of the State, not as an independent entity. Further, "appoint" is the "broadest possible" term. As the McPherson court noted, it encompasses popular elections of various forms, appointment by the Legislature, hybrid popular election/legislative appointment schemes, and even (in Tennessee) the naming of specific individuals to make the appointments.

"Direct" as an intransitive verb means "to point out, prescribe, or determine a course or procedure." To prescribe or determine a procedure is a law-making function, not the undertaking of a single act.

Like "appoint", "direct" is a broad term. For example, while "direct" means much the same thing as "prescribe" (the terms are synonyms), "prescribe" suggests a level of specificity that is not necessarily present in "direct." Prescribe is more prescriptive, if you will. Thus, "specify" is a synonym of "prescribe" but not of "direct."

"May," in common usage, is another very broad term: it means "have permission to." "May" can also mean "shall" or "must," when used in law where the sense, purpose or policy requires this interpretation.

The Constitution uses "shall" and "may" in almost countless instances. Indeed, the clause now under consideration uses both terms. The Framers were careful to distinguish between "shall" and "may." Consistently, "may" is associated with discretionary, non-mandatory matters.

"Shall" is used in laws, regulations, or directives to express what is mandatory.

"Manner" means "a mode of procedure or way of acting." Again, the Constitutional text requires the creation of procedures. As the McPherson court noted, an election is but one of the "modes" encompassed by Article II.

Justice Thomas' concurring opinion in Chiafalo expounds on the meaning of "Manner" in Article II.

> At the time of the founding, the term "manner" referred to a "[f]orm" or "method." . . . . These definitions suggest that Article II requires state legislatures merely to set the approach for selecting Presidential electors. . .
>
> Historical evidence from the founding also suggests that the "Manner" of appointment refers to the method of selecting electors. . . . In context, it is clear that the Framers understood "Manner" in Article II. Sec. 1, to refer to the mode of appointing electors—consistent with the plain meaning of the term.
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> This understanding of "Manner" was seemingly shared by those at the ratifying conventions. For instance, at the North Carolina ratifying convention, John Steele stated that "[t]he power over the *manner* of election [under Article I, Sec. 4] does not include that of saying who shall vote.". . . Rather, "the power over the manner only enables [States] to determine how these electors shall elect."

The majority in Chiafalo interpreted Article II, Section 1 a bit differently than Justice Thomas. It grounded its decision on the fact that Article II gives "states" the broadest possible power to "appoint," and that inherent in that power is the power to condition the appointment. Slip Op, at 9. The majority did not opine on the meaning of "Manner" in Article II.

B. Tenth Amendment.

Justice Thomas arrived at the same result—that States have inherent power to condition the appointment of electors—but he got there by a different route. Since the plain language of Article II does not grant states this power, but also does not prohibit the states from exercising this power, the inherent power comes not from Article II itself but from the Tenth Amendment.

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, **nor prohibited by** it to the States, are **reserved to the States respectively, or to the people.** (emphasis supplied)

On its face, this language is consistent with initiative. Through the initiative process, the "States" establish a procedure by which "the people" exercise the "power" of popular sovereignty. Under Justice Thomas' reasoning, "'where the Constitution does not speak expressly or by necessary implication,'" the Tenth Amendment empowers the States and the people to act. Slip. Op. 11. Since "[t]hese sections of the Constitution [Article II and the Twelfth Amendment] provide the Federal Government with limited powers concerning the election," *Id*., the scope of initiative for effectuating presidential election reform at the state level should be correspondingly broad.

The Tenth Amendment was the only one of the Bill of Rights that was proposed to Congress by all of the 11 states that originally ratified the Constitution. Akhil Reed Amar, *Bill of Rights: Creation and Reconstruction* (1998), 14. The addition of "or to the people" was a conscious choice, made while the amendment was debated in Congress. Jake Sullivan, Scholarly Review of "The Tenth Amendment in Local

Government," Yale Law Journal. https://www.yalelawjournal.org/comment/the-tenth-amendment-and-local-government "The people," a term that was not used anywhere in the Articles of Confederation., *Id,* is a perfect book-end to the Preamble's "We the People," and reflects the Constitution's profound philosophical and structural commitment to popular sovereignty—to "the people" as the true and only source of governmental authority. Amar, *supra,* Chapter 6. One role of "the people" under the plain language of the Preamble to the United States Constitution is to "ordain and establish" constitutions.

As an aside, one of the proposals for presidential election reform discussed later, the Voter Choice Ballot, is wholly aligned with both the language of the Tenth Amendment and the values embodied in it. Under that proposal, "the people" decide in each presidential election in each "state" the extent to which they favor a national popular vote for president. The Voter Choice Ballot functions as a sort of state-wide town hall meeting, at which the voters reconsider every four years the wisdom of selecting the president through the national popular vote.

C. Article I, Section 4.

The Constitution also uses the term "Legislature" in connection with elections for Congress.

The source of the states' authority and obligation to conduct elections for Congress is Article I, Sec. 4, cl. 1, which provides in relevant part:

"The Times, Places and **Manner** of holding **Elections** for Senators and Representatives, **shall** be **prescribed** in each **State** by the **Legislature** thereof. . . "

This duty and authority are not unlimited. The second half of the clause empowers Congress to set aside, or create on its own, laws for election to Congress, as follows:

". . . but the **Congress may** at any time **by Law make** or **alter such Regulations**, except as to the places for chusing Senators."

The operative terms of the first half of this clause are "Legislature," "State," "Manner," "shall," "Elections" and "prescribe."

The definitions of "Legislature," "State," "Manner" and "shall" are the same as for Article II. There are important distinctions, however, and the terms may not "mean" precisely the same "thing." In Article I, the "Legislature shall" establish the Manner of elections. In Article II, the "Legislature may" establish the Manner of appointing Electors. The plain language establishes one as a mandatory duty, the other as an authorization to proceed.

"Election" means an act or process of electing. Again, there is a significant difference between Articles I and II. Article I is laser focused on elections; Article II grants states the widest possible discretion in determining the mode of choosing electors, which can include elections and much else.

"Prescribe" means to specify with authority; a synonym is specify. Prescribe the Manner means specify the mode. Of the two definitions of "election", Article I Sec. 4 clearly addresses the "process of electing," not the "act of electing."

That "prescribing" the "manner" of conducting "elections" means the same thing as passing a law becomes abundantly clear from the second half of Article I's time, place, manner clause. In that clause Congress is given plenary, but discretionary ("Congress may"), power to override the actions taken by state legislatures or to create an election code of its own. In the first clause, Legislatures are to create "such Regulations," not vote in an election. (A separate provision, Article I, Sec. 3, cl 1, obligated legislatures to choose senators for six year terms.)

<u>D. Recap: translating the words of Articles I and II into the facts for which they stand.</u>

There is no responsible basis to argue that the plain language of Articles I and II, with respect to the term "Legislature," means anything other than a state legislature acting as a law-maker. But while the two clauses

in question use many of the same words and share some common elements, the meanings are also subtly and importantly different.

One commonality is that each contains a mandatory element and a discretionary element. Using highly prescriptive terms, Article I commands state legislatures to create an election code for federal elections. It empowers, but does not compel, Congress to alter or change that code. Similarly, Article II commands states to appoint electors. It authorizes state legislatures to direct the manner of that appointment, but the language employed ("direct" "appoint") is less specific than Article I, and a key verb, "may," denotes discretion, not command.

How, one might ask, could a "state" direct the manner of appointing electors without legislation that addresses the topic? The state constitution can determine the manner. In Minnesota, for example, the constitution mandates that all elections shall be by ballot and establishes a state canvassing board to canvass state-wide returns and certify the winners. Some other state constitutions, such as in Florida and Arizona, specify that elections "by voters" shall be by ballot; but those constitutions leave open the possibility that some elections might not be by the voters—e.g., electors might be appointed by the legislature.

Of the various modes of appointing electors canvassed in McPherson, Minnesota is committed in general terms to popular election without the need for the legislature to pass a law to that effect. Of course the constitution could be more specific. For example, it could single out presidential electors and require that they be chosen by vote of the people. Indeed, the Colorado Constitution of 1876, section 20, did precisely that, as follows:

> The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.

A forthcoming law review article argues, persuasively, that his provision remains in effect. David B. Kopel & Hunter Hovenga, "The National Popular Vote Violates the Colorado Constitution" 2020 *Denver Law Review Forum* _____, (forthcoming)

https://static1.squarespace.com/static/5cb79f7efd6793296c0eb738/t/5f6a830dbef74d05fadea185/1600815885833/National+Popular+Vote+violates+the+Colorado+Constitution_Final.pdf

Similarly, a state constitution might specify that electors will be appointed on the basis of the winner of the national popular vote, and that the Legislature may determine the manner of ascertaining the national vote winner. In 2017, a bill for an amendment that would have done essentially that was authored (but not introduced) by a former Speaker of the Minnesota House.

The constitutional histories of Articles I and II are unique unto themselves. The time, place and manner clause of Article I was deeply considered in the Constitutional Convention and was regarded as of existential importance to the new nation. Hamilton described this as the most "completely defensible" clause in the whole constitution, supported by "this plain proposition, that *every government ought to contain in itself the means of its own preservation." (*emphasis in the original*)* Federalist, No. 59*,* Rossiter, *The Federalist Papers, 362 (1961).* Hamilton also observed, "it will therefore not be denied that a discretionary power over elections should exist somewhere." *Id*. The integrity of congressional elections was critical to the proper functioning of government. Article I is thus laser focused on elections, requires that state legislatures address this question with specificity, and reserves the discretionary power for Congress to step in if the national interest requires.

The constitutional history of Article II is wholly different. While the Constitutional Convention considered presidential selection on numerous occasions, it was unable to coalesce around any of numerous proposals. The matter was resolved at the very end by a compromise that punted the question to the states, obligating the states to appoint electors in the broadest terms but otherwise leaving it up to the states to work out the details.

The Framers chose a word of discretion, not a word of command, to describe the legislature's role in Article II. As McPherson pointed out, this language is almost identical to article 5 of the Articles of

Confederation: "in such manner as the legislature of each state shall direct." The Framers could have used "shall;" they changed it to "may."

The nation would soon adopt a constitutional amendment that specified that—absent prohibition with regard to a given topic—the states and the people retain power over it. While the drafters of Article II could not have known that the Tenth Amendment would become part of the constitution, the Congress that drafted the Tenth Amendment, and the states that ratified it, knew there was a problem with the Electoral College. Even though every government should contain within itself the means of its preservation, in the very first presidential election New York's legislature deadlocked, and the state failed to supply any electors (or to choose senators on a timely basis), despite the constitutional command that it do so.

The Tenth Amendment preserved to the States and the people power to remedy these constitutional wrongs, and, as we shall see, in the fullness of time they have sought to do so. The Tenth Amendment is part of the constitutional text and of the constitutional design. Justice Thomas' insight that Article II should be interpreted in light of the Tenth Amendment makes sense.

II. Popular Sovereignty—the Founding to 1892.

As the Arizona State Legislature majority opinion recognized, direct democracy has been a part of American life from the beginning:

> There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England's town hall meetings and the submission of early state constitutions to the people for ratification. [citations omitted] But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States.

While accurate with respect to the Progressive Era itself,, the court's description of the direct democracy movement fails to convey the extent to which direct democracy had already become a fixed feature of the

nation's political life at the beginning of the Progressive Era. This lessons learned from this early period were brought to public attention in the 12 months leading up to McPherson.

As the Progressive Era was being born in the run-up to McPherson, the reality that citizens across the nation were already exercising extensive direct democracy law-making power—particularly through state constitutional amendments requiring referendum elections—was one of the central points in the Progressives' argument. This early history is the subject of two chapters in Thomas Goebel's, *A Government by the People: Direct Democracy in America*, 1890-1940 (2002). In Spring-Autumn 1892, the direct democracy movement became a social force, and direct democracy was a significant issue in the 1892 elections.

The early Progressive Era's counterparts to the Revolution's Thomas Paine and *Common Sense* were James William Sullivan and his *Direct Legislation by the Citizenship through the Initiative and Referendum* (1892). In Chapter 4, "Direct Legislation in the United States," Sullivan first discussed the town meeting, which had been known since earliest colonial times and at which citizens could both initiate local legislation and vote on legislation referred by others. The town meeting, he observed, was "gradually spreading throughout the western states—of recent years with increased rapidity."

Sullivan then turned to "The Referendum in States, Cities, Counties, Etc." At the state level, in 1892 there had already been extensive direct citizen-legislating by virtue of both referendum elections for approval of state constitutional amendments and provisions in constitutions requiring citizen approval of myriad measures.

> Few are aware of the advances which direct legislation has made in state government in the United States. . . Constitutional amendments now go to the people for a vote in every state except Delaware. The significance of this fact. . . [is] seen when one considers the subject matter of a state constitution. . . . [T]hey themselves [the people] are the real legislators. Among the matters once left entirely to legislatures, but now commonly dealt with in constitutions, are the following: Prohibiting or regulating

> the liquor traffic; prohibiting or chartering lotteries; determining tax rates [7 additional topics are listed]. . . .
>
> In fifteen states, until submitted to a popular vote, no law changing the location of the capitol is valid; in seven, no laws establishing banking corporations; in eleven, no laws for the incurrence of debts excepting such as are specified in the constitution. . . Without the Referendum, Illinois cannot sell its state canal; Minnesota cannot pay interest or principal of the Minnesota railroad. . . .With the Referendum, Colorado may adopt woman suffrage. . . .
>
> Numerous important examples of the Referendum in local matters in the United States, especially in the West, were found. . .
>
> In fact, the vast United States seems to have seen as much of the Referendum as little Switzerland. But the effect of the practice has been largely lost in the great size of this country and in the loose and unsystematized character of the institution as known here.

In the above passages, Sullivan summarized and popularized a scholarly article that had appeared the previous year. Ellis P. Oberholtzer, Law-Making by Popular Vote; or, The American Referendum." Annals of the American Academy of Political and Social Science. Nov. 1891, 324-44. Like Sullivan, Oberholtzer observed that the extent of this phenomenon had previously gone unremarked. By the time McPherson was decided, that was no longer the case, either in scholarly circles or in popular culture.

III. McPherson v. Blacker.

The seminal U.S. Supreme Court case on the Article II Electors Clause is McPherson v Blacker, 146 U.S. 1 (1892). McPherson involved a constitutional challenge to a Michigan law that replaced selection of electors on the basis of winner-take-all with designation of one elector per congressional district (with one additional elector chosen by a western and by an eastern mega-district, each made up of six congressional districts).

A. Framing and resolution of fundamental questions concerning role of the "state."

As noted previously, the Court construed the term "appoint" to give the State the broadest possible latitude in choosing the manner of selecting electors. The narrow question was whether the phrase "State shall appoint" in Article II meant the state as a whole was required to appoint.

> It is insisted that it was not competent for the legislature to direct this manner of appointment [by districts], because the **state is to appoint** as a body politic and corporate, and so **must act as a unit**, and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the appointment of electors by districts is not an **appointment by the state**, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors. (emphasis supplied) *Id*., 24.

The Michigan Supreme Court had stated that, "If the question were to be determined solely by the language employed it may be admitted that there would be much force in the contention that the State must act as a unit. . . " Making of Modern Law , U.S. Supreme Court Records and Briefs, 1832-1978, McPherson v. Blacker Transcript of Record with Supplemental Pleading, Record, 21. (hereafter, MOML).

After an examination of principles and a lengthy discussion of history—much of these sections, including all of the history, is, strictly speaking, dicta—the Supreme Court summed up its interpretation of Article II:

> In short, the appointment and mode of appointment of electors **belong exclusively to the states** under the constitution. They are. . . no more officers or agents of the United States than are the members of the state legislature when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in congress. . . [Aside from determining the time and day of choosing electors] **the power and jurisdiction of the state is exclusive**. . . (citations and quotation marks omitted). *Supra*, 146 U.S. 34-35.

For both the "appointment" and the "mode [Manner]" of appointment, "the power and jurisdiction of the state is exclusive." And neither the state—nor the legislature which functions as a part of the state under Article II—is an "officer[] or agent[]" of the United States under Article II. It is quite clear from this passage that, for the McPherson court, the applicable, plain meaning definition of "legislature" is a law-making entity that is subject to the state's normal law-making rules, not a body that exercises power separate and distinct from the state by way of direct delegation from the US Constitution.

B. Positions of the parties on fundamental principles and Article II.

Respondent, Secretary of State Blacker, acknowledged that "state" means much more than "legislature" and that acts done on behalf of the state are acts authorized by the state's constitution:

> The State acts through its political agencies. Whether any organ is competent to bind the State or to speak for it, involves the construction of the laws, and, in a broad sense, of the Constitution of the State.
>
> It is no answer to this contention that the State acts in the exercise of a power given it by the Constitution. The fact remains, the power belongs to the State; and the State can execute it only in conformity with its own Constitution and laws.

MOML, Kirchner Brief, at 31.

Thus, the governor, acting within constitutional limits, acts for the state; and the judiciary, in the exercise of judicial power, acts for the state. *Id*. at 32. Both of these branches of state government have important roles to play in the Electoral College system, roles that were discussed in the briefs.

The Electoral Count Act of 1887 (discussed *id*, at 21-28) encourages states to establish judicial or quasi-judicial procedures to adjudicate disputes concerning the lawfulness of appointment of electors and establishes a preferred status for electors whom the governor certifies. The 1887 Act was the product of fourteen years of continuous legislative effort to establish a coherent system of counting electoral

votes. One part of the history was the electoral crisis of 1877, which was addressed in briefs from both parties. MOML, FA Baker Brief, 52-59; Atty. Gen. Ellis Brief, 16-22. For a thorough analysis of the legislative history of the 1887 Act, see Stephen Siegel, "The Conscientious Congressman's Guide to the Electoral Count Act of 1887," *56 Fla.L.Rev. 541 (2004).* See also, Eric Schickler, et al. "Safe at any Speed: Legislative Intent, The Electoral College Count Act of 1887, and Bush v. Gore," 16 Journal of Law and Politics 717 (2002); and L. Colvin and Edward B. Foley, "Lost Opportunity: Learning the Wrong Lessons from the Hayes-Tilden Dispute," *79 Fordham Law Review, No. 5, 1043 (Apr. 2011).*

The 1877 proceedings framed questions that Congress would resolve (some would say "attempted" to resolve) in 1887. Among these were whether Congress has the power to "go behind" the state's certification, and what is one's opinion about giving conclusive effect to fraudulent action by state canvassing boards. MOML, Baker Brief, 58, 59.

Attorney General Ellis acknowledged that a state's constitution could vest legislative power elsewhere than in the legislature:

> In short it may be laid down as elementary and axiomatic that **unless the constitution of the state confers authority upon some other agent in express terms**, the legislature is the only agent that represents the state whenever the state is called upon to do anything. (emphasis supplied) MOML, Ellis Brief, 41.

The legislature itself can delegate authority to subordinate bodies. *Id*, 45.

Respondent Blacker interpreted the language of Article II in accordance with its plain language. As discussed in Section I, the power is discretionary:

> The language of the Constitution admits of no doubt of its intention to leave the manner of appointment **to the discretion of** the Legislature of each State. (emphasis supplied) MOML, Kirchner Brief, 32.

Attorney General Ellis, making the same point, set out the Tenth Amendment and then quoted one of the Framers for the proposition that the cryptic language of Article II confers absolute discretion:

> Speaking of the same matter in the House of Representatives, in 1800 Mr. Chas. Pinkney [sic], who was one of the framers of the constitution, said:
>
> "By the constitution, electors of the president are to be chosen in the manner directed by the State legislatures—that is all that is said. In case the State legislatures refuse to make these directions there is no power to compel them. . ."MOML, Ellis Br, 12.

Pinckney was no fan of the Electoral College. He opposed it, in favor of election by a joint session of Congress, during the Constitutional Convention. Alan E. Johnson, The Electoral College: Failures of Original Intent and a Proposed Constitutional Amendment for Direct Popular Vote 215-16 (2018). His criticism in 1800 was correct. The constitution, which speaks in almost cryptic terms and with language of permission ("may") rather than command ("shall"), creates no compulsory power in the national government to remedy a violation of the constitution—the command that the state shall appoint electors—in the event the legislature defaults. *Id*, 12-13. History furnishes at least one direct and two implicit counterfactuals, however, that disprove the assertion that state legislatures are beyond the control of any power.

Independent scholar Michael Rosin has noted that in 1848 Wisconsin's first legislature adjourned without completing its work. A bill calling for popular election of electors had been considered, bit it was not passed. The state's governor filled the gap and arranged for appointment by popular election. Similarly, by requiring popular election of presidential electors, the constitutions of Minnesota and Colorado assure that the constitutional wrong to which Pinckney implicitly referred—New York's failure to appoint electors in 1788—will not recur in those states.

<u>C. The court's statement of fundamental principles and one limiting principle.</u>

After stating the issue before it—was the "state" required to "appoint" as a unit—the Court set forth fundamental principles of how states act

and the nature of legislative power. At four separate points (noted in brackets in the following passage), the McPherson court made clear that the legislative power is subject to state constitutional limitations—at one point also noting that power could be reposed somewhere other than in the legislature (cf. MOML, Ellis Brief, 45):

> The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, **[1] except as may be limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, **[2] unless by the fundamental law power is elsewhere reposed**. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states as the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power **[3] under state constitutions as they exist.** The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall,' and if the words "in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned **[4] in the absence of any provision in the state constitution in that regard.** Hence, the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself. (emphasis supplied) 146 U.S. 25.

The core of the analysis is this: "What is forbidden or required [by the US Constitution] to be done **by a state** is forbidden or required of the **legislative power** under **state constitutions as they exist."** (emphasis supplied)

As demonstrated in Part II, by 1892 state constitutions had become the source of a great deal of direct democracy, through which legislative power had become reposed in "the people," primarily by way of state constitutional amendments approved by the people. Thus, by 1892 the court's opening observation, that states do not act "by the people in

their collective capacity," was not fully accurate. Indeed, as previously noted, under the plain language of the US Constitution there is a role for "the people" in a republican form of government—to "ordain and establish" constitutions.

The Court articulated one limiting principle, which proponents of the "Independent Legislature Doctrine" stress, to wit:

> Hence, the insertion of those words ["in such manner as the legislature thereof may direct"], **while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power,** cannot be held to operate as a limitation on that power itself. (emphasis supplied) *Id*.

The limitation on "the state" could cover a lot of constitutional real estate. On one end of the field, as noted in the briefs of the parties, the governor and the judiciary can also speak for "the state." A purported appointment made on behalf of "the state" by action of its governor or the judiciary, in the absence of any authority in state law, would be out of bounds.

Speaking to this very point, Attorney General Ellis' brief contains a passage from Justice Field's opinion as a Commissioner in the 1877 electoral vote contest. The following language appears to be the origin of the court's observation about "limitation upon the state:"

> Any substantial departure from the manner prescribed must necessarily vitiate the whole proceeding. If, for example, the appointment of electors should be made by the Governor of a state, when the legislature had directed that they should be chosen by the qualified voters at a general election, the appointment would be clearly invalid and have to be rejected. So, too, if the legislature should prescribe that the appointment should be made by a majority of the votes cast at such election, and the canvassers or other officers of election should declare as elected those who had received only a plurality of the votes, or the votes of a portion only of the state, the declaration would be equally invalid as not conforming to the legislative direction; and the appointment of the parties thus declared elected could only be treated as a nullity.

MOML, Ellis Brief 20-21.

On the other end of the field, could the language really be thought to invalidate state constitutional provisions that require popular election of electors, or more generally that require that legislation enacting or repealing a law be presented to the governor? Such provisions do "circumscribe" a current legislature from acting unilaterally, but they affirm and regularize the essential nature of the lawmaking power—they hardly "circumscribe" it.

Indeed, a legislature purporting to act unilaterally would be no different than the rogue governor in Justice Field's example. Article II uses the term "legislature," but it does not in itself answer the question, "which legislature"—the one that passed a law and presented it to the governor as required by the state constitution, or one that might arrogate to itself the power to repeal all laws and act in derogation of the state's constitution. Four times over, the McPherson decision said that legislative power is subject to the state's constitution.

D. Insights from the Electoral Count Act of 1887 and its legislative history.

The plain language of the Electoral Count Act of 1887 and its legislative history speak directly and indirectly to the question of limitations on legislative power.

The plain language of Section 4 of the Act, now codified at 3 U.S.C. Section 15, addresses the question posed in the McPherson briefs—what would one think of counting votes that resulted from fraud. MOML, Baker Brief, 59. It is clear that Congress's opinion was that such votes should not be counted. For example, when competing certificates or papers claiming to be certificates are submitted to Congress, only "lawful" votes are to be counted:

> . . .then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by **lawful** electors appointed i**n accordance with the laws of the State,** unless the two Houses, acting separately, shall concurrently decide such

> votes **not to be the lawful votes of the legally appointed electors** of such State. (emphasis supplied)

At the least, this is an implicit rejection of the Independent Legislature Doctrine. If unlawful votes will not be counted, what point would there be in appointing electors in violation of existing law?

The fourteen year legislative record reveals a diversity of views on Congress' role in counting electoral votes under Article II. On one side were advocates of states' rights who asserted that the role was purely ceremonial and mathematical—gather together and count the votes, but never "go behind" the formal record. Siegel, *supra*, 667 (Rep. Dibble). The contrary view had origins in the Civil War, when in 1865 purported votes from Louisiana and Tennessee were not counted. President Lincoln's signing statement for a joint resolution that prohibited counting of votes from states that had been in rebellion explained:

> T]he two houses of Congress . . . have complete power to exclude from counting all electoral votes deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter.

Id., 553, n. 65.

In 1873, Congress refused to count votes from Arkansas, which were "certified" by the Secretary of State rather than the governor and were not the result of a lawful election. *Id.,* 580. n. 239. That year Congress also rejected both competing slates of electors from Louisiana, finding that neither resulted from a lawful canvass. *Id.,* 581. These examples may not be precisely the ones that Justice Field described, but they are of the same type and involved Congress going behind the formal returns to determine the lawfulness of the purported votes.

In the election of 1876, competing slates were submitted from three states. The election was marked, not only by fraud and irregularities, but by an appalling level of violence by Democratic Party adherents. In a New York Times article from October 1876, former Confederate

Brigadier General Wade Hampton III, the ultimately successful 1876 candidate for governor of South Carolina, was quoted as follows:

> South Carolina is a white man's state, and in spite of nigger majorities the Democrats are going to rule it. . . . That policy [the "shotgun policy"] is to plainly tell the negroes that the Whites are again in command of the state. . . We must warn the leaders that "the tall poppies will fall first." . . . We must be prepared to shoot rather than be prevented from redeeming the State from Radical rule.

Jesse Wegman, *Let the People Pick the President: the case for abolishing the Electoral College* (2020*)* at 112. It is estimated that 150 African Americans were killed in the ensuing violence. Wikipedia, Wade Hampton III, last visited 11/30/20. Following a contentious and ultimately partisan proceeding conducted by a panel of 15 commissioners, the Democratic slates were rejected. Federal troops were removed from the South, however, and almost a century of subjugation of the Black population ensued.

Attorney General Ellis' brief set out passages from several of the Commissioners who adjudicated the disputes arising out of the 1876 election. Time and again, the Commissioners recognized that exclusive power belongs to "the States," a view that contradicts the Independent Legislature Doctrine. Ellis Brief, 17-18 (Morton, "The States . . . have a perfect freedom from all outside interference in the appointment of electors."); 19 (Hunton, "It is conceded the power to appoint belongs to the State."); 19 (Hoar, "the appointment of electors and the ascertaining who has been appointed is the sole and exclusive prerogative of the State. The State acts by such agencies as it selects."); 19-20 (Garfield, "their appointment is placed absolutely and exclusively in the power of the States," however legislatures have "plenary power" "if the constitution of any State were silent upon the subject"); 21-22 (Field, "The appointment and mode of appointment belong exclusively to the State.")

The 1887 Act was a bi-partisan measure; all sides compromised to some degree on deeply held principles. Siegel, *supra,* 549-50. Since the language as adopted clearly rejected the "purely ceremonial" line of

thinking, the most relevant views are from those who believed Congress should not count illegal votes. Cited here are passages from the final 1886-87 floor debates, which mirrored points that had been made throughout the14 years it took to reach agreement.

The Senate report, which is set out in the House debates, stated: "The two Houses. . . can only count legal votes, and in doing so must determine, from the best evidence to the had, what are legal votes. . ." 18 Cong. Rec. 30 (1886). Rep. Caldwell, in introducing the bill on the floor of the House of Representatives, stated: "It is certainly absurd to try to deny to Congress the power to remedy an unlawful return. . . " Id., 31.

There is no hint of a suggestion in the 1886-87 legislative history that a state's legislature, separate and apart from its state, had some outsized role that would privilege it to disregard the state's own constitution. To the contrary, during the Senate floor debates Senator Wilson explained:

> The electors may, under this provision [Art. II, Sec. 1, cl.2] be appointed by the Legislature itself, or that **department of the State** government may, **unless prohibited by its own constitution,** provide for the election of electors by general ticket, or by districts, or a part by one mode and a part by some other. The entire matter of the appointment or election of the electors is **committed to the several States**. (emphasis supplied)

17 Cong. Rec. 1059 (1886). Likewise, the McPherson Court stated that the legislative power of appointment could not be challenged "in the absence of any provision in the state constitution in that regard." 146 U.S. 25.

House manager Caldwell furnished an extreme example of actions that would circumscribe legitimate legislative power through an unlawful usurpation of such power. Rep. Caldwell explained:

> Instances have often been cited and may be again. Under section 4, article 4, of the Constitution "the United States shall guarantee to every State in the Union a republican form of government." Suppose some State should enthrone a king, constitute a house of lords, and they should appoint electors, and send up but one

> return properly certified and finally determined as required under the second section of the bill proposed by the minority. Shall an American Congress count such a vote?

18 Cong. Rec. 31 (1886).

Rep. Adams of Illinois furnished a more realistic example of a case in which "it must be determined that an alleged vote of a State is not the real vote of the State:"

> In the first place, the persons claiming to be electors may not have been voted for by the people of their State according to the provisions of the Constitution and laws enacted by the State.

Id, at 50. By 1886, historical precedents included the 1876 Constitution of Colorado, which specified that from 1880 on, all appointment of electors would be made through direct election by the people.

Thus, the legislative record that led to enactment of the ACA in 1887, portions of which were cited to the Court, leaves no doubt that where a state's existing laws duly enacted in accordance with the state's constitution provide for popular election of electors, legislative appointment would transgress and "circumscribe" the lawful expression of legislative power. Furthermore, as Rep. Caldwell suggested, whatever the specific terms of a statute Congress might enact—and there was and is an open question whether a statute could bind a future Congress, Siegel, *supra*, 564-65—Congress has inherent authority to remedy a usurpation of power by virtue of its underlying obligation to assure to the states a republican form of government.

E. McPherson court's historical narrative; 1874 Senate Report.

The McPherson opinion's lengthy exposition of history was the very opposite of a "plain meaning" analysis of the terms in Article II. The Court took pains to make this clear:

> The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt,

> or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight 146 U.S. 27.

Following the lead of the Michigan Supreme Court, the Court, "conceding that [appellants'] argument inspires a doubt sufficient to justify resort to the aids of interpretation," reviewed the history.

The Court summarized the outcome of that review as follows:

> From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the **practical construction** of the clause has **conceded plenary power** to the **state legislatures** in the manner of the appointment of electors. (emphasis supplied) Id, 35.

One passage from the court's discussion of the historical record requires careful analysis—both because Chief Justice Roberts cited it with apparent approval in his dissent in Arizona State Legislature, and because it lies at the heart of the Article II Independent Legislature Doctrine. To put the passage in context, the fourteen year effort that culminated in the Electoral Vote Act began in 1873 when Indiana Senator Oliver P. Morton's committee was charged with investigating the disputes over electoral votes in Louisiana and Arkansas. Morton had urged Congress to pass a resolution that Morton's committee also investigate the best way of conducting elections for president and establish a tribunal to adjust and decide disputes. Alexander Keyssar, *Why Do We Still Have the Electoral College?* (2020) 119-120.

McPherson concluded the historical narrative with a quotation from Senator Morton's 1874 Senate Report that recommended both a constitutional amendment that would have required states to appoint electors on a district basis—much as Michigan had done in the case before the court—and discussed the question of resolving disputes regarding electoral votes. While the report was obviously relevant—it dealt with the same substantive issue raised in McPherson—it also voiced absolutist views about the power of state legislatures under

Article II. After noting that Morton's proposed amendment had "failed to obtain action," the court continued:

> In this report it was said: "The appointment of these electors is thus placed **absolutely and wholly with the legislatures** of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, or any other agent of its will, to appoint these electors. **This power is conferred upon the legislatures of the states by the constitution of the United States,** and **cannot be** taken from them or **modified by their state constitutions** any more than can their power to elect senators of the United States. **Whatever provisions may be made by statute, or by the state constitution**, **to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."** Senate Rep. 1st Sess. 43rd Cong. No. 395 Id. 860. (emphasis supplied) 146 U.S. 34-35.

This passage obviously treats "legislature" under Article II, Sec. 1, cl. on a par with the numerous provisions of the Constitution in which a legislature, qua legislature, is required or authorized to undertake a specific act—such as choose Senators, or ratify amendments to the US constitution. In all those provisions, power actually is placed "absolutely and wholly" with the legislature, which actually is free to exercise that power without regard to the state's constitution and laws. As we have seen, however, under the plain language of the US constitution that is not what the term "legislature" in Article II actually means, and that is not how the McPherson court interpreted the term. The report is at most obiter dicta, if it is even that.

The 1874 Senate Report was cited in briefs for both parties. Appellant McPherson highlighted the fact (noted by the Court) that the committee's proposal had failed in the Senate. "At best it was only the opinion of the committee or more often the opinion only of the chairman of the committee." MOML, Dufford Br. 24.

As one might expect, given that the report expressly supported the right of states to utilize district-based appointment of electors, respondent Blacker cited it more extensively. MOML, AG Ellis Brief, 14-16. Ellis' brief included the following quotation (not found in the Court's opinion) that suggests legislatures could not only ignore laws, they could actually repeal laws.

> Therefore, under the constitution as it now stands, it is in the power of any legislature to repeal all laws providing for the election of electors by the people, and take such election into their own hands. It may be said that this is not likely to be done; but the answer is that it may be and that it has been done: and who can tell what may be the future exigencies of parties and politicians, or what they may not do? *Id.*

A charitable reading of this passage is that before a legislature would take up appointment of electors, its first step would be to initiate a process of repeal in the manner provided by the state's constitution. The difficulty with this reading is that the preceding paragraph suggests the legislature need not bother with complying with the constitution.

The position staked out in the Senate Report represents the most extreme version of the Independent Legislature Doctrine. At first blush this would seem odd, given that the author of the report, Senator Morton, was one of the staunchest opponents of the Electoral College. Keyssar, 119-124. As Keyssar recounts, in 1877 Morton described the Electoral College as a "total failure" that is "dangerous" and "ought to be abolished;" it was "antirepublican, antidemocratic in the true sense of the word." He wrote "experience, as well as reason, now suggests that the rubbish of the electoral college be brushed away entirely." *Id.* 124. At second look, however, the Report is not at all odd. The Report was intended to raise an alarm that, "without an amendment, state legislatures would retain the potentially hazardous authority to change the mode of choosing electors whenever they wished." *Id*. 120.

Hayward Smith's narrative of this history (Smith at 778-79, footnotes omitted) is to similar effect:

> Morton, "who was at this time the most earnest and zealous advocate of the necessity of a change," was compelled to point out every conceivable way in which the ostensibly settled and uniform system actually presented "contingencies, some of them not remote, but near and probable, which threaten the country with revolution and the government with destruction." (Abraham Lincoln once commented, "Morton is a good fellow, but at times he is the skeere-dest man I know . . . .") . . . . And perhaps most ominously, although every state legislature had provided for popular election of electors, Morton warned that popular election could not be assured because the appointment of the electors was "placed absolutely and wholly with the legislatures." Without amendment to the Federal Constitution, and in spite of any state constitutional restraints, it would remain "in the power of any legislature to repeal all laws providing for the election of electors by the people and take such election into their own hands." This potential for the system to "[set] at defiance the popular will" demonstrated "the necessity for a uniform constitutional rule."

The Senate Report is unquestionably an advocacy document, meant to cast the Electoral College as an utterly undemocratic and dangerous institution, in which state legislatures can do whatever they want, whenever they want, state laws and constitutions be damned. The McPherson court did not adopt, approve or endorse that view. It simply set forth the history.

It appears there is no historical precedent for the implication that legislatures "have done so"—i.e., that the have actually retaken the power of appointing electors in violation of existing law. Morton listed states that had used legislative appointment at various times but never suggested any had done so contrary to then-existing law. involved a legislature disregarding the state's own laws and constitution. Stephen Siegel identifies no references to such occurrences in his review of the legislative history of the ECA.

The briefs of the parties also did not provide the court such proof. Attorney General Ellis stated that during the first election (in which electors were appointed by legislatures in five states), "with one or two

exceptions the legislature of the state appointed under this provision of the constitution without a law of the state upon the subject." *Id*., 33. In the first election, however, not only did some states not have written constitutions; but most states did not employ gubernatorial veto. There was no functional difference in those states between a joint rule or joint resolution about how to appoint electors and a law. Of course, in the first election, it would have been impossible for legislative appointment to have been in derogation of existing law. The debacle in New York—whose legislative chambers failed to reach agreement, with the result that New York did not participate in the first election for president—proved the need for some regularity.

The briefing addressed the situation as it had evolved by 1800. At that point, the common practice in many states (including Pennsylvania) was that a new law would be passed every four years. MOML, FA Baker Brief, 28-29. In Pennsylvania, the previous, now lapsed, law provided for appointment by a joint legislative session, In the newly elected (and divided) legislature, under the lapsed law the Federalists would have lost, and Jefferson would secure all the electors. Under an apparently veiled threat that Pennsylvania would have no law and appoint no electors, as had been the case in New York in 1788, a compromise was reached in which each chamber appointed a designated number—eight for Jefferson and seven for Adams. *Id*. 29. The net effect (+1 for Jefferson) was almost the same as if no electors had been appointed.

New York's law, which did not lapse in 1800 (perhaps a precaution against repeating the 1788 debacle), provided for election by the legislature. That year, with the Federalists about to lose control of the legislature, Alexander Hamilton proposed to John Jay that the outgoing legislature be called into special session to adopt a popular election district system for appointing electors and thus divide the state's vote. FA Baker Brief, 29-31. (The new legislature could try to repeal the law, but presumably Jay would issue a veto.) Jay declined to implement the proposal. If the understanding of these eminent Founders/Framers (two of the three authors of the Federalist Papers, one of whom wrote the principal paper on the Electoral College) had been that the new legislature would possess plenary power to ignore laws and constitutions and vetoes and appoint electors on its own, Hamilton's scheme would have been facially foolish. Jay's internal note rejected the

idea because it was for unseemly "party purposes," not because it was foolish.

The 1874 Report's statement that the legislature's power to appoint "can neither be taken away nor abdicated" is the tag-end phrase from a sentence that asserts the legislature can resume the power "at any time," regardless of whatever provision might have been made in the state's constitution and laws. There is no evidence any legislature had every purported to do such a radical and revolutionary thing. Suggestions in 2020 from the Trump campaign that state legislatures take this step are without historical foundation, and they are without legal foundation beyond the groundless and exaggerated assertions in the (at best) obiter dicta of the 1874 Report.

F. What McPherson said about "plenary" powers.

McPherson is frequently cited for the proposition that state legislatures in fact have "plenary power" over appointment of electors. A careful reading of the case shows that the court never actually said this. First, as discussed previously, following its review of the historical record and quotation from Senator Morton's Report, the Court did not state that power is given "absolutely and wholly" to the "legislature." It said power is given "exclusively" to the "states."

Second, in the two passages where the term "plenary" appears, the language was conditional and guarded. In the paragraph that ended the historical narrative, the court said that "practical construction" had "conceded" plenary power to the legislatures. An earlier paragraph that followed the statement of fundamental principles began with this phrase:

> If the legislature possesses plenary authority. . .

146 U.S. 25.

The Michigan Supreme Court itself had warned of the danger of the "plenary power" doctrine:

> The danger in this plenary power conferred by the constitution of this State [*sic*, in context, "of this State" appears to be erroneous] upon its legislatures has been recognized by the wise and patriotic statesmen of all political parties, and several attempts have been made in Congress to secure an amendment requiring a uniform mode.

MOML, Record, 28-29.

This passage almost certainly refers to Senator Morton and the 1874 Report. Both the Michigan Supreme Court and the 1874 Senate Report warned of dangers—and a legislature that could act in complete disregard of its constitution and laws would certainly be a dangerous thing. In Senator Morton's view, if the legislature actually possessed that power, the circumstances called either for a constitutional amendment or a tribunal to assure Congress would not count the unlawful votes. Quotation of a passage from history that warned of a danger can hardly be considered an "approval" of the state of affairs that allegedly called forth the warning.

Two passages are cited to support the position that McPherson endorsed the plenary power doctrine. At the close of the paragraph that begins "[i]f the legislature possesses plenary power," the court concluded:

> . . . the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed. 146 U.S. 26.

Shortly thereafter, in the paragraph that immediately precedes the historical narrative, the court stated:

> [The Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object. 146 U.S. 27.

Neither of these passages, however, suggests that the legislature can disregard the state's constitution and existing laws when it exercises

legislative power. Moreover, the "whole subject" that is said to be committed to the legislature is actually quite narrow—"defining the method" for appointing electors, which, in McPherson itself, meant simply choosing between unitary or district-based elections.

IV. In the Twentieth Century, both Congress and an unbroken line of Supreme Court authority rejected the Independent Legislature Doctrine under Article I.

It is clear from the plain language of Article I, Sec. 4, cl. 1, that the legislature is to act as a law-maker. A series of cases has interpreted Article I in precisely that way and has held that in the exercise of legislative power, legislatures are not independent agents free to act independently from other branches of state government or unencumbered by the requirements of state constitutions.

The first of these cases, Ohio ex re. Davis v. Hildebrandt, 241 U.S. 565 (1916), involved an amendment to the constitution of the State of Ohio, approved by the voters in 1912, that incorporated initiative and referendum into the state constitution as part of the "legislative power" of the State of Ohio. Ohio's 1851 constitution was a prime example of the phenomenon discussed in Part II of "the people" functioning as lawmakers,. The 1851 constitution provided that in 1871, and every 20 years thereafter, the question of whether to conduct a constitutional convention would be put to the people. In 1911 the people, exercising the power reposed in them by the constitution, voted in the affirmative, a convention was held, and in September 1912 the people exercised their constitution-based power to approve the constitutional amendment at issue in Hildebrandt.

The previous year, Congress had amended the federal statute governing reapportionment of congressional districts, replacing the phrase, "until **the legislature** of such state, in the **manner prescribed herein,**" with the phrase "in the manner provided **by the laws thereof."** (emphasis supplied) As the Court explained in Hildebrandt, the legislative history of the 1911 law "left no room for doubt" that the change from a specific

reference to the "legislature" to a general reference to the "laws" was made "for the express purpose, in so far as Congress has power to do it," of excluding the possibility of the very argument made in Hildebrandt with regard to referendum. That argument was that including referendum within the "legislative power" was "repugnant" to Article I, Sec. 4 and introduced a "virus" which "destroys [legislative] power, which in effect annihilates representative government, and causes a state. . . to be not republican in form."

Thus, much as Congress in 1887 had repudiated the extreme version of the Article II Independent Legislature Doctrine set out in the 1874 Senate Report, so in 1911 Congress rejected the view that under Article I Sec. 4 only "legislatures" can exercise "legislative power." In Congress' view, initiative and referendum do not "circumscribe" "legislative power;" they are simply another form of legislative power.

Moreover, by the time Congress acted in 1911, citizen initiative had already been used by the states to prescribe the manner of elections under Article I, Sec. 4—specifically, the manner of conducting elections for the Senate. Because of Chief Justice Roberts' wholly inadequate rendering of that history in his dissent in *Arizona State Legislature*, an historical detour is in order.

The 1911 statute was passed in the midst of what may have been the most productive period in the nation's history for direct democracy. In August 1911, the same month the 1911 statute was enacted, Congress authorized Arizona statehood under a constitution that incorporated initiative and referendum as part of Arizona's legislative power. In the political sphere, 1911 witnessed the reversal of the position of leaders who would be two of the three leading candidates for President the following year. Both Woodrow Wilson and Theodore Roosevelt switched sides and became supporters of initiative and referendum. Goebel, *A Government by the People, supra*, 125-127. Wilson was influenced by Oregon progressive William U'Ren. *Id*., 127.

Roosevelt discussed direct democracy with Senator Bourne, also of Oregon, an ardent supporter of direct democracy. As of January 1911 Roosevelt observed that such matters as the "direct primary" and "direct nomination of Senators, are merely means to ends." Id. 125. By

1912, he had been won over. Speaking at the Ohio constitutional convention that would propose the initiative and referendum provisions that were at issue in *Hildebrandt*, Roosevelt said:

> I believe in pure democracy. . . . In short, I believe that the initiative and referendum should be used, not as a substitute for representative government, but as methods of making such government really representative.

Id.

Roosevelt's speech was delivered on the eve of what was to be direct democracy's greatest triumph in "making such government really representative." Specifically, on May 13, 1912, Congress proposed the Seventeenth Amendment to the States, and the amendment was ratified promptly, on April 8, 1913.. The amendment remedied a constitutional wrong that had bedeviled the nation ever since the first election, in 1788.

The constitutional wrong was this. Repeatedly over a span of 125 years, state legislatures, although required to elect Senators by Art. I, Sec. 3 of the US constitution, but riven by partisan discord—and with a whiff of cabal, intrigue and bribery in the air—had failed to discharge their duty.

The early experience, from 1788 through 1866, was recounted by Senator Sherman at the outset of the 1886 Senate debates on the Electoral Count Act:

> For a time Ohio was not represented in the Senate, because the senate of the State was one way and the house was the other, and they would not agree to go into joint convention. Nearly every state in this Union had been from time to time partly unrepresented by the contests that grew out of the election of United States Senators.
>
> .At one time. . . there were several vacant seats in this body, made vacant by the want of unanimity in the two legislative bodies of a State. . . . [T]he case often occurred when a pending controversy over a United States Senator hung the Legislature in doubt for one

> or two or sometimes three years, divided it politically, and entered into all business of the Assembly, and was made the business of corrupt propositions, until the election of Senator in the old-fashioned way became—I can scarcely use any word strong enough—it became the mere plunder of political contention and barter.

17 Cong. Rec. 818 (1886). The remedy for this dysfunctional system had been an 1886 law, enacted pursuant Congress' reserved powers under Art. I. Sec. 4 to create or override state laws prescribing the manner of conducting elections for the Senate. The 1866 law required that, in case state legislative bodies were deadlocked, they must meet in joint session and elect US Senators by majority vote. Senator Sherman proposed that the Electoral Count Act adopt this same solution for counting disputed electoral college votes.

Senator Sherman's view was that the 1866 law had solved the problem. *Id.* The solution did not hold. Toward the end of the 19th Century, the constitutional wrong of failure to elect Senators recurred, as many states were unable to muster the majority vote required by the 1866 law. Jay S. Bysbee described the situation in "Ulysses at the Mast: Democracy, Federalism and the Sirens' Song of the Seventeenth Amendment, 91 *NwULRev* 501, 542 (1997):

> As support for direct election swelled, state legislatures proved particularly inept. Between 1891 and 1905, eight state legislatures failed to elect senators and were without full representation from periods of ten months to four years. Delaware presented the most extreme case, failing to send senators in 1895, 1899, 1901, and 1905. One of Delaware's seats went unfilled from March 1899 to March 1903, and between 1901 and 1903, Delaware failed to send any senators to Washington.

In an equally flagrant case, in Oregon a boycott led by William U'Ren (Woodrow Wilson's link to the Progressives) deprived the legislature of a quorum, with the result that the state not only failed to elect a Senator—the purpose of the boycott—it also failed to pass any laws. *Ibid*; Goebel, *supra*, 80.

Citizen initiative was key to remedying this situation. Kris W. Kobach described the crucial development in "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," 103 *Yale L. Journal* 1971, 1978 (1994):

> In 1904, citizens in Oregon petitioned for and approved a popular initiative instituting a system that would soon be copied throughout the country. The law, endorsed by a three-to-one majority in the Oregon referendum, provided that candidates for the U.S. Senate had to be nominated by voter petitions. In the election preceding the state legislature's selection of a Senator for Congress, citizens would be allowed to vote for their choice for Senator. However, the U.S. Constitution required state legislatures to choose the Senators. Thus, a method was needed to bind state lawmakers to select the choice of the people. Accordingly, the Oregon system provided that candidates for the state legislature could sign one of two public statements. By signing "Statement No. 1," the aspiring state legislator promised to vote "for that candidate for United States Senator in Congress who has received the highest number of the people's votes .... without regard to my individual preference." In contrast, "Statement No. 2" indicated that the legislator would "consider the vote of the people for United States Senator ... as nothing more than are commendation, which I shall be at liberty to wholly disregard if the reason for so doing seems to me to be sufficient."", Not surprisingly, few politicians were willing to risk signing Statement No. 2, particularly when citizens were circulating petitions on which they promised not to vote for any candidate who failed to sign Statement No. 1.

Oregon's elaborate prescription for election of senators was adopted, not by a law proposed to the governor by the legislature, but by way of an initiative petition. Election of two Senators under the plan—an event that had taken up to four years in Delaware--required 22 minutes of deliberation. The Oregon plan soon swept the nation and generated unstoppable momentum for the Seventeenth Amendment. Whether initiative petitions were actually needed in other states is beside the point. With a 3:1 vote in Oregon and elections requiring 22 minutes, a

legislature in any other state that provided initiative would be foolish not to simply pass the plan as a regular law.

Stepping back from this historical detour, the facts in Hildebrandt were that a legislatively drafted redistricting plan, approved by the governor in May 1915, was challenged pursuant to a referendum petition, and the plan was voted down in a special election. The Court upheld the referendum on three grounds. First, it was obvious that whether referendum constituted a part of the constitution and laws and was part of the state's legislative power was a question for the state courts to decide, and their decision in the affirmative was conclusive. Second, as discussed above, for its part, Congress' view was that referendum should be held and treated part of the state's legislative power. Finally, whether use of referendum annihilated the representative character of state government such that it was no longer a republican form of government was a non-justiciable question over which Congress had exclusive authority.

The second case, Hawke v. Smith, 253 U.S. 221 (1920), illustrates a proper application of the Independent Legislature Doctrine under Article V. In Hawke, a proposed referendum to disapprove Ohio's ratification of the 18th Amendment was rejected. The Court emphasized that the act of ratification under Article V does not involve law-making. The court explained the difference from Hildebrandt, where "the referendum provision of the State Constitution, when applied to a law redistricting the state. . . was not unconstitutional. Article I, section 4, plainly gives authority to the state to legislate. . . Such legislative action is entirely different from the requirement of the Constitution as to expression of assent or dissent to a proposed amendment to the Constitution. In such expression, no legislative action is authorized or required."

In the third case, Smiley v. Holm, 285 U.S. 335 (1932), the Supreme Court affirmed the right of the Governor of Minnesota to veto a redistricting plan passed by the Minnesota Legislature following the 1930 census. The state court—applying an extreme version of the Independent Legislature Doctrine found in the 1874 Senate Report—asserted that use of the term "Legislature" in Article I meant the state legislature was acting as an agent of the federal government, not as one

of the tri-partite organs of a republican government whose bills could become law only if signed by the governor. The Supreme Court reversed: "As the authority is conferred for the purpose of making laws for the state, it follows. . . that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." Such limitations do not in any sense unduly "circumscribe" legislatures or legislative power under Article I:

> We find no suggestion in the federal constitutional provision of an attempt to 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 that laws shall be enacted.

V. The Role of the Independent Legislature Doctrine in Bush v. Gore.

Although the Independent Legislature Doctrine had been rejected by Congress twice—1887 (Art. II) and 1911 (Art. I)—and by three unanimous Supreme Court decisions from the Twentieth Century (all Art. I cases), it found a rebirth in Bush v. Gore. The circumstances of the case created a real life laboratory for testing the nature and limits of the Independent Legislature Doctrine. Specifically, as detailed in two briefs *amicus curia*, the Florida Legislature proposed to resume the power to appoint electors itself if the decision of the Florida Supreme Court was not reversed. As we have seen, the 1874 Senate Report had asserted the legislature could take up the power to appoint at any time. Not surprisingly, the Florida Senate's amicus brief quoted from that Report twice—the second time falsely asserting that the McPherson court had quoted the Report "favorably," when in fact McPherson had only quoted it as part of the historical record.

In all, in the two amicus briefs and the principal briefs, the Bush team cited the 1874 Report or the immediately following paragraph that in included a characterization of the report 10 times. In 8 of 10 times, the Bush team misrepresented the report. The Appendix sets out all 10.

To be clear, the Bush team did not propose to ignore the Florida constitution altogether. In 2000 Florida was a Republican Party trifecta.

The legislature proposed to pass a new law, to be signed by Governor Bush. (Under the Florida Constitution, new laws can take effect immediately, with no need for a super-majority, so the threat was credible.) The legislature maintained that whether or not it would be justified in acting was in the first instance a decision vested exclusively in the state legislature and not subject to judicial review. Similarly, whether votes of electors appointed by the Florida legislature in this manner would be counted by Congress was said to be a non-justiciable, political question over which Congress had exclusive jurisdiction.

Inherent in this brazen position, however, is assertion that the legislature truly is independent from the state's constitution. The claim that a legislature, even with approval from the governor, could effectively disregard and overturn the results of an election already conducted necessarily carries with it the assertion that anything the Florida constitution might say about the sanctity of the franchise or due process of law, and of the power of Florida's courts to require adherence to its constitution, is negated by the legislature's "plenary" power.

Turning to the principal briefs, the parties in Bush v. Gore argued various aspects of the Independent Legislature Doctrine. In Bush I (the application for a stay of the Florida Court's recount order) the Bush team argued that the involvement of the state's judicial branch violated Article II. The Bush Team characterized Article II as granting authority exclusively to the legislature, to the exclusion of the other branches. The team asserted that Article II required states to apply a separation of powers doctrine in the appointment of electors. The Bush I brief quoted the 1874 Senate Report for the proposition that power is delegated "absolutely and wholly with the legislatures of the several states." Brief for Petitioners, Bush v. Palm Beach Co. Canvassing Board, No. 00-836, 40.

The Gore Team replied to Bush's absolutist argument. In McPherson itself, the state court had measured the statute against the Michigan statutes and constitution, and the Supreme Court had affirmed that it was bound by these decisions of local law. In addition to the line of Article I cases discussed in Section IV, above, the Gore team cited

Supreme Court authority that views favorably the role of state courts in deciding Article I reapportionment cases.

The Supreme Court's order entering a stay did not mention the 1874 Senate Report. The Court directed the parties to address whether the Florida constitution could "circumscribe the legislative power:"

> There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, "circumscribe the legislative power."

The briefs on the merits addressed whether a state constitution could be said to circumscribe legislative power. The Bush team's brief quoted prominently a passage from the 1874 Senate Report that set out an extreme version of the Independent Legislature Doctrine, and the brief falsely stated that the passage had been cited "with approval:"

> Article II, §1 of the United States Constitution, however, does not permit state constitutions to circumscribe in any way a state legislature's selection of the manner of choosing presidential electors. See *McPherson*, 146 U.S. at 35 **(**"This power is conferred upon the legislatures of the states by the constitution of the United States, *and cannot be taken from them or modified by their state constitutions.")* (emphasis added) (quoting with approval Senate Rep., 1st Sess., 43d Cong., No. 395).

Brief for Petitioners, Bush v. Gore, No. 00-949, 29; see also Id. 20, "absolutely and wholly with the legislatures. . . "

The Gore brief rebutted Bush's arguments. Among other points made were the following. The Florida constitution itself had been "drafted, proposed and approved" by the Florida legislature. Given the so-called "plenary" power of state legislatures, how can one possibly argue that legislatures are disenabled from relying on their states' constitutions to provide many of the election details—which all state constitutions do—or from establishing standards that form the basis for judicial review by state courts. State constitutions provide essential rules for how

legislatures themselves function—what is a legislature without its constitution? In 1876, the Colorado state constitution actually prescribed the manner in which electors would be appointed (by the legislature). Both McPherson and Hildebrandt had been appeals from state supreme courts that had applied state constitutional principles; both decisions had been affirmed.

In its per curium opinion on the merits, the Supreme Court again did not decide the Article II issues that had been argued. Thus, everything the court said about Article II in Bush I and Bush II is dicta.

In a short overview of the Article II issue, however, the Court lent undeserved credibility to the argument that the 1874 Senate Report represented the views of the McPherson court:

> The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See id., at 35 ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong.,1st Sess.).

There is no doubt that "the state" may change to legislative appointment, if it acts in a manner consistent with its own constitution. There was no foundation in history, law or constitutional text for suggesting that "the legislature" could do this on its own.

Finally, the Court justified its remedial order—that terminated the recount and required the initially certified results to be used—on the basis that the Florida legislature intended to take advantage of the safe harbor provisions of the Electoral Count Act and that there was simply not enough time to complete the recount. The order deprived Florida of an additional six days to conduct the recount. As Eric Shickler and colleagues have convincingly demonstrated, however, the Court's assertion about legislative intent (which was grounded in arguments of the Bush Team) was made up out of whole cloth. The assertion and the order is unsupported by anything in the text of the Florida law or in legislative history of the current law or of the various predecessor laws going back decades. Schickler et. al, "Safe at any Speed: Legislative

Intent, the Electoral College Count Act of 1887, and *Bush v. Gore*, 16 *Journal of Law and Politics*, 717-765 (2002).

VI. Arizona State Legislature v. Arizona Independent Redistricting Commission.

In Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015), the Supreme Court held that the Article I Time Place and Manner Clause does not preclude a state, whose constitution incorporates citizen initiative as part of the state's legislative powers, from using citizen initiative to prescribe the manner of conducting congressional elections—specifically, for purposes of redistricting. The court effectively extended Hildebrandt's holding with respect to referendum to citizen initiative.

The majority opinion rested its decision on several grounds, including (i) the general development of direct democracy since the founding; (ii) the specific incorporation of initiative in state constitutions as part of legislative power; (iii) the unbroken line of cases under Article I holding and declaring that state legislatures exercise law-making power that is subject to the terms of state constitutions; and (iv) the fact that some definitions of "legislature" from the Founding refer generically to the law making power, without reference to legislative bodies as such.

The majority also cited serious prudential concerns. States have adopted a wide array of election laws both through initiative and through vote of the people in ratifying or amending state constitutions. Topics have included voter registration, voting by ballot, vote counting, straight party ticket voting, absentee voting, victory thresholds, voter ID and felon voting. Are all of those invalid with respect to federal elections for Congress, and by extension under Article II for president? If so, the consequence is the need to have two elections running under separate sets of rules at the same time. For example, in some states voter ID would apply to one election but not the other.

Chief Justice Roberts' dissent joined issue principally over the definition of "legislature." Because the term is used in numerous places in the constitution to mean a legislative body, and is defined as such in the

very Article I cases cited by the majority, it was a bridge too far to use generic definitions from the Founding. The dissent emphasized the plain meaning of "shall," which imposes a duty on the legislature. It argued that where the US Constitution imposes a specific duty, a contrary provision of a state constitution must give way.

The fundamental tension animating the case was the establishment of initiative as a method to pass legislation within the state constitution, which controls legislative exercise of power, on one hand, and the traditional understanding that legislature means a legislative body, on the other.

A. Critique of Chief Justice Roberts' Dissent.

The dissent is grounded in the Independent Legislature Doctrine. Although none of the parties had urged that the case be decided on that basis, an amicus curiae brief from the Coolidge-Reagan Foundation specifically urged this approach. The amicus brief cited the 1874 Senate Report (which includes the false analogy between legislative law-making under Article I Sec. 4 and legislative election of senators under Art. I, Sec. 3..) It cited an 1865 congressional decision on an election contest. It even urged the court to reverse Hildebrandt—which as shown in Part IV is fundamentally at odds with the Independent Legislature Doctrine. Aside from the suggestion to overrule Hildebrandt, the amicus brief is a roadmap to important portions of the dissent.

On its way to embracing the false analogy to legislative election of senators under the original constitution, the dissent—while claiming to follow a plain meaning methodology—failed to adhere to it. The dissent simply switched out an inconvenient verb that denotes law-making, replacing it with a verb that denotes a specific action.

> The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives. And that duty "shall" **be carried out** "in each State by the Legislature thereof." (emphasis supplied)

The concluding sentence quoted the very words of the constitution, but only some of the very words. The constitution uses the term "prescribed," not "carried out." The dissent loudly proclaimed that in Arizona redistricting is not "carried out" by the legislature. Well, that is not what the plain text of the constitution requires.

This verb switch conflated the requirement of Art. I Sec. 3—Senators be chosen by state legislatures—with the separate provisions of Art. I Sec. 4 concerning the "manner" of conducting elections for the Senate. Changing the manner of selecting Senators by the legislature does not change the underlying requirement that the legislature shall choose Senators. Likewise, with respect to the House of Representatives, Art. I Sec. 2 requires that representatives be chosen by "the people" of each state. Changing the "manner" of elections for the House does not affect the underlying requirement that the people elect.

The dissent's anti-historical rendition of the adoption of the Seventeenth Amendment, and its illogical arguments based on that rendition, were the centerpiece of its argument. The essential components follow.

> [T]he most powerful evidence of all comes from the Seventeenth Amendment. . . .
>
> At no point in this process did anyone suggest that a constitutional amendment was unnecessary because 'Legislature' [under Art. I, Sec. 3] could simply be interpreted to mean 'people.'. . .
>
> In fact, as the decades rolled on without an amendment, 28 of the 45 States settled for the next best thing by holding a popular vote on candidates for Senate, then pressuring state legislatures into choosing the winner.
>
> The majority's revision renders the Seventeenth Amendment an 86-year waste of time, and singles out the Elections Clause as the only one of the constitutions seventeen provisions referring to "the Legislature" that depart from the ordinary meaning of the term.

To suggest that citizen initiative might have been used to supplant the term "Legislature" in Art. I Sec 3 is disingenuous, if not outright bizarre. Section 3 does not provide for making laws; it requires the taking of specific acts—election of senators. Citizen initiative entails law-making, not voting.

For purposes of understanding the meaning of "Legislature" in Art. I, Sec. 4—which was the issue in Arizona State Legislature—the relevant historical period is not 86 years, and the relevant analogy is not efforts to change Art. I, Sec. 3 of the constitution itself. The relevant question is whether and how those who sought reform actually did utilize Art. I Sec. 4 in their efforts, and the relevant period is the time when such efforts were made.

The answer for the relevant time period is the late 1890s to 1912-13—the beginnings and flourishing of the Progressive era, which coincided with a renewed incompetence of some state legislatures when it came to electing senators. Direct election of Senators was a key element of the Progressives' platform, as was initiative and referendum. Legend has it that a pivotal character in the saga, William U'Ren, heard John Sullivan's book on direct democracy read at a gathering in 1891 and from that day forward became dedicated to achieving direct democracy in Oregon. Goeble, *supra*, 80. (Section II contains a lengthy quotation from Sullivan's book.)

While it may be that proponents of reform hoped some day to amend the constitution, the immediate imperative was to reform their states if that could be done. As the historical detour in Section IV shows, it could be done and was done—first and foremost through use of citizen initiative. It is patently ridiculous and historically fallacious to suggest that the Progressives, who were among the most ardent supporters of constitutional change, did not also think to use citizen initiative wherever and whenever that would contribute to the overall movement for reform. They did. The history of the Seventeenth Amendment, and the related reforms that led to its adoption, is "powerful evidence" indeed. It is a powerful precedent that Article I, Sec. 4 allows citizen initiative to reform the manner in which states prescribe elections for Congress, because that is what actually happened.

As had been suggested by the Coolidge-Reagan Foundation, the dissent cited the 1865 elections dispute case. This was a "hard facts make bad law" decision, which was decided on an almost purely partisan basis, in which the state constitution might have deprived citizens who were away fighting the Civil War of the right to vote. See Smith, at 769-775. The majority report, which the dissent relied upon, rested on a constitutional interpretation that "borders on incoherent." *Id*., 769-70.

Of particular concern for our purposes is the dissent's rendition of McPherson:

> "The next relevant precedent is this Court's decision in *McPherson v. Blacker,* 146 U. S. 1 (1892). That case involved a constitutional provision with considerable similarity to the Elections Clause, the Presidential Electors Clause of Article II: "Each State shall appoint, in such Manner *as the Legislature thereof* may direct, a Number of Electors. . . ." §1, cl. 2 (emphasis added). The question was whether the state legislature, as a body of representatives, could divide authority to appoint electors across each of the State's congressional districts. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in "the Legislature" of the State. That power, the Court explained, "*can neither be taken away nor abdicated.*" 146 U. S., at 35 (emphasis added; internal quotation marks omitted)."

This passage misconstrues the McPherson decision on multiple levels. As discussed in Part III, in McPherson the issue was whether "the State" could divide authority to appoint electors, and thus whether the legislature's role was simply to "direct" what type of unitary method to use—legislative appointment vs. winner-take-all elections. At the end of an extended analysis, the Court held that exclusive authority over both the appointment and the mode of appointment was conferred on "the State." The court did not "emphasize" the "plain text." To the contrary, both the Michigan Supreme Court and the US Supreme Court conceded that the text was ambiguous. The lengthy review of history was the very opposite of a "plain text" analysis.

But most importantly, the dissent profoundly misrepresented the 1874 Senate Report. A report that the Bush team falsely characterized as having been "approved" by the Court magically became the very words of the *McPherson* court itself—the very "explanation" of the court's reasoning, with emphasis added—even as actual citation of the Senate Report disappears into thin air.

The 1974 Report was at most a piece of legislative history. Yet, with respect to Senator Morton's proposed constitutional amendment, it is a mere whisper of legislative history. The Report was in support of a bill that received a single hearing in a single chamber of Congress and then died.

The Report is an important historical foundation for the long effort that culminated in enactment of the 1887 Electoral Vote Act. Viewed in this context, citation of the Report is the worst sort of cherry-picking of one, rogue, passage from a long and well-considered legislative record that is replete with contrary statements and that actually rejects the idea that legislatures acting under Article II are empowered to do anything other than to pass laws in accordance with state constitutions.
The false representations by the Bush team that the McPherson court had cited the 1874 Report with "approval" may explain its presence in the per curium decision in Bush v. Gore. In this dissent, a member of that team compressed all of the Bush team's inappropriate uses of the report into a few lines. (Failure to cite the source of the words; misrepresentation as cited with approval/favorable; court's own explanation vs. observation of what had been said in the historical record; stating the words of the report are the court's own explanation.] See Appendix.

While one might be tempted to excuse this mistreatment of original source documents in light of its brevity and relative obscurity, the passage is not in the least bit obscure to the Coolidge-Reagan Foundation and the vast network of like-minded amicus factories. When the dust settles on the 2020 election, it will be interesting if legal scholars are able to compile all the instances in which the 1874 Report has been misrepresented in the briefs of Trump's legal team and amicii, and how many times it has been inappropriately cited by the court. Of more direct concern during the 2020 election has been that the dissent's

endorsement of the 1874 Senate Report could be cited as justification for urging that Republican legislatures take extreme measures to undermine democratic elections—state constitutional provisions and existing laws be damned.

Even the dissent's middle ground, discussed below, does not fully clear the air. It concedes only that "when" a legislature is prescribing election regulations, it "may" be required to follow ordinary law-making processes. What if the legislature decides to dispense with law-making and just act, as the 1874 Senate Report, quoted with emphasis by the dissent, suggests it can?

B. <u>The Dissent's Middle Ground</u>

.As noted, the majority opinion identified a wide range of election rules that have been adopted by citizen initiative or that are set out in state constitutions. The majority pointed out that a ruling that state constitutions do not apply or that initiative is not available under Article I could lead to electoral chaos.

Justice Roberts' *de facto* response was to stake out a middle ground, under which citizen initiative is not excluded from Article I altogether:

> Nothing in *Hildebrant*, *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely. . . .
>
> The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be exclusive in congressional districting, but neither may it be excluded.

Thus, even under the dissent's reasoning, it appears that any number of presidential election reforms can be implemented through citizen initiative, either because, as a formal matter, the reform does not

pertain to the "Manner" of appointing electors, or simply because it does not exclude the legislature entirely.

VI. Chiafolo v. Washington

Chiafolo v. Washington, 591 U.S. ___ (2020), the "faithless" electors case, is a straightforward application of McPherson's statement that Article II, Sec. 2, cl. 2, conveys "the broadest power of determination" over who becomes an elector. Slip Op. 9. Buttressed by long-standing practice among the states, the Court held that the state's power to appoint confers inherent power to condition the appointment.

As discussed in Section I, Justice Thomas' concurring opinion includes an important discussion of "Manner" under Article II, as well as a valuable perspective on the role of the Tenth Amendment.

> These definitions suggest that Article II requires state legislatures merely to set the approach for selecting Presidential electors. . .

Justice Thomas' understanding of the limited role of legislatures under Article II and the relevance of the 10th Amendment aligns with Charles Pinckney (1800) and with points made by the respondents in McPherson. Even if the "entire matter" was delegated to the legislatures, the "matter" itself, as defined in the Constitution, is narrow—what approach shall the state use for appointing electors?

This is a far cry from a constitutional duty to create a "complete code for congressional elections" under Article I, Section 4. Smiley v. Holm, *supra*. Furthermore, as with the dissent's middle ground position in Arizona State Legislature, Justice Thomas' understanding would leave room for many presidential election reforms to be implemented through citizen initiative, once the "approach" had been established.

Recognizing the legitimacy of a broad field for use of citizen initiative is also consistent with the actual history of the reform movement that created the Oregon Plan, which then led, ultimately, to the Seventeenth Amendment. The Oregon Plan did not change the "mode" or "approach" for electing senators—the legislatures still elected.

Beyond that, the Tenth Amendment analysis shines a light on a potentially crucial distinction between Article I and II—that Article I imposes a mandatory duty on the legislature, whereas Article II uses language of authorization or permission, not duty. Pursuant to the plain terms of the Tenth Amendment, under Article II the states and the people should be free to use citizen initiative to enact any and all electoral college reforms that they deem appropriate.

VIII. Application of the Law to Specific Electoral College Reforms.

Over two centuries of historical development and case law provide three possible answers to the question of whether use of citizen initiative to achieve Article II reform is permitted. Current law is the Ginsberg/Arizona State Legislature view, which understands "legislature" to mean "legislative power as defined in the state's constitution." Initiative is available to implement all reforms under this approach.

An extreme contrary view is the Independent State Legislature Doctrine. This has never been adopted by the Supreme Court, and it has been rejected by Congress and several unanimous Supreme Court decisions. Implicit in this doctrine is that, because the Constitution delegates absolute control to the legislatures, initiative is not available to adopt any reforms. Even if a reform were enacted—by initiative or regular legislation—the Independent Legislature Doctrine holds that the legislature can take back the power to appoint electors at any time.

Under a middle ground view represented by the Arizona State Legislature dissent and the Chiafolo concurrence, states have broad latitude to implement reforms by way of initiative, so long as they do not exclude the legislature entirely in setting the "approach" for appointing electors.

Two presidential election reforms clearly pass muster under the middle ground. One is ranked choice voting, which changes only how individual voters cast their votes, not the state winner-take-all mode of appointing electors. The Voter Choice Ballot proposal (described in several entries on the Making Every Vote Count web site) also falls within the

acceptable middle ground. The Ballot affects only a detail of how elections are administered by adding an option for voters in the state election to cast their votes for the winner of the nation-wide vote. Just like ranked choice voting, the Ballot does not change the "state winner-take-all" approach to appointing electors.

Two other reforms might or might not survive a middle ground. One is state laws that take effect immediately and change the basis of appoint of electors to national winner-take-all. The arrangements might involved an individual state or a group of "paired" states. (For several years, the author has been advocating that these approaches be considered.) The other reform is the well-known Interstate Compact (fully described in *Every Vote Equal* and on the National Popular Vote web site), which also changes the basis for appointment from state to national winner-take-all.

For a number of reasons, the dissenters in Arizona State Legislature might agree that initiative can be used to adopt either the Interstate Compact or laws that take effect immediately. First, the legislature is given a less prominent role in Article II—it need only "direct" the manner of appointment, not "prescribe" it. To hold that initiative cannot be used under Article II, when existing law is that it can be used under Article I, would be incongruous. A due respect for precedent would counsel that initiative be allowed under Article II.

Second, Article II does not actually command the legislature to do anything. As noted, in 1800 Charles Pinckney pointed out what he considered a defect in the electoral college system. If a legislature failed or refused to act, there was nothing the federal government could do to obtain electoral votes from the state—even though the constitution clearly requires states to appoint electors. The fact that the constitution disempowers the federal government from acting, combined with the fact that the constitution uses language of discretion ("may"), independently and collectively support the conclusion that under the Tenth Amendment power is reserved to the states and the people.

Third, consider the case in which a state has specified the approach to appointing its electors in its constitution. The Tenth Amendment argument would apply with particular force to that situation. If a state

constitution can establish the manner of appointing electors, why cannot it also establish initiative and permit the people to determine the manner of appointing electors, either by passing laws or by further amending the constitution?

The constitutional landscape explored in this paper presents an intriguing mix of options. One might follow the strategy pioneered by reformers such as Justice Ginsberg and the late Justice Thurgood Marshall and proceed first with the narrower but more clear-cut case—use of initiative to enact ranked choice voting or the Voter Choice Ballot, which face essentially no constitutional hurdles.

One might combine a Ballot initiative with an Interstate Compact initiative, or one might proceed with the Compact alone. The positive results of 2020 referendum elections in Colorado (Interstate Compact) are very encouraging.

IX. Sketch of Potential Legislative Solutions.

It is beyond the scope of this paper to examine potential legislative solutions in depth. However, a number of approaches seem worth exploring. This is a brief sketch of two of those.

First, many are calling for amendments to the Electoral Count Act. An additional useful change to consider, and one that would benefit various types of reforms (e.g., both independent state laws of immediate effect and the Interstate Compact). is for Congress to specify (perhaps through a new safe harbor) that votes of electors who are appointed in the manner established by citizen initiative shall be counted. The ECA was passed for the express purpose of encouraging states to act in a certain way. If Congress can encourage states to act, it can also authorize states to act. Further, Congress can clarify whether it considers certain types of procedures lawful. Thus, just as it would be appropriate for Congress to clarify whether it considers legislative appointment of electors done in violation of preexisting state laws and constitutions to be a lawful (the legislative history indicates it would not, but it may now be important to specify that point in statute), it would be appropriate to clarify that Congress considers use of citizen initiative to be lawful and appropriate.

Congress did just that in 1911, and the Supreme Court effectively deferred to Congress' right to do so in Hildebrandt and Az State Legislature.

Second, Congress might consider limitations on Supreme Court review. This might range from essentially inviting the Supreme Court to decline review to expressly withholding jurisdiction. There are several predicates for this idea.

One, the 14 year legislative history of the ECA shows (a) that Supreme Court involvement occurred (1877), (b) that at several points Congress considered creating a role for the Supreme Court, in the statute, and that it was rejected, with Sen. Sherman noting that many believed such involvement would be "odious" and others noting that Supreme Court justices were seen to be mere politicians during the 1877 controversy, and (c) that Congress in text and intent pretty clearly provided for only state court involvement in electoral counting disputes. Schickler, et al., *supra*.

Two, in the McPherson briefs, AG Ellis made a very respectable argument that the ACA creates exclusive jurisdiction in such tribunals as states may create and in the Congress, to resolve what is fundamentally and profoundly a political question. [He did not quote Sen. Sherman's reference to supreme court involvement being odious to many.]

Three, as noted, the court recognized in Hildebrandt that use of direct democracy implicates Congress' responsibility to assure to states republican forms of government and that this is a political question over which the Court has no jurisdiction.

Four, Justice Thomas' emphasis on Tenth Amendment principles under Article II calls into question whether the Supreme Court would have any business adjudicating this issue.

Five, in Arizona State Legislature, both Thomas and Scalia would have dismissed the case for lack of standing/lack jurisdiction. Like the political question doctrine, this is a prudential doctrine.

Six, in its most recent gerrymandering case, the Supreme Court expressly held that oversight of gerrymandering is a political question, to be left to Congress under Art. I. Sec. 4.

Seven, the court has good reason to be concerned about its institutional legitimacy/reputation and to invoke prudential/restraining doctrines. With three members of the court having participated in the Bush team that effectively lied to the Supreme Court about the 1874 Senate Report, with CJ Roberts' disgraceful dissent in Az State Legislature, and with Donald Trump having taken the implications of what the Bush team and CJ Roberts promoted to the extremes we have seen, and having boasted that one of his appointments would swing the election to him, it would be particularly odious for the Supreme Court to be involved.

Eight, Congress could hold hearings and make findings about (i) the 1874 Report; (ii) use of the Report by the Bush team; (iii) use of the report in CJ Roeberts' dissent; and (iii) use of the report in the 2020 litigation—both in the briefs of the parties and in the opinions.

Use of citizen initiative to achieve presidential election reform is a vital question that warrants full attention, not only of courts, advocates and citizens of all descriptions, but of Congress as well.

APPENDIX—Excerpts from briefs in Bush v. Gore

Bush v. Palm Beach County Canvassing Board, No. 00-836

Amicus curiae Brief of Florida Senate on behalf of neither party, Nov. 27, 2000

pp. 2-3:

ARGUMENT

1.The State Legislature Has Plenary Authority To Appoint Electors And, When An Election Fails To Make A Timely Choice Pursuant To Pre-existing Rules, It Must Exercise That Authority To Assure Its Electors Are Counted By Congress.

The Constitution of the United States grants each State Legislature the plenary power to appoint that State's Presidential Electors. See U.S.CONST.ART. II, §1, ¶2 ("each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors."). This clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). **[ALERT: Misleading citation.** The court did not say "the clause confers;" the court said, at the end of a long discussion of history, that "the practical construction of the clause concedes." An historical observation is changed to a statement about plain meaning.]

"'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'" Id. at 34(quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong.(1874)).
{ALERT: Misleading re 1874 Report; the court quoted neutrally, not "favorably."]

Id., pp. 4-5 (emphasis supplied):

Article II, Section 1, of the United States Constitution expressly grants each State Legislature the authority to assure that its Electors are chosen in the manner it has directed. **This constitutional power is conferred directly on the State Legislature, not on the State as a whole, and cannot be limited by state courts or even by a state constitution:**

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions maybe made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

McPherson, 146 U.S. at 34-35 (favorably quoting 1874 Senate Report, supra). [**ALERT: misleading re 1874 Report**: the court quoted neutrally, not favorably.]

* * * *

Brief for Petitioners Bush et al..

p. 40:

> **B. In The Absence Of Express Legislative Direction, The State Executive And Judicial Branches Are Constitutionally Prohibited From Engrafting Material Changes Onto The Manner Of Appointing Presidential Electors**

. . .The Florida legislature has thus been granted, by the Constitution itself, plenary authority to regulate the manner of appointment of presidential electors: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States." *Id*. at

34-35 (quoting Senate Rep. 1st Sess. 43 Cong. No. 395 (Sen. Morton)) **[NOTE, reliance on 1874 Report].** . .

Id., p 43 (footnotes omitted):

The Florida legislature could have delegated to state courts some authority over the manner appointing electors. See *McPherson,* 146 U.S. at 34-35 ("it is, no doubt, competent for the legislature to authorize the governor, *or the Supreme Court of the State*, or any other agent of its will, to appoint these electors") (emphasis added) [**ALERT: failure to cite the 1874 Report,** from which the quotation is taken..]

Id. p. 47:

Instead, the court repeatedly invoked the Florida constitution as "[t]he abiding principle governing all election law in Florida." Pet. App. 14a; see also, e.g., id. at 30a. While that might well be an acceptable source of law for an election of a state official, it cannot suffice with respect to the appointment of presidential electors. As this Court has explained, "[t]his power [to determine the manner of appointing electors] is conferred upon the legislatures of the States by the Constitution of the United States, and *cannot be taken from them or modified by their State constitutions*." *McPherson*, 146 U.S. at 35 (emphasis added).

[ALERT: Misleading on two grounds. One, it fails to cite the 1874 Report, from which the language is taken. Two, it characterizes the quotation as the Court's own "explanation," which it is not. It is simply a quotation from the 1874 Senate Report.]

The Florida Supreme Court's decision, which disregards this principle, cannot be reconciled with the framework imposed on the States by Article II.

Bush v. Gore, No. 00-949

Amicus Curiae Brief of Florida House of Representatives on behalf of neither party, Dec. 10, 2020

pp. 3-4:

I. The Florida Supreme Court Has Distorted and Disregarded the Legislative Scheme for Presidential Elections in Violation of Article II.

A presidential elector can constitutionally be appointed only "in such Manner as the [State] Legislature thereof may direct." U.S.CONST.ART. II, §1, ¶2. If an elector is appointed in some manner other than that directed by the State Legislature, that appointment is unconstitutional.

This constitutional clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker,* 146 U.S. 1, 35 (1892).
[ALERT: Misleading citation. The court did not say the "clause confers;" the court said, at the end of a long discussion of history, that "the practical construction of the clause concedes." As a result, an historical observation is changed to a statement about plain meaning.]

Indeed, as this Court recognized, in "the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II,§1, cl. 2, of the United States Constitution." *Bush v. Palm Beach County Canvassing Board*, No. 00-836, Op. at 4 (Dec. 4, 2000).Thus, this direct grant of authority "'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.'" *Bush, supra*, at 5 (quoting *McPherson,* 146 U.S. at 25).

State courts may not invoke even the state constitution to circumscribe this state legislative power. *Bush, supra*, at 5, 7. n. 3

n. 3 *See McPherson*, 146 U.S. at 34-35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, and can not be taken from them or modified by their state constitutions . . . . Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the

right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." ((quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong.(1874)). **[NOTE: Reliance on 1874 Report.]**

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Brief for Petitioners Bush, et al.

p. 16:

SUMMARY OF ARGUMENT

I. The new standards, procedures, and timetables established by the Florida Supreme Court for the selection of Florida's presidential electors are in conflict with the Florida Legislature's detailed plan for the resolution of election disputes. The court's new framework thus violates Article II, §1, cl.2 of the United States Constitution, which vests in state legislatures the exclusive authority to regulate the appointment of presidential electors. See *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

pp. 20-21

This Court has recognized that the legislature's Article II power of appointment is exclusive. See *McPherson*, 146 U.S. at 34-35 ("'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'") (quoting with approval S.Rep., 1st Sess., 43d Cong., No. 395).
[**ALERT: misleading re 1874 Report**: the court quoted neutrally, not "with approval."]
Indeed, the Constitution contains provisions that vest responsibility in the States qua States, e.g., U.S. CONST. art. I, §8, cl. 16, as well as provisions that, as here, single out the particular branch of state

government charged with exercising certain duties integral to the functioning of the federal government, e.g., U.S. CONST. art. I, §2, cl. 4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Framers' decision to vest specific authority in state legislatures must be understood to be exclusive of state executive or judicial power to prescribe the "manner" of appointing electors. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

p. 29:

Article II, §1 of the United States Constitution, however, does not permit state constitutions to circumscribe in any way a state legislature's selection of the manner of choosing presidential electors. See *McPherson*, 146 U.S. at 35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions.") (emphasis added) (quoting with approval Senate Rep., 1st Sess., 43d Cong., No. 395). [**ALERT: misleading re 1874 Report**: the court quoted neutrally, not "with approval."]