

## THE INTRATEXTUAL INDEPENDENT “LEGISLATURE” AND THE ELECTIONS CLAUSE

*Michael T. Morley\**

### INTRODUCTION

The Elections Clause of the U.S. Constitution is the Swiss army knife of federal election law. Ensclosed in Article I, it provides, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations.”<sup>1</sup> Its Article II analogue, the Presidential Electors Clause, similarly specifies that “[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors” to select the President.<sup>2</sup> The concise language of these clauses performs a surprisingly wide range of functions implicating numerous doctrines and fields beyond voting rights, including statutory interpretation,<sup>3</sup> state separation of powers and other issues of state constitutional law,<sup>4</sup> federal court deference to state-court rulings,<sup>5</sup> administrative discretion,<sup>6</sup> and preemption.<sup>7</sup>

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\* Assistant Professor, Barry University School of Law. Climenko Fellow and Lecturer on Law, Harvard Law School, 2012–14; J.D., Yale Law School, 2003; A.B., Princeton University, 2000. Special thanks to Dr. Ryan Greenwood of the University of Minnesota Law Library, as well as Louis Rosen of the Barry Law School library, for their invaluable assistance in locating historical sources. I also am grateful to Terri Day, Dean Leticia Diaz, Frederick B. Jonassen, Derek Muller, Eang Ngov, Richard Re, Seth Tillman, and Franita Tolson for their comments and suggestions. I was invited to present some of the arguments from this Article in an amicus brief on behalf of the Coolidge-Reagan Foundation in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 14-1314 (U.S. 2014). I appreciate the superb editing of the Northwestern University Law Review Online staff.

<sup>1</sup> U.S. CONST. art. I, § 4, cl. 1 (emphasis added) [<http://perma.cc/X4NH-5MDG>].

<sup>2</sup> *Id.* art. II, § 1, cl. 2 (emphasis added).

<sup>3</sup> *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring) (concluding that, because the Constitution delegates plenary authority over presidential elections to state legislatures, “the text of [an] election law itself . . . takes on independent significance”) [<http://perma.cc/UAF3-HBQJ>]; *id.* at 130 (Souter, J., dissenting) (“The issue is whether . . . the law as declared by the [state] court [is] different from the provisions made by the [state] legislature, to which the National Constitution commits responsibility for determining how each State’s Presidential electors are chosen[.]”).

<sup>4</sup> *See* *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (holding that the Elections Clause “operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power” to regulate federal elections, including through “any provision in the state constitution in that regard”) [<http://perma.cc/KQ4D-FQ79>]; *cf.* *Bush*, 531 U.S. at 113 (Rehnquist C.J., concurring)

States lack inherent power to regulate federal elections. Thus, when a state regulates federal elections, it is acting “by virtue of a direct grant of authority” under the Elections Clause or Presidential Electors Clause.<sup>8</sup> These constitutional provisions are “express delegations of power”<sup>9</sup> that confer upon state legislatures the power to “provide a complete code” for federal elections, including but not limited to laws concerning “notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.”<sup>10</sup>

At first blush, the meaning of the term “legislature” in the Elections Clause and Presidential Electors Clause appears quite clear: it refers to the entity within each state comprised of elected representatives that enacts statutes. The Supreme Court, however, has taken a somewhat different view. In *Ohio ex rel. Davis v. Hildebrant*, the Court held that the Elections Clause allows a state’s citizens to use the referendum process established by the state constitution to nullify a law enacted by the legislature concerning federal redistricting.<sup>11</sup> It tersely rejected the argument that the state legislature had exclusive power under the Elections Clause to enact or repeal laws governing federal elections, dismissing it as “plainly without substance.”<sup>12</sup> *Hildebrant* permits a state to enact laws governing federal

(recognizing that the Presidential Electors Clause is among the “few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government”).

<sup>5</sup> *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (“As a general rule, this Court defers to a state court’s interpretation of a state statute. But in the case of a [state] law . . . applicable . . . to the selection of Presidential electors, the legislature is . . . acting . . . by virtue of a direct grant of authority made under [the Presidential Electors Clause] of the United States Constitution.”) [<http://perma.cc/HWD8-KFF2>].

<sup>6</sup> See *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012 & n.2 (S.D. Ohio 2008) (holding that a directive from the Ohio Secretary of State concerning minor party candidates was unconstitutional, because it “purport[ed] to create new law” and, under the Elections Clause, “the Secretary of State, a member of the executive branch of government, has no authority independent of the Ohio General Assembly to direct the method of the appointment of . . . federal officials”) [<http://perma.cc/R8YE-YLP2>].

<sup>7</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253–54 (2013) (holding that federal laws passed under the Elections Clause are not subject to the traditional presumption against preemption) [<http://perma.cc/Q6EV-K3Q7>].

<sup>8</sup> *Palm Beach*, 531 U.S. at 76; accord *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (“[T]he States may regulate the incidents of [congressional] elections . . . only within the exclusive delegation of power under the Elections Clause.”) [<http://perma.cc/L2DT-GAB5>].

<sup>9</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) [<http://perma.cc/2KAM-M5C6>].

<sup>10</sup> *Smiley v. Holm*, 285 U.S. 355, 366 (1932) [<http://perma.cc/C3VG-FKD6>]. For a compelling discussion of the debates in the Constitutional Convention concerning the Elections Clause, as well as the Supreme Court’s history of interpreting it, see Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1220–33 (2012) [<http://perma.cc/69QM-6EBX>].

<sup>11</sup> 241 U.S. 565, 569–70 (1916) [<http://perma.cc/4ANE-KR4G>].

<sup>12</sup> *Id.* at 569.

elections through any process that the state constitution includes within the state’s “legislative power,” even if the state legislature itself is not involved.<sup>13</sup>

The Supreme Court explored the issue in greater depth in *Smiley v. Holm*, in which it permitted a state governor to veto a federal redistricting bill passed by the state legislature, because the state constitution included vetoes as part of the legislative process.<sup>14</sup> It explained that a legislature’s exercise of its power under the Elections Clause to enact laws governing congressional elections “must be in accordance with the method which the State has prescribed for legislative enactments.”<sup>15</sup> The Court added, “We find no suggestion in the [Elections Clause] 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.”<sup>16</sup>

The scope of the Elections Clause is again before the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>17</sup> Arizona voters passed a state constitutional amendment through the initiative process to “remove[] congressional redistricting authority from the Legislature and vest[] that authority in a new entity, the Arizona Independent Redistricting Commission (“IRC”).”<sup>18</sup> A three-judge panel of the U.S. District Court for the District of Arizona upheld the IRC’s constitutionality because “*Hildebrant* and *Smiley* . . . demonstrate that the word ‘Legislature’ in the Elections Clause refers to the legislative process used in [a] state, determined by that state’s own constitution and laws,”<sup>19</sup> rather than the institutional legislature itself. The Elections Clause therefore “does not prohibit a state from vesting the power to conduct congressional districting” in an entity other than the state legislature, such as Arizona’s redistricting commission.<sup>20</sup>

*Arizona Independent Redistricting Commission* is poised to be the Supreme Court’s first holding about whether a state’s institutional legislative body may be wholly stripped of its powers concerning federal redistricting, if not federal elections altogether.<sup>21</sup> The immediate effects of

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<sup>13</sup> *Id.* at 568–69.

<sup>14</sup> 285 U.S. 355, 368 (1932).

<sup>15</sup> *Id.* at 367.

<sup>16</sup> *Id.* at 367–68.

<sup>17</sup> 997 F. Supp. 2d 1047 (D. Ariz. 2014), *cert. granted*, 135 S. Ct. 46 (2014) [<http://perma.cc/X7S3-TX6E>].

<sup>18</sup> *Id.* at 1048.

<sup>19</sup> *Id.* at 1054.

<sup>20</sup> *Id.* at 1056.

<sup>21</sup> The Court already has stated in dicta that a state may permit entities other than the legislature itself to redraw congressional districts. *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a

its ruling will reverberate far beyond Arizona, as “12 states . . . give first and final authority for legislative redistricting to a group other than the legislature.”<sup>22</sup> More broadly, this case will revisit the meaning of the term legislature as used in the Elections Clause (and, by extension, Article II’s Presidential Electors Clause), confirming whether it actually refers to: the legislature alone; the legislature *plus* whatever other processes or entities a State constitution includes within the lawmaking process; or any process or entity that a state constitution vests with legislative power over federal elections, to the potential exclusion of the institutional legislature.

This Article contends that the term legislature should be interpreted in accordance with its plain meaning, as referring solely and exclusively to the multimember body of representatives within each state generally responsible for enacting its laws.<sup>23</sup> This conclusion becomes especially clear through an intratextual approach to the Elections Clause.

Part I of this Article introduces the intratextual method of constitutional interpretation, explaining how the Constitution’s repeated uses of a term often provide a wealth of context from which a court may discern the term’s meaning. Part II offers an intratextual interpretation of the Elections Clause, examining how each of the other contexts in which the Constitution uses the term legislature demonstrates that the term refers to a specific institution. In fact, the Supreme Court itself employed an intratextual analysis in *Hawke v. Smith* to conclude that Article V permits a state to ratify a constitutional amendment only through a vote of its institutional legislature (or a specially called convention), not a public referendum.<sup>24</sup>

Part III shows that this understanding is confirmed by both a traditional textualist approach to the term, as well as the “independent state legislature”

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federal court.”) [<http://perma.cc/LE5R-JZVE>]; *accord* *Growe v. Emison*, 507 U.S. 25, 34 (1993) [<http://perma.cc/2WJ9-M4B6>].

<sup>22</sup> *Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/redistricting/redistricting-commissions.aspx> [<http://perma.cc/R298-YKDT>].

<sup>23</sup> Much academic debate on this issue has focused on whether the Presidential Electors Clause allows a state’s citizens to change the state’s method for allocating presidential electors from winner-take-all to a proportional system through a public initiative. *See, e.g.*, Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631 (2008) (defending the use of ballot initiatives to change state laws governing presidential elections) [<http://perma.cc/AGV4-WPTD>]; Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”: Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599, 629 (2008) (“A strict textual view suggests that initiated reform is unconstitutional; case law and policy arguments show the question is more uncertain. Reasonable judges could reach opposite conclusions on the question.”) [<http://perma.cc/ZYN5-5QB5>]; Nicholas P. Stabile, Comment, *An End Run Around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the Method of Distributing Electors*, 103 NW. U. L. REV. 1495 (2009) [<http://perma.cc/Y69V-Z5ZW>].

<sup>24</sup> 253 U.S. 221, 227–28 (1920) [<http://perma.cc/ZEA8-VMKY>].

doctrine.<sup>25</sup> Part IV briefly concludes that adopting an intratextual approach to the term legislature—one informed by both traditional textualism and the independent state legislature doctrine—would help the *Arizona Independent Redistricting Commission* Court reach the most accurate understanding of the Elections Clause.

### I. IN DEFENSE OF AN INTRATEXTUAL APPROACH

Intratextualism counsels that the Constitution’s use of “strongly parallel language [in different places] is a strong (presumptive) argument for parallel interpretation” of that language.<sup>26</sup> This approach urges a reader interpreting “a contested word or phrase that appears in the Constitution” to consider its meaning as it appears in other passages.<sup>27</sup> “[T]extually nonadjoining clauses” of the Constitution should be placed “side by side for careful analysis,” to ensure that a proposed interpretation of a term makes sense in the various contexts in which the Constitution deploys it.<sup>28</sup>

Akhil Amar identifies three main types of intratextual arguments. First, when attempting to determine the meaning of a word in a particular clause, other constitutional provisions can “serve[] a basic dictionary function” by “illustrat[ing] [its] usage.”<sup>29</sup> Second, a reader also may arrive at the “best” interpretation of a term by determining the meaning that would fit best with its usage throughout the Constitution.<sup>30</sup> Finally, when entire clauses are structured identically to each other, with only one or two key words changed, they generally should be read *in pari materia* and interpreted consistently.<sup>31</sup>

Amar contends that the “greatest virtue of intratextualism” is that “it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses.”<sup>32</sup> He explores the Court’s long legacy of intratextual analysis,<sup>33</sup> including Chief Justice John Marshall’s use of intratextualism in *McCulloch v. Maryland*<sup>34</sup> and Justice Joseph Story’s use of it in *Martin v. Hunter’s Lessee*.<sup>35</sup> As mentioned earlier, in *Hawke v. Smith*, the Court

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<sup>25</sup> The independent state legislature doctrine provides that a state legislature is not bound by substantive restrictions or limits contained in a state constitution when exercising its power under the Elections Clause or Presidential Electors Clause to regulate federal elections. See *infra* Section III.B.

<sup>26</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999) [<http://perma.cc/2Q9Q-KV7N>].

<sup>27</sup> *Id.* at 748.

<sup>28</sup> *Id.* at 788.

<sup>29</sup> *Id.* at 791.

<sup>30</sup> *Id.* at 792–94.

<sup>31</sup> *Id.* at 794–95.

<sup>32</sup> *Id.* at 795.

<sup>33</sup> *Id.* at 755–58, 760–63.

<sup>34</sup> 17 U.S. (4 Wheat.) 316, 412 (1819) [<http://perma.cc/P3NJ-8F8F>].

<sup>35</sup> 14 U.S. (1 Wheat.) 304, 328–34 (1816) [<http://perma.cc/L9NH-36Y2>]. For a more recent example, see *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008), in which the Court interpreted

adopted an intratextual approach to determine the meaning of the term legislature as it appears in Article V.<sup>36</sup> Academic commentators have also applied this technique to various constitutional provisions.<sup>37</sup>

Intratextual interpretation is not a mechanical process, however, as “certain chameleon words should sensibly mean different things in different clauses.”<sup>38</sup> When the Constitution uses a word differently in different contexts, intratextualism can lead to misleading results.<sup>39</sup> Moreover, “[c]arried to extremes, intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound.”<sup>40</sup> Thus, intratextualism should be used to “suggest possible readings” or “generate interpretative leads and clues” that must be assessed through “other tools of interpretation,” not to “dictate results.”<sup>41</sup>

Adrian Vermeule and Ernest A. Young offer a powerful critique of intratextualism, questioning its premise that the Constitution should be given a consistent, uniform interpretation. They point out that the document may lack internal consistency because its “component provisions were enacted at different times, in different circumstances, and for different reasons.”<sup>42</sup> Even the text of the original, unamended Constitution is the result of numerous “tradeoffs, political battles won and lost, and compromised ideals.”<sup>43</sup> Rather than an integrated document springing from a single author, it is the product of a body of people disagreeing,

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the phrase “right of the people” as used in the Second Amendment to protect an individual right to bear arms, because the Constitution’s three other uses of that phrase “unambiguously refer to individual rights.” [<http://perma.cc/TXE2-XUWV>].

<sup>36</sup> 253 U.S. 221, 227–28 (1920).

<sup>37</sup> E.g., Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1021–22 (2007) (applying intratextualism to interpret the words “inferior” and “supreme” with regard to courts); Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 725 (2008) (same for the word “treaties”) [<http://perma.cc/4XUC-53BG>]; Vasana Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1757–58 (2002) (same for congressional authority to regulate Presidential elections); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1172 (2003) (applying an intratextual comparison of the Interstate, Foreign and Indian Commerce Clauses). For articles where intratextualism was deemed insufficient to support a particular interpretation, see Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 493–94 (2002) [<http://perma.cc/63S8-R53Z>] and Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 39 (2013) [<http://perma.cc/S6KT-ZQ8Q>].

<sup>38</sup> Amar, *supra* note 26, at 793; *accord id.* at 799.

<sup>39</sup> E.g., Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1181 (2003); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 767–68 (2000) [<http://perma.cc/BF6C-CSSB>].

<sup>40</sup> Amar, *supra* note 26, at 799.

<sup>41</sup> *Id.*

<sup>42</sup> Vermeule & Young, *supra* note 39, at 731; *accord* Clark, *supra* note 37, at 723.

<sup>43</sup> Vermeule & Young, *supra* note 39, at 742.

compromising, and amending each other's work. It is highly unlikely that the dozens of men who contributed to its writing all used important terms consistently.<sup>44</sup>

Moreover, because intratextualism requires judges to interpret a term as it appears in numerous constitutional provisions, this approach may unduly tax their "time, information, and expertise;" lead to more errors; and allow for more subjectivity than a clause-bound method of interpretation.<sup>45</sup> Intratextualism also is more indeterminate and manipulable than clause-bound textualism, because it does not offer interpretive guidance when a term's apparent meaning based on a single clause in isolation differs from its apparent meaning based on other clauses in which it appears. Thus, a reader still must choose among competing interpretations using a theory or process other than intratextualism itself.<sup>46</sup> William Treanor, further critiquing intratextualism from an originalist perspective, adds that it is "unreliable" because it "privileges a small subset of contemporaneous usages (those in the constitutional document) over the larger body of relevant contemporaneous usages."<sup>47</sup>

At a minimum, intratextualism provides a useful data point for courts to consider in determining the meaning of a disputed term, and would be especially useful for the Supreme Court in interpreting the meaning of legislature in the Elections Clause and Presidential Electors Clause. The term is concrete and reasonably susceptible of a limited number of definitions. Moreover, it does not appear to lend itself to the type of compromise or mutually inconsistent understandings to which other, more general language might be subject.

Additionally, the original, unamended Constitution uses legislature on numerous different occasions, thereby avoiding the issue of whether subsequent constitutional amendments employ it in the same manner. As Part II demonstrates, the numerous other constitutional clauses that use the term all refer to a state's sole lawmaking body comprised of elected representatives, rather than some broader conception of the word. This consistent pattern of usage creates a strong presumption that the Elections Clause and Presidential Electors Clause employ it in the same fashion. And,

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<sup>44</sup> See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 610 (1842) (pointing out that, because many constitutional provisions "were matters of compromise of opposing interests and opinions . . . no uniform rule of interpretation can be applied to it") [<http://perma.cc/JMF4-DN67>].

<sup>45</sup> Vermeule & Young, *supra* note 39, at 731; accord Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 941 (2003).

<sup>46</sup> Michael J. Gerhardt, *The Utility and Significance of Professor Amar's Holistic Reasoning*, 87 Geo. L.J. 2327, 2330 (1999) (book review) (concluding that intratextualism "provides an almost limitless array of possible interpretations or readings and posits no standard for measuring or choosing among plausible interpretations").

<sup>47</sup> William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 523–24 (2007) [<http://perma.cc/QV2Z-8U8T>].



as discussed in Part III, the results of this intratextual analysis can be corroborated through both a plain meaning interpretation as well as consideration of the longstanding independent state legislature doctrine. Even if the constraints under which many judges operate may prevent them from using intratextualism effectively, the Supreme Court can devote sufficient time and attention to a case of this magnitude to make intratextualism an appropriate and useful strategy.

## II. INTRATEXTUALISM AND THE ELECTIONS CLAUSE

The Constitution contains numerous references to state legislatures that may be used to elucidate that term's meaning as it appears in the Elections Clause (and, by extension, the Presidential Electors Clause). These references may be divided into four groups: (i) those that discuss features of a legislature; (ii) those that distinguish between a state legislature and other state personnel or entities; (iii) those that confer quasi-legislative or nonlegislative powers upon a legislature; and (iv) those, such as the Elections Clause and Presidential Electors Clause, that confer legislative authority over certain subjects upon the legislature.

The text, context, original understanding, and consistent history of interpretation of the first three types of references to the term legislature demonstrate that it is best understood as referring to a state's general lawmaking body of elected representatives, rather than a broader legislative power<sup>48</sup> or other entities upon which a state's constitution may attempt to confer a portion of that legislative power. These provisions create a strong, and ultimately insurmountable, presumption that the same meaning should be attributed to the term as it appears in the fourth category of clauses: those such as the Elections Clause and Presidential Electors Clause that grant state legislatures the power to enact certain types of laws.

### A. *Discussions of Legislatures*

Certain constitutional provisions' usage of the term legislature reveals that a legislature contains certain characteristics. For example, Article VI's Oath Clause requires that "Members of the several State Legislatures . . . be bound by Oath or Affirmation, to support th[e] Constitution."<sup>49</sup> This provision contemplates that a state legislature will have members. And its requirement that such members pledge to uphold the federal Constitution is best understood as referring to individuals who belong to a particular lawmaking institution within a state, rather than members of some

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<sup>48</sup> Cf. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568–69 (1916).

<sup>49</sup> U.S. CONST. art. VI, cl. 3. The Fourteenth Amendment contains similar references. Section 2 imposes penalties on a State that denies the right to vote, including in elections for "members of the legislature." *Id.* amend. XIV, § 2. Section 3 prohibits a person who, while "a member of any state legislature," engaged in "insurrection or rebellion" against the United States from serving as a federal official unless Congress removes the disability by a two-thirds vote. *Id.* amend. XIV, § 3.



overarching legislative power that conceivably encompasses the entire voting public.

Similarly, Article I's Qualifications Clause provides that a person may vote for the U.S. House of Representatives if he possesses "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."<sup>50</sup> This provision treats the legislature as an entity that presumptively features multiple branches and is comprised of representatives selected by electors.

Article I's Senate Vacancies Clause (which has been superseded by the Seventeenth Amendment) states that, if a vacancy occurs in the U.S. Senate "during the Recess of the Legislature of any State," the state executive may make a temporary appointment "until the next Meeting of the Legislature."<sup>51</sup> Yet again, this provision contemplates the existence of an institutional legislature whose members periodically meet and which may be called into recess. Finally, the Domestic Violence Clause in Article IV provides that, "on Application of the [state] Legislature, or of the [state] Executive (when the Legislature cannot be convened)," the federal government shall protect a state against "domestic Violence."<sup>52</sup> This further corroborates the constitutional image of a legislature as a multimember body that periodically convenes and adjourns.

Thus, every clause that gives some insight into the nature of the legislature uses the term to refer to a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets for limited periods of time, and then enters into recess.

#### *B. Provisions That Distinguish Between Legislatures and Other State Personnel and Entities*

Several other constitutional provisions expressly distinguish between legislatures (and their members) and other state officials and entities. For example, as discussed above, the Oath Clause requires "Members of the several State Legislatures, and all executive and judicial Officers . . . of the several States" to take an oath or affirmation to support the Constitution.<sup>53</sup> Likewise, the Senate Vacancies Clause provides that, if a vacancy occurs while the "Legislature of any State" is in recess, "the Executive thereof may make temporary Appointments until the next Meeting of the Legislature,

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<sup>50</sup> *Id.* art. I, § 2, cl. 1. The Seventeenth Amendment contains identical language concerning U.S. Senate elections. *Id.* amend. XVII.

<sup>51</sup> *Id.* art. I, § 3, cl. 2.

<sup>52</sup> *Id.* art. IV, § 4.

<sup>53</sup> *Id.* art. VI, cl. 3. Provisions of the Fourteenth Amendment discussed above reprise this list of State officials. *See supra* note 49.

which shall then fill such Vacancies.”<sup>54</sup> And the Domestic Violence Clause requires the federal government to protect a state “against domestic Violence” upon “Application of the Legislature, or of the Executive (when the Legislature cannot be convened).”<sup>55</sup> These provisions all distinguish between the state legislature and the state executive (or state executive officials). This juxtaposition of different branches suggests that, just as references to a state’s executive are best construed as referring to its governor, references to a state’s legislature are best construed as referring to its main lawmaking body comprised of elected representatives.

Even more telling is Article V, which specifies that a proposed constitutional amendment may be ratified either by “the Legislatures” or “Conventions” in three-fourths of the States, depending on the mode of ratification authorized by Congress.<sup>56</sup> This clause demonstrates that, when the Framers wished to authorize action by the people independent of their institutional legislatures, they knew how to do so. Article V further bolsters the conclusion that the term legislature refers exclusively to the particular institution within a state that exercises its general lawmaking authority.

### C. References to *Quasi-Legislative or Nonlegislative Powers*

Numerous constitutional provisions confer authority on state legislatures other than the power to enact certain types of laws. The Constitution grants them the power to choose U.S. Senators (since repealed by the Seventeenth Amendment);<sup>57</sup> “fill” Senate vacancies;<sup>58</sup> “call” for a convention for proposing amendments to the Constitution;<sup>59</sup> “[a]ppl[y]” for the federal government’s “protect[ion] . . . against domestic Violence;”<sup>60</sup> “ratif[y]” proposed amendments to the Constitution;<sup>61</sup> and “[c]onsent” to the formation of new states within their borders or through “Junction” with other states,<sup>62</sup> or to the federal government’s purchase and exercise of exclusive authority over land within the state for the erection of military facilities, docks, and other “needful Buildings.”<sup>63</sup>

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<sup>54</sup> *Id.* art. I, § 3, cl. 2. The Seventeenth Amendment’s vacancy provisions likewise distinguish between the state legislature and the state’s “executive authority.” *Id.* amend. XVII.

<sup>55</sup> *Id.* art. IV, § 4.

<sup>56</sup> *Id.* art. V.

<sup>57</sup> *Id.* art. I, § 3, cl. 1.

<sup>58</sup> *Id.* art. I, § 3, cl. 2; *cf. id.* amend. XVII, § 2.

<sup>59</sup> *Id.* art. V.

<sup>60</sup> *Id.* art. IV, § 4.

<sup>61</sup> *Id.* art. V. Consistent with this provision, various constitutional amendments specify that they would not take effect unless ratified by a sufficient number of state “legislatures” within a specified period of time. *Id.* amend. XVIII, § 3; *id.* amend. XX, § 6; *id.* amend. XXII, § 2.

<sup>62</sup> *Id.* art. IV, § 3, cl. 1.

<sup>63</sup> *Id.* art. I, § 8, cl. 17.

For most, if not all, of these provisions, the Framers' debates over the Constitution further confirm that they exclusively empower institutional legislatures to perform the specified acts. For example, as originally enacted, the Constitution directed state legislatures, rather than the electorate, to choose U.S. senators.<sup>64</sup> During the Constitutional Convention, James Dickenson moved that senators be elected by state legislature for two reasons:

1. because the sense of the States would be better collected through their Governments; than immediately from the people at large. 2. because he wished the Senate to consist of the most distinguished characters . . . and he thought such characters more likely to be selected by the State Legislatures, than in any other mode.<sup>65</sup>

He later added that granting legislatures this power would help preserve the states as distinct entities and “produce that collision” between the federal and state governments “which should be wished for in order to check each other.”<sup>66</sup>

Throughout the ensuing debate, all delegates used the term legislature consistently, referring to a particular, well-understood entity within each state.<sup>67</sup> Later in the convention, James Wilson reiterated:

[O]ne branch of the Genl.—Govt. (the Senate or second branch) was to be appointed by the State Legislatures. The State Legislatures, therefore, by this participation in the Genl. Govt. would have an opportunity of defending their

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<sup>64</sup> *Id.* art. I, § 3, cl. 1 (amended 1913). This provision's reference to legislatures was specifically intended to preclude the electorate from playing a direct role in electing U.S. Senators. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 884 (1995) (Thomas, J., dissenting) (“In the context of congressional elections, the Framers obviously saw a meaningful difference between direct action by the people of each State and action by their state legislatures.”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 701, at 182 (Boston, Hilliard, Gray, & Co. 1833) (observing that the Framers unanimously voted for the Senate to be “chosen by the legislature of each state” rather than “by the people thereof”) [<http://perma.cc/76MR-E2JF>]; *see also* THE FEDERALIST NO. 63, at 323 (James Madison) (Ian Shapiro ed., 2009) (distinguishing, in its discussion of the U.S. Senate, between “the State legislatures” and “the people at large”) [<http://perma.cc/8JR2-UQCH>].

<sup>65</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's Notes, Jun. 7, 1787) (statement of John Dickinson) [<http://perma.cc/RE8P-VJHP>].

<sup>66</sup> *Id.* at 153 (Madison's Notes, Jun. 7, 1787) (statement of John Dickinson).

<sup>67</sup> For example, Roger Sherman concurred, urging that “elections by the people” are not as likely “to produce such fit men as elections by the State Legislatures.” *Id.* at 154 (Madison's Notes, Jun. 7, 1787) (statement of Roger Sherman). Elbridge Gerry similarly contended that allowing the People to select Senators directly would give the “landed interest” an advantage and leave commercial interests with “no security.” *Id.* at 152 (Madison's Notes, Jun. 7, 1787) (statement of Elbridge Gerry). Conferring that power on state legislatures, in contrast, would “be most likely to provide some check in favor of the commercial interest [against] the landed; without which oppression will take place.” *Id.*

rights. . . . The States having in general a similar interest, in case of any proposition in the National Legislature to encroach on the State Legislatures, he conceived a general alarm [would] take place in the National Legislature itself, that it would communicate itself to the State Legislatures, and [would] finally spread among the people at large.<sup>68</sup>

Thus, in commenting on the selection of senators, Wilson expressly distinguished among a “State” as a whole, state legislatures, and “the people at large.”<sup>69</sup>

Likewise, in discussing the Senate Vacancies Clause, the Framers’ debates unmistakably concerned institutional legislatures: they discussed the relative frequency with which various states’ legislatures met and the power of certain legislatures to select the state’s governor.<sup>70</sup> The same is true of Article V’s delegation of authority to state legislatures to call for a new constitutional convention and to ratify amendments to the Constitution.<sup>71</sup> As the Supreme Court recognized in *Hawke v. Smith*, legislature was “not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people.”<sup>72</sup> The debates at the Constitutional Convention likewise confirm that the power to request federal assistance under the Domestic Violence Clause lies specifically in the institutional legislature.<sup>73</sup>

#### D. *References to Legislative Authority*

The plain text of the Constitution, context of other constitutional provisions, and Framers’ original understanding all confirm that the Constitution’s numerous other instances of the term legislature uniformly refer to the specific institution within each state that is comprised of elected representatives and exercises general lawmaking authority. Compelling evidence is therefore necessary to conclude that the term has a different, unique, and unusual meaning as used in the Elections Clause and Presidential Electors Clause.

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<sup>68</sup> *Id.* at 355–56 (Madison’s Notes, Jun. 7, 1787) (statement of James Wilson); *accord id.* at 366 (King’s notes, Jun. 21, 1787) (statement of James Wilson).

<sup>69</sup> *Id.* at 355–56 (Madison’s Notes, Jun. 7, 1787) (statement of James Wilson).

<sup>70</sup> 2 *id.* at 231 (Madison’s Notes, Aug. 9, 1787) (statement of James Wilson).

<sup>71</sup> U.S. CONST. art. V.

<sup>72</sup> 253 U.S. 221, 227 (1920). The Court elaborated, “When [the Framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.” *Id.* at 228; *see also* Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920) (“The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it.”) [<http://perma.cc/QA5S-ZHT6>].

<sup>73</sup> 2 FARRAND’S RECORDS, *supra* note 65, at 316–17, 466–67 (Madison’s Notes Aug. 17, 1787, Aug. 30, 1787).

The Supreme Court previously held that the term legislature should be accorded a different meaning in the Elections Clause (and, by extension, the Presidential Electors Clause) because those provisions—unlike the Constitution’s other references to legislatures—confer a type of traditionally *legislative* authority on state legislatures: the ability to enact laws regulating federal elections.<sup>74</sup> The Court never explained, however, why this somewhat different context requires a unique definition of legislature that differs from its use throughout the rest of the Constitution.

In *Ohio ex rel. Davis v. Hildebrant*, the Court held that the Elections Clause permitted Congress to enact a law authorizing states to draw or alter congressional districts through either state legislation or public referenda.<sup>75</sup> It rejected as “plainly without substance” a challenge to a state referendum that nullified a redistricting plan enacted by the Ohio legislature.<sup>76</sup> Despite the Court’s single passing reference to the Elections Clause, however, it assumed that any constitutional challenge to the use of public referenda to regulate federal elections must arise under the Guarantee Clause.<sup>77</sup>

According to the Court, the Petitioners were arguing that public referenda “introduce a virus” that “annihilates representative government and causes a State . . . to be not republican in form.”<sup>78</sup> It summarily rejected that argument on the grounds that Guarantee Clause claims are nonjusticiable.<sup>79</sup> Thus, while *Hildebrant* mentioned the Elections Clause, it neither held nor purported to explain why the electorate or a public referendum qualifies as a legislature under the Elections Clause. Rather, the *Hildebrant* Court failed to recognize that a distinct Elections Clause claim existed, and instead transmuted the plaintiff’s claim under that provision into a nonjusticiable Guarantee Clause argument.

In *Hawke v. Smith*, the Court held that the term legislature in the Article V Amendment Clause exclusively refers to “the representative body which ma[kes] the laws of the people.”<sup>80</sup> The Court distinguished *Hildebrant* by contending that the case held the Elections Clause “plainly

<sup>74</sup> *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (holding that the language of the Elections Clause “aptly points to the making of laws”); *Bush v. Gore*, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting) (stating that the Elections Clause and Presidential Electors Clause “call upon legislatures to act in a lawmaking capacity whereas [the Ratification Clause] simply calls on the legislative body to deliberate upon a binary decision”); see also Seth Barrett Tillman, *Betwixt Principle and Practice: Tara Ross’s Defense of the Electoral College*, 1 N.Y.U. J. L. & LIBERTY 922, 925–26 (2005) (book review) (contending that the term Legislature can “have a variety of meanings depending on context”). The Seventeenth Amendment also may be read in part as authorizing the enactment of legislation concerning the appointment of U.S. Senators. U.S. CONST. amend. XVII.

<sup>75</sup> 241 U.S. 565, 569 (1916).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (discussing U.S. CONST. art. IV, § 4).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 253 U.S. 221, 227 (1920).

gives authority to the State to *legislate*” concerning federal elections through public referenda.<sup>81</sup> Congress therefore could recognize a “referendum as part of the legislative authority of the State” under constitutional provisions dealing with the enactment of laws.<sup>82</sup> “Such legislative action,” the Court reasoned, “is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.”<sup>83</sup> *Hawke*’s premise—that *Hildebrand* purported to interpret the Elections Clause—is an overstatement. As discussed above, *Hildebrand* misinterpreted or avoided the Elections Clause issue by transmuting it into a Guarantee Clause claim.<sup>84</sup> In any event, *Hawke* never explained why the term legislature should be given different meanings under the Elections Clause and Article V (or the other constitutional provisions it surveyed). The Court pointed out that enacting statutes under the Elections Clause to regulate federal elections is a traditional legislative activity, while ratifying constitutional amendments under Article V is a quasi- or nonlegislative act.<sup>85</sup> It never explains, however, why this distinction requires or justifies attributing a different and unusual meaning to the term legislature. In light of the Constitution’s consistent use of that term throughout the rest of the document, there is a strong presumption that the Elections Clause and Presidential Electors Clause use it in the same manner—a presumption that neither *Hildebrand* nor *Hawke* overcomes.

The Court gestured toward these issues in *Smiley v. Holm*, in which it considered whether the Elections Clause permits a state’s governor to veto a state law regulating federal elections that the state’s institutional legislature enacted.<sup>86</sup> *Smiley* reiterated that, unlike most other constitutional provisions referring to legislatures, the Elections Clause grants them lawmaking authority.<sup>87</sup> The Court held, “As the authority is conferred for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments.”<sup>88</sup> *Smiley* never held that the term legislature should mean something other than a state’s institutional, representative lawmaking body. Rather, it concluded only that when such an entity exercises authority under the

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<sup>81</sup> *Id.* at 231 (emphasis added).

<sup>82</sup> *Id.* at 230.

<sup>83</sup> *Id.* at 231.

<sup>84</sup> See *supra* notes 76–79 and accompanying text.

<sup>85</sup> *Hawke*, 253 U.S. at 231.

<sup>86</sup> 285 U.S. 355, 365–66 (1932).

<sup>87</sup> *Id.* at 367.

<sup>88</sup> *Id.*

Elections Clause, it must do so subject to the standard lawmaking process set forth in the state constitution, including a gubernatorial veto.<sup>89</sup>

Thus, the holdings of both *Hawke* and *Smiley* are consistent with an intratextual reading of the term legislature as used in the Elections Clause and Presidential Electors Clause, and *Hildebrant* does not actually address the issue. The Supreme Court never identified any evidence that the Framers intended to use the term differently in those provisions than throughout the rest of the Constitution. Nor did it provide a persuasive explanation as to why the word should mean something different when referring to the exercise of a traditionally legislative power rather than a quasi- or nonlegislative power.

*The Federalist Papers* confirm that the term legislature bears the same meaning in the Elections Clause as it does in Article I, § 3, which permitted state legislatures to select U.S. senators. Federalist No. 59 explains that state legislatures seeking to undermine the national government are more likely to do so by abusing their power under the Elections Clause by refusing to hold House elections, than by refusing to appoint Senators.<sup>90</sup> The Elections Clause itself alleviates this risk by permitting Congress to impose its own rules for congressional elections if states fail to act.<sup>91</sup> The early *Commentaries* of both St. George Tucker<sup>92</sup> and Chancellor Kent<sup>93</sup> likewise discuss legislatures under Article I, § 3 and under the Elections Clause—often in the same sentence—without suggesting any potential differences in the term’s meaning. Kent also distinguished between having the legislature select presidential electors and allowing the “people at large” to do so, confirming that a power vested in a “legislature” may not be exercised directly by the electorate as a whole.<sup>94</sup>

Thus, the best reading of the word legislature as it appears throughout the Constitution, including in the Elections Clause and Presidential Electors Clause, is that it refers solely and exclusively to a state’s general lawmaking body comprised of elected representatives and cannot extend to other entities such as independent redistricting commissions.

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<sup>89</sup> *Id.* at 372–73.

<sup>90</sup> THE FEDERALIST NO. 59, at 302–04 (Alexander Hamilton) (Ian Shapiro ed., 2009) [<http://perma.cc/X7NB-QWTP>].

<sup>91</sup> *Id.* at 302.

<sup>92</sup> 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, note D, pt. 2, at 143–44 (Philadelphia, William Young Birch, and Abraham Small 1803) [<http://perma.cc/CP73-6ERC>].

<sup>93</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, pt. 2, lecture XI, at 210–12 (New York, O. Halsted 1826) [<https://perma.cc/3RA9-58BM>].

<sup>94</sup> *Id.*, pt. 2, lecture XIII, at 232.



## III. CONFIRMING THE INTRATEXTUAL CONCLUSION

Even compelling intratextual arguments can be further bolstered through outside confirmation.<sup>95</sup> Here, an intratextual interpretation of the term legislature is confirmed by the original understanding of that term in the Founding Era, as well as the independent state legislature doctrine that courts applied for well over a century and a half following the Constitution's enactment.

A. *Original Understanding*

An intratextual interpretation of the term legislature is consistent with a clause-bound approach that focuses on how that term was generally understood in the Founding Era. Any such textual analysis must begin with dictionaries from that period.<sup>96</sup> Matthew Hale's 1713 *The History of the Common Law of England* defines the British legislature as comprised of three parts: the King of the Realm and the two Houses of Parliament.<sup>97</sup> Citing Hale's work, Samuel Johnson's mid-1700s dictionary defines legislature as "the power that makes laws."<sup>98</sup> Several other Founding Era dictionaries utilized Johnson's definition verbatim.<sup>99</sup> James Barclay's dictionary both incorporates Johnson's definition and, in its accompanying discussion, explains that the legislature is comprised of the House of Lords and the House of Commons.<sup>100</sup>

Entities such as the Arizona Independent Redistricting Commission would not qualify as legislatures under the prevailing definition from the Founding Era for at least three reasons. First, those definitions' use of the definite article "the" implies the existence of a single legislature within each sovereign entity. They appear to preclude recognition of multiple entities within a state as legislatures. Second, the definitions refer to the exercise of a general lawmaking power. An entity specifically empowered only to enact certain kinds of laws or perform certain narrow functions (i.e., drawing congressional districts) would not qualify as a legislature. Third, drawing congressional districts arguably does not even qualify as "mak[ing] laws."

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<sup>95</sup> See *supra* note 41 and accompanying text.

<sup>96</sup> See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014) [<http://perma.cc/ULD5-NM5K>]; *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

<sup>97</sup> MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 2 (London, J. Nutt 1713) [<http://perma.cc/9T49-HRQB>].

<sup>98</sup> 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 32 (London, W. Strahan 1755) [<https://perma.cc/9WMC-XK4J>].

<sup>99</sup> E.g., CALEB ALEXANDER, *THE COLUMBIAN DICTIONARY OF THE ENGLISH LANGUAGE* 285 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1800); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* 360 (London, Charles Dilly, 2d ed. 1789).

<sup>100</sup> JAMES BARCLAY, *A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN* xli–xlii, 603 (London, J.F. and C. Rivington, 1792).

Perhaps more importantly, every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives with the authority to enact laws,<sup>101</sup> and most other references to legislatures throughout those documents are consistent with that understanding.<sup>102</sup> If the Elections Clause and Presidential Electors Clause used the term legislature in a broader capacity, they would apparently be the only provisions in any organic documents from the Founding Era to do so—not a single precedent in any state constitution supports a more expansive interpretation.

*The Federalist Papers* and Justice Story's *Commentaries on the Constitution* reinforce this interpretation. Federalist No. 59 and Section 814 of Story's *Commentaries*, which focus specifically on the Elections Clause, contend that there "were only three ways" in which the power to regulate federal elections could have been allotted: "it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or

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<sup>101</sup> DEL. CONST. of 1776, art. 2 ("The legislature shall be formed of two distinct branches; they shall meet once or oftener in every year, and shall be called, 'The general assembly of Delaware.'"); GA. CONST. of 1777, art. II ("The legislature of this State shall be composed of the representatives of the people . . . and the representatives shall be elected yearly . . ."); MD. CONST. of 1776, art. I ("THAT the Legislature consist of two distinct branches, a Senate and House of Delegates, which shall be styled, *The General Assembly of Maryland*."); MASS. CONST. pt. II, ch. I, § II, art. II; pt. II, ch. I, § III, art. I ("The Senate shall be the first branch of the legislature . . . There [also] shall be, in the legislature of this commonwealth, a representation of the people, annually elected . . ."); N.Y. CONST. of 1777, art. II ("[T]he supreme legislative power within this State shall be vested in two separate and distinct bodies of men . . . who together shall form the legislature . . ."); VA. CONST. of 1776, para. 2 ("The legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature."); see also N.H. CONST. of 1776, para. 4 (discussing "both branches of the legislature"); N.J. CONST. of 1776, art. VI (establishing the Council as "a free and independent branch of the Legislature of this Colony"); N.C. CONST. of 1776, declaration XVIII ("[T]he people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."); PA. CONST. of 1776, art. XVI ("[T]he people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances . . ."); S.C. CONST. of 1778, art. IX (providing that the "journal shall be laid before the legislature when required by either house").

The organic documents of Connecticut and Rhode Island did not refer to a legislature. CHARTER OF CT. of 1662; GOVERNMENT OF NEW HAVEN COLONY of 1643; CONST. OF THE COLONY OF NEW-HAVEN of 1639; FUNDAMENTAL ORDERS OF CT. of 1639; R.I. & PROVIDENCE PLANTATIONS CHARTER of 1663. See generally FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (1909) (collecting historical state and colony constitutions) [<https://perma.cc/48TM-HHU6>].

<sup>102</sup> DEL. CONST. of 1776, art. 3, 5, 12, 13, 16, 24, 25, 29; GA. CONST. of 1777, art. XII, XXXV, LI, LIV, LV, LXII; MASS. CONST. pt. II, ch. II, § III, art. V; *id.* pt. II, ch. II, § III, art. VII, *superseded by* MASS. CONST. amend. XXV; *id.* pt. II, ch. III, art. I–II; *id.* pt. II, ch. VI, art. II; *id.* pt. II, ch. VI, art. X, *annulled by* MASS. CONST. amend. XLVIII; MD. CONST. of 1776, declarations III, V, VII–XII, XX, XXVI, XXVIII, XXX, XXXIII–XXXV, XLII; *id.* art. II, XV, XVIII, XXVI, XLIII, LVI; N.J. CONST. of 1776, art. XIX; N.Y. CONST. of 1777, art. III, V, VI, XII, XV, XVIII; N.C. CONST. of 1776, declaration XXV; *id.* art. XLIII; PA. CONST. of 1776, § 9, 30–31, 33, 35, 37, 47; S.C. CONST. of 1778, art. II, XII–XXIV, XXXIV, XXXVIII.

primarily in the latter and ultimately in the former.<sup>103</sup> They explain that the Elections Clause embodies the final alternative.<sup>104</sup> These passages' contrast of the "national legislature," which refers exclusively to Congress, with "state legislatures" strongly suggests that the latter refers to a state's analogue to Congress: its institutional legislature, comprised of elected representatives, that exercises general lawmaking authority.

William Rawle's *A View of the Constitution* likewise states that the Elections Clause permits Congress to "make or alter" regulations governing federal elections, "except as to the *place* of choosing senators," in order to "guard against a refractory disposition, should it ever arise in the legislatures of the states," concerning the issue.<sup>105</sup> He explains that the Elections Clause's exception concerning the place of choosing senators "was proper, as congress ought not to have the power of convening the state legislature at any other than its usual place of meeting."<sup>106</sup> Thus, Rawle also treated the entity empowered to select senators as the same one delegated sole constitutional authority to regulate federal elections (subject only to congressional override).

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

Finally, the independent state legislature doctrine, which has been embraced by the Supreme Court, state courts, and both houses of Congress,<sup>107</sup> further confirms the accuracy of an intratextual interpretation of legislature. This doctrine recognizes that a state legislature's authority to regulate federal elections comes directly from the U.S. Constitution.<sup>108</sup> Consequently, a state constitution may neither impose substantive limits on the scope of a legislature's authority to regulate the time, place, or manner of federal elections, nor strip the legislature of its prerogative to do so. Arizona's Independent Redistricting Commission flatly violates the independent state legislature doctrine because the state constitutional amendment that created it purports to strip the legislature, as a matter of state constitutional law, of authority it derives directly from the U.S. Constitution.

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<sup>103</sup> THE FEDERALIST NO. 59, at 301 (Alexander Hamilton) (Ian Shapiro ed., 2009); *accord* 2 STORY, *supra* note 64, at § 814, at 281.

<sup>104</sup> THE FEDERALIST NO. 59, at 301–02 (Alexander Hamilton) (Ian Shapiro ed., 2009); 2 STORY, *supra* note 64, at § 814, at 281–82.

<sup>105</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 42 (Philadelphia, H.C. Carey & I. Lea 1825).

<sup>106</sup> *Id.*

<sup>107</sup> See Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 198–204 (2014) [<http://perma.cc/ZE3Y-UVYQ>].

<sup>108</sup> Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause.").

In 1892, the Supreme Court recognized the independent state legislature doctrine in dicta in *McPherson v. Blacker*.<sup>109</sup> It stated that the Presidential Electors Clause “operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power” concerning presidential elections, including through “any provision in the state constitution in that regard.”<sup>110</sup> This reasoning applies with equal force to congressional elections and the Elections Clause.

The Court went even further in *Leser v. Garnett*, in which it held that the doctrine also applies to a state legislature’s role in ratifying constitutional amendments under Article V.<sup>111</sup> It ruled that a legislature’s “function . . . in ratifying a proposed amendment to the Federal Constitution . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.”<sup>112</sup> A state constitutional provision purporting to prevent the legislature from ratifying certain amendments to the U.S. Constitution is therefore unenforceable.<sup>113</sup>

Several state courts similarly have relied on the independent state legislature doctrine as an essential component of their holdings concerning the Elections Clause and Presidential Electors Clause. For example, the Supreme Court of Rhode Island held in *In re Plurality Elections* that the state constitution may not “impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States without restraint.”<sup>114</sup> The court enforced a state law providing that a candidate had to receive only a plurality of votes in order to win a federal election, despite a state constitutional provision specifying that all candidates had to receive an absolute majority to prevail.<sup>115</sup>

Likewise, the Nebraska Supreme Court held that it was “unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature” and a particular provision of the state constitution.<sup>116</sup> It explained that a state constitution may not “circumscribe the legislative power’ granted by the Constitution of the United States” to regulate the selection of presidential electors.<sup>117</sup> Other courts have reached the same conclusion.<sup>118</sup>

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<sup>109</sup> 146 U.S. 1 (1892).

<sup>110</sup> *Id.* at 25.

<sup>111</sup> 258 U.S. 130, 135 (1922) [<http://perma.cc/FG53-VQPK>].

<sup>112</sup> *Id.* at 137.

<sup>113</sup> *Id.* at 136–37.

<sup>114</sup> 8 A. 881, 882 (R.I. 1887).

<sup>115</sup> *Id.*

<sup>116</sup> State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 287 (Neb. 1948).

<sup>117</sup> *Id.* (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

The U.S. House of Representatives adopted the independent state legislature doctrine in resolving an election challenge in *Baldwin v. Trowbridge*.<sup>119</sup> The House upheld the validity of votes cast in a congressional election pursuant to a state law that authorized voting by military members who were absent from their districts on Election Day, despite a state constitutional provision requiring that all votes be cast in person.<sup>120</sup> Similarly, in a report on the Electoral College, the U.S. Senate Committee on Privileges and Elections concluded that a state legislature's power under the Presidential Electors Clause to regulate presidential elections cannot be:

[T]aken from [state legislatures] 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.<sup>121</sup>

Numerous commentators have embraced the independent state legislatures doctrine,<sup>122</sup> while others have rejected it.<sup>123</sup> Its longstanding

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<sup>118</sup> See, e.g., *In re Opinion of Justices*, 45 N.H. 595, 601 (1864) (holding that, because a State legislature's "authority . . . to prescribe the time, place and manner of holding elections for representatives in Congress," is derived from the Elections Clause, "[t]he constitution and laws of this State are entirely foreign to the question"); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944). Modern courts also occasionally apply the independent state legislature doctrine. See, e.g., *PG Publ'g Co. v. Aichele*, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012) (noting that the Pennsylvania legislature's authority to regulate the manner in which congressional and presidential elections are conducted stems from the U.S. Constitution and "is not circumscribed by the Pennsylvania Constitution") [<http://perma.cc/L9MF-JLU5>].

<sup>119</sup> D.W. BARTLETT, DIGEST OF ELECTION CASES, H.R. MISC. DOC. NO. 41-152, at 46–47 (1870).

<sup>120</sup> 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 856 (1907); see also *In re Holmes*, 1 *id.* § 525.

<sup>121</sup> S. REP. NO. 43-395, at 9 (1874).

<sup>122</sup> See, e.g., Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917) ("[T]he exercise of such power [to regulate presidential elections] is given to the state legislature subject to no restriction from the state constitution.") [<http://perma.cc/4T2P-4LXL>]; Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 835 (2001) ("Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail.") [<http://perma.cc/3YHA-66AY>]; James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) ("[S]tate legislatures are limited by constitutional provisions for veto, referendum, and initiative in prescribing the manner of choosing presidential electors, but . . . state constitutional provisions concerning suffrage qualifications and the manner of choosing electors do not limit the substantive terms of legislation.") [<http://perma.cc/98JQ-PZP5>].

<sup>123</sup> See, e.g., Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 783–84 (2001) (arguing that the Founders did not construe the Presidential

history and acceptance by state and federal courts, as well as both houses of Congress, however, confirms the validity of an intratextual interpretation of the Elections Clause and Presidential Electors Clause. The legislature, as referenced in those provisions, is the state's general lawmaking body, and its power under the federal Constitution to regulate federal elections may not be reduced or withdrawn by state constitutions.

#### IV. CONCLUSION

Because of the Constitution's numerous references to state legislatures, an intratextual approach sheds compelling light on the term's proper meaning in the Elections Clause and Presidential Electors Clause. The text, context, drafting history, contemporaneous interpretations, and history of subsequent judicial interpretation of the numerous other constitutional provisions referring to legislatures collectively confirm that the term refers exclusively to the elected body of representatives within each state that exercises general lawmaking authority. Neither the Supreme Court nor academic commentators have provided a persuasive reason for concluding that, despite the consistent use of the term throughout most of the Constitution, it should be given a different and unusual construction solely for purposes of the Elections Clause and Presidential Electors Clause.

In particular, there is no basis for concluding that the word legislature as used in the Elections Clause and Presidential Electors Clause refers broadly to a state's "lawmaking authority," allowing a state's voters to directly regulate federal elections through public initiatives or referenda. Likewise, because the Constitution specifically empowers the state legislature to regulate the "Time, Place and Manner" of federal elections, attempts to allow outside entities such as the Arizona Independent Redistricting Commission to determine the boundaries of congressional districts violate the U.S. Constitution.

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Electors Clause as authorizing state legislatures to act independently of state constitutions) [<http://perma.cc/F49X-QE9Z>]; see also Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001) (accepting Smith's conclusion that "as a matter of historical practice, state legislatures were not understood at the time to be more 'independent' by virtue of Article II of the constraints and conditions on their power than they were when acting pursuant to any other source of authority") [<http://perma.cc/DFZ9-77B9>]; David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 748 (2001) ("It is far from clear what the relationship is between a state's constitution and the power that a state 'legislature' may exercise under Article II, Section 1 to 'direct' the 'manner' in which electors are appointed.") [<http://perma.cc/L683-F53Q>].