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Cover Page Footnote

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NOTES

DIRECT DEMOCRACY AND THE ELECTORAL COLLEGE: CAN A POPULAR INITIATIVE CHANGE HOW A STATE APPOINTS ITS ELECTORS?

*Michael McLaughlin**

This Note explores the constitutionality of a proposed popular initiative in California that would direct the manner in which the state appoints presidential electors. Article II, Section 1, Clause 2 of the U.S. Constitution gives the state legislature the power to direct the manner in which the state appoints its presidential electors. The issue presented in this Note is whether a popular initiative qualifies as a "state legislature" under Article II, Section 1, Clause 2. To answer this question, this Note first examines the history of the Elector Appointment Clause, with respect to the Electoral College and in light of the Constitution's preference for representative lawmaking. Next, it explores the legal development of the clause's meaning and how the U.S. Supreme Court has interpreted the term "state legislature" in other constitutional provisions. This Note ultimately concludes that the lack of voter accountability for an initiative makes it susceptible to manipulation and inconsistent with the purpose of the Electoral College.

INTRODUCTION

The 2000 election reminded the American public that election rules matter.[1] Voters were forced to confront the hard fact that the national popular vote does not elect the President. Instead, the will of the people runs through the complex machinery of the Electoral College, a conceptual contraption of weights and counterweights. The dispute in *Bush v. Gore*[2] showed that a dexterous legal manipulation of the Electoral College's many moving parts could make a President.

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1. *See* Robin Toner, *Election Quandary Prompts Pop Civics Test*, N.Y. Times, Nov. 9, 2000, at B8 (describing how theoretical and abstract debates about the Electoral College suddenly became very real).

2. 531 U.S. 98 (2000). *See generally* 36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis (John W. Wright ed., 2001).

No Electoral College rule holds more election-altering potential than Article II, Section 1, Clause 2 of the U.S. Constitution, which declares that each state shall appoint its electors "in such Manner as the Legislature thereof may direct."[3] This provision, referred to here as the Elector Appointment Clause, gives state legislatures broad discretion to direct the state's mode of appointment.[4] The legislature can decide that the state will appoint electors by statewide popular vote, district popular vote, or even by the legislature itself.[5] Before statewide popular vote became the norm in the mid-nineteenth century, state legislatures experimented with many different modes of appointing electors.[6] The first presidential elections showed that this freedom of decision makes the manner of appointment vulnerable to political manipulation,[7] as state legislatures, led by some of the Constitution's framers, created rules to advance particular candidates.[8]

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3. U.S. Const. art. II, § 1, cl. 2. The entire clause reads,

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Id. Elsewhere, Article II defines the procedures that electors must follow when casting votes, the rules by which Congress counts elector votes, and the contingency election that occurs if no candidate receives a majority of the electors' votes. *See id.* art. II, § 1, cl. 3.

4. *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892) (noting that the U.S. Constitution does not provide a specific mode for appointing electors, but instead "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").

5. *See* William Rawle, A View of the Constitution of the United States of America 55 (William S. Hein & Co., Inc. 2003) (2d ed. 1829) ("At present, (1824,) the electors are chosen by the people in seventeen of the twenty-four states, either by a general ticket, or in districts fixed by the legislature. In the remaining seven, the legislature has reserved to itself the power of appointing them.").

6. *See* Neal R. Peirce & Lawrence D. Longley, The People's President: The Electoral College in American History and the Direct Vote Alternative 45–47 (rev. ed. 1981) (explaining that direct "choice by the legislature was the most widely used method in the first four elections"; popular vote by district was the system "favored by many of the Nation's most distinguished early statesmen"; and statewide popular vote was rapidly adopted in the 1820s and became the chosen mode of all but one state by 1836 (emphasis omitted)); *see also McPherson*, 146 U.S. at 28–36 (describing the various modes states used in early elections to appoint electors).

7. *See* Peirce & Longley, *supra* note 6, at 37 (recounting that the 1800 campaign "prompted the leading politicians of both parties to rig the methods of choosing electors in their respective states to maximize their own electoral vote and minimize the opposition's"); *id.* at 45 (noting that, because legislative appointment "involved no reference to the people," when "state legislatures saw a chance that the candidate of their party would be defeated in the popular choice of electors, they sometimes revoked previous laws permitting popular election and took the *appointment* of electors back into their own hands"). *See generally* Tadahisa Kuroda, The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804, at 83–98 (1994) (describing various efforts by state legislatures to manipulate the outcome of the 1800 election).

8. *See* Peirce & Longley, *supra* note 6, at 37 ("Several members of the Constitutional Convention, men who had declared so confidently in 1787 that they had protected the election of the president against intrigue and cabal, were at the forefront of the effort."); *see also* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 Va. L. Rev. 551, 583 (2004) (claiming that the electoral system became the

In modern elections, if the state legislature were to change the manner of appointment from a statewide general ticket to a proportionate or district system, the candidate who would have lost the statewide vote would gain a share of the state's electors.[9] This previously unavailable share of electoral votes could change the outcome of the national election.[10] Yet there are reasons why a state legislature might resist amending its general ticket system. If the political party that controls the legislature backs the presidential candidate likely to win the statewide vote, the legislature may not change the rules in a way that would harm its candidate.[11] Even when a rule change would benefit the legislature's preferred candidate, accountability to the electorate might keep the legislature from diminishing the state's voting power in the national election[12] or from engaging in partisan rule making.[13]

To avoid the obstacles presented by state legislatures, reformers have sought to change state elector appointment rules by popular initiatives.[14]

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object of intense partisanship, and that "parties used their political power to manipulate the process of selecting electors—shifting to legislative selection, or changing the mode of popular choice, depending on their perception of partisan advantage").

9. *See* Hendrik Hertzberg, *Votescam*, New Yorker, Aug. 6, 2007, at 21, 21 (predicting that the initiative, "if passed, would spot the Republican ticket something in the neighborhood of twenty electoral votes"); Vikram David Amar, *The So-Called Presidential Election Reform Act: A Clear Abuse of California's Initiative Process*, FindLaw, Aug. 17, 2007, http://writ.news.findlaw.com/amar/20070817.html (calculating that the California district system would have given George W. Bush twenty-two electoral votes if it had been in place in 2004).

10. *See* Hertzberg, *supra* note 9, at 21–22.

11. *See* Charles A. O'Neil, The American Electoral System 73–74 (N.Y., G.P. Putnam's Sons 1887) (describing the schemes designed by the state legislature of Pennsylvania to use manner of appointment powers to manipulate the 1800 election); Peirce & Longley, *supra* note 6, at 36–39, 44–45 (noting state legislatures that made the manner of appointment decision to maximize political preference in the 1800 and 1812 elections).

12. *See* Judith Best, The Case Against Direct Election of the President: A Defense of the Electoral College 23 (1975) (describing that the unit or general ticket rule spread and prevailed generally over a district system "because those states that did not consolidate their electoral power were believed to have less influence and less strength than those that did consolidate").

13. In North Carolina, a state where Republicans are the majority party, the North Carolina legislature is controlled by Democrats. In 2007, the legislature proposed to switch to a district system. *See* Bob Herbert, Op-Ed., *GOP's Dirty Tricks Begin*, N.Y. Times, Sept. 18, 2007, at A27; Jennifer Steinhauer, *Frustrated States Try to Change the Way Presidents Are Elected*, N.Y. Times, Aug. 11, 2007, at A1; Progressive Democrats of North Carolina, 2007 Legislative Policy Priorities For the NC General Assembly, http://www.progressivedemocratsnc.org/blog/node/64 (last visited Mar. 31, 2008) (resolving that the Democratic Party of North Carolina will "use all of its influence to encourage the 2007 General Assembly to . . . introduce and support" a bill to appoint presidential electors by district in time for its use in the 2008 presidential election). The bill was tabled in summer 2007 in response to pressure from national Democratic leadership. *See* Steinhauer, *supra*. The bill was sent back to committee in response to pressure from national Democratic leadership. *See* S.B. 353, 2007 Gen. Assem., Reg. Sess. (N.C. 2007) (reporting that the bill has been in committee since July 30, 2007).

14. Colorado proposed a popular initiative in 2004 that would have adopted a proportionate system for appointing electors. The initiative, which ultimately was defeated by voters, would have divided the state's electoral votes to the benefit of the candidate who

California citizens proposed such an initiative in 2007 that would enact a district-based system of elector appointment for the 2008 presidential election.[15] The initiative's supporters argued that district-based appointment would better capture the state's political diversity, increase the importance of individual votes, and draw national attention to local issues.[16] However, critics claimed the initiative's rhetoric cloaked a political scheme designed to benefit the party likely to lose a statewide election.[17]

Because the California initiative would determine the manner in which the state appoints electors without involving the California legislature, it arguably violates Article II, Section 1, Clause 2 of the Constitution, which vests this power in "the Legislature" of each state.[18] However, the Constitution uses the term "state legislature" in two separate ways.[19] The term "legislature" sometimes refers to the lawmaking power of the state, as defined by the allocation and processes laid out in the state constitution.[20] At other times, the Constitution uses the term "legislature" to refer to the formal body of representatives that assembles at the state capital.[21] The initiative's constitutionality turns on which sense of state "legislature" Article II addresses.

This Note discusses the meaning of Article II, Section 1, Clause 2 and evaluates whether the California initiative violates it. Part I discusses the proposed initiative's place under California law and examines the Elector Appointment Clause in historical, textual, and structural contexts. Part II analyzes the constitutionality of the proposed initiative under this

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would have lost the statewide vote. *See* David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect That Change*, 25 Rev. Litig. 575, 587–90 (2006) (explaining how proportionate systems allow electoral minority candidates to receive a share of a state's electoral votes, and describing the specifics of the proposed Colorado initiative).

15. *See* Letter from Thomas W. Hiltachk, Californians for Equal Representation, to Patricia Galvin, Office of the Att'y Gen. (July 17, 2007) [hereinafter Cal. Initiative No. 07-0032], *available at* http://ag.ca.gov/cms_attachments/initiatives/pdfs/2007-07-17_07-0032_Initiative.pdf. The proposed initiative would rescind the current system that appoints all fifty-five of the state's electors to the candidate with the largest statewide popular vote and enact a district-based system. *See id.*

16. *See* Electoral Reform Cal., http://electoralreformcalifornia.com (last visited Mar. 4, 2007) (arguing that the initiative is "[r]eally a [g]ood [i]dea").

17. *See* Hertzberg, *supra* note 9, at 21–22; Amar, *supra* note 9.

18. *See* U.S. Const. art. II, § 1, cl. 2; Amar, *supra* note 9.

19. *See* John R. Koza et al., Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote 291–92 (2006) (defining the two constitutional meanings of state "legislature" as "the state's two legislative chambers—that is, the state house of representatives and the state senate agreeing on a common action" and "the state's law-making process—that is, the process of enacting a state law" (emphasis omitted)).

20. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932) (holding that laws passed pursuant to Article 1, Section 4, which gives state legislatures power to prescribe the time, place, and manner of congressional elections, are subject to the lawmaking processes defined by the state constitution including gubernatorial veto).

21. *See* Hawke v. Smith, 253 U.S 221, 227–28 (1920) (noting that, in the context of Article V, which empowers state legislatures to ratify amendments, the Constitution's use of "legislature" refers only to the state's representative lawmaking body and precludes subjecting the legislature's ratification to a popular referendum).

framework. Part III concludes that because mechanisms of direct democracy are more likely to lead to unfair and illegitimate presidential elections, Article II should be read to exclude a state from directing the manner of appointment by popular initiative.

I. THE ORIGINS OF THE DEBATE

The current debate over the California initiative has deep historical roots. Although the Elector Appointment Clause received little attention during the Constitutional Convention, it became a source of controversy during the 1800 election due to allegations that the clause was being used to manipulate outcomes.[22] After many failed efforts to reform the Electoral College,[23] the clause's meaning remains unsettled, making it a ready vehicle for manipulation even today. This part examines the clause from historical, functional, and textual perspectives in order to resolve this conflict.

Part I.A defines the initiative power under the California Constitution and describes the mechanics of the proposed initiative. It then discusses how the initiative could change the national election. Part I.B examines the clause in original, historical, and functional contexts. It first explores the original meaning of Article II in light of the purposes behind the Electoral College and the opinion of direct democracy held by the framers of the Constitution. Next, Part I.B traces the historical meaning of the clause over the course of the country's history. Finally, this part describes how the nature of the function that the Constitution requires a state legislature to perform drives the meaning of the term "state legislature" in other provisions of the Constitution.

A. *The Proposed California Initiative*

The California popular initiative power grew out of frustration with the corruption and inactivity[24] of representative government.[25] Enacted in the early twentieth century, the popular initiative was a progressive reform designed to reduce the control of private interest groups on lawmaking and

22. *See* O'Neil, *supra* note 11, at 70–77 (describing the political maneuvering and controversy surrounding the Elector Appointment Clause in the 1800 election).

23. *See* Letter from James Madison to George Hay (Aug. 23, 1823), *in* IX The Writings of James Madison 147, 151 (Gaillard Hunt ed., 1910) (responding favorably to George Hay's proposal for a constitutional amendment that would create a national uniform system of presidential election by districts).

24. *See* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11, 14 (1997) (explaining that the initiative was designed to remedy "sins of omission" by the legislature).

25. *See id.* at 30–31 (recounting that California was controlled by a few powerful interest groups at the turn of the twentieth century, and direct democracy mechanisms were viewed as a way to release the people from the "stranglehold of 'misrepresentative government'").

break the legislative monopoly of formal assemblies.[26] The California Constitution currently provides that the legislative power is "vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."[27] The Supreme Court of California has interpreted this provision to mean "the power to legislate is shared by the Legislature and the electorate through the initiative process."[28] Statutes passed by initiative have equal status in California with statutes passed by the California legislature.[29]

Using this initiative power, California citizens proposed a popular initiative in 2007 that would change the state's manner of appointing electors to a district-based system.[30] The initiative was designed to go into effect before the 2008 presidential election.[31] California currently gives all of its fifty-five[32] electoral votes to the winner of the statewide plurality.[33] The initiative would have amended the system by giving candidates one electoral vote for winning the plurality within each of the state's fifty-three congressional districts, and awarding the statewide plurality winner the state's other two electoral votes.[34] Supporters trumpeted the many benefits of the initiative.[35] Critics, though, decried the initiative because it would have had the practical effect of favoring a Republican candidate who would likely lose the popular vote in this historically Democratic state.[36] However, the initiative's failure to receive the requisite signatures to appear on a 2008 ballot forestalled this political controversy.[37]

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26. *See id.* at 23 (explaining that, although not all progressives viewed the initiative as an end in itself, they all recognized direct democracy mechanisms "as means toward the end of removing the corrupting influences which straitjacketed the political system into acquiescence to the social afflictions accompanying industrialization").

27. Cal. Const. art. IV, § 1.

28. Prof'l Eng'rs in Cal. Gov't v. Kempton, 155 P.3d 226, 240 (Cal. 2007).

29. *See* Indep. Energy Producers Ass'n v. McPherson, 136 P.3d 178 (Cal. 2006).

30. *See* Cal. Initiative No. 07-0032, *supra* note 15, at 2.

31. *See id.*

32. *See* Jennifer Steinhauer & Raymond Hernandez, *In Ballot Fight, California Gets a Taste of '08*, N.Y. Times, Oct. 4, 2007, at A1.

33. *See* Cal. Elec. Code § 6902 (West 2008).

34. *See* Cal. Initiative No. 07-0032, *supra* note 15, at 2.

35. *See* Electoral Reform Cal., *supra* note 16 (arguing that the initiative would be good for the state because it would return voting power to the people; reinforce the founders' notion of representative government; make California a "competitive market" for candidates; bring money into the state; increase the value of independent, local, and rural voters; reflect the state's "political demography"; and enhance the importance of swing voters and districts; and because it is "the fairest system possible").

36. *See* Hertzberg, *supra* note 9, at 21–22; Steinhauer & Hernandez, *supra* note 32 (noting that the effect of the initiative would be to give "the 2008 Republican nominee twenty of the state's fifty-five votes—the rough equivalent of winning Illinois or Pennsylvania—in this otherwise reliably Democratic state").

37. *See* Debra Bowen, Cal. Sec'y of State, 2008 Initiative Update, http://www.sos.ca.gov/elections/elections_j.htm (last visited Mar. 30, 2008) (defining Initiative No. 07-0032 as "failed" as of February 19, 2008). Supporters plan to resubmit the initiative to the attorney general. *See* Electoral Reform Cal., *supra* note 16.

The initiative's national impact led both the Democratic and Republican parties to take the proposed initiative seriously.[38] After reports surfaced that the leading proponent of the initiative was a significant contributor to the campaign of Republican candidate Rudolph Giuliani,[39] supporters of Democratic candidate Hillary Clinton mobilized to defeat the measure.[40] Clinton supporters raised $200,000 for an anti-initiative campaign and filed a complaint with the Federal Election Commission.[41] The controversy led the initiative's drafter to resign and some Republican leaders to distance themselves from the effort.[42]

In addition to engendering this political controversy, the proposed initiative fostered legal debate over whether the Constitution permits a state to use a popular initiative to define its manner of elector appointment. To help answer this question, this Note next explores what the framers understood the phrase "in such Manner as the Legislature thereof may direct"[43] to mean.

B. *The Original Meaning*[44]

The framers never expressly said whether lawmaking by popular initiative was permissible under the Elector Appointment Clause.[45] Whether this power is granted to state assemblies to the exclusion of popular initiative lawmaking can only be determined by examining the context of the clause. Contextual analysis, though potentially helpful, requires inference and offers few express answers.

This part analyzes two contextual aspects. First, it examines the clause's role in the larger scheme of the Electoral College. Next, it queries whether the clause's delegation to state legislatures was a meaningful element of the compromise struck in Philadelphia, or whether it was only boilerplate language that was meant to postpone the controversy of the elector appointment question to some later date. If the delegation to state

38. *See* Steinhauer & Hernandez, *supra* note 32.

39. *See id.* ("One of Mr. [Rudolph] Giuliani's top fundraisers, Paul Singer, a New York City hedge fund executive, donated nearly all the money raised so far in support of the measure—roughly $170,000 . . . .").

40. *See id.* (noting that efforts to topple the measure were led by Chris Lehane, an attorney close to Senator Hillary Clinton's presidential campaign, who "first raised the alarm bells . . . and then encouraged Howard Dean, the Democratic Party chairman, and other national democrats to oppose it loudly.").

41. *See id.* (explaining that the complaint questioned the ties of the Giuliani campaign because Singer did not immediately reveal himself to be behind the effort).

42. *See id.*

43. U.S. Const. art. II, § 1, cl. 2.

44. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.").

45. *See* Peirce & Longley, *supra* note 6, at 24 (explaining that the debates never discussed the limits or definition of the power given to state legislatures by Article II, Section 1, Clause 2).

legislatures bears weight in the Electoral College compromise, it makes sense to use the purposes of the Electoral College to inform the meaning of the clause. However, if the clause was only meant to avoid debate, it makes less sense to worry about its consistency with the theoretical purposes of the Electoral College.[46]

This part then examines the Constitution's view of direct democracy. The modern popular initiative did not exist during the framing,[47] but the choices the framers made in creating the Constitution's legislative system may provide clues for whether the delegation of the power to appoint electors to the "Legislature thereof" authorizes lawmaking by popular initiative. To the extent that state legislatures perform a federal function or implicate a special federal interest when determining the manner of elector appointment, the federal view of direct democracy might help interpret whether the proposed California initiative is constitutional.

1. The Context of the Electoral College

In its system of electing the President, the Constitution provides in Article II, Section 1, Clause 2 that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[48] Delegates adopted this clause after months of debate over the proper operation of presidential elections.[49] In the end, they settled on a compromise in the twilight of the Convention that left the manner of appointment decision to the legislature of each state.[50] The delegates left no direct record for why this power was vested

46. *See* Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 Colum. L. Rev. 350, 357 (2003) (arguing that use of the term "legislature" had two possible original purposes under Article II: either the term "may not have been carefully chosen and was instead merely intended to give the power in question to the states" or the word "was carefully chosen specifically to be a delegation to the state legislature, as opposed to the state executive or judiciary").

47. *See* Charles Sumner Lobingier, The People's Law or Participation in Popular Law-Making 358–66 (Gaunt Inc. 2001) (1909) (noting that the referendum and initiative existed in the American colonies before the Revolutionary War for specific measures, but a general initiative and referendum power that applies to all legislation did not develop until the turn of the twentieth century); *see also* James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Electors*, 27 Law & Contemp. Probs. 495, 501 (1962) (stating that "referendum and initiative were nonexistent" at the time of the Constitutional Convention).

48. U.S. Const. art. II, § 1, cl. 2.

49. *See* Kuroda, *supra* note 7, at 10 (suggesting that, in addition to the heavily debated modes of legislative appointment, direct election, and intermediate electors, the delegates heard "proposals for more than a dozen other modes for choosing the executive, some of them bizarre"). Hugh Williamson of North Carolina introduced the creative idea that the legislature should elect "three executives—one each for the northern, middle, and southern states." *Id.*

50. *See* James Madison, Journal of the Federal Convention 654–56 (Books for Libraries ed. 1970) (E.H. Scott ed., 1840) [hereinafter Journal of the Federal Convention] (statement of James Madison, Sept. 4, 1787) (chronicling the introduction of the basic language of the clause to the general convention, less than two weeks before the convention adjourned).

specifically in state legislatures,[51] nor any clear indication of whether this power rested exclusively in each state's assembly or generally in the lawmaking power of the state.[52]

However, the delegates thoroughly documented their general purposes for adopting the Electoral College. The debates suggest that the delegates crafted the Electoral College to tailor compromises struck elsewhere in the Constitution to the unique concerns posed by presidential elections.[53] Since the Elector Appointment Clause functioned as an element of this chosen scheme, the general purposes and compromises of the Electoral College may inform the meaning of the clause.

The delegates built the Electoral College to protect the presidential election from particular dangers, while still following the basic constitutional design.[54] Harmony with the larger Constitution meant striking notes of executive independence[55] and state equality;[56] orchestrating the specifics of a presidential election required hushing the dissonance of foreign intrigue and corruption[57] through movements capable of practical execution.[58] Reconciling these indispensable interests would

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51. *See* Peirce & Longley, *supra* note 6, at 24.

52. *See* Kirby, *supra* note 47, at 501; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U. L. Rev. 731, 743 (2001) ("At the Constitutional Convention, the Founders did not specifically address whether state legislatures operate independently of their state constitutions when they exercise their Article II powers.").

53. *See* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. Am. Hist. 35, 57–58 (1986) (arguing that the Electoral College included practical methods to protect elections, but was also informed by "the need to resolve the central dispute at Philadelphia, namely the large state-small state controversy"); *see also* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 Vand. L. Rev. 2099, 2115–17 (2001); Joy McAfee, *2001: Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000*, 32 Cumb. L. Rev. 643, 646–48 (2001). For a discussion of the practical concerns that motivated the Electoral College, see generally Peirce & Longley, *supra* note 6.

54. *See* Peirce & Longley, *supra* note 6, at 23 (noting how the plan adopted by the delegates was a compromise that satisfied different interests).

55. *See* Journal of the Federal Convention, *supra* note 50, at 365 (statement of Gouverneur Morris, July 17, 1787) (arguing that, if Congress selects the President, the President "will be the mere creature of the Legislature"); *see also* Slonim, *supra* note 53, at 39–40.

56. *See* Journal of the Federal Convention, *supra* note 50, at 432 (statement of Hugh Williamson, July 25, 1787) ("The principal objection against an election by the people seemed to be, the disadvantage under which it would place the smaller States."); *see also* Festa, *supra* note 53, at 2112–13; McAfee, *supra* note 53, at 646.

57. *See* Journal of the Federal Convention, *supra* note 50, at 365 (statement of Gouverneur Morris, July 17, 1787) ("If the Legislature elect, it will be the work of intrigue, of cabal, and of faction; it will be like the election of a pope by a conclave of cardinals . . . ."); *see also* The Federalist No. 68, at 393 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.").

58. *See* Journal of the Federal Convention, *supra* note 50, at 367–68 (statement of George Mason, July 17, 1787) ("[A] government which is to last ought at least to be practicable."); Peirce & Longley, *supra* note 6, at 21 (noting that Roger Sherman found the

lead the delegates to reject alternatives of appointment by the national legislature, direct popular election, and appointment by state legislatures.[59]

Although the Convention initially embraced the appointment of the President by Congress, and the delegates often returned to the mode throughout the summer, they ultimately rejected it. Their primary fear was that legislative appointment would make the executive too dependent on Congress,[60] increasing the risk of tyranny through the aggrandizement of legislative power.[61] Further, delegates worried that Congress could be easily corrupted and influenced by foreign governments.[62] By August 1787, the delegates finally removed legislative appointment from consideration.

Popular election, the other primary option early in the debates, ultimately failed as well for a number of reasons. Some delegates worried that popular election would disrupt the hard fought power balance between states reached elsewhere in the Constitution, favoring larger states and the national government while leaving small states underrepresented in the election of the President.[63] Others believed that due to the localized nature of politics at the time, it would be logistically difficult to reach a national consensus.[64] Further, delegates expressed concerns that the popular electorate would be too uninformed and impressionable to dangerous influences to choose the best candidate properly.[65] Finally, delegates worried that private interests would manipulate the people.[66] The combined effect of these risks doomed a popular election system.

As an alternative to legislative appointment and popular election, delegates briefly considered appointment of the executive by the state

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proposal for direct popular election "impractical" because people would end up only voting for candidates in their own state).

59. *See* Slonim, *supra* note 53, at 47 (describing the failure of the other plans debated by the delegates before the creation of the Electoral College).

60. Peirce & Longley, *supra* note 6, at 20.

61. *See* The Federalist No. 48 (James Madison), *supra* note 57, at 311 ("[T]he legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.").

62. *See* Journal of the Federal Convention, *supra* note 50, at 431 (statement of Pierce Butler, July 25, 1787) ("The two great evils to be avoided are, cabal at home, and influence from abroad. It will be difficult to avoid either, if the election be made by the National Legislature."); *id* at 432 (statement of Hugh Williamson, July 25, 1787) (stating that "strong objections" lay against election of the Executive by the Legislature because it would open "a door for foreign influence").

63. *See id.* at 366 (statement of Charles Pickney, July 17, 1787) (expressing concerns that in popular elections, the most "populous States, by combining in favor of the same individual, will be able to carry their points").

64. *See id.* at 366–67 (statement of Gouverneur Morris, July 17, 1787).

65. *See id.* at 367–68 (statement of George Mason, July 17, 1787) ("[I]t would be as unnatural to refer the choice of a proper character for Chief Magistrate to the people, as it would, to refer a trial of colors to a blind man. The extent of the country renders it impossible, that the people can have the requisite capacity to judge . . . the candidates.").

66. *See id.* at 433 (statement of Elbridge Gerry, July 25, 1787) ("A popular election in this case is radically viscous. The ignorance of the people would put it in the power of some one set of men . . . acting in concert, to delude them into any appointment.").

governments.[67] Some believed that appointment by state governments could maintain proper separation of powers and strengthen the connections between state and national governments.[68] It would also offer the practical benefits of allowing a feasible election process[69] and producing better candidates.[70] The framers empowered state legislatures to appoint senators in Article I, Section 3[71] under similar rationales of filtering popular will and giving states a role in the federal system.[72] At the Convention, Elbridge Gerry argued that the Senate's rationale should extend to all the constitutional election systems to further ties between state governments and the national government.[73] Yet, despite these arguments, the delegates

67. *See* The Records of the Federal Convention of 1787, at 80 (Max Farrand ed., 1937) (statement of Elbridge Gerry, June 2, 1787); Journal of the Federal Convention, *supra* note 50, at 388 (statement of Oliver Ellsworth, July 19, 1787).

68. *See* Journal of the Federal Convention, *supra* note 50, at 388 (statement of Elbridge Gerry, July 29, 1787) (noting that allowing states to appoint electors would "form a strong attachment in the states to the National system").

69. *See id.* at 418 (statement of William Houston, July 21, 1787) (suggesting that state legislatures should appoint electors due to the "extreme inconveniency and the considerable expense of drawing together men from all the States for the single purpose of electing the chief magistrate").

70. *See* The Records of the Federal Convention of 1787, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (preferring legislative appointment because the people were "too little informed of personal characters in large districts, and liable to deceptions"). *But see* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 283 (2002) (arguing that the delegates proposed that state legislatures appoint electors in order not to "remedy the perceived shortcomings of direct election by the people, but to retain the critical link between the president and the people").

71. The Seventeenth Amendment provided for election of senators by direct popular vote, displacing state legislative appointment of senators under Article I, Section 3. *See* U.S. Const. amend. XVII, cl. 1; Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1352–55 (1996) (explaining that the movement for direct popular election of senators was driven by perceptions that state legislative appointments were corrupt, improperly driven by private interest groups, unrepresentative of the public will, prone to long delay when filling vacant seats, and more concerned with national than local interests). Like senatorial election reform, the popular initiative movement aimed to break the perceived corruption and unresponsiveness of state legislatures caused by powerful private interests. *See* Persily, *supra* note 24, at 27–28 (describing that some progressives "saw in direct democracy both a liberation from the railroad trusts which dominated their state politics and the statewide realization of the dream of government of, by, and for the people" (internal quotation marks omitted)).

72. *See* The Federalist No. 62 (James Madison), *supra* note 57, at 364–65 (stating that the appointment of senators by state legislatures "is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems."); Amar, *supra* note 71, at 1352 (contending that the framers chose legislative election in Article I, Section 3 to "safeguard the existence and interests of state governments," to create harmony between state and federal governments, and, to a lesser degree, to filter popular passion and produce more qualified senators).

73. *See* Journal of the Federal Convention, *supra* note 50, at 388 (statement of Elbridge Gerry, July 29, 1787) ("The people of the States will then choose the first branch [of the National Legislature]; the Legislature of the States, the second branch of the National

voted down the proposal for appointment by state legislatures out of concerns that it would give state legislatures too much influence over the President.[74]

The Electoral College scheme of state-appointed electors was crafted as a palatable alternative that protected against the specific risks posed by a presidential election and maintained the compromises struck elsewhere in the Constitution.[75] Particular fears of foreign intrigue and corruption were diminished through a system of disinterested and geographically dispersed electors.[76] Delegates answered concerns that direct popular vote would be difficult to conduct and susceptible to irrational decision making by placing actual voting power in a small and deliberative body of electors.[77]

In addition, the Electoral College reinforced the compromises of federalism and separation of powers.[78] The system gave each state a number of electors equal to the state's combined representatives in the House and Senate.[79] This benefited large states by incorporating the

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Legislature; and the Executives of the States, the National Executive."). At other times during the debates, Elbridge Gerry argued that state legislatures should appoint the President. *See id.* at 91 (statement of Elbridge Gerry, June 2, 1787); *see also* Smith, *supra* note 52, at 753–54 (describing the apparent similarity between Gerry's rationale for appointment of electors by state legislatures and James Madison's justifications for the Article I, Section 3 state legislative appointment of senators). According to Hayward H. Smith, these "fundamental principles of representation" provide the basis for an argument, which he ultimately rejects, that the framers understood the discretion of state legislatures to direct the manner of appointment "not as a mere baseline but as an essential and absolute requirement." *Id.* at 754.

74. *See* Journal of the Federal Convention, *supra* note 50, at 428 (statement of James Madison, July 25, 1787) ("Should a majority of the Legislatures at the time of election have the same object, or different objects of the same kind, the National Executive, would be rendered subservient to them."); *see also* Slonim, *supra* note 53, at 45 (stating that Madison opposed entrusting selection of the President to the states, whether by state legislature or by the executive).

75. *See* Slonim, *supra* note 53, at 54 (concluding that the delegates adopted the Electoral College scheme because it "so successfully blended all the necessary elements to ensure a safe and equitable process for electing a President and which reserved considerable influence for the states").

76. *See* The Federalist No. 68 (Alexander Hamilton), *supra* note 57, at 394 (contending that the Electoral College guards against cabal, intrigue, and corruption by not depending "on any pre-existing bodies of men who might be tampered with beforehand"; making ineligible former office holders who might have too great a connection to an incumbent President; and defining their office as transient and dispersed to make corruption more difficult); *see also* Peirce & Longley, *supra* note 6, at 22.

77. *See* The Federalist No. 68 (Alexander Hamilton), *supra* note 57, at 393 ("It was . . . desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation. . . . The choice of *several* to form an intermediate body of electors will be much less apt to convulse the community with any extraordinary or violent movements than the choice of *one* who was himself to be the final object of the public wishes.").

78. *See* Kuroda, *supra* note 7, at 15 (arguing that Article II, Section 1 reinforced the Connecticut Compromise, which had balanced large and small states' interests by giving more populous states more seats in the House of Representatives and giving all states, regardless of size, two seats in the Senate, because the Electoral College ensured that "every state would have the same weight in presidential elections that it had in the Congress").

79. *See* U.S. Const. art. II, § 1, cl. 2.

House's population-based representation, while protecting small states by incorporating the state equality of the Senate system.[80] Small states were further placated by the provision that whenever no candidate received an electoral majority, Congress would choose among the top five candidates by each state delegation casting one vote.[81] The Electoral College also responded to concerns about executive independence by taking initial appointment powers away from Congress and placing them in a body of independent electors.[82] Answering specific concerns and achieving balance among the states led the framers and the states to accept the Electoral College without serious challenge both during the Convention and in the subsequent ratification debates.[83]

The records provide no direct evidence for why the delegates vested authority in state legislatures to determine the manner of appointing electors or whether they intended this authority to be exclusive.[84] Some argue that the framers vested manner of appointment powers in state legislatures as a practicable mode to empower the people of the states.[85] This argument holds that state legislatures were empowered less for their deliberative capacities than for their role as the people's agents and lawmaking organs.[86] The delegates often stressed the President's accountability to the people.[87] Further, allowing the state legislature to determine the manner of appointment left open the possibility that the people would appoint electors.[88] Although the debates provide no clear resolution, they allow a

80. *See* Festa, *supra* note 53, at 2112–13; McAfee, *supra* note 53, at 646.

81. *See* McAfee, *supra* note 53, at 648 (claiming that small states were thought to benefit from the contingency election in the House of Representatives where each state got one vote, while the large states were thought to benefit from part of the distribution of electors being based on House representatives).

82. Peirce & Longley, *supra* note 6, at 22–23.

83. Very few Anti-Federalists criticized the Electoral College. Some criticized the system as overly complex and the institution of electors as antidemocratic. *See* David J. Siemers, The Antifederalists: Men of Great Faith and Forbearance 171 (2003).

84. *See* Peirce & Longley, *supra* note 6, at 24 (explaining that there was not "any debate on how the state legislatures should or would select electors—whether they would appoint the electors themselves, require that they be chosen by popular vote in districts, or provide for popular vote statewide").

85. *See* Barkow, *supra* note 70, at 285 ("Placing the decision in the state legislatures was intended to give the people the power to select the manner of choosing electors without creating the perceived dangers of direct election by the people."). *But see* 3 Joseph Story, Commentaries on the Constitution of the United States 319 (Rothman & Co. ed. 1991) (1833) (noting that one objection to the mode of appointment was that the President was not appointed by the people, "so as to secure a proper dependence upon them," but will "in fact owe his appointment to the state governments").

86. *See* Barkow, *supra* note 70, at 285 (arguing that "state legislatures were granted authority to select the manner of choosing electors not because state legislatures possess unique institutional competence, but because 'the people act through their representatives in the legislature'" (quoting McPherson v. Blacker, 146 U.S. 1, 27 (1892))).

87. *See* Journal of the Federal Convention, *supra* note 50, at 602 (statement of James Madison, Aug. 24, 1787) ("[T]he President is to act for the *people*, not for the *States*.").

88. *See* Slonim, *supra* note 53, at 56 ("[P]roponents of popular election achieved partial success. Although the election of the president was not to be a direct act of the people, the state legislatures would be free, if they wished, to confer the choice of electors upon the

plausible interpretation that, by vesting state legislatures with manner of appointment powers, the framers sought to reinforce the tie between the President and the people.[89]

Others use the debates to draw different inferences on the meaning of the Elector Appointment Clause. Some argue that allowing state legislatures to determine the manner of appointment was part of the larger Electoral College compromise crafted to balance competing interests between small state governments and the newly formed national government, and the clause is a significant concession to state governments.[90] Others argue that the Electoral College was a politically effective but unprincipled plan made at the end of a very long summer.[91] They contend that the clause was merely default language that was the product of the delegates' inability to reach a consensus on any uniform manner of appointment and that no lofty ideological meaning should be read into it.[92] Still, the records themselves only establish silence and the framers' apparent belief that the Elector Appointment Clause was not worth debating.

Although the debates provide no clear explanation of the clause's purpose within the Electoral College, the compatibility of the proposed initiative with Article II may also be informed by the framers' opinion of direct democracy. The next section explores the type of lawmaking that the framers preferred and embodied in the Constitution to determine whether

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people themselves."); *see also* Kuroda, *supra* note 7, at 15 (arguing that "the delegates respected popular participation, for their plan made it possible to have popular election of electors, but they did not mandate this").

89. *See* James Wilson, Address in the Pennsylvania Convention (Dec. 11, 1787), *in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 512 (Jonathan Elliot ed., J.B. Lippincott Co. 1941) (1836) (arguing that, although the delegates rejected popular vote because they thought it impracticable, by giving manner of appointment powers to state legislatures the choice is "brought as nearly home to the people as is practicable"). Wilson suggested that the legislature would enable the people to remain closely connected to the President, because with the "approbation of the state legislatures, the people may elect with only one remove." *Id.*

90. *See* McAfee, *supra* note 53, at 648 ("Those who feared a strong federal government were given a system that allowed states to determine their own method of choosing their electors.").

91. *See* John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 Am. Pol. Sci. Rev. 799, 810 (1961) (arguing that the compromise of the Electoral College was "a masterful piece of political improvisation," which the delegates recognized had little value as an institution). According to Roche, the merits of the proposal were that "everybody got a piece of cake," which included the concession to state legislatures that they could determine the mode of selecting the electors. *Id.*

92. *See id.* at 811 ("The vital aspect of the Electoral College was that it got the Convention over the hurdle and protected everybody's interests. The future was left to cope with the problem of what to do with this Rube Goldberg mechanism."); Smith, *supra* note 52, at 737 (noting that the parallel language of Article II, Section 1, Clause 2 and Article V of the Articles of Confederation suggests that the clause was a default provision); *see also* Festa, *supra* note 53, at 2118 (rejecting the argument that the clause was ad hoc, but agreeing that, because key issues of the balance of state power had already been determined, it made sense to leave the manner of appointment decision to the state legislatures, especially with the widespread disagreement on the proper mode of appointment).

the meaning of the term "legislature" in Article II is amenable to lawmaking by popular initiative.

2. The Constitution's Preference for Representative Lawmaking

As with the contextual analysis of the Electoral College, the question of whether the proposed initiative is consistent with the framers' lawmaking preferences can only proceed by inferences. The framers could leave no direct evidence of their opinion of the modern popular initiative because it did not exist when the Constitution was written.[93] However, other forms of direct democracy were practiced in the colonies[94] and state constitutions prior to 1787.[95] The legislative system the Constitution chose to adopt, and its rejection of available forms of direct democracy, may provide insights into how the framers would have viewed the popular initiative power.

Although the Constitution derived its authority from the "People,"[96] it placed the powers of lawmaking in elected representatives.[97] Supporters of this republican design[98] believed representative government could tame the tyrannical impulses inherent in democracies and foster government that

93. *See* Persily, *supra* note 24, at 16 (noting that South Dakota was the first state to create a modern popular initiative in 1898).

94. Lobingier, *supra* note 47, at 80 (describing the local governance in Rhode Island and other colonies, where all matters "of common interest[] were brought before the town meting"). The town imposed a fine of twelve pence on residents who appeared late. *Id.* According to Charles Sumner Lobingier, "[I]n these separate towns of primitive Rhode Island we find all the marks of a pure democracy. The people are not merely the source of legislative power;—they are the legislatures." *Id.*

95. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 555 (1998) (describing that the past practice of instructing legislatures had been "accepted in England for centuries," used in the colonies prior to the Revolution, and contained in the state constitutions of five of the original states); Lobingier, *supra* note 47, at 178 (recounting that the Massachusetts State Constitution of 1780 "was desired, inspired, and ratified by the people, and framed under their watchful eye by their specially chosen servants"). Lobingier also describes how the Articles of Confederation were submitted to the people of the state for instruction prior to ratification by the legislature. *See id.* at 167–68.

96. The preamble of the Constitution reads,

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. Const. pmbl.

97. *See id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *see also* Brown, *supra* note 95, at 553 (arguing that the constitutional system was designed to insulate representatives from the popular majority will, noting that at every turn the framers "buffered majority will, insulated representatives from direct influence of majority factions, and provided checks on majority decisionmaking").

98. *See* The Federalist No. 10 (James Madison), *supra* note 57, at 126 (making a clear distinction between "a republic, by which I mean . . . a scheme of representation" and "a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person").

would protect the liberties of all citizens equally.[99] James Madison wrote that the primary threat to democratic government lay in oppressive factions, majorities that ruled out of self-interest to the detriment of the public good.[100] According to Madison, "[A] pure democracy . . . can admit of no cure for the mischiefs of faction."[101] The cure could only come by forming a national republic built on representative government. Representative government would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens" who would deliberate for the public good.[102] Alexander Hamilton described representative government as the form of government "best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests."[103] Without the deliberative process of insulated representatives, factions would infect the democracy with the "mortal diseases" of "instability, injustice, and confusion . . . under which popular governments have everywhere perished."[104]

The framers also rejected direct democracy because they believed that the people were especially vulnerable to the forces of tyranny. Madison wrote that pure democracy created the danger that at "particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of

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99. *See id.* at 124–25 (arguing that, whereas "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment," when a majority is driven by a common interest, the form of "popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens"); *see also* Brown, *supra* note 95, at 554 (noting the "dichotomy between the implementation of popular will, on the one hand, and liberty, on the other" that existed in the framers' belief reflected in the Constitution that only a deliberative, insulated body could protect the liberty of minorities).

100. *See* The Federalist No. 10 (James Madison), *supra* note 57, at 123 (defining factions as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community").

101. *Id.* at 126. Madison further explained,

> A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

Id.

102. *Id.* The other advantage of national representative government was that it draws a larger number of representatives from a broader geographical area, thereby diluting the influence of factions. *See id.* at 126–27; *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1525–29 (1990) (arguing that two of the ways the Constitution filters majority preference—representation and separation of powers—are absent from the popular initiative).

103. The Federalist No. 70 (Alexander Hamilton), *supra* note 57, at 403.

104. The Federalist No. 10 (James Madison), *supra* note 57, at 122; *see* Eule, *supra* note 102, at 1523 (speculating that, had initiatives been around at the time of the Constitution, delegates "would have looked upon such a scheme with a feeling akin to horror" (internal quotation marks omitted)).

interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[105] Representative government removed lawmakers from moments of majority passion and tyranny by making representatives accountable to the public will only in periodic elections.[106]

In addition to its philosophical preference for representative lawmaking, the Constitution also rejected specific mechanisms of direct democracy that were available at the time. Although several state constitutions gave citizens the right to instruct their representatives on how to vote on specific issues, the original Constitution did not provide this right.[107] Subsequent efforts to include this right within the First Amendment ultimately failed, leaving the Constitution's preference for representative lawmaking in tact.[108] Additionally, the Constitution made Congress more removed from the people than the legislature had been under the Articles of

105. The Federalist No. 63 (James Madison), *supra* note 57, at 371.

106. *See id.* (defending the insulated nature of the Senate "in order to check the misguided career and to suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind[]").

107. *See* Eule, *supra* note 102, at 1523 (arguing that the central problem that drove the delegates to convene in Philadelphia was "concern over an excess of populism in the state governments"); Marci A. Hamilton, *How Democratic Is the American Constitution? Republican Democracy Is Not Democracy*, 26 Cardozo L. Rev. 2529, 2533 (2005) (arguing that, although many state legislatures prior to the Constitution included a right to instruct representatives, the framers "explicitly rejected the right to instruct, and therefore intended to set the republican representatives free from the people, so there would not be majoritarian determination of policy"); *see also* Cecelia M. Kenyon, *Introduction* to The Antifederalists, at xxi, cvii–iii (Cecelia M. Kenyon ed., 1966) (noting that Anti-Federalists regarded "representation primarily as an institutional substitute for direct democracy and endeavored to restrict its operation to the performance of that function," which drove their inclination to "regard representatives as delegates bound by the instructions of constituents rather than as men expected and trusted to exercise independent judgment"). According to Cecilia M. Kenyon, the instructive model of representation's "major weaknesses were closely akin to those of direct democracy itself, for representation of this kind makes difficult the process of genuine deliberation, as well as the reconciliation of diverse interests and opinions." *Id.* at cviii.

108. *See* Brown, *supra* note 95, at 555 (arguing that the right to instruct was supported by those who favored a stronger voice for the people, but was rejected by Madison and Alexander Hamilton because such "a right in the people was inconsistent with the insulation inherent in the legislative structure" that was designed to protect individual liberty from oppressive majorities).

Confederation.[109] Despite strong objections,[110] the framers consciously chose representative government as the Constitution's legislative system.[111]

However, because the Constitution does not prohibit states from employing popular initiatives, its preference for representative lawmaking does not answer the question of whether the California initiative is constitutional. To help answer that inquiry, this Note next examines how states understood the Elector Appointment Clause during the first years of the republic.

C. *Historical Development of the Meaning of Article II, Section 1, Clause 2*

1. Early Interpretations

The ratification debates and the early practices of state governments present two general themes that bear heavily on the constitutionality of the proposed initiative. First, the Elector Appointment Clause had an ambiguous meaning from the beginning. Second, the variety of modes available to state legislatures under the clause enabled widespread political manipulation in the first presidential elections. Although 200 years have since passed, very little has changed.

The lack of definition in Article II, Section 1, Clause 2 let constitutional advocates alternately interpret the clause as vesting the ultimate power of choosing the President in the people,[112] the electors,[113] or the state legislatures.[114] Sometimes, the same constitutional advocate would even offer different interpretations, depending on the surrounding contextual arguments they furthered.[115] In *The Federalist No. 39*, in which Madison

109. *Compare* Hamilton, *supra* note 107, at 2530 (noting that, under the Articles, Congress consisted of a weak coalition of "loosely affiliated states" that "eventually disbanded because of its ineffectiveness"), *with* The Federalist No. 62 (James Madison), *supra* note 57, at 368–69 (arguing that the Senate's indirect election and long tenure allows for a greater level of stability than the Articles of Confederation did).

110. *See* Kenyon, *supra* note 107, at cix (describing how the Anti-Federalists believed republican government needs to have a small ratio between citizens and representatives, and therefore rejected the Constitution's representative system that was removed from the people). Kenyon writes, "[W]hereas Madison saw in this process of 'filtering' or consolidating public opinion a virtue, the Antifederalists saw in it only danger." *Id.*

111. This is not to suggest that the Constitution prohibits states from using mechanisms of direct democracy. Although Article IV of the Constitution guarantees citizens of states the right to a republican form of government, the Supreme Court has never interpreted this to invalidate state popular initiatives or referenda. *See, e.g.*, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

112. *See* Wilson, *supra* note 89, at 512 ("The choice of this officer is brought as nearly home to the people as is practicable. With the approbation of the state legislatures, the people may elect with only one remove . . . .").

113. *See* The Federalist No. 68 (Alexander Hamilton), *supra* note 57, at 393 (suggesting that electors will have discretion to deliberate and make an independent choice).

114. *See* Peirce & Longley, *supra* note 6, at 29 (recounting that future President James Monroe believed state legislatures would determine the President).

115. *See id.* at 28 (describing the "inherent contradiction" in the way the Constitution's advocates explained the system).

sought to establish that the Constitution creates a republic where all power flows from the people, he wrote that the "President is indirectly derived from the choice of the people," and did not explicitly reference state legislatures.[116] Yet in *The Federalist No. 45*, in which Madison assuaged fears that the federal government will dominate the states, he offered another interpretation: "Without the intervention of the State legislatures," wrote Madison, "the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases themselves determine it."[117] The clause allowed enough interpretive leeway for a variety of plausible statements that served various ends.[118]

The Constitution's presidential selection system never prompted the type of vigorous debate during ratification from which a more certain meaning of the Elector Appointment Clause might have emerged.[119] Even Anti-Federalists who objected to most of the Constitution expressed few criticisms about the Electoral College generally or the clause specifically,[120] though a few criticized the system for removing the choice from the people and obscuring the election within a mess of convoluted rules.[121] As then noted by Hamilton, "The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure . . . ."[122]

Since the Convention and ratification debates failed to yield a certain meaning of the role of state legislatures under Article II, states began defining their legislatures' roles in presidential elections themselves. When the first presidential election took place, the constitutions of two states,

116. The Federalist No. 39 (James Madison), *supra* note 57, at 255. Madison also suggested that the President would be the choice of the people at the Virginia ratifying convention. *See* Peirce & Longley, *supra* note 6, at 29.

117. The Federalist No. 45 (James Madison), *supra* note 57, at 294.

118. Even single writings sometimes contained contradictions. In *The Federalist No. 68*, Hamilton wrote that it was "desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided," before writing a few sentences later that the ultimate decision would be made by "[a] small number of persons, selected by their fellow-citizens from the general mass . . . most likely to possess the information and discernment requisite to so complicated an investigation." The Federalist No. 68 (Alexander Hamilton), *supra* note 57, at 393.

119. *See* Smith, *supra* note 52, at 746 (noting that, compared to other topics, the presidential election method received little attention).

120. *See* Kenyon, *supra* note 107, at lv (noting that there was a "relative scarcity of criticism of the indirect election of the Senate and the President"); A Manifesto of a Number of Gentlemen from Albany County (1788), *reprinted in* The Antifederalists, *supra* note 107, at 359, 362 (obliquely criticizing the indirect election of the President).

121. *See* Republicus, Letter to the Lexington Ky. Gazette (Mar. 1, 1788), *reprinted in* Siemers, *supra* note 83, at 169, 171 (describing how under Article II "the legislative body of each state[] is empowered to point out to their constituents, some mode of choice, or (to save trouble) may choose themselves, a certain number of electors," and later questioning whether it is necessary that a free people "resign their right to suffrage into other hands besides their own").

122. The Federalist No. 68 (Alexander Hamilton), *supra* note 57, at 392–93.

Massachusetts and New York, subjected ordinary legislation to a veto.[123] When the Massachusetts legislature passed a law determining the manner of appointing electors that year, it followed its normal legislative procedure by presenting that law to Governor John Hancock for approval.[124] Although New York never reached a consensus on appointment of electors in 1788, it subjected laws regulating congressional elections and determining the manner of electing senators to the state veto power.[125] In addition, representatives in both states relied upon state constitutional procedural provisions when determining how the manner of appointment powers would be distributed between the houses of the state assembly.[126] Some have suggested that these early practices show that states understood themselves to be bound by their state lawmaking processes when exercising Article II powers.[127]

Even if early state legislatures felt constrained by the processes of state lawmaking, they exhibited great freedom in determining the substance of how the state would appoint electors.[128] Under this discretion, they most commonly chose direct legislative appointment in the first four elections, finding it to be "the simplest method, since it involved no reference to the people—that unpredictable and sometimes fickle electorate."[129] Legislatures also soon learned that the discretion granted by Article II could be employed to powerful and immediate ends.[130] They commonly changed the manner of appointment to swing votes to a favored candidate,[131] and the

123. *See* Smith, *supra* note 52, at 761–62.

124. *See id.* at 760.

125. *See id.* at 760–61 (noting that the New York Council of Revision, which held the state's veto power, exercised it in regard to a bill determining the manner of appointing senators); *see also* Koza et al., *supra* note 19, at 307–08 (explaining that, although the New York Assembly submitted the laws determining the manner of appointing senators to the Council of Revision as part of the normal lawmaking process, the legislature did not involve the council when electing senators under Article I, Section 3).

126. *See* Smith, *supra* note 52, at 761–65.

127. *See id.* at 759 (arguing that the practices of the New York and Massachusetts legislatures suggest "the founding generation did not have an overriding respect for the constitutionally prescribed role of state *legislatures*" (internal quotation marks omitted)).

128. *See* Peirce & Longley, *supra* note 6, at 44 (explaining that the Constitution had "given the state legislatures an absolute *carte blanche* in this regard," which they used to adopt a variety of schemes); *see also id.* at app. B (charting the distribution of methods of appointment used by states from 1789 to 1836, and showing that states used legislative appointment, popular vote by general ticket, popular vote by district, and combination methods in early elections).

129. *Id.* at 45.

130. *See* Letter from Alexander Hamilton to James Madison (Nov. 23, 1788), *in* 5 The Papers of Alexander Hamilton 235, 236 (Harold C. Syrett ed., 1962) (predicting to Madison, on the eve of the first election, how various state legislatures would appoint electors for vice president based on their party preferences).

131. *See* Peirce & Longley, *supra* note 6, at 44 ("Massachusetts, for example, shifted its system of choosing electors no less than seven times during the first ten elections."). The low point of these moves came during the 1800 election. The New York Legislature, which had been controlled by Federalists prior to the state elections in the spring of 1800, had enacted a law in 1796 that appointed electors by the legislature. *See* Kuroda, *supra* note 7, at 85–86; O'Neil, *supra* note 11, at 34. After the Federalists lost control of the legislature in

results of state legislative elections began to influence presidential outcomes.[132]

Until the popular general ticket took hold in the late 1820s, state legislatures continued to choose various modes of appointment for short-term political purposes.[133] This led to calls for amendments to create uniformity in the mode of appointment,[134] though no amendment was ever ratified. By the early 1830s, nearly all states used a system of popular statewide vote,[135] and this rise of democratic sentiment did not permit state legislatures to exercise the same discretion they once had in choosing electors.[136]

2. Soldier-Voting Cases and the Formation of the Independent Legislature Interpretation of Article II

The Elector Appointment Clause avoided controversy for a number of years after the rise of a uniform system of popular statewide appointment and the end of state legislature manipulation. However, the clause inflamed dispute again during the Civil War, when the issue arose whether a state legislature could override its state constitution in order to enfranchise out-of-state soldiers.[137] In resolving a contested congressional election, the

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the 1800 election to the Anti-Federalists, Hamilton wrote a letter to Governor John Jay suggesting the lame duck Federalist legislature should adopt a district system that would split the electors. *See* Kuroda, *supra* note 7, at 85–86. Jay rejected the proposal. *See id.*; *see also* O'Neil, *supra* note 11, at 71; Peirce & Longley, *supra* note 6, at 45 (noting that the lame duck senate in Pennsylvania took elector appointment away from the people and into their own hands).

132. *See* Kuroda, *supra* note 7, at 107 (noting that, by 1800, political parties "understood that state elections, even those occurring several years before presidential ones, affected crucial decisions about how electors should be chosen and for whom they should vote").

133. *See* Peirce & Longley, *supra* note 6, at 45 (describing a "bolder coup" by the Federalist-controlled New Jersey legislature in 1812 in which it repealed the state law that appointed elector by popular choice and "designat[ed] the electors itself on the very eve of the statewide election").

134. *See* 1 Proposed Amendments to the U.S. Constitution 1787–2001, at 80 (John R. Vile ed., 2003) (noting that forty-two constitutional amendments have been proposed to create a uniform system to appoint electors by district); *see also* Letter from James Madison to George Hay, *supra* note 23, at 147 (discussing a proposed amendment for a uniform district system); Rufus King, Amendment to the Constitution, *reprinted in* 3 The Founders' Constitution 555 (Philip B. Kurland & Ralph Lerner eds., 1987). Rufus King, the former convention delegate, argued that the "election of a President of the United States is no longer that process which the Constitution contemplated," and that, to restore the original intent, an amendment was needed to create a uniform district system. *Id.*

135. *See* Peirce & Longley, *supra* note 6, at 46–47 (explaining that the move to a uniform statewide popular system occurred because "democratic ideals had advanced," because it allowed the ruling party to solidify its political control, and because "adoption of the general ticket in some states . . . virtually compelled the others to follow suit so that their strength in the electoral college would not be diluted").

136. *See id.* at 45 (explaining that "parties that used the legislative election to control a state's electoral votes subsequently found themselves thrown out of office by an enraged populace").

137. *See* Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldiers' Voting Bill, 45 N.H. 595, 599 (1864); *In re* Opinion of the Judges, 37 Vt. 665,

House of Representatives Elections Committee determined that state legislatures are independent of state constitutions when exercising electoral powers created by the Federal Constitution.[138]

The constitutional problem arose out of laws passed by state legislatures in the 1860s that allowed out-of-state citizens fighting in the Civil War to vote in federal elections.[139] At the time, many state constitutions had provisions that required citizens to be present physically when casting votes in state elections, and courts were asked whether state constitutions prohibited the newly passed soldier-voting laws.[140] Courts eventually faced the question of whether state constitutions could invalidate soldier-voting laws in federal elections, and the high courts of New Hampshire and Vermont decided to uphold the laws despite their inconsistency with state constitutions.[141]

The New Hampshire court based its decision on the premise that the state legislature performs a federally created function when directing the manner in which a federal election takes place. The court wrote that, because the power to conduct a federal election is "derived from . . . the Constitution of the United States,"[142] laws passed pursuant to Article I, Section 4 and Article II are "not an exercise of [the] general legislative authority under the Constitution of the State, but of an authority delegated by the Constitution of the United States."[143] The New Hampshire court reasoned that the state constitution could only limit the state legislature's regulation of a federal election insofar as it was "referred to and adopted by the Constitution of the United States."[144] The court characterized the legislature's Article II power as an "unlimited authority," finding that "the manner of appointment is lodged, in the broadest and most unqualified terms, in the legislature."[145] Since the state legislature exercises broad discretion under Article II in

666–67 (1864) (upholding laws that allowed out-of-state soldiers to vote in federal elections in apparent contravention of state constitutional limitations).

138. *See* Smith, *supra* note 52, at 769–75 (describing the contested election case of *Baldwin v. Trowbridge*, H.R. Misc. Doc. No. 39-10, at 1–3 (1865), in the House of Representatives).

139. *See, e.g.*, *In re Opinion of the Judges*, 37 Vt. at 667–68.

140. *See* Smith, *supra* note 52, at 765–67. The initial question facing state courts was whether soldier-voting laws violated state constitutions in the context of state elections. On this question, the state courts split. *See* State *ex rel.* Chandler v. Main, 16 Wis. 398, 415–18 (1863) (reading state constitutional provisions narrowly to uphold a law permitting out-of-state soldiers to vote in state elections); *see also* Opinion of the Justices, 44 N.H. 633, 637 (1863) (invalidating an out-of-state soldier-voting law after finding it "in conflict with the provisions and the spirit" of the state constitution).

141. *See In re Opinion of the Judges*, 37 Vt. at 667–68; *Opinion of the Justices*, 45 N.H. at 606–07 (holding that the "whole subject is entrusted to the State Legislature, subject to the control of Congress" and there can be "no ground to question the power of the legislature to authorize voting for electors").

142. *Opinion of the Justices*, 45 N.H. at 601.

143. *Id.*

144. *Id.* at 599.

145. *Id.*

performance of a federal function, the court found that the state constitution could not limit the soldier-voting laws.[146]

The House of Representatives addressed a similar question in the disputed Michigan election case of *Baldwin v. Trowbridge*.[147] In *Baldwin*, the outcome of a congressional election turned on the admission of votes cast by out-of-state soldiers.[148] Although the specific issue concerned the ability of state constitutions to limit the powers of state legislatures to regulate congressional elections, the House's reports discussed the general capacity of state constitutions to limit their state legislatures' exercise of federal electoral powers.[149]

The House Committee of Elections's majority report interpreted the Constitution to give state legislatures power to exercise federally created electoral powers independent of state constitutional limitations.[150] The report concluded that, in case of conflict between a legislative act and a state constitutional provision, the state constitution must bow to the legislature.[151] The majority report drew a distinction between the legislative power of the state and the historical meaning of "legislature."[152] It held that, when the Constitution delegates a power to a "legislature," it gives power to an assembly distinct from a state constitutional convention.[153] According to the majority report, if a power "was conferred upon the [state] legislature by the [U.S.] Constitution, a [state] constitutional convention could not exercise it, or inhibit [a state] legislature from exercising it."[154]

The minority report saw things differently, arguing that the powers possessed by the Michigan legislature "did not exhaust the legislative

146. *See id.*

147. Baldwin v. Trowbridge, H.R. Misc. Doc. No. 39-10, at 1–3 (1865); *see* Chester A. Rowell, A Historical Legal Digest of All the Contested Election Cases in the House of Representatives of the United States from the First to the Fifty-Sixth Congress, 1789–1901, at 200–01 (Greenwood Press 1976) (1901).

148. *See id.* at 200.

149. *See* H.R. Rep. No. 39-13, at 2–3 (1866) (arguing that the Constitution's use of "legislature" in Article II referred to the state legislature in its historical sense as the assembly body proper).

150. *See* Rowell, *supra* note 147, at 200–01.

151. *See* H.R. Rep. No. 39-13, at 3 ("[T]he legislation of Michigan may be sustained against the constitution of that State . . . ."); Rowell, *supra* note 147, at 200; *see also* Smith, *supra* note 52, at 769 ("The majority report of the Committee of Elections is the first and most comprehensive defense of the independent legislature doctrine ever made.").

152. *See* H.R. Rep. No. 39-13, at 2–3; Smith, *supra* note 52, at 770.

153. *See* H.R. Rep. No. 39-13, at 2–3; Rowell, *supra* note 147, at 200. *But see* Smith, *supra* note 52, at 771 (finding the House Committee of Elections's majority report's reliance on the textual distinction between the word "legislature" and "convention" to be "bizarre," because it is not inconsistent to recognize the distinction and still think of "legislatures as creatures of their constitutions").

154. Rowell, *supra* note 147, at 201; *see also* Smith, *supra* note 52, at 771 (describing the majority report's alternate argument that, even if "legislature" was understood as the lawmaking power of the state, the state law would still withstand a challenge from the state constitution because it was enacted under a power created by the Federal Constitution, which the state constitution had no power to restrict).

power of the State."[155] It stated that the legislature in its broadest sense "signifies that body in which all the legislative powers of a State reside, and that body is the people themselves who exercise the elective franchise."[156] The minority report defined the legislative assembly as "secondary or subordinate" to the state constitution. It wrote that the legislature is "the creature of the organic laws of the State, owes its existence to it, and can rightly do nothing in contravention of its provisions."[157] The minority report concluded that the Constitution only confers authority on state legislatures to act "in subordination and in conformity to that organic law to which it owes its own existence."[158]

These reports fully articulated the two possible interpretations of "legislature" in the Constitution. The majority report held that "legislature" meant the formal assembly body. After examining how the term "legislature" was historically understood at the time of the founding,[159] and how the Constitution uses "legislature" in other contexts,[160] the majority report concluded that "by the word legislature" the Constitution meant "the legislature *eo nomine*, as known in the political history of the country."[161] The minority report instead interpreted "legislature" to mean the legislative power of the state, which rests in the people of the state to define. Fifty years after the House reports, the U.S. Supreme Court would develop a functional analysis to determine which sense of "legislature" applies to a given constitutional provision.[162] Before developing this functional analysis, the Supreme Court made its first attempt to define the state legislature's power under Article II, relying on principles discussed in the House reports and state Civil War voting cases.[163]

155. Rowell, *supra* note 147, at 201; *see also* Smith, *supra* note 52, at 772–75 (describing the ways in which the House Committee of Elections's minority report used history and precedent to establish that Article I, Section 4 referred to the lawmaking power of the state as defined by the state constitution).

156. Rowell, *supra* note 147, at 201.

157. *Id.*

158. *Id.*

159. *See id.* at 200 (finding probative the "fact that each of the colonies, at the time of the adoption of the Constitution, had a legislature similar to the legislatures of the present States").

160. *See id.* (arguing that "throughout the Constitution the word 'legislature' was used consistently to designate this assembly" (internal quotation marks omitted)).

161. *Id.*

162. *See* Smiley v. Holm, 285 U.S. 355, 365–66 (1932) (noting that, when the Federal Constitution requires a state legislature to perform a lawmaking function, it addresses the lawmaking processes defined by the state, and when the Federal Constitution requires a state legislature to perform a special, nonlawmaking function, it exclusively addresses the formal assembly). Under this analysis, the U.S. Supreme Court sided with the minority report, finding that, in Article I, Section 4, the Constitution requires the state legislature to make laws, which must conform with the lawmaking process defined by the state constitution. *See id.* at 372–73.

163. *See* Smith, *supra* note 52, at 775 (describing how the "independent legislature doctrine" that was developed by the majority report was later incorporated into Supreme Court dicta).

D. *Supreme Court Interpretations of the Elector Appointment Clause*

The Supreme Court has substantially discussed the Elector Appointment Clause only three times. The first time was in 1892, already more than 100 years after ratification, in *McPherson v. Blacker*.[164] Then, after 100 more years of silence, the Court spoke again in the cases of *Bush v. Palm Beach County Canvassing Board*[165] and *Bush v. Gore*.[166] However, even in these cases, the Supreme Court never decided whether or not a state constitution can limit its state legislature's exercise of Article II powers. In *McPherson*, most of the Court's statements concerning the relation between state constitutions and state legislatures came in dicta.[167] *Bush v. Palm Beach County Canvassing Board* discussed the clause but issued no holding.[168] Chief Justice William H. Rehnquist's concurring opinion in *Bush v. Gore*, which relied on Article II, Section 1, Clause 2, only received support from two other Justices.[169] These cases, while helpful, are therefore not conclusive precedent.

1. *McPherson v. Blacker*

Thirty years after the Civil War voting cases, the Supreme Court interpreted the meaning and scope of a state legislature's manner of appointment power in *McPherson*.[170] *McPherson* concerned whether a state must appoint electors as a unitary body or if it could appoint them separately by district.[171] The Supreme Court upheld the Michigan legislature's decision that the state would appoint its electors through a district-based system.[172]

The Court began its inquiry by examining what the term "state" means under Article II.[173] The Court observed that a "[s]tate does not act by its people in their collective capacity, but through such political agencies as are

164. 146 U.S. 1 (1892).
165. 531 U.S. 70 (2000).
166. 531 U.S. 98 (2000).
167. *See* Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 114 (2001) (considering a core statement from *McPherson* concerning the relationship between state legislatures and constitutions in Article II "dictum uttered in the course of holding that the state legislature could delegate the appointment of electors to voters in local districts").
168. *Palm Beach County*, 531 U.S. at 77–78 (noting that although decisions of the Florida Supreme Court "may be read to indicate 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 Court would "decline at this time to review the federal questions asserted to be present").
169. *Gore*, 531 U.S. at 111.
170. 146 U.S. 1, 24–26 (1892).
171. *See id.* at 24–25.
172. *Id.* at 41.
173. *Id.* at 25 (explaining that "a State in the ordinary sense of the Constitution . . . is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed" (citation omitted)).

duly constituted and established."[174] The Court determined that the legislative power is typically the organ through which the state acts unless it is limited by its state constitution.[175] The Court therefore found that if, Article II had read simply that each state shall appoint and "if the words 'in such manner as the legislature thereof may direct[]' had been omitted," the legislative power could not have been questioned in the absence of a state constitutional limitation.[176]

Because Article II includes the clause that each state shall appoint electors "in such manner as the legislature thereof might direct," the Court reasoned that it can only reinforce the legislature's default role as the means through which a state acts when directing the manner of appointing electors.[177] Against the backdrop of the legislature's default role, 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."[178] The Court concluded,

> [T]he act of appointment is none the less the act of the State in its entirety because arrived at by district, for the act is the act of political agencies duly authorized to speak for the State, and 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.[179]

Although this would have been sufficient to justify the holding in the case, the Court proceeded to expound on the expansive powers of legislatures under Article II. By placing manner of appointment powers in the state legislature rather than in the state, the Court found "the whole subject is committed" to the state legislature, which "possesses plenary authority" without state constitutional limitation.[180] According to the Court, this power "cannot be taken from [state legislatures] or modified by their State constitutions any more than can their power to elect Senators of the United States."[181]

When the Court used the term "legislative power," it did not necessarily limit its meaning to the representative assembly.[182] For instance, the Court wrote, "[T]he sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is

174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 25–26.
180. *Id.*
181. *Id.* at 35 (citing S. Rep. No. 43-395 (1874)).
182. *See id.* at 25 (distinguishing between "representatives in the legislature" and the "legislative power"); Koza et al., *supra* note 19, at 311 (arguing that, because an initiative is "considered a co-equal grant of authority to that given to the state's legislature, the treatment of the initiative process as a legislative power is consistent with the fundamental law of states that have the initiative process").

elsewhere reposed."[183] In 1892, the year *McPherson* was authored, the popular initiative movement was beginning to take shape in western states.[184] *McPherson*, therefore, may not foreclose a state from defining its legislative power to include a popular initiative.[185]

2. The 2000 Election Cases[186]

More than 100 years later, the Supreme Court revisited the Elector Appointment Clause during the 2000 election dispute.[187] The Article II question presented in *Palm Beach County* and *Bush v. Gore* concerned to what extent a state court could alter the state legislature's mode of appointing electors through judicial review.[188] A majority of the Court never answered this question, but the range of the Justices' opinions showed that the meaning of the Elector Appointment Clause still remained an open question.[189]

On November 21, 2000, the Florida Supreme Court extended a statutory filing deadline to allow manual recounts in the 2000 presidential election, in an opinion that relied in part on a right-to-vote provision in the Florida Constitution.[190] After George W. Bush appealed, the Supreme Court vacated the Florida ruling and remanded the case.[191] The Court called the Florida Supreme Court's attention to "the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"[192] The Court quoted its statement in *McPherson*, that while the language of Article II operates as a "limitation upon the State in respect of any attempt to circumscribe the legislative power, [it] cannot be held to operate as a limitation on that power itself."[193] Although the Court

183. *McPherson*, 126 U.S. at 25.

184. *See* Persily, *supra* note 24, at 19–21 (describing the move toward referendum and initiative in the 1890s). South Dakota was the first state to enact a general popular initiative and referendum in 1898. *See id.* at 16.

185. *See* Koza et al., *supra* note 19, at 311.

186. *See* Bush v. Gore, 531 U.S. 98 (2000); Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); Palm Beach County Canvassing Bd. v. Harris 772 So. 2d 1273 (Fla. 2000).

187. *See generally* 36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis, *supra* note 2.

188. *See Palm Beach County*, 531 U.S. at 77 (considering the degree to which the Florida Supreme Court could use the Florida Constitution to construe the Florida Election Code and remain consistent with Article II); *Gore*, 531 U.S. at 114 (Rehnquist, C.J., concurring) ("[T]he general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies.").

189. *See generally Gore*, 531 U.S. 98. The Justices wrote six separate opinions, all of which devote at least some attention to the Article II question. *Id.*

190. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).

191. *Palm Beach County*, 531 U.S. at 78.

192. *Id.* at 76–77.

193. *Id.* at 76 (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

gave these suggestions, it issued no holding on whether the Florida Supreme Court had violated Article II.[194]

The election dispute returned to the Supreme Court in *Bush v. Gore*, in which the Court ordered Florida to stop its manual recount.[195] A majority of the Justices held that the recount violated the Equal Protection Clause,[196] but three of the Justices contended that the Florida Supreme Court's action additionally violated Article II.[197]

Chief Justice Rehnquist argued in concurrence that Article II assigns a special role for state legislatures, and "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[198] Although Rehnquist suggested that the Supreme Court should still give state courts some deference under Article II,[199] because the Florida Supreme Court's ordered recount departed so

194. *Id.* at 78 (declining to review the federal questions because of the uncertainty of the Florida court's decision).

195. Bush v. Gore, 531 U.S. 98, 110 (2000).

196. *Id.* (finding that "it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process" in the time available before the statutory deadline).

197. *Id.* at 115 (Rehnquist, C.J., concurring) ("[T]he Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.").

198. *Id.* at 113. Chief Justice William H. Rehnquist continued,

> [T]here are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. . . . [T]he text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance. . . . If we are to respect the legislature's Article II powers . . . we must ensure that postelection state-court actions do not frustrate the legislative desire.

Id. at 112–13; *see also* Colo. Gen. Assem. v. Salazar, 541 U.S. 1093, 1095 (2004) (denying certiorari) (Rehnquist, C.J., dissenting) (noting that the Constitution requires "some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts").

199. *See Gore*, 531 U.S. at 114 (Rehnquist, C.J., concurring) ("Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies."); *id.* ("Though we generally defer to state courts on the interpretation of state law . . . there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."); *see also* Laurence H. Tribe, Comment, Erog .v Hsub *and its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 189–94 (2001) (arguing that the Rehnquist opinion showed some degree of deference to state court determinations and did not advocate completely removing the state court's role under Article II).

Laurence H. Tribe further argues that the Court engages in a similar level of review of state court interpretations in other federal constitutional contexts. *See id.* at 188 ("[W]henever a provision of the federal Constitution specifies something—whether substantive, structural, or procedural—about how a decision otherwise internal to a state's system of governance should be made, that provision's enforcement is a matter for the federal judiciary . . . ."); *see also id.* at 193 ("[T]he institutional function of checking the state court's construction of state election legislation to ensure that federal constitutional ground rules (here, those of Article II) are followed is unexceptional . . . [as long as the

severely from the legislature's method of elector appointment, it justified federal intervention to protect the state legislature's plenary powers under Article II.[200]

The Rehnquist opinion suggested that the special character of presidential elections justify federal review of internal state processes.[201] It contended that while the Court usually defers to a state court's interpretation of its own constitution, scrutiny was justified in this case because electors perform a federal function[202] and presidential elections have special national importance.[203] According to Rehnquist, Article II therefore requires the federal judiciary to protect the state legislature's Article II powers from undue interference by other branches of state government.[204]

The dissenting Justices attacked the Rehnquist opinion on the grounds that it improperly interfered with judicial review,[205] violated principles of federalism,[206] and misinterpreted the meaning of "state legislature" under the Constitution.[207] Justice Ruth Bader Ginsburg argued that because judicial review is indispensable to republican government, the Court should not interpret Article II, Section 1, Clause 2 to limit the Florida Supreme Court's ability to review legislation.[208] Interpreting Article II to empower the state legislature to the exclusion of the judiciary would "disrupt a

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Court] reject[s] only *manifestly unreasonable* state judicial constructions of state statutes and not simply to substitute its own preferred construction for the state court's.").

200. *See Gore*, 531 U.S. at 122 (Rehnquist, C.J., concurring).

201. *Id.* at 112 ("We deal here not with an ordinary election, but with an election for the President of the United States.").

202. *Id.* ("'While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.'" (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934))).

203. *Id.* (claiming that, in the context of a presidential election, state-imposed restrictions implicate "a uniquely important national interest" because the President and Vice President represent voters across the nation (citing Anderson v. Celebrezze, 460 U.S. 780, 794–95 (1983))).

204. *Id.* at 115 ("This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court . . . would be to abdicate our responsibility to enforce the explicit requirements of Article II.").

205. *See id.* at 123–24 (Stevens, J., dissenting) ("The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it.").

206. *See id.* at 139 (Ginsburg, J., dissenting) ("I would have thought the cautious approach we counsel when federal courts address matters of state law, and our commitment to 'build[ing] cooperative judicial federalism,' demanded greater restraint. (citing Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974))).

207. *See id.* at 123 (Stevens, J., dissenting) (denying the independence of state legislatures under Article II and contending that the legislature is the "supreme authority except as limited by the constitution of the State").

208. *Id.* at 141 (Ginsburg, J., dissenting) ("The Framers of our Constitution . . . understood that in a republican government, the judiciary would construe the legislature's enactments.").

State's republican regime," which is inconsistent with the Constitution's guarantee that states enjoy a republican form of government.[209]

Justice Ginsburg wrote that by using Article II to protect one state organ from another, the Chief Justice "contradicts the basic principle that a State may organize itself as it sees fit."[210] According to Ginsburg, principles of federalism require the Court to show greater respect for the state constitution than for the state legislature.[211] Nothing in Article II, according to Ginsburg, justifies displacing the ordinary primacy of the state constitution over the state legislature.[212]

Justice John Paul Stevens argued that the concurrence erred by determining that Article II gave the Florida legislature powers independent of the Florida Constitution.[213] He wrote that the Federal Constitution "does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions."[214] According to Justice Stevens, laws passed pursuant to Article II are subject to ordinary state constitutional processes, including judicial review.[215] Justice Stephen Breyer agreed that neither the text of Article II nor *McPherson* "leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors."[216]

Stevens's dissenting opinion included a footnote that compared the meaning of "state legislature" in Article II with its meaning in other constitutional contexts.[217] The next section examines several other powers that the Constitution gives to state legislatures. The function state legislatures perform has been central to the Supreme Court's analysis in determining whether state legislatures remain subordinate to state constitutions when exercising federally created powers.

E. *The Function and the Meaning of the Term "Legislature"*

As previously noted, the Constitution uses the term "state legislature" in two distinct senses. Sometimes the Constitution refers to the lawmaking

209. *See id.* (discussing the Guarantee Clause in Article IV of the Constitution).

210. *Id.*

211. *See id.* at 142 (claiming that the "Chief Justice's solicitude . . . comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign").

212. *See id.* at 141–42.

213. *See id.* at 123 (Stevens, J., dissenting) (rejecting the independent notion of Article II state legislatures, and instead contending that "[w]hat is forbidden or required to be done by a State in the Article II context is forbidden or required of the legislative power under state constitutions as they exist" (alteration in original) (internal quotation marks omitted)).

214. *Id.*

215. *Id.*

216. *Id.* at 148 (Breyer, J., dissenting).

217. *Id.* at 123 n.1 (Stevens, J., dissenting) (claiming that Article II is most similar to Article I, Section 4, which gives state legislatures powers to regulate congressional elections). The Supreme Court has found state legislative power under Article I, Section 4 to be limited and defined by the state constitution. *See* Smiley v. Holm, 285 U.S. 355, 372 (1932); *infra* Part I.E.

processes of the state, which can include veto, referendum, or initiative.[218] At other times, the Constitution refers to the formal assembly body of the state, the group of elected representatives that meets at the state capital.[219] The Supreme Court has created a function-based framework to determine which meaning of state legislature applies to a given constitutional provision.[220] The Court has held that, when the constitutional provision requires state legislatures to make law, it refers to "legislature" as the lawmaking process of the state.[221] In these cases, the authority granted by the Federal Constitution to the "state legislature" is subject to the state constitution's definition of its legislative power.[222] However, when the federal constitutional power requires the state legislature to perform a special, nonlawmaking function, it refers to the formal assembly body of the state.[223] In these cases, the Court has held that this power is not subject to the normal state constitutional lawmaking process.[224] This section discusses the meaning of "legislature" in several constitutional provisions to determine which meaning the Constitution assigns to "legislature" in Article II.

1. The Function-Based Analysis

In *Smiley v. Holm*, the Supreme Court outlined a function-based framework for determining whether a state legislature is subordinate to its state constitution when exercising a federal constitutional power.[225] The case concerned whether the Minnesota governor could veto a congressional districting law passed by the state legislature pursuant to its powers to regulate congressional elections under Article I, Section 4.[226] The Court wrote,

> The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the constitution under Article V. It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term

218. *See supra* note 20 and accompanying text.
219. *See supra* note 21 and accompanying text.
220. *See Smiley*, 285 U.S. at 365–66.
221. *See id.* at 367–68.
222. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 567–68 (1916).
223. *See* Hawke v. Smith, 253 U.S. 221, 227–28 (1920).
224. *Id.* at 231.
225. *See Smiley*, 285 U.S. at 365–66; Kirby, *supra* note 47, at 502 (interpreting *Smiley* to use a "functional approach" to define "state legislatures" to "refer to the lawmaking power of the state").
226. *See Smiley*, 285 U.S. at 361–62.

> 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view.[227]

The Court considered whether the power granted to regulate congressional elections entailed a unique function that justified displacing the state constitution's ordinary authority over its legislature.[228] The Court found that federally granted powers that only require the state legislature to make laws do not justify displacing the state constitution's ordinary supremacy.[229] The Court concluded that Article I, Section 4 entails no special function "which precludes a State from providing that legislative action . . . shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."[230] Therefore, the Court found that because the Constitution delegates Article I, Section 4 power to the legislature, as synonymous with the state's lawmaking process, the state could subject the law to a governor's veto.[231]

Sixteen years before *Smiley*, the Supreme Court held in *Ohio ex rel. Davis v. Hildebrant* that Article I, Section 4 does not preclude a state from subjecting legislation to a popular referendum.[232] The Court found that, without a contrary congressional act,[233] the state could define its legislative power to include a referendum.[234] According to the Court, the only federal constitutional question raised was whether the referendum destroyed the state's republican form of government in violation of the Guarantee Clause of Article IV, Section 4.[235] The Court found this was not a justiciable question.[236]

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227. *Id.* at 365–66 (citations omitted).

228. *See id.* at 367 ("As the authority is conferred for the purpose of making laws for the State . . . in the absence of an indication of a contrary intent . . . the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments.").

229. *See id.* at 365 (finding the core inquiry to be whether the Constitution "invests the legislature with a particular authority and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws").

230. *Id.* at 372–73.

231. *See id.*

232. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568–70 (1916).

233. The Court's inquiry into the powers of state legislatures under Article I, Section 4 is further complicated by the fact that Congress holds ultimate authority to regulate congressional elections. *See Ex parte* Siebold, 100 U.S. 371, 385 (1879) (holding that state legislatures and Congress have concurrent authority under Article I, Section 4, and congressional action controls under the Supremacy Clause).

234. *See Davis*, 241 U.S. at 568 (finding that, "so far as the State had the power to do it, the referendum . . . was contained within the legislative power").

235. *Id.* at 569.

236. *See id.* (determining that the "question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution"); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (holding that the constitutionality under the Guarantee Clause of state legislation by initiative and referendum is not resolvable by the judiciary).

2. Special Functions That Make State Legislatures Independent of State Constitutions

Although in *Smiley* and *Davis* the Supreme Court determined that state legislatures performing legislative functions are subject to state constitutions, the Court has defined the meaning of "legislature" differently when state legislatures perform nonlegislative functions.[237] The Court held in *Hawke v. Smith* that "legislature" in Article V refers exclusively to the assembly body because performance of the constitutional obligation entails a special, nonlegislative function.[238]

Hawke considered whether subjecting the state legislature's ratification of a federal constitutional amendment to a popular referendum violated Article V.[239] The Court held that the Constitution conferred the power of ratification specifically to legislatures to the exclusion of popular referendum powers.[240] The Court wrote,

> There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they 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.[241]

The Court considered other special functions that the Constitution assigns exclusively to the state assembly body, including the election of senators.[242] The Court distinguished these special functions from federal constitutional powers that require state legislatures to make laws. The Court wrote,

> Article I, § 4, [regulation of congressional elections,] plainly gives authority to the State to legislate within the limitations therein named. Such legislative action 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.[243]

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237. *See* Smiley v. Holm, 285 U.S. 355, 365–66 (1932).

238. *See* Hawke v. Smith, 253 U.S. 221, 227–28 (1920). The Court affirmed this holding on somewhat different grounds in *Leser v. Garnett*, 258 U.S. 130, 137 (1922), holding that a state constitution cannot limit the power to ratify because ratification is a federal function that transcends "any limitations sought to be imposed by the people of a state."

239. *See Hawke*, 253 U.S. at 221–28.

240. *Id.* at 228–29 ("[The term 'legislature' was] not a term of uncertain meaning when incorporated into the Constitution . . . . A Legislature was then the representative body which made the laws of the people."); *see also* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (finding that amendments proposed by Congress need not be submitted to the President for veto).

241. *Hawke*, 253 U.S. at 228.

242. *See id.* at 227–28.

243. *Id.* at 231. The Court argued that the use of the term "legislature" in Article I, Section 3, which provided that senators shall be elected by state legislatures, meant "legislature" not to include legislative powers reserved in the people. *Id.* The necessity of the Seventeenth Amendment to allow popular senate elections confirms that the Constitution originally delegated the power only to the assembly body. The Court wrote,

The Court also based its holding on the fact that the Article V power comes from the Federal Constitution, and that in the "act of ratification . . . the State derives its authority from the Federal Constitution to which the State and its people have alike assented."[244] Despite its analysis of Article V, *Hawke* still recognized that federal constitutional powers that require state legislatures to exercise lawmaking functions involve a different relationship between the legislature and the state constitution.[245]

The constitutionality of the proposed initiative might therefore turn on whether Article II requires lawmaking in a way similar to Article I, Section 4, or instead contemplates a special function more analogous to the ratification of amendments under Article V. Principles of federalism underlie this functional analysis. State constitutions control the definition of "legislature" when state legislatures perform legislative functions, while the Federal Constitution controls the meaning when the state legislatures perform special functions. The next section considers two additional questions relating to federalism. First, does an important national interest, regardless of the function the legislature performs, justify the Federal Constitution imposing its definition of "legislature" on the states? Second, does the inquiry instead turn on whether the legislature performs a state function, in which case the state defines "legislature," or a federal function, in which case the Federal Constitution defines it?

3. How the Special National Interest of Presidential Elections Might Alter the Question

In addition to the function that the legislature performs, the federal interest at stake also drives the Supreme Court's analysis in determining whether it should hold that a state legislature is not subject to ordinary state constitutional limits. Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* argued that the national interest of a presidential election justified a departure from normal principles of federalism, because "[w]e deal here not with an ordinary election, but with an election for the President of the United States."[246] According to Rehnquist, a presidential election presents an extraordinary federal interest that supports the Court's intervention into state processes to protect the special role the Constitution assigned to state

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> It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.

Id. at 228. For a complete discussion of the way the Constitution has defined "legislature" in different constitutional contexts, see generally Koza et al., *supra* note 19, at 291–335.

244. *See Hawke*, 253 U.S. at 230; *see also* Leser v. Garnett, 258 U.S. 130, 137 (1922) (holding similarly that a state gubernatorial veto could not limit a state legislature's Article V powers because a state legislature performs a federal constitutional function when ratifying amendments).

245. *See Hawke*, 253 U.S. at 231 (clarifying that Article I, Section 4 is legislative action that is entirely different from the expression of assent or dissent to a proposed amendment).

246. Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

legislatures.[247] He wrote, "This inquiry does not imply disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."[248] Faced with this fundamental national interest, for the Court to defer too readily to the state government would "abdicate our responsibility to enforce the explicit requirements of Article II."[249]

The sources of Rehnquist's argument are cases that have used the national importance of presidential elections to justify federal regulation of state powers under Article II, Section 1, Clause 2. In *Anderson v. Celebrezze*,[250] the Court found that an Ohio statute that required an independent presidential candidate to meet an early filing deadline placed an unconstitutional burden on the voting and associational rights of the candidate's supporters.[251] To justify this limitation on the state's powers to determine the manner of appointing electors, the Court wrote,

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement [of regulations] . . . has an impact beyond its own borders.[252]

The Court further found that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."[253] The combination of a strong national interest and weaker local interest in the presidential election led the Court to show less deference to the state regulation.

In *Burroughs v. United States* the Court upheld a federal law that made it a crime to conspire to corrupt presidential electors.[254] The Court wrote, "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."[255] The Court found that, while elector regulation is generally a state matter, the national importance of the presidency and the

247. *See id.* at 112–13.
248. *Id.* at 115.
249. *Id.* Some scholars argue that the interpretation of "legislature" should not turn on whether a special national interest is implicated because under Article I, Section 4 an important national interest exists but the legislature is still defined by the legislative process of the state; instead, the inquiry should turn on whether the legislature acts in a state or federal capacity. *See* Zipkin, *supra* note 46, at 369 (arguing that, where the Court has found the legislature not to be subject to state legislative processes, the legislature has been acting "as a federal body").
250. 460 U.S. 780 (1983).
251. *Id.* at 794–95.
252. *Id.* at 795.
253. *Id.*
254. Burroughs v. United States, 290 U.S. 534, 548 (1934).
255. *Id.* at 545.

fact that electors "exercise federal functions" under the Constitution give the federal government power to protect a presidential election from corruption despite the states' Article II powers.[256]

Although *Burroughs* and *Celebrezze* suggest that the national interest of the presidential election may justify the federal government showing less deference to state sovereignty, neither case speaks directly to the question of whether this national interest justifies federal intervention into the relations between branches of state government or whether a state legislature is subordinate to its state constitution when exercising manner of appointment powers.[257] However, this basis for federal intervention into presidential elections may also justify limitations on state legislative processes that are relevant to the constitutionality of the proposed initiative.[258] Along with this issue, Part II examines whether the history, precedent, and function of the Elector Appointment Clause suggest that a state can direct the manner of appointment by popular initiative.

II. DOES THE CALIFORNIA INITIATIVE VIOLATE THE CONSTITUTION?

With this ambiguous history, muddled precedent, and complicated purpose in mind, this Note moves to consider whether proposed California Initiative 07-0032 violates the Federal Constitution. Several questions structure this analysis. First, what do the history of the framing and ratification of Article II reveal about how the framers would have reacted to the proposed initiative? Second, what do the understandings of interpretive bodies—state legislatures, state courts, the Supreme Court, and Congress—suggest about the constitutionality of the initiative? Third, does the function that a state legislature performs when directing the manner of appointing electors suggest a certain definition of "legislature" in Article II that either includes or excludes the popular initiative? And finally, how do the unique characteristics of presidential elections and the Electoral College bear on the constitutionality of the proposed initiative?

A. *Viewing the Initiative Through an Original Lens*

As discussed in Part I, the record of the debates and ratification of the Constitution left behind no definitive meaning of the term "legislature" in Article II's Elector Appointment Clause.[259] However, the history suggests several possible purposes for the chosen language of the clause. Article II may have vested this power in the legislatures of the states to tie the

256. *Id.*

257. *See* Bush v. Gore, 531 U.S. 98, 141–42 (2000) (Ginsburg, J., dissenting).

258. *See infra* Part II.D.

259. *See* Peirce & Longley, *supra* note 6, at 24 (describing how the "knotty problem" of the manner of elector appointment, "which would cause endless debates and maneuvers in the state legislatures in the ensuing years, was completely ignored"); Kirby, *supra* note 47, at 501; Smith, *supra* note 52, at 743.

election as closely as possible to the people.[260] According to this view, the presidential election served to connect the President to the people.[261] After direct popular election proved infeasible, vesting manner of appointment powers in state legislatures, along with actual election powers in electors, was part of a next-best, pragmatic strategy to give the election to the people as much as the Constitution possibly could.[262] In opposition to the popular surrogate interpretation of "legislature," Article II may have specifically used the term "legislature" to refer exclusively to the assembled body of representative lawmakers as a means to filter the popular will and reinforce the tie between the federal and state governments.[263] Several delegates used these rationales to justify placing other powers in state legislatures,[264] and the framers may have generally valued representative lawmaking over direct popular legislation.[265] As a final possibility, the framers may have intended the clause to be an open-ended concession to state governments that left each state to define its own legislative power.[266] This may explain why, after months of debate, the delegates could resolve the elector appointment issue so easily, and why constitutional advocates gave inconsistent explanations of Article II during the ratification debates.[267]

The founders of the Constitution based its legitimacy on its derivation from the people and designed the President to be the embodiment and

260. *See* Barkow, *supra* note 70, at 285 (arguing that state legislatures were granted manner of appointment authority because they were the branch of government tied closest to the people).

261. *See* Journal of the Federal Convention, *supra* note 50, at 602 (statement of James Madison, Aug. 24, 1787).

262. *See* Wilson, *supra* note 89, at 512.

263. *See* Journal of the Federal Convention, *supra* note 50, at 388 (statement of Elbridge Gerry, July 29, 1787) (finding that allowing states' governments to appoint electors would attach state governments to the national system); The Records of the Federal Convention, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (preferring legislative appointment because the people were "too little informed of personal characters in large districts, and liable to deceptions").

264. *See* The Federalist No. 62 (James Madison), *supra* note 57, at 364–65 (arguing that appointment of senators by state legislatures produced the double advantage of "favoring a select appointment" and linking state and federal governments); Amar, *supra* note 71, at 1352 (contending that the framers chose legislative election in Article I, Section 3 to protect state interests and, to a lesser extent, to filter popular will); *see also* Journal of the Federal Convention, *supra* note 50, at 388 (statement of Elbridge Gerry, July 29, 1787) (proposing that all the constitutional election systems serve to tie states to the federal government); Smith, *supra* note 52, at 753–54 (describing the apparent similarity between the rationale for appointment of electors by state legislatures and Madison's justifications for the Article I, Section 3 state legislative appointment of senators).

265. *See supra* notes 93–111 and accompanying text.

266. *See* Roche, *supra* note 91, at 810 (explaining that the Electoral College was improvisational and unprincipled); Smith, *supra* note 52, at 737 (arguing that the phrase "in such Manner as the Legislature thereof may direct" was likely boilerplate or default language due to its similarity with language in the Articles of Confederation).

267. *See* Peirce & Longley, *supra* note 6, at 28 (describing the inconsistencies in the delegates' description of who would hold the true power of electing the President); *supra* notes 116–19 and accompanying text (recounting various interpretations).

protector of these ultimate sovereigns.[268] This may have led to the stubborn insistence of many of the delegates, during the dog days of the Philadelphia summer, that the people should elect the President.[269] Although the ideal of popular election proved infeasible,[270] the delegates may have constructed the Electoral College as a practical, if imperfect, mechanism by which the people could exercise their sovereignty.[271] A removed body of electors could approximate the popular vote but overcome the perceived impossibility of direct popular election;[272] and, of all the available options, allowing a state legislature, the most democratic branch of state government, to direct the manner of appointment could come closest to letting the people decide.[273]

If the Electoral College was designed to facilitate the popular will, then a popular initiative that brings the decision closer to the people would further, rather than frustrate, the purpose of the framers.[274] That the framers did not have available an orderly, practical form of statewide popular lawmaking should not prevent Article II from now embracing the modern plebiscite.[275] Instead, the Constitution permits, and possibly even encourages, a state to

268. *See* The Federalist No. 84 (Alexander Hamilton), *supra* note 57, at 475 (arguing that a bill of rights is unnecessary under the Constitution, which is "professedly founded upon the power of the people" and where "the people surrender nothing").

269. *See* Peirce & Longley, *supra* note 6, at 21 (finding that "advocates of direct vote were among the convention's more illustrious members—James Wilson, Gouverneur Morris, and James Madison").

270. *See* Kuroda, *supra* note 7, at 9 (recounting that the delegates rejected popular election out of specific impracticability concerns, including the impossibility that a census could be taken before the first election, the varying suffrage requirements that existed in the states, the high cost of supervising an election, and the risk a national popular election would create domestic disturbances).

271. *See* Barkow, *supra* note 70, at 285 (writing that "the decision in the state legislatures was intended to give the people the power to select the manner of choosing electors without creating the perceived dangers of direct election by the people").

272. *See* The Federalist No. 68 (Alexander Hamilton), *supra* note 57, at 393 (finding it "desirable that the sense of the people should operate" in the choice of the President, and that this end could be accomplished by "committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture").

273. *See* Wilson, *supra* note 89, at 511–12 (arguing that giving manner of appointment powers to state legislatures brought the decision as close to the people as practicable); *see also* The Federalist No. 46 (James Madison), *supra* note 57, at 297 (finding it "beyond doubt that the first and most natural attachment of the people will be to the governments of their respective states").

274. *See* Peirce & Longley, *supra* note 6, at 21 (contending that the arguments that delegates made in favor of direct popular election were "better suited to future generations" when practical obstacles would no longer exist); *see also* The Records of the Federal Convention of 1787, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (expressing some approval of the idea of popular election, but "waiting till people [should] feel more the necessity of it," as the "Community [was] not yet ripe").

275. *See* Kirby, *supra* note 47, at 501 (claiming that modern popular initiatives did not exist at the time of the founding of the Constitution); *see also* Persily, *supra* note 24, at 16 (noting that South Dakota was the first state to create a modern popular initiative in 1898).

direct the manner of appointing electors with the most democratic form of rule making available.[276]

However, as the entire Constitution had to deal with the tension between the ideal of democracy and the necessity of insulated and structurally checked representative government,[277] the democracy-furthering interpretation of Article II must confront the framers' preference for representative government.[278] If the Electoral College rejected direct election not because of its impracticability, but because it tended toward tyranny,[279] then vesting state legislatures with the power to direct elector appointment may have been an exclusive grant to an assembly body that could filter the raw impulses of the popular will.[280] And an additional value—strengthening the tenuous tie between state governments and the federal government, thereby increasing the legitimacy and acceptance of the newly created dual system—would also accrue from vesting the power exclusively in a sitting branch of state government.[281] Fear of unbridled democratic power and fidelity to a newly born federal system may have driven the delegates to say that state legislatures—those assembly bodies that could deliberate and then filter and strengthen the bonds of concurrent sovereigns—shall direct the manner of appointing presidential electors.

According to this argument, a popular initiative would betray the framers' purpose because it would make law without deliberation, thus facilitating the tyranny of factions,[282] and dissolve the bond between state government and federal government by allowing the people to determine

276. *See* Barkow, *supra* note 70, at 285.

277. *See* Brown, *supra* note 95, at 554 (noting that the tension "between the implementation of popular will, on the one hand, and liberty, on the other" led to the belief that only a deliberative, insulated legislative body could protect the liberty of minorities); *supra* notes 95–100 and accompanying text.

278. *See* The Federalist No. 10 (James Madison), *supra* note 57, at 124–26 (describing the virtues of representative government and the dangers of direct democracy). *But see* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1051–53 (2000) (arguing that the framers' understanding of the deliberative qualities of Congress did not necessarily apply to state legislatures, which, unlike Congress, did not need to be geographically diverse and could be instructed by citizens, reflecting the "dominant mode of thought regarding the state governments in effect before ratification [that] viewed legislatures as merely alter egos of the people").

279. *See* Journal of the Federal Convention, *supra* note 50, at 433 (statement of Elbridge Gerry, July 25, 1787) ("A popular election in this case is radically viscous. The ignorance of the people would put it in the power of some one set of men . . . acting in concert, to delude them into any appointment.").

280. *See* The Records of the Federal Convention of 1787, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (describing the virtues of deliberation in a system of legislative appointment).

281. *See* Journal of the Federal Convention, *supra* note 50, at 388 (statement of Elbridge Gerry, July 29, 1787); Smith, *supra* note 52, at 753–54.

282. *See* The Federalist No. 10 (James Madison), *supra* note 57, at 126 (describing the destructive and tyrannical tendency of direct democracy).

the mode of appointing electors directly.[283] As the framers rejected the forms of direct democracy available in the eighteenth century,[284] they would not allow a modern state to appoint electors using a popular initiative that is lacking in the necessary and unique virtues of representative lawmaking.

In contrast with the principled positions that Article II was designed either to promote or restrict democracy, there is a third interpretation of the original meaning: the words "in such Manner as the Legislature thereof may direct" placed control in the general state legislative power, but did not favor one form of lawmaking over another.[285] Some have argued that the clause was a concession to the states that left them discretion over how to define their legislative power and how elector appointment would take place.[286] Under this state-centered interpretation, the word "legislature" was possibly chosen either because it was the customary form through which states then exercised their sovereignty,[287] or because it allowed prospective rule making, which the delegates may have found preferable to leaving the decision to a more retrospective branch of state government.[288] In any event, the primary purpose of the language was to leave the manner of appointment decision to the states, without federal interference.[289] This would circumvent a stalemate on an issue that stymied the delegates throughout the summer and would place a substantial power in the states helping to promote balance in the Electoral College compromise.[290] This helps make sense of the contradictions of the framers' interpretations of Article II during the ratification debates.[291]

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283. *See* The Records of the Federal Convention of 1787, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (arguing that popular election tends to "supersede altogether the State authorities").

284. *See* Hamilton, *supra* note 107, at 2533 (describing the framers' rejection of a right to instruct federal representatives); *supra* notes 106–10 and accompanying text.

285. *See* Smith, *supra* note 52, at 783 (describing the Elector Appointment Clause as a compromise that "rejected a decisive role for state legislatures" and intended to empower "the people of the state as much as, if not more than, the legislatures").

286. *See* McAfee, *supra* note 53, at 648 ("Those who feared a strong national government were given a system that allowed states to determine their own method for choosing their electors.").

287. *See* Hawke v. Smith, 253 U.S 221, 228–29 (1920) (contending that the term "legislature" was "not a term of uncertain meaning when incorporated into the Constitution" but a term that then meant "the representative body which made the laws of the people").

288. *See* Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 Fla. St. U. L. Rev. 811, 838–40 (2001) (arguing that, by vesting power in the legislature, Article II implies the manner of appointment must be directed before an election); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. Chi. L. Rev. 657, 662 (2001) (claiming that the framers' decision to place manner of appointment power in state legislatures ensured that states would "enact their rules in advance of any particular controversy").

289. *See* Smith, *supra* note 52, at 783.

290. *See* Roche, *supra* note 91, at 811 (summarizing the purpose of the Electoral College as getting the convention "over the hurdle" of how the President would be elected by protecting everyone's interests).

291. *See supra* notes 112–18 and accompanying text.

Under this interpretation, through directing the manner of appointment by popular initiative, a state would properly act within its legislative power.[292] If Article II was primarily a grant of power to states, and the term "legislature" was chosen simply because it was a common way states exercised their sovereign powers,[293] or more substantially because the term "legislature" facilitated prospective lawmaking,[294] then the proposed initiative would further the framers' design. Allowing California to direct the manner of appointment by popular initiative would leave ultimate discretion to the states, without federal interference, through a mode that many states now use to exercise their sovereignty and that still provides for prospective lawmaking.

B. *Analyzing the Initiative Under Judicial and Legislative Precedent*

Over the past 220 years, numerous courts and legislatures have ventured to interpret the meaning of the enigmatic Article II. These opinions deal with two distinct, though interacting, issues. Some cases concern whether a state constitution can substantively limit the discretion of its state legislature under Article II.[295] This issue typically concerns whether a state constitutional provision can limit the manner of appointment that a state legislature directs.[296] Other cases concern whether a state constitution can determine the process by which the manner of appointment is directed.[297] These cases ask whether direction by the "legislature" requires a specific process under Article II or if the process can be defined by the state constitution.[298] Parsing out questions of substance and process allows a more specific inquiry into the constitutionality of the proposed California initiative.

1. The Supreme Court's Line Between Substantive and Procedural Limitations

The Supreme Court's decisions in *Bush v. Gore* and *Bush v. Palm Beach County Canvassing Board* show how the line between process and

292. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (declining to find that a mechanism of direct democracy violated the Guarantee Clause of Article IV).

293. *See* Hawke v. Smith, 253 U.S. 221, 228–29 (1920).

294. *See* Friedman, *supra* note 288, at 836–40.

295. *See* State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286–87 (Neb. 1948) (discussing the conflict between a substantive state constitutional provision and the state legislature's directed mode of appointment); Opinion of the Judges of the Supreme Court on the Constitutionality of "An Act Providing for Soldier Voting," 37 Vt. 665, 666–67 (1864) (issuing a narrow holding that dealt with a substantive conflict between a state constitutional provision and an out-of-state soldier-voting law).

296. *See, e.g.*, *Marsh*, 34 N.W.2d at 285–87.

297. *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892) (describing how the Constitution places the manner of appointment power in the legislature of the state); *In re* Opinion of the Justices, 107 A. 705, 706–07 (Me. 1919) (discussing the constitutionality of using the process of referendum to exercise Article II powers).

298. *See In re Opinion of the Justices*, 107 A. at 706–07.

substance drives the Court's analysis.[299] In the unanimous *Palm Beach County* opinion,[300] all the Justices seemed to recognize that Article II provided some protection of the substance of a state legislature's chosen manner of appointment from retrospective state constitutional limitation.[301] However, the Justices split in *Bush v. Gore* because some believed that stopping the Florida Supreme Court's recount was necessary to protect the substance of the legislature's enactment,[302] while others believed it would only impermissibly interfere with state legislative process.[303] Chief Justice Rehnquist framed the Florida court's action as a substantive limitation, arguing that the state court's interpretation ran so afoul of the legislature's intent that it would "wholly change the statutorily provided appointment."[304] His objection was not that the law was subject to judicial review, but that the judicial review so severely deviated from the legislative intent that it altered the substance of the law.[305] Of course, by subjecting a state court decision to greater scrutiny, this substance-based inquiry would regulate state constitutional process by limiting the normal flexibility a state court could use when interpreting state law.[306] However, the language of Rehnquist's opinion focused on substance and never contended that Article II made state legislatures independent of normal state constitutional process.[307]

Unlike Rehnquist, the dissenting Justices found that the Florida Supreme Court did not substantively alter the legislature's chosen mode,[308] and,

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299. *See* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694 (Ky. 1944) (reconciling Supreme Court precedent by drawing a distinction between legislative process, which is limited by state constitutions, and the substance of legislative enactments, which is not); Kirby, *supra* note 47, at 504.

300. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

301. *See Palm Beach County*, 531 U.S. at 77–78 (finding that the decisions of the Florida Supreme Court "may be read to indicate 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").

302. *See* Bush v. Gore, 531 U.S. 98, 114 (Rehnquist, C.J., concurring) (accepting the role of judicial review until it conflicted with the legislature's chosen mode).

303. *See id.* at 139 (Ginsburg, J., dissenting); *id.* at 123–24 (Stevens, J., dissenting).

304. *Id.* (Rehnquist, C.J., concurring).

305. *See id.*; *see also* Tribe, *supra* note 199, at 190 (arguing that Rehnquist engaged in a typical review of a state court's interpretation of a federal norm).

306. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 Yale L.J. 1407, 1416 (2001) (claiming that Rehnquist's substance-process distinction, that the Florida Supreme Court can interpret Florida law as long as it does not change it, "enters a realm of metaphysical speculation" because courts "change law whenever they interpret it"). According to Jack M. Balkin, the substance-procedure distinction only serves to mask the real question of what standard of review to apply to the state court decision. *See id.*

307. *See Gore*, 531 U.S. at 113–14 (Rehnquist, C.J., concurring).

308. *See id.* at 127–28 (Stevens, J., dissenting) ("Neither in this case, nor its earlier opinion . . . did the Florida Supreme Court make any substantive change in Florida Election Law."); *id.* at 131 (Souter, J., dissenting) ("None of the state court's interpretations is unreasonable to the point of displacing the legislative enactment . . . ."); *id.* at 136 (Ginsburg, J., dissenting) ("[D]isagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated."); *id.* at 151 (Breyer, J., dissenting) ("Nor can one say that the [Florida Supreme] Court's ultimate

therefore, Article II should not meddle with the ordinary legislative process of the state.[309] However, none of these Justices held that every state court action would be immune from Article II regulation,[310] just as Rehnquist did not hold that Article II makes the state legislature wholly independent from judicial review.[311] Instead, the disagreement between the dissenting Justices and Rehnquist concerned what degree of scrutiny the Court should apply to the state court decision.[312] Whether the recount was a substantive change that justified Article II intervention was ultimately a function of the level of judicial review each Justice applied.[313]

2. Substantive State Constitutional Limitation of State Legislatures

State cases concerning whether an express state constitutional provision could substantively limit a state legislature's chosen manner of appointment provide a more straightforward application of the substance-process distinction. Many of these cases upheld legislative enactments passed pursuant to Article II that substantively conflicted with state constitutions.[314] The Supreme Court of Kentucky, in a soldier-voting case that arose during World War II, drew a clear distinction between substance and process when upholding soldier-voting laws.[315] The court found that, though "the legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment," it "does not necessarily follow that when functioning in the manner prescribed by

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determination is so unreasonable as to amount to a constitutionally 'impermissible distortion' of Florida law.").

309. *See id.* at 123–24 (Stevens, J., dissenting) ("The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it."); *id.* at 141 (Ginsburg, J., dissenting) ("By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, the Chief Justice contradicts the basic principle that a State may organize itself as it sees fit.").

310. *See id.* at 127–28 (Stevens, J., dissenting) (considering whether the Florida decision was a substantive change in violation of Article II); *id.* at 131 (Souter, J., dissenting) (considering whether the Florida court's decision was unreasonable to the point of displacing Florida law); *id.* at 136 (Ginsburg, J., dissenting) (considering whether the Florida court's decision constituted legislating); *id.* at 151 (Breyer, J., dissenting) (evaluating whether the Florida court's decision was an impermissible distortion of Florida law).

311. *See id.* at 113–14 (Rehnquist, C.J., concurring).

312. *See* Tribe, *supra* note 199, at 185–94 (arguing that the Article II issue in *Gore* was a red herring because all the justices gave some deference to the Florida Supreme Court, and Chief Justice Rehnquist's analysis did not stray from the way the Court interprets other federal constitutional norms).

313. *See* Balkin, *supra* note 306, at 1416 (arguing that the Rehnquist opinion ultimately turned on the level of judicial review it applied).

314. *See* State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286–87 (Neb. 1948) (holding that Article II makes it unnecessary to consider a substantive conflict "between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision"); *In re* Opinion of the Judges, 37 Vt. 665, 666–67 (1864) (upholding a soldier-voting law despite a substantive conflict with a state constitutional provision).

315. *See* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694 (Ky. 1944).

the State Constitution, the scope of its enactment is also limited by the provisions of the state constitution."[316] Although dicta of some of these state decisions moved beyond the substance question,[317] they primarily concerned the question of whether a specific state constitutional provision could limit a mode of appointment that the legislature had already chosen, not the means by which the legislature enacted that mode.[318]

Opinions that hold a state constitution cannot substantively limit the state legislature's chosen manner of appointment would not necessarily render the proposed California initiative unconstitutional. The initiative instead concerns the separate question of whether Article II limits the authority of a state constitution to define its own lawmaking process. However, these opinions are still relevant to the initiative question because they recognize a scenario in which Article II allows federal intervention into the relationship between a state legislature and its state constitution.[319] Still, the question of whether Article II allows the federal government to intervene to protect a certain process from state constitutional limitation requires a distinct constitutional analysis.

3. Procedural State Constitutional Limitation of State Legislatures

McPherson provided the Supreme Court's fullest discussion of whether Article II allows a state constitution to define how it exercises its manner of appointment powers or, instead, sets forth a specific process that a state must follow.[320] The Supreme Court found that Article II meant that only the legislative power of the state could direct the manner in which the state appoints electors.[321] The Court thus asserted that the manner of appointment must be directed by the state's legislative process, finding that a state constitution could not divert this power from the legislative branch to the executive or judicial branches.[322] However, the Court did not say definitively what this legislative process must entail, or of what precisely a

316. *Id.*

317. *See* Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldiers' Voting Bill, 45 N.H. 595, 599 (1864) (writing, with language broad enough to forbid state constitutional limits on process, that "the Constitution of the State has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States").

318. *See* Kirby, *supra* note 47, at 504 (drawing the substance-process distinction after reviewing state court cases).

319. *See* Bush v. Gore, 531 U.S. 70, 112 (2000) (Rehnquist, C.J., concurring) (describing the special national interest of presidential elections).

320. *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892) (noting that the Constitution does not provide a specific mode for appointing electors, but instead "leaves it to the legislature exclusively to define the method of effecting the object").

321. *See id.* at 26–27 (finding that the whole matter of how a state appoints its electors is committed to the legislature).

322. *See id.* at 25 (reasoning that the insertion of the words "in such manner as the legislature thereof may direct" operates to limit any attempt by the state to "circumscribe the legislative power").

state's "legislature" must consist.[323] As previously discussed, the opinion could plausibly support a definition of legislature limited to a representative assembly,[324] or one that allows other expressions of the "fundamental law power."[325] Even language that seemingly asserts the primacy of state legislatures over state constitutions might really be concerned with preventing substantive limitations, not procedural ones.[326] For instance, the Maine Supreme Judicial Court upheld the use of a referendum that gave women the right to vote for electors, concluding that nothing in *McPherson* prevented a state from defining its own legislative process under Article II.[327]

Since *McPherson* left open whether Article II limits a state constitution from defining its own legislative process, it could be constitutionally reconciled with the proposed California initiative. Indeed, some language from *McPherson* suggests an understanding that the fundamental law power of a state might be reposed somewhere other than a representative assembly, which could include placing lawmaking power in the people through a popular initiative.[328] The opinion of the Maine Supreme Judicial Court shows that the proposed California initiative could be read as a legitimate exercise of the lawmaking power of the state that is consistent with Article II and *McPherson*.[329]

In contrast to the ambiguity of *McPherson*, some courts and legislative bodies have adopted the strict understanding that "legislature" in Article II refers to a specific legislative process, consisting of deliberative decision making by the state's representative assembly, which a state constitution cannot infringe.[330] Some state Civil War soldier-voting cases and the majority report in *Baldwin*, all of which were issued before *McPherson*,

323. *See id.* ("What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist.").

324. *See id.* at 27 (writing that the constitution "recognizes that the people act through their representatives in the legislature").

325. *See id.* at 25 (finding that the people exercise their sovereignty "through their representatives unless the fundamental law power is elsewhere reposed").

326. *See id.* at 35 (citing a Senate report that said "provisions" of statutes or the state constitution that provided for popular election could not limit the authority of state legislatures to define the manner of appointment, without discussing whether any limitations exist on the process a state must use to enact those provisions (citing S. Rep. No. 43-395 (1874))).

327. *See In re* Opinion of the Justices, 107 A. 705, 706 (Me. 1919) (holding that Article II "means, simply that the state shall give expression to its will, as it must, of necessity, through its law-making body, the Legislature" and that these "acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law").

328. *See* Smith, *supra* note 52, at 776 (describing how "[b]oth sides of the independent legislature debate look to this passage [from *McPherson*] for support").

329. *See In re Opinion of the Justices*, 107 A. at 706–07 (finding that a popular referendum does not violate Article II).

330. *See* Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldiers' Voting Bill, 45 N.H. 595, 599 (1864) (holding that the "whole subject is entrusted to the State Legislature, subject to the control of Congress" and there can be "no ground to question the power of the legislature to authorize voting for electors").

concluded that Article II requires states to direct elector appointment through a process of representative lawmaking.[331] These decisions used a combination of textual and historical analysis to argue that the Constitution consciously used the term "legislature" specifically to empower the assembly body of the state.[332] They envisioned the most robust and fixed idea of state "legislature" under Article II—a representative body free from both the substantive and procedural fetters of its state constitution.[333]

Under this narrow interpretation, the proposed initiative would violate Article II because it would direct the manner of appointing electors to the exclusion of the term "legislature." Because the Constitution commits this power exclusively to the representative body, any state constitutional lawmaking process that allows a popular initiative to direct the manner of appointment would impose an impermissible procedural limitation on the state legislature. Examining the meaning of the term "legislature" that the Court has assigned in other constitutional contexts may help determine whether it makes sense to adopt this narrow understanding of "legislature" in Article II, or instead embrace the broader definition of legislative power put forth by the Maine Supreme Judicial Court.

C. *Placing the Initiative Within the Functional Framework*

As previously discussed, the Supreme Court has held that the Federal Constitution uses "legislature" in two distinct senses.[334] In some contexts, legislature denotes the assembly body of state representatives;[335] in other contexts, it denotes the lawmaking power of the state.[336] The first definition is fixed and superintended by the Constitution;[337] the latter is left to the states.[338] For example, the Court has held that the Constitution refers exclusively to the formal assembly body when empowering state legislatures to ratify constitutional amendments under Article V, prohibiting ratification by other state legislative processes of direct democracy and gubernatorial veto.[339] But then, the Court has held that the term

331. *See* Rowell, *supra* note 147, at 200–01 (describing the contested election case of *Baldwin v. Trowbridge*, in which the majority report of the House Committee of Elections held that the Constitution used the term "legislature" to refer exclusively to the representative body).

332. *See id.* at 200 (quoting the majority report position that, when the Constitution empowers the state legislature, it does so to the exclusion of the state constitution).

333. *See id.*

334. *See supra* Part I.E.

335. *See* Hawke v. Smith, 253 U.S. 221, 227–28 (1920).

336. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 567–68 (1916).

337. *See Hawke*, 253 U.S. at 227–28 (asserting that the Constitution gave the term "legislature" a definite meaning as the assembly body of the state in the context of Article V).

338. *See Davis*, 241 U.S. at 568 (finding that, insofar as a referendum was part of the legislative power under the state constitution, it was an act of the legislature under Article I, Section 4 of the Constitution).

339. *See Hawke*, 253 U.S. at 227–28 (prohibiting referendum); Leser v. Garnett, 258 U.S. 130, 137 (1922) (prohibiting veto).

"legislature" in Article I, Section IV refers to the state's legislative power, allowing that power to determine the time, manner, and place of congressional elections through its own process, which can include forms of direct democracy or a governor's veto. The Court has provided a concise explanation for these two definitions of the term "legislature": when the Constitution requires a state legislature to make law, that law should be enacted by the state's ordinary legislative process; however, when the Constitution asks the state legislature to do something different than lawmaking, only the assembly body can perform that special function.[340] The functional inquiry into Article II must therefore begin by asking whether a state legislature makes law or does something else when it directs the manner in which a state appoints presidential electors.

One working definition of the "legislative" power of a state is "the power to establish general rules of prospective application."[341] When state legislatures prescribe the time, place, and manner of congressional elections, they legislate, in the sense that they set rules in advance for the future election to follow.[342] The term "prescribe" refers to the power to ordain future action,[343] and the setting of the time, place, and manner of an election necessarily requires making rules of general application. Accordingly, Article I, Section 4 powers are exercised by the legislative power of the state, whatever the state constitution defines that to be.

The Supreme Court noted the similarity between the construction of Article II, Section 1 and Article I, Section 4 in *U.S. Term Limits, Inc. v. Thornton*.[344] To direct the manner in which the state appoints electors may require, like the power to prescribe under Article I, Section 4, the state legislature to establish general rules of prospective application.[345] The term "direct" is synonymous with "prescribe" and likewise means to set forth a future course of action.[346] Directing the manner of elector appointment will typically require a state legislature to construct a statewide election process, which will involve making rules of general application analogous to the

340. *See* Smiley v. Holm, 285 U.S. 355, 366 (1932).

341. John Ferejohn, *Judicializing Politics, Politicizing Law*, Law & Contemp. Probs., Summer 2002, at 41, 44; *see also* Koenig v. Flynn, 179 N.E. 705, 707 (N.Y. 1932) (defining a legislative act as the "prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the state").

342. *See Smiley*, 285 U.S. at 365–66 ("Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named.").

343. *See Koenig*, 179 N.E. at 707.

344. 514 U.S. 779, 805 (1995) ("This duty parallels the duty under Article II . . . . These Clauses are express delegations of power to the States to act with respect to federal elections."). The opinion also found similarity between the clauses in that the Constitution treats both the President and congressional representatives as federal officers. *See id.*

345. *See* Bush v. Gore, 531 U.S. 98, 124 n.1 (2000) (Stevens, J., dissenting) (writing that it is "perfectly clear" that Article II parallels Article I, Section 4 rather than Article V because Article I, Section 4 and Article II "both call upon legislatures to act in a lawmaking capacity").

346. *See* American Heritage Dictionary of the English Language 512 (4th ed. 2000) (defining "direct" as "to manage or conduct the affairs of; regulate," or "to supervise the performance of").

rules state legislatures promulgate under Article I, Section 4.[347] Under these rationales, Article II requires state legislatures to make law, and the Constitution thus commits the power to determine the manner of appointment to the legislative power of the state, rather than the formal assembly.

Under this broader definition of "legislature," Article II would allow a state to define the lawmaking process by which it determines the manner of elector appointment. The California Constitution defines the popular initiative as part of its lawmaking power,[348] and an initiative acts legislatively in the sense that it establishes rules of prospective application.[349] Were a court to interpret "legislature" in Article II to mean "legislative power," the constitutionality of the California initiative would be difficult to question.

However, there is a wrinkle in the functional analysis of Article II. Recall the Supreme Court's position that, when the Constitution asks a state legislature to do something nonlegislative, it exclusively references the state's formal assembly body.[350] These special functions do not require the legislature to make prospective rules of general application. Instead, special functions are discrete acts that require no ongoing legal enforcement and implementation; they are self-contained and bounded in a way that lawmaking is not.[351] In addition to holding that the Article V power to ratify constitutional amendments entails a special function, the Court has suggested that several other constitutional grants to state legislatures involve similarly nonlegislative acts.[352] Specifically, the Court indicated that the power to elect senators, which state legislatures possessed pursuant to Article I, Section 3 prior to the Seventeenth Amendment, was one such special power that the Constitution gave exclusively to the assembly bodies.[353] The casting of ballots involves a simple, absolute action that does not require prospective rule making.[354] Significantly, states have interpreted the Seventeenth Amendment provision, which says the time, place, and manner of holding elections shall be determined by each state's

347. *See Gore*, 531 U.S. at 124 n.1 (Stevens, J., dissenting).

348. *See supra* notes 24–29 and accompanying text.

349. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 567–68 (1916) (holding that another mechanism of direct democracy, a popular referendum, qualified as lawmaking under Article I, Section 4).

350. *See* Hawke v. Smith, 253 U.S. 221, 227–28 (1920).

351. *See id.* at 231 (writing that "legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution").

352. *See id.* at 227–28 (describing other constitutional provisions where "legislature" refers to an assembly body).

353. *See id.* at 228 (finding that Congress and the states understood that "election by the people was entirely distinct from the legislative action" of electing senators under Article I, Section 3).

354. *See* Amar, *supra* note 278, at 1069 (explaining that state legislatures enjoyed independence in selecting senators in the decades after the Constitution was written).

legislature, to apply generally to the state lawmaking process.[355] This highlights the constitutional distinction between the nonlegislative act of casting the vote itself and the legislative act of making the rules under which that vote will be cast.

The broad plenary power that state legislatures possess under Article II might complicate the functional analysis. If a state legislature chose to appoint electors by some form of popular statewide election, such direction of appointment would involve lawmaking similar to the lawmaking required by Article I, Section 4.[356] However, if the legislature directed that they would appoint the electors themselves,[357] such a decision seems no more prospective or general in application than legislative election of senators under Article I, Section 3. By allowing the legislature to act either as general election rule promulgator or simple self-appointer, the manner of appointment power seems to straddle the Supreme Court's dichotomy between functions legislative and nonlegislative.[358] The self-appointment capacity for which the clause allows forms a basis for the argument that the manner of appointment power is vested only in the formal assembly body of the state, and the proposed initiative is therefore unconstitutional.

However, this special function might only be illusory, resulting from an argument that conflates the manner of appointment and the act of appointment itself. Article II, Section 1, Clause 2 separates the power to appoint, which it places in states, from the power to direct the manner of appointment, which it places in state legislatures.[359] If a state legislature directed that it would self-appoint, its power to do so would derive not from its manner of appointment power, but from the state's appointment power, which the legislature can only exercise from its authority to act on behalf of the state.[360] Therefore, Article II and Article I, Section 3 are formally different because, rather than vesting the power to elect senators specifically in state legislatures, Article II vests the power to appoint electors in the states. Further, as a functional matter, the direction that the

355. *See* Koza et al., *supra* note 19, at 328.

356. *See* Bush v. Gore, 531 U.S. 98, 123 n.1 (Stevens, J., dissenting) (arguing that Article II is most similar to Article I, Section 4, which gives state legislatures powers to regulate congressional elections).

357. *See id.* at 104 (per curiam) (citing McPherson v. Blacker, 146 U.S. 1, 7 (1892)) (noting that "the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution").

358. *See* Cmty. Rights Counsel, The Effort by California Republicans to Use a Ballot Initiative to Trump the California Legislature's Allocation of California's Electors for the 2008 Election Is Unconstitutional, http://www.communityrights.org/newsroom/CaliforniaBallotLegalAnalysis.asp (last visited Mar. 9, 2008).

359. *See* U.S. Const. art. II, § 1, cl. 2 (distinguishing between powers of the state and the state legislature by holding that "Each State shall appoint" and this appointment shall occur "in such Manner as the Legislature thereof may direct").

360. *See McPherson*, 146 U.S. at 25 ("The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established.").

state legislature would appoint the electors themselves would resemble lawmaking. Legislatures would still choose from various courses of action and their decision would still bind the state's future appointment of electors. Therefore, as a functional and formal matter, the capacity to self-appoint under Article II might not turn the power into a special, nonlegislative function. The Constitution does not require the legislature to perform the nonlegislative function of appointment; rather, it gives the legislature broad power to set forth a prospective manner of appointment that allows, but by no means requires, appointment to be made by the legislature on behalf of the state.[361]

Even if the functional analysis suggests that a state legislature performs a legislative function when directing the manner of appointment, there may be other ways to distinguish Article II from Article I, Section 4. Presidential elections might implicate unique interests that require deviation from a strict functional analysis.[362] In addition, risks posed by popular initiatives could carry special significance in the context of the Electoral College.[363] The following section discusses the particular concerns and interests that exist in the context of a presidential election.

D. *Evaluating the Initiative in Light of the Special National Interest of Presidential Elections*

Although analogies to other constitutional provisions can illuminate the meaning of the Elector Appointment Clause, the Constitution's system for electing the President in many ways is a creature unto itself. Unlike a congressional election, in which states separately elect local representatives, Article II requires states to cooperate when electing a national executive.[364] If a state legislature changes the manner of appointment so as to alter which electors the state appoints, this influences not only the state's choice but the other states' choices as well.[365] This national interest might justify heightened federal oversight of state action under Article II.[366] If popular initiatives pose special risks to the structure of the Electoral College,[367] this national interest might provide a basis for making it unconstitutional for a state to direct the manner of appointment by plebiscite. On the other hand, if this unique national interest only justifies a constitutional prohibition of ex post, retrospective elector appointment, a popular initiative, as prospective lawmaking, would not violate Article II.

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361. *See* U.S. Const. art. II, § 1, cl. 2.

362. *See supra* Part I.E.

363. *See* Eule, *supra* note 102, at 1525–29 (describing the lack of structural safeguards in popular initiatives).

364. *See* Anderson v. Celebrezze, 460 U.S. 780, 795 (1983) (arguing that the state has a lesser interest in a presidential election due to its national character).

365. *See* Hertzberg, *supra* note 9, at 21–22 (describing how the proposed California initiative would have changed the 2004 election).

366. *See* Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

367. *See* Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. Chi. L. Sch. Roundtable 17, 18–23 (1997) (noting the corruption risks posed by popular initiatives).

The special character of presidential elections may warrant reducing the ordinary federal deference to the state's internal legislative process. Each state's stake in electing the President exists relative to the other states; if one state legislature changes its manner of appointment in order to swing an election toward a certain candidate, the relative power of the other states also changes. The Supreme Court has based limited substantive federal regulation of presidential elections upon this interest,[368] and Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* would have used this principle to assert greater federal scrutiny over a state court's interpretation of its legislature's chosen manner of appointment.[369] The national interest of a presidential election might further justify a constitutional limit on the legislative process that directs the manner in which a state appoints electors.

1. Lack of Structural Safeguards in Direct Democracy

Popular initiatives may facilitate heightened risks of corruption and manipulation that offend the design of the Electoral College and call for constitutional prohibition based on the special national character of presidential elections. One reason some of the framers objected to the direct election of the President was the risk that the people's votes would be driven by powerful private interests.[370] A manner of appointment direction made by popular initiative, a process that lacks deliberation and accountability,[371] may be more exploitable by a single faction or interest group.[372] The low voter turnout for initiative measures may compound the risk that an interest group, or political party, will lead voters to direct a manner of appointment that is designed to assist a chosen candidate.[373] A popular initiative that directed the manner of appointment would circumvent the Electoral College's deliberative design and increase the risk of election manipulation.[374]

368. *See Anderson*, 460 U.S. at 795 ("[T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."); Burroughs v. United States, 290 U.S. 534, 545 (1934).

369. *See Gore*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

370. *See* Journal of the Federal Convention, *supra* note 50, at 433 (statement of Elbridge Gerry, July 25, 1787) ("A popular election in this case is radically viscous. The ignorance of the people would put it in the power of some one set of men . . . acting in concert, to delude them into any appointment.").

371. *See* Eule, *supra* note 102, at 1525–29 (arguing that direct initiatives lack the process that provides for compromise by locating common interests through deliberation and debate).

372. *See* Garrett, *supra* note 367, at 18–23 (describing the role of organized interest groups in driving the initiative process and the dangers it poses to minority rights).

373. *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 32–34 (1995) (describing the influence of interest groups and risks posed by lower turnout).

374. The Records of the Federal Convention, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (arguing in favor of state legislative appointment as a filtering mechanism).

However, as U.S. election history makes apparent, deliberation gives no guarantee that lawmakers will act in the public good either—formal state assembly bodies often chose the manner of appointment that would elect their desired candidate.[375] Still, the other quality of representative lawmaking—accountability—may lessen the risk that modern lawmakers will direct a politically motivated manner of appointment that diminishes the force of the popular will. Before popular suffrage became the norm in the 1820s, appointment by a state legislature may not have offended the expectations of citizens to the same degree.[376] However, after nearly 200 years of most states appointing presidential electors by statewide general election, if legislators today sought to change the outcome of an election by changing the manner of appointment, the citizens of the state would likely hold them accountable in the next election.[377]

If a popular initiative is more susceptible to corruption and manipulation of outcome, the California initiative may be unconstitutional because it undermines the safeguards of the design of Article II. The unique national interest in presidential elections would justify federal intervention to prohibit a state from directing the manner by which it appoints electors to include the legislative process of popular initiative.

2. Prospective Lawmaking in Elections

The national interest could also justify reading "legislature" narrowly to require that the manner of appointment decision is made by the prospective rule-making branch of state government.[378] This argument begins with the premise that constitutional elections should produce legitimate and orderly outcomes.[379] The Elector Appointment Clause serves this end by "requiring the manner of selection of electors to be specified in advance by the [state] legislature . . . [which] limits the ability of political actors to rig the rules in favor of their candidate."[380] Such an interpretation reinforces the framers' concerns about corrupting influences[381] and furthers values of

375. *See supra* notes 130–33 and accompanying text (recounting efforts by state legislatures to manipulate outcomes in the first presidential elections).

376. *See* Peirce & Longley, *supra* note 6, at 45 (describing the popular resistance to state legislative appointment in the 1820s).

377. *See* Steinhauer, *supra* note 13 (describing North Carolina's legislature's plan to change the state to a district system prior to the 2008 election, and the resistance it received from national party leaders).

378. *See* Friedman, *supra* note 288, at 838–41 (arguing that it makes sense to interpret Article II to provide for ex ante rule making).

379. *See* Posner, *supra* note 167, at 155–56 (arguing that insulating legislative action under Article II from interference from other branches of state government would minimize the risk of uncertainty caused by interbranch disputes over electors).

380. McConnell, *supra* note 288, at 662.

381. *See supra* notes 57, 62 and accompanying text.

certainty and finality.[382] Additionally, as a policy matter, having elections run according to clear rules ensures more fair and neutral results.[383]

For these reasons, the substance of laws passed by the legislature determining the manner of appointing presidential electors might be free from undue interference from the state constitution after they are enacted, so as not to lead to competing interpretations of electoral votes.[384] According to the argument, state courts may be able to resolve internal ambiguities of the laws within limits, but a state court should never interpret the legislative enactment so as to distort the legislature's purpose or subordinate that purpose to the state constitution.[385]

This provides a policy rationale for the distinction some courts have drawn between regulations on process and regulations on substance. It would allow a state to define how it distributes its legislative power before an election because this does not undermine the result by second-guessing the assembly's decision.[386] This interpretation argues that "state legislatures are limited by [state] constitutional provisions for veto, referendum, and initiative in prescribing the manner of choosing presidential electors, but the state constitutional provisions . . . do not limit the substantive terms of legislation."[387] Because the proposed California initiative entails prospective rule making, it would not violate the purpose of Article II's delegation to state legislatures.

III. ORIGINAL PRAGMATISM: CONTEMPORARY POLICY TO FURTHER THE PURPOSE OF THE ELECTORAL COLLEGE

The Electoral College, while embodying the compromises of the Convention and managing a multitude of seemingly irreconcilable interests, still possesses a certain narrow and idiosyncratic character formed from the particular circumstances that created it.[388] Any attempt to apply larger constitutional principles to the structure of the Electoral College should thus

382. *See* Cass R. Sunstein, *Order Without Law*, 68 U. Chi. L. Rev. 757, 760–65 (2001) (arguing that the Supreme Court made an extralegal decision for certainty and finality in *Bush v. Gore*).

383. *See generally* Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 Harv. C.R.-C.L. L. Rev. 65 (2002) (claiming that elections should run with a combination of rules and standards in order to maximize fairness).

384. *See* Kirby, *supra* note 47, at 501; Posner, *supra* note 167, at 157 (arguing that Article II should allow legislatures to delegate authority to other branches of state government, "but [a state legislature] must make clear that it is doing this and act in advance of the Presidential election").

385. *See* Posner, *supra* note 167, at 156 (arguing that, while this interpretation is not required by case law, history, or constitutional language, "it is consistent with the concern expressed at the constitutional convention . . . with preventing the choice of the President by cabals, intrigue, corruption, or agents of foreign powers").

386. *See id.* at 156–57 ("[I]nterpreting the 'Manner directed' clause to forbid a state's governor or courts to change the electoral rules laid down by the legislature . . . operates to reduce malign influences on the selection of electors.").

387. Kirby, *supra* note 47, at 504.

388. *See supra* notes 90–92 and accompanying text.

proceed cautiously. This seems especially true with the Elector Appointment Clause, which, as evidenced from subsequent amendment efforts and statements by the delegates, may have been originally designed as a temporary fix.[389] History suggests that the delegates, unable to settle on a definite manner of appointment, placed the decision in the hands of the various state legislatures until a consensus could be reached.[390] This interpretation does not deny that the delegates likely had specific reasons for vesting this power in the state legislature, but it recognizes that the clause was primarily motivated by their failure to reach a uniform mode.

Although a consensus did eventually emerge in the form of statewide general election, this manner of appointment was never committed to the Constitution by amendment.[391] Still, as statewide popular appointment became more entrenched, the wide discretion state legislatures formally enjoyed became increasingly bound by the subtle chains of custom and the democratic expectations of the voting public.[392] This may explain the confused and astounded response to Article II arguments during the 2000 election dispute—by then, how many Americans could still recall that a state legislature had any special constitutional role to play in the election of the President?[393]

One byproduct of the 2000 election may have been a renaissance in legal and political study of Article II. In the run-up to the 2008 election, members of both the Republican and Democratic parties have sought to exploit the special role that Article II prescribes for state legislatures—the power to direct the manner in which a state appoints its electors—to advance their immediate political ends.[394] This Note discussed the question of whether one such effort, California Initiative No. 07-0032, is constitutional. To resolve this question, the Note looked at the history of Article II, the legal interpretations of the manner of appointment power, and a functional comparison between the various powers the Constitution vests in state legislatures. These inquiries yielded few definite answers; they more often pointed in opposite directions, moving the quest no closer to discovering the true meaning of the Elector Appointment Clause.

Rather than attempting to distill a definitive meaning out of all these vague and illusive possibilities, which would be either fruitless or disingenuous, this Note bases its argument on policy. However, to stress

389. *See* Smith, *supra* note 52, at 737 (noting that the parallel language of Article II, Section 1, Clause 2 and Article V of the Articles of Confederation suggests that the clause was a default provision).

390. *See supra* notes 90–92 and accompanying text.

391. *See supra* notes 134–36 and accompanying text.

392. *See* Peirce & Longley, *supra* note 6, at 45 (describing public resistance to state legislative appointment once the norm of popular election took root).

393. *See* Toner, *supra* note 1 (describing the public's reaction to the 2000 Florida election dispute).

394. *See* Steinhauer, *supra* note 13 (describing efforts by the North Carolina legislature and Republicans in California to change their states' manners of appointment).

the necessity of a policy-based analysis, a brief summary of the various bases of interpretation, and their ultimate flaws, proves helpful.

The original and historical materials allow several possible and contradictory interpretations of the Elector Appointment Clause. On one hand, the delegates, although fundamentally faithful to the ideal of democracy and the popular election of the President, eventually realized that a nationwide popular election would create logistical obstacles impossible to overcome.[395] They decided that allowing state legislatures to direct the manner of appointment, although inferior to pure popular election, could place the choice of appointment as close to the people as the practicalities allowed.[396] The delegates clung to the ideal that, when the circumstances improved, future generations could amend the Constitution to provide for uniform popular election.[397] Under this interpretation, the California initiative would not only be constitutional, but also would fully embody the democratic intent of the delegates.

On the other hand, the delegates may have sought to remove the presidential election from the people, placing the power to elect in an exclusive body of electors and the power to determine the manner in which electors are appointed in a deliberative body of representatives.[398] The people, prone to passion and faction, could not be trusted with the mighty task of electing a President.[399] Under this interpretation, the California initiative would violate the framers' manifest intent to prohibit direct democracy from electing the President.

Finally, the Elector Appointment Clause might have had no special purpose, intended instead to remove an obstacle to compromise by placing the power in the general lawmaking authority of the states.[400] Under this interpretation, the California initiative would be a permissible exercise of the lawmaking authority of the state.

In the final analysis, these interpretations are equally true or equally false, depending on one's point of view. Delegates who favored democracy might have embraced the initiative; those who feared democracy might have rejected it; those weary of national power might have accepted it out of deference to the states. The problem with the original analysis is that it assumes that the delegates were driven by one overriding intent. Such a unified purpose is especially strange to impose on the Electoral College, which was designed only to reconcile conflicting interests under the

395. *See supra* notes 268–76 and accompanying text.

396. *See* Barkow, *supra* note 70, at 285.

397. *See* Letter from James Madison to George Hay, *supra* note 23, at 147 (regretting the failure of the delegates to achieve uniformity and advocating an amendment).

398. *See supra* notes 277–81 and accompanying text.

399. *See* Journal of the Federal Convention, *supra* note 50, at 433 (statement of Elbridge Gerry, July 25, 1787) (arguing that popular election posed risks of tyranny); The Records of the Federal Convention of 1787, *supra* note 67, at 80 (statement of Elbridge Gerry, June 2, 1787) (describing the virtues of deliberation in a system of legislative appointment).

400. *See supra* notes 285–86 and accompanying text.

umbrella of a mutually acceptable, if gawky, mechanism for electing the President.[401]

The lack of a clear constitutional purpose for the clause may explain the vagueness with which courts and legislative bodies have interpreted it. Most, though not all, of these cases draw a line between the substance of a state legislature's chosen manner of appointment, which state constitutions cannot limit,[402] and the legislative process by which the manner of appointment occurs, which a state can define.[403] Still, as illustrated in *Bush v. Gore*, there is no bright line between substance and process, as ostensibly substantive limitations on state constitutions can often cause procedural limitations as well.[404] Additionally, some interpretations suggest a certain core of process that a state constitution cannot take away from a legislature.[405] Therefore, although these interpretations give guidance, they provide scant specific indication of whether Article II allows a state to direct the manner of appointment by popular initiative.

The functional analysis also leaves the question unresolved. It could lead to the conclusion that Article II requires lawmaking, which means that it can be exercised according to the state constitution's normal legislative process.[406] However, presidential elections could require deviation from the ordinary functional analysis, suggesting that the functional rationale may not neatly apply to Article II.

Therefore, this Note bases its ultimate resolution of the issue on a barefaced policy rationale. Because the fairness of an election is essential to the legitimacy of the result, Article II, Section 1, Clause 2 should be read to encourage fair elections. Interpreting Article II to require prospective lawmaking[407] and encourage uniformity promotes fairness.[408] Although the historical, functional, and legal interpretations remain relevant, when there is doubt or ambiguity Article II should ultimately be read to further the policy aim of good elections. This Note posits that good elections result from a system that encourages all the parties to play by similar rules that are fixed in advance of the vote.

Prospective rule making is essential because it makes postelection manipulation less likely.[409] After an election, decision makers are better positioned to appreciate the political consequences of their actions.[410] Before an election, they maintain the blissful ignorance of not

401. *See* Roche, *supra* note 91, at 811.
402. *See* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694 (Ky. 1944).
403. *See In re* Opinion of the Justices, 107 A. 705, 706 (Me. 1919).
404. *See supra* notes 302–13 and accompanying text.
405. *See* Tribe, *supra* note 199, at 185–94 (arguing that fundamental procedural limits exist that would prevent a state constitution from placing the power to direct the manner of appointment in a plebiscite or court).
406. *See supra* notes 341–49 and accompanying text.
407. *See supra* notes 378–80 and accompanying text.
408. *See supra* notes 375–77 and accompanying text.
409. *See supra* notes 378–80 and accompanying text.
410. *See* McConnell, *supra* note 288, at 662.

understanding how the rules will influence the result.[411] Reading Article II to require states to determine the manner of appointment in advance of elections diminishes the risk of manipulation. It provides a sound policy basis for why the Constitution vested the power to direct rules of elector appointment in the state legislature, the rule-promulgating branch of state government. The use of the term "direct" gives additional textual support for this prospective interpretation.[412]

This interpretation would not require federal interference with normal state legislative process that applies to other acts passed by the assembly body. A state legislature's directed manner of appointment should remain subject to a governor's veto, and state courts should resolve ambiguities as they would for any piece of state law. However, a state constitution could not determine the manner of appointment retrospectively by a nonlegislative mechanism. By interpreting the Elector Appointment Clause to require that only a prospective legislative act can direct the mode of appointment, Article II reduces the risk of election corruption.

Uniformity promotes fair and legitimate elections. The United States has now achieved a largely uniform manner of appointing electors.[413] Article II should be interpreted to diminish the risk that a state could disrupt this de facto uniformity by changing its manner of appointment to further immediate political ends. If nothing else can be gathered from the delegates' debates, they show a persistent desire to reach a consensus on a uniform mode of appointment.[414] The laments of Madison thirty-five years after the Constitutional Convention reinforce the idea that uniformity was something the delegates sought but could never accomplish.[415]

The constitutionality of the proposed California initiative should turn in part on whether such initiatives encourage or discourage uniformity. Today, formal state assembly bodies seem unlikely to alter a state's manner of appointment to advance a chosen candidate.[416] This is largely because of voter accountability, although structural checks and deliberation may also make the formal assembly a less likely manipulator.[417] However, lacking institutional checks and a mechanism for accountability, a popular initiative can more easily be hijacked by a factional interest.[418] The low voter turnout in special elections increases the risk that a political party could change a state's manner of appointment in a way that would disrupt uniformity.[419] To further the aim of uniformity, the meaning of "legislature" in Article II should be interpreted narrowly to exclude a

411. *See id.*
412. *See supra* note 346 and accompanying text.
413. *See* Hertzberg, *supra* note 9, at 21.
414. *See supra* notes 48–74 and accompanying text.
415. *See* Letter from James Madison to George Hay, *supra* note 23, at 147.
416. *See supra* notes 376–77 and accompanying text.
417. *See supra* notes 371–73 and accompanying text.
418. *See supra* note 372 and accompanying text.
419. *See* Garrett, *supra* note 367, at 18–23 (describing the role of organized interest groups in driving the initiative process and the dangers such groups pose to minority rights).

popular initiative from directing the manner in which a state appoints its electors.

CONCLUSION

In light of its pragmatic origins, the Electoral College should be interpreted to enable fair and legitimate elections. To that end, the meaning of the Elector Appointment Clause should encourage state uniformity and minimize corruption. In our time, the structural deficiencies of popular initiatives make them more susceptible to political rule manipulation that would disrupt state uniformity. Because they are not subject to the check of electoral accountability, initiatives pose a heightened risk that the people, "mislead by the artful representations of interested men," will adopt a manner of appointment designed to further a specific presidential candidate.[420] The low voter turnout for early popular initiative ballot measures exacerbate the danger that partisan interests will enact politically advantageous rule changes under the guise of democratic reform.[421] For these reasons, reading "legislature" in Article II to exclude popular initiatives will lead to more honest and fair elections. This resonates with the original purpose of the Electoral College. While the framers disagreed about which lofty principles informed the Electoral College, they all appreciated that its practical value lay in promoting well-run and uncorrupted elections. Rather than attempting to graft extrinsic theoretical purposes onto the strange shape of the Electoral College, the interpretation should consider immediate exigencies of policy and thus find consistency with the original design.

420. The Federalist No. 63 (James Madison), *supra* note 57, at 371.

421. *See* Garrett, *supra* note 367, at 18–23; *supra* notes 37–42 and accompanying text.