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GAPING GAPS IN THE HISTORY OF THE INDEPENDENT STATE LEGISLATURE DOCTRINE: *MCPHERSON V. BLACKER*, USURPATION, AND THE RIGHT OF THE PEOPLE TO CHOOSE THEIR PRESIDENT

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Prof. Fitzgerald and Mr. Bohnhorst are authors of Presidential Ballots and Reconstruction: The Last Serious Attempt at Legislatures Choosing Presidential Electors, (August 13, 2022) (unpublished manuscript) (on file with authors).
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ABSTRACT

The so-called independent state legislature doctrine was the jurisprudential heart of the effort by former President Trump and allies to overturn the 2020 presidential election and was featured in the briefs for *Texas v. Pennsylvania*. The idea that state legislatures might have power to intervene against the popular vote for the electoral college helped animate the attack on the Capitol on January 6, 2021.

Frighteningly, at the very end of the 2021 Term, the Supreme Court accepted review of a North Carolina case—*Moore v. Harper*—in which Republican Party legislators invoked the independent state legislature doctrine to contend that state legislators are at liberty to create *entirely* partisan congressional districts, freed from constraints in the North Carolina Constitution as interpreted by the state's judiciary.[1] A victory by these legislators would directly implicate their parallel power to reject or ignore any state's popular vote for President.

The independent state legislature doctrine rests on dubious dicta in *McPherson v. Blacker*.[2] *McPherson* concluded that "plenary power" over the appointment of presidential electors was "conceded" to state legislatures

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[1] The question posed by the North Carolina Republican legislators for which the Court granted certiorari is: "Whether a State's judicial branch may nullify the regulations governing the 'Manner of holding elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,' U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a 'fair' or 'free' election." Petition for Writ of Certiorari at i, Moore v. Harper, No. 21-1271 (Mar. 17, 2022).

[2] 146 U.S. 1 (1892).

through the "practical construction" of the Constitution.[3] Yet the Court excluded, with almost surgical precision, extensive historical evidence that shows that the legislative election of electors was not intended by the Framers nor by those who ratified the Constitution.[4]

Further, such legislative election authority was vigorously contested whenever it mattered—in the presidential elections in 1800, 1812, and 1824—and was soon thereafter abandoned in the face of the claim that this doctrine was a "usurpation."[5] The doctrine was more emphatically rejected following the Civil War, including through Section 2 of the Fourteenth Amendment. Nonetheless, *Bush v. Gore* repeated *McPherson*'s historical amnesia and provoked a doctrine that directly threatened such core democratic values as state court authority to interpret state constitutions and the power of the people to elect the President of the United States.

[3] *Id.* at 35.

[4] *See id.* at 1.

[5] In 1826, a unanimous committee of the U.S. Senate wrote that state legislatures that took upon themselves the power to elect presidential electors, without delegation from and consent of the people, became "mere usurpers." S. REP. NO. 19-22, at 6–7, 16 (1826); 2 REG. DEB. 126 (1826).

I. INTRODUCTION

In December 2020, the State of Texas, supported by seventeen other states, asked the U.S. Supreme Court to intervene in the presidential election and direct the question of whose electors should be appointed to state legislatures.[6] Their claim was grounded primarily on a legal theory derived from *McPherson v. Blacker* (which had nothing to do with legislatures choosing electors).[7] It also invoked an 1874 Senate Report[8] (on which no action was ever taken) and some dicta in *Bush v. Gore*.[9]

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[6] *See* Motion for Leave to File Bill of Complaint at 16, 21–22, 25, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155).

[7] 146 U.S. at 35. The specific question in *McPherson* was whether the U.S. Constitution required a particular type of popular election. *See id.* at 25–26.

[8] S. REP. NO. 43-395 (1874); *see infra* notes 249–74 and accompanying text.

[9] 531 U.S. 98, 104 (2000) (rejecting any federal constitutional right to vote for electors for the President of the United States "unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college"; the Court nevertheless cited dictum in *McPherson* and its reliance on the 1874 Senate Report concerning the power of state legislatures to intervene without regard to state constitutions or law).

Central to this claim was the Court's lengthy review of the history of presidential elections in *McPherson*, which concluded that the "practical construction" of the U.S. Constitution had conceded plenary power over the appointment of presidential electors to the state legislatures.[10] It is easy to assume that Chief Justice Fuller's unanimous opinion was essentially accurate, at least in its broad outlines of the historical record. Demonstrably, it was not. Missing was extensive evidence showing that the Framers intended the people to elect the presidential electors.[11] Also entirely absent was any mention of the heated controversies in 1800 and from 1824 to 1826 over the constitutionality of such legislative election.[12] Overlooked as well was the post-Civil War era, during which the doctrine of legislative election was repudiated in multiple ways, not least through formal government actions. These included the resolution of a South Carolina constitutional convention, state statutes, state constitutions, federal statutes, a gubernatorial veto, and, most significantly, in the explicit text of the Fourteenth Amendment to the U.S. Constitution.[13]

McPherson's once-over-lightly, highly selective historical survey has taken on a significant life of its own. Still, *McPherson* was fundamentally an easy case, and its pernicious afterlife has had nothing to do with what was actually decided. The controversy in *McPherson* arose when Michigan Democrats changed the election law while they temporarily controlled state government after the 1890 election. The change was from one system of popular election of electors to another—from the prevailing winner-take-all system to a district system. The purpose was to dilute Michigan's normally Republican vote in the electoral college.[14]

The Republicans sued, claiming that Article II should be interpreted to require a general winner-take-all popular election. They also claimed that Section 2 of the Fourteenth Amendment was intended to incorporate the winner-take-all system, which by 1866 had become the rule in every state.[15] The history of the electoral college undermined their Article II argument, however. From the founding to the argument in *McPherson*, no one had ever interpreted the Constitution to require general-ticket elections, and district systems were used extensively throughout the country in the nation's first decades.[16] Furthermore, in the drafting and ratifying of the Fourteenth Amendment, there was no hint of any intent to incorporate

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[10] *McPherson*, 146 U.S. at 28–35.
[11] *See infra* Sections II.A–B.
[12] *See infra* Section II.C & Part III.
[13] *See infra* Sections IV.A–D.
[14] For the political and legal context of *McPherson*, see ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 131–38 (2020).
[15] *Id.* at 137.
[16] *See* McPherson v. Blacker, 146 U.S. 1, 28–35 (1892).

a particular type of popular election for President.[17] While *McPherson* got those portions of the history right, it ignored one important aspect of presidential election history: the growing and ultimately successful nationwide opposition to state legislatures choosing presidential electors. This Article presents an overview of the significant constitutional and legal history that *McPherson* omitted, filling major gaps in the *McPherson* narrative.

II. THE NEW NATION

A. The Constitutional Convention

McPherson discussed the Constitutional Convention in one long paragraph, which included a scattershot listing of proposals made and rejected, and a partial list of proponents of three main presidential election alternatives: popular election, election by Congress, and election by state legislatures.[18] The Court then declared that "[t]he final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action,"[19] or through some form of popular election. On the contrary, it is clear from the extant records of the Constitutional Convention that the Framers did not accept the idea that state legislatures would choose the presidential electors.

The view that the people should be as directly involved as possible in electing the President was emphatically expressed throughout the

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[17] *Brief of Otto Kirchner*, *in* U.S. SUPREME COURT RECORDS AND BRIEFS, 1832–1978: MCPHERSON V. BLACKER U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS 42, 43 (Making of Modern Law 2011) ("[T]o the counsel for plaintiff in error belongs the distinguished honor of having made this astounding claim for the first time since the adoption of the Fourteenth Amendment.").

[18] *McPherson*, 146 U.S. at 28. The Court listed four delegates it identified as having supported something other than popular election. Two of the four were Luther Martin and Elbridge Gerry: Martin walked out of the Constitutional Convention, and Gerry refused to sign the Constitution. EDWARD J. LARSON & MICHAEL P. WINSHIP, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 169, 172 (2005). Subsequently, Gerry was not elected to the Massachusetts ratifying convention and, although he was allowed to attend to provide facts, he walked out of the state convention when he was not allowed to make speeches. Gerry was forced into a run-off election for a seat in the House of Representatives largely because of charges that he was an enemy of the Constitution. 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 437, 642–55, 749 (Merrill Jensen & Robert A. Becker eds., 1976) [hereinafter 1 DHFFE]. The other two delegates mentioned by the Court, who at some point proposed something other than popular election, were Oliver Ellsworth and Roger Sherman, both of Connecticut. Yet, on August 24, 1787, Connecticut and four other states voted explicitly for popular election—that is, election by electors chosen by the people of each state. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 397, 399 (Max Farrand ed., rev. ed. 1966). Because Connecticut had three delegates, at least one, and possibly both Ellsworth and Sherman, changed their minds and voted for popular election of electors. *Id.*

[19] *McPherson*, 146 U.S. at 28.

Convention, and it prevailed. It was supported not only by leading figures such as James Wilson, Gouverneur Morris, and Alexander Hamilton[20]—all mentioned in *McPherson*[21]—but also by James Madison, whom the Court omitted. By contrast, the idea that state legislatures might elect the President was entertained for only one week in July; it was then decisively rejected and never raised again.[22]

Some delegates certainly had qualms about the popular election of the President, and a few were particularly averse to election by the people at large.[23] Yet, virtually no one disputed the central principle—close to the core ideology of the American Revolution—that legitimate government requires the consent of the governed.[24] In addition, the behavior of the states

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[20] Hamilton's proposal for district-based popular election of electors was part of a long speech delivered on June 18, 1787, but it was not incorporated into a motion. The speech is set out in Madison's *Notes of the Constitutional Convention*, but Hamilton's proposals are not mentioned in the *Journal of the Convention*. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 281, 283–93 (Max Farrand ed., rev. ed. 1966).

[21] *McPherson*, 146 U.S. at 28.

[22] For the discussion in June, see *infra* notes 29–31 and accompanying text. For the discussion in July, see *infra* notes 33–46 and accompanying text. For the discussion in August, see *infra* notes 47–49 and accompanying text. For the discussion in September, see *infra* notes 50–61 and accompanying text.

[23] ALAN E. JOHNSON, THE ELECTORAL COLLEGE 13–18 (Philosophia Publications, 1st ed. 2018).

[24] THOMAS E. RICKS, FIRST PRINCIPLES 52–58 (2020). This founding principle was articulated earlier by James Wilson in an essay written (but not published) in 1768. Wilson argued that not only the Stamp Act, but Parliament's exercise of any political power over the colonies, was illegitimate. He derived this principle from Scottish Enlightenment thinking with roots that were 200 years old. Wilson's 1768 essay was published in 1774—to great acclaim—and it appears to have been the foundation for the most famous passages in the Declaration of Independence. JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 45–47 (2020). One possible exception was South Carolina delegate Charles Pinckney, who was one of the most active supporters of slavery. LARSON & WINSHIP, *supra* note 18, at 174 ("[E]xtremely active role . . . as a nationalist and protector of slavery . . . ."). Pinckney wrote to James Madison on March 28, 1789, disparaging the nation's founding principles: "Are you not . . . abundantly convinced that the theoretical nonsense of an election of the members of Congress by the people in the first instance, is clearly and practically wrong . . . . [And] that the Legislature[s of the states] are the only proper judges of who ought to be elected?" Letter from Charles Pinckney to James Madison (Mar. 28, 1789) (available at National Archives: Founders Online). Pinckney proposed on June 6, 1787, that the state legislatures, not the people, elect members of the lower house of Congress. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 20, at 130–31, 137, 142, 143, 145, 147. Pinckney's motion was defeated, eight states to three; numerous delegates emphasized the importance of the people electing directly at least one chamber of the national legislature. *Id.* at 130–31, 132–36. At the end of his life, reflecting on Pinckney's proposal, Madison referred to popular election for the House as "the corner-stone of the fabric" of the Constitution. 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 532, 535 (Max Farrand ed., revised ed. 1966). At the beginning of

and state legislatures under the Articles of Confederation remained an overriding concern. James Madison, for example, in an April 1787 private memorandum, attributed seven of eleven substantial "[v]ices of the Political System of the United States," directly to the states and state legislatures.[25] As an eighth vice, Madison pointed out that in many states the Articles were sanctioned only by the state legislatures rather than through the state constitutions. This undermined the force of federal law and threatened disunion.[26] And negative assessments of various state legislatures appeared throughout Madison's *Notes of the Constitutional Convention*,[27] as well as

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the Convention, on May 29, 1787, Pinckney submitted a plan for a constitution, but the document has been lost to history. Four versions exist—three created at or immediately after the Convention and one published over thirty years later, in 1819, as part of a publication of the *Journal of the Convention*. Pinckney's June 6 motion and March 28, 1789 letter directly contradict the version published in 1819. The 1819 version cast Pinckney as a proponent of popular election to the House, but clearly, he was not. This core discrepancy (among many others) establishes that the 1819 version is not what was submitted to the Convention on May 29, 1789. *Id.* at 502–06, 479–82, 531–32, 534–37, 595–609. *See generally* Lynn Uzzell, *The Deep South's Constitutional Con*, 53 ST. MARY'S UNIV. 711 (2022) (identifying a fourth version (one of two in James Wilson's hand), correcting historical errors regarding Wilson versions, and confirming that the 1819 version contradicts all three contemporaneous versions). Despite the overwhelming evidence, petitioners in *Moore v. Harper* treated the 1819 version as if it were the document Pinckney submitted. Brief for Petitioners at 15, Moore v. Harper, No. 21-1271 (Aug. 29, 2022) (arguing that the phrase "each State shall prescribe" in the 1819 version shows that the earliest reference to regulation of congressional elections assigned the power to "*each state as a whole*."). Yet regulation of congressional elections was not mentioned in the iterations written during or immediately after the convention, and almost certainly it was not part of Pinckney's proposal on May 29, 1787. DHRC, *infra* note 57, at 1:246 (version in the hand of James Wilson). Even this version from James Wilson that Petitioners cite in their reply brief does not mention congressional regulation. Reply Brief for Petitioners at 8–10, Moore v. Harper, No. 21-1271 (Aug. 29, 2022). *See also* 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 595–601 (pamphlet published shortly after the Constitutional Convention); LARSON & WINSHIP, *supra* note 18, at 174 ("Not a modest man, Pinckney later claimed that he was the most influential delegate at the Convention.").

[25] JAMES MADISON, WRITINGS 69–80 (Jack N. Rakove ed., 1999). He listed a twelfth vice but did not elaborate on it. *Id.* at 80.

[26] *Id.*

[27] The *McPherson* history did not refer to Madison's *Notes*, which Madison kept secret during his lifetime and that were not published by Congress until 1840. *See* McPherson v. Blacker, 146 U.S. 1, 28 (1892) (citing only volume 1 of *Elliot's Debates*, which was published in 1836, without incorporating Madison's *Notes*). Mary Sarah Bilder's recent, award-winning reexamination of Madison's *Notes* does not cast doubt on Madison's description of the electoral college debate. MARY SARAH BILDER, MADISON'S HAND 117–20 (2015) (mentioning the debate that took place between July 19 and July 25; the debates after August 21 about presidential selection are not mentioned). Bilder states that the topic of the executive did not particularly interest Madison at the Convention. *Id.* at 164. Madison's *Notes* regarding the electoral college are consistent with Hamilton's essays in the *Federalist Papers* and with the *Journal of the Convention*; they are independently corroborated in part by John Dickinson. *See John Dickinson to George Logan*, *infra* note 50. Bilder shows that

in the delegates' correspondence during the Convention, and in many of the delegates' arguments thereafter.[28]

James Wilson introduced the idea of using electors chosen by the people early in the Convention. On June 1, 1787, Wilson said that he favored direct election by the people at large, at least in theory; but George Mason said that although he also favored popular election in principle, election by the people at large was utterly impractical.[29] The next day, Wilson proposed dividing the states into districts where the people would elect one elector, with the electors then electing the President.[30] Thus, the electoral college concept was born. Later in June, Alexander Hamilton also proposed a district-based system through which the people would choose electors.[31]

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the version of Madison's *Notes* from August 21 onward was written two years later, presumably based on rough contemporaneous notes. BILDER, *supra* note 27, at 141–43. Significant speeches by Gouverneur Morris from August 24 and September 4 largely repeated points he and others had made prior to August 21. While Madison had a heavy load of committee work after August 21, his *Notes* about the electoral college included the work of a committee on which he served, with language that Dickinson reported Madison had recorded on behalf of the committee. *See infra* text of note 50.

[28] North Carolina delegate Richard Spaight wrote to future Supreme Court Justice James Iredell on August 12, 1787: "There is no man of reflection, who has maturely considered . . . the tyrannical and unjust proceedings of most of the State governments . . . but must sincerely wish for a strong and efficient National Government." 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 168 (Griffith J. McRee ed., 1949) (1857). *McPherson* mentioned Connecticut's Oliver Ellsworth, a future Supreme Court Chief Justice, as favoring election by the state legislatures. 146 U.S. at 28. Yet Ellsworth wrote a series of arguments supporting ratification titled "Letters of a Landowner," in which he excoriated both Elbridge Gerry's and George Mason's published attacks on the Constitution and Luther Martin's defense of Gerry. *The Ratification of the Constitution by Connecticut*, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 314, 398–403, 462–65, 476–84, 487–92, 497–501, 503–07, 514–16 (Merrill Jensen ed., 1978). Ellsworth praised the Convention's decision to establish ratification through conventions of delegates elected by the people rather than through state legislatures. *Id.* at 398. The choice, he stated, demonstrated "honesty and patriotism." *Id.* at 398. State legislators had often "provided well for themselves" and might resist change. *Id.* at 399. The Framers' choice meant that "the artifice of a small number cannot negative a vast majority of the people," and "[t]his danger was foreseen by the Federal Convention." *Id.* As for the right to elect members, even to the House of Representatives, Ellsworth noted: "We have a recent instance in the state of Rhode Island, where a desperate junto are governing, contrary to the sense of a great majority of the people. It may be the case in any other stare [sic], and should it ever happen, that the ignorance or rashness of the state assemblies, in a fit of jealousy should deny you this sacred right, the deliberate justice of the continent, is enabled to interpose, and restore you a federal voice." *Id.* at 479. Likewise, the *Federalist Papers* are replete with sharp criticisms of state legislatures. *See, e.g.*, Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 GA. L. REV. (forthcoming Spring 2023).

[29] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 20, at 68–69.

[30] *Id.* at 77, 80.

[31] *Id.* at 283–93.

Throughout the Convention, the primary alternative to some form of popular election was election by the national legislature.[32] For a brief time, the Convention entertained the idea that the state legislatures might be directly involved in electing the President. On July 17, Luther Martin proposed that state legislatures choose electors who would then elect the President.[33] Martin did not provide details, and his proposal was soundly defeated—receiving only two votes in favor.[34] Two days later, however, Oliver Ellsworth renewed the proposal that electors appointed by state legislatures choose the President.[35] He proposed an allocation scheme that allowed a maximum of three electors—which, as Madison pointed out the following day, would greatly favor small states.[36] The Convention approved the general idea of state legislatures appointing electors on July 19, but left the allocation scheme for another day.[37]

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[32] The electoral college "represented a compromise between those who favored selection by Congress and those who insisted that such a process had fatal flaws." KEYSSAR, *supra* note 14, at 25. The debate over election by the national legislature lasted throughout the Convention. The "Virginia Plan" and the "New Jersey/Patterson Plan" were introduced in June. Each featured election by the national legislature. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 20, at 62–69, 242–47 (explaining the Virginia Plan on June 1 and the New Jersey/Patterson Plan on June 15). Election by the national legislature was discussed and approved on June 13. *Id.* at 225–26, 230, 236. On July 17, both election by state legislatures and election by the people were rejected. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 22, 24, 29–32. On July 19, the national legislature was rejected in favor of the state legislature. *Id.* at 55–57, 60–64. On July 24, the state legislature was rejected in favor of the national legislature. *Id.* at 97–98, 99–106. On July 25–26, popular election was discussed. *Id.* at 107–16, 118–21. On August 6, the Committee of Detail's draft of the Constitution included election by the national legislature. *Id.* at 185. Election by the national legislature again was discussed on August 7 and 24. *Id.* at 196–97, 397, 399, 402–04. In early September, the Committee of Eleven settled on a system of electors elected by the people in preference to an election by the national legislature. *See John Dickinson to George Logan*, *infra* note 49 and accompanying text. On September 4, Edmund Randolph and Charles Pinckney "wished for a particular explanation" for changing the mode of election from election by the national legislature. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 500. On September 5, Charles Pinckney and John Rutledge of South Carolina criticized the electoral college system and moved to return to election by the national legislature, but this was supported by only two states. *Id.* at 507–08, 511. The electoral college as adopted incorporated two elements from proposals for election by the national legislature. First, each state's vote was equal to the number of its representatives and senators—the same as under an election by the legislature through a joint ballot, which had been agreed to on August 24. *Id.* at 397, 399, 402–03. Second, any contingent election would take place in the House, with each state having one vote—a system that some smaller states supported in the debate over election by the national legislature. *E.g.*, *id.* at 196–97, 402–03.

[33] *Id.* at 22, 24, 32.

[34] *Id.*

[35] *Id.* at 50–51, 57–59.

[36] *Id.* at 63.

[37] Given Ellsworth's harsh appraisal of state legislatures, his idea might be best interpreted as a pro-small state rather than a pro-state legislature measure. *See supra* note 28 (discussing Ellsworth's "Letters of a Landowner").

Four days later, the Convention debated a related but separate question concerning what role state legislatures should play in forming the national government. Adopting a view Madison and James Wilson shared, the Convention decided that the Constitution should be ratified by the people—through single-purpose conventions—and not by state legislatures.[38] Edmund Randolph agreed that state legislatures should not be involved in ratification, noting that local "demagogues" often influenced them.[39] Having squarely rejected a role for state legislatures in bringing the national government into existence, the Convention voted to reconsider the proposal that the executive be appointed by electors chosen by the state legislatures.[40]

On July 24, the idea that state legislatures would choose electors was specifically rejected in favor of selection by the national legislature.[41] The next day, the Convention debated whether state legislatures might be involved in choosing the President one final time, and it was never mentioned again. James Madison explained his own opposition.[42] There were many reasons, he said, but foremost was the state legislatures' propensity to support "pernicious" schemes.[43] Madison feared a cabal of state legislatures who could make the President subservient to their will.[44] Instead, Madison embraced the idea of electors chosen by the people. His central point was that, in contrast to state legislators, electors chosen to perform a single act would be effectively immune from political scheming and even outright corruption.[45] These views were hardly unique to Madison. As noted, Edmund Randolph rejected ratification by state legislatures on July 23 for similar reasons, and dissatisfaction with state legislatures was rampant.[46]

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[38] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 88–89.

[39] *Id.* Madison wrote to Jefferson and Randolph in March and April of 1787, stressing the importance of ratification by the people. MADISON, *supra* note 25, at 64, 89 ("[The people] *acting in their original & sovereign character*"). Wilson strongly supported this same principle. WEGMAN, *supra* note 24, at 44, 48, 51.

[40] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 85–86, 95.

[41] *Id.* at 97–106. There was considerable discussion around how to ameliorate the danger of executive-legislative intrigue. *See id.*

[42] *Id.* at 92–93, 110.

[43] *Id.* at 109–10.

[44] *Id.* A leading proponent of the independent state legislature doctrine, Michael T. Morley, has overlooked both the debate on July 25 and the votes and debate on August 24. Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, GA. L. REV. 1, 31 (2020) (stating that after the July 24 vote, further debate was postponed until the Committee of Eleven was formed at the end of August).

[45] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 110. Madison's concerns applied equally to state and national legislatures. *See id.*

[46] *See supra* notes 25–26, 28, 39 and accompanying text. For the historical setting, see Brief for Amici Curiae Scholars of the Founding Era in Support of Respondents at 7–8, Moore v. Harper, No. 21-1271 (Oct. 26, 2022) ("[I]n the decade after 1776, criticism of the performance of the state legislatures became a driving force in American political thinking. Every historian of the Constitution agrees that this disillusionment with the state legislatures was a dominant theme in shaping the agenda of the Federal Convention . . . .").

When the Convention took up Article II on August 24, only two proposals were seriously considered: election by the national legislature or election by electors chosen by the people.[47] Election by electors lost by only one vote.[48] Many delegates continued to have serious objections to election by the national legislature, however, and on August 31 the issue was referred to the Committee of Eleven.[49] John Dickinson, a member of the committee, later recalled that he joined a gathering at which committee members considered election by the national legislature. Dickinson wrote that he persuaded the committee to adopt election by electors chosen by the people; he reported that he had argued to the committee that because the Constitution established a President who would have great powers to be exercised directly upon the people, the people must be involved as directly as possible in choosing the President.[50]

On September 4, 1787, the committee recommended election by electors, as follows: "Each State shall appoint in such manner as its Legislature may direct, a number of electors . . . ."[51] The phrase "its [l]egislature" is the possessive genitive case, meaning, as used here, that the "Legislature" is part of or is controlled by the "State."[52]

On September 6, the Convention formally agreed with the committee's proposal.[53] When asked for an explanation, Gouverneur Morris gave the following reasons for the committee's switch from presidential election by the national legislature to election by electors: (1) to limit the danger of intrigue and faction; (2) no one was satisfied with appointment by the legislature; (3) "many were anxious for an immediate choice by the people"; (4) maintaining the independence of the executive

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[47] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 397, 399, 401–04.

[48] *Id.* at 404. On July 25, Madison said that three alternatives remained for consideration: election by the national legislature, election by the people at large, and election by electors chosen by the people. *Id.* at 110. Election by the people at large was decisively rejected earlier in the day on August 24. *Id.* at 402.

[49] *Id.* at 493–94, 497–98. The committee was comprised of one member from each state in attendance. It included leading proponents of popular election—James Madison, Gouverneur Morris, James Dickinson, and Rufus King. *See id.* at 481. Three of the remaining members were from small states that had voted in favor of popular elections on August 24 (Connecticut, New Jersey, and Delaware). *Id.* at 397–99. That vote came immediately after the Convention had decided that election by the national legislature would be by joint ballot, effectively eliminating any substantial role for small states in choosing the president. *Id.* at 403–04.

[50] *John Dickinson to George Logan (January 16, 1802)*, THE CONSTITUTIONAL SOURCES PROJECT, http://www.consource.org/documents/john-dickinson-to-george-logan-1802-1-16/ [https://perma.cc/9UBU-REW9]. Dickinson added that it was James Madison who wrote down the committee's agreed terms.

[51] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 497.

[52] *See A Guide to Double Possessives*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/double-possessives-genitives [https://perma.cc/89RV-DF4H] (noting the distinction between genitive of possession and of association: "picture of my friend" is genitive of association, whereas "my friend's picture" is genitive of possession).

[53] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 525.

was an "indispensable necessity"; (5) to avoid the "great evil of cabal"; and (6) because "it would be impossible to corrupt them."[54]

On September 8, 1787, by vote of the Convention, five delegates were elected to the Committee of Style and Arrangements to draft the Constitution, subject to any final modifications.[55] Four of the five members personally supported popular election of electors (Madison, King, Morris, and Hamilton), and the fifth, committee chair William Stanly Johnson, was from Connecticut, which had voted for "election by electors chosen by the people" on August 24.[56] Madison, Morris, and King served on the Committee of Eleven, which proposed the possessive genitive "its Legislature."[57] Most of the final document was written by Gouverneur Morris (one of the most prominent advocates of popular election).[58]

The committee presented its report on September 12.[59] The committee replaced one possessive genitive ("its Legislature") with another ("Legislature thereof").[60] That same day, James Madison explained the intent as clearly as one could: "[The President] is now to be elected by the people and for four years."[61]

McPherson, despite its purported historical garb, ignored James Madison's *Notes*,[62] as well as Madison's comments on, and management of, the issue of presidential elections. The opinion also gave no consideration

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[54] *Id.* at 500. Clearly, these were also sound reasons to have the people, not the state legislatures, choose the electors.

[55] *Id.* at 547.

[56] *See id.* (members); *see also id.* at 397–99 (voting record for August 24, 1787).

[57] *See supra* note 51 and accompanying text.

[58] LARSON & WINSHIP, *supra* note 18, at 173.

[59] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 582.

[60] *See supra* note 51 and accompanying text. "Thereof," as a synonym for "its," is the possessive genitive case. 11 *Thereof*, THE OXFORD ENGLISH DICTIONARY 285 (1933) (third definition). Founding era dictionaries are to similar effect. *See* NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 308 (1806) ("Thereof, *ad.* of that, of this, *of that very thing*" (emphasis added)); 2 *Thereo'f*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 836 (1785) ("Of that; of this" and providing examples: thereof as a controlling source ("this present age . . . behold we yield to the stream *thereof*."), thereof as part ("not any part remains *Thereof* . . . . "), thereof as part (referring to Greece, "several instances might be brought from other states *thereof*.")).

[61] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 587. Madison's remark came during discussion of a reduction in the congressional supermajority required to override a veto from three-fourths to two-thirds. *See id.* at 585–87. Madison explained that when three-fourths was agreed to, Congress would elect the President for seven years, but this had changed. *Id.* at 586–87.

[62] Madison observed that "faint and refracted rays" (those of the *Journal of the Convention*) may lead to error that could be avoided by "more competent lights" (presumably those of Madison's own notes). *See infra* note 125 and accompanying text. *Cf.* LARSON & WINSHIP, *supra* note 18, at 163, 171–72 (noting the "inestimable value of Madison's notes"); RICKS, *supra* note 24, at 197 (quoting fellow delegate William Pierce, "[e]very person seems to acknowledge [Madison's] greatness . . . . In the management of every great question he evidently took the lead . . . .").

to specifically what was decided and when it was decided.[63] Chief Justice Fuller buried the details within his anodyne conclusion that "[t]he final result seems to have reconciled contrariety of views," which included the positions of those who had spoken in favor of election by state legislatures.[64] Yet after July 25, 1787, no delegates suggested that the state legislatures might "appoint directly by joint ballot or separate concurrent action."[65] Any reconciliation achieved was between those who supported election by the national legislature and those who supported election by the people.

B. Ratification

The debates over ratification of the Constitution—which *McPherson* simply ignored—confirm that those who ratified the Constitution understood that the people were to elect the electors. James Wilson, a devoted supporter of popular election, set the tone with a widely reprinted October 6, 1787 speech.[66] Four days later, even a leading anti-Federalist pamphlet by a "Federal Farmer" conceded that the method for selecting the President was satisfactory.[67] Convention delegate General Charles Cotesworth Pinckney told the South Carolina legislature on January 18, 1788, that "[the President] is to be elected by the people, through the medium of electors chosen particularly for that purpose."[68] Further, the *Federalist Papers* repeatedly stated that the people would elect the electors. In the *Federalist* 68, for example, Hamilton stated such, and, in the *Federalist* 59, Hamilton wrote that allowing legislatures to choose senators was a "necessary evil" that should not be extended.[69] At the state ratifying conventions, supporters of the Constitution, including those who had been Convention delegates, said time after time that the people were to choose the electors.[70] Hardly anyone contended otherwise.

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[63] *See* McPherson v. Blacker, 146 U.S. 1, 28 (1892).
[64] *Id.*
[65] *Id.*
[66] 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–72 (John D. Kaminski et al. eds., 2009) [hereinafter 2 DHRC]. The focus of Wilson's October 6 speech was to rebut claims that the Constitution would lead to the demise of state governments. WEGMAN, *supra* note 24, 48–49. For an explanation of Wilson's philosophy and role in the Convention and ratification debates, see *id.* at 45–47.
[67] 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 222 (John D. Kaminski et al. eds., 2009) [hereinafter 19 DHRC].
[68] 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 148 (John D. Kaminski et al. eds., 2009) [hereinafter 27 DHRC].
[69] THE FEDERALIST NOS. 59, 68 (Alexander Hamilton).
[70] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1367 (John D. Kaminski et al. eds., 2009) [hereinafter 10 DHRC] (statements of Edmund Randolph); *id.* at 1368, 1376–77 (statements of James Madison); 4 THE DEBATES IN THE

The rejection of the proposal that state legislatures have authority to choose presidential electors is clear from the Constitutional Convention's full record, which is confirmed through the ratification debates. Yet, the constitutional text promulgated in 1787 is ambiguous.[71] Article II, Section 1 does not specifically require that the people elect presidential electors.[72] Admittedly, the text does not specifically prohibit the legislatures from electing electors.[73] In the decades that followed, an interpretation developed that the sovereign was the people in a republican form of government, and that unless the sovereign delegated its powers, they were retained. *McPherson*'s facile overview of the founding era history overlooked crucial facts, and as a result is seriously misleading at best.

SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 58 (Jonathan Elliot ed., 2d. 1836) [hereinafter 4 ELLIOT'S DEBATES] (William Davie: "How is [the President] created? By electors appointed by the people under the direction of the legislatures—by a union of the interest of the people and the state governments."); JOHNSON, *supra* note 23, at 77–78 ("[A]s nearly home to the people as is practicable; with the approbation of the state legislatures, the people may elect with only one remove."). After eleven states had ratified, North Carolina Governor Samuel Johnston said in his state's unsuccessful ratification convention that some people believed the state legislatures could select electors. *See infra* notes 156–59 and accompanying text.

[71] U.S. CONST. art. II, § 1, cl. 2 provides in part: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors . . . ." Clause 2 specifies further that the "state" and not the "legislature" is to appoint. In addition, Clause 4 refers to the date for "chusing" electors. *Id.* Thus, electors are both chosen and appointed. The specific role of the state legislatures appears to relate only to the "appointment" of the chosen electors. *Id.* The meaning of "appoint" was litigated during the 1877 Electoral Commission proceedings. Rutherford B. Hayes' position, which prevailed, was that appointment refers to the final step or steps in the elective process: appointment is an action that occurs after votes have been cast, canvassed, and certified. George McCrary, Argument, *in* PROCEEDINGS OF THE ELECTORAL COMMISSION AND OF THE TWO HOUSES OF CONGRESS IN JOINT MEETING, 65–66 (1877), https://archive.org/details/electoralcount00washrich/page/n5/mode/2up [https://perma.cc/B4NZ-CLLU] [hereinafter ELECTORAL COMMISSION PROCEEDINGS]. The *McPherson* opinion itself stated that the term "appoint" refers to "the result" of the election. McPherson v. Blacker, 146 U.S. 1, 27 (1892). The version of Clause 4 reported to the Constitutional Convention on September 4, and approved on September 6, provided that Congress may determine "the manner of certifying and transmitting their [the electors'] votes." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 529 (Sept. 6, 1787). The Committee of Style deleted this phrase, and the Convention approved the final language without any vote about the change. DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861, at 137 (Univ. of Chicago Press 2005) ("Embarrassingly . . . we do not know why" the change was made). In any event, the Convention clearly recognized the essential difference between voters "giv[ing] their votes" on a particular date—that is, the voters choosing their preferred candidate—and the "manner of certifying" those votes, so that the winner could be appointed or certified at a later date.

[72] U.S. CONST. art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors . . . .").

[73] *Id.*

C. The Elections of 1788 and 1800: Debates in the States About Election by the Legislature

The *McPherson* opinion devoted five paragraphs to the four presidential elections held between 1788 and 1800.[74] The Court detailed the various systems used, including election by state legislatures in many states. Chief Justice Fuller initially said of these four elections: "No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt . . . ." [75] But the Court was clearly mistaken. Substantial questions arose in the very first election, as this section will demonstrate; and the *McPherson* opinion got the election of 1800 precisely backwards—the constitutionality of legislative choice was a major issue.

From the extant records, in 1788 most states had either no debate or, at most, a minimal debate about the mode of choosing electors. Everyone knew that George Washington would be the first President.[76] Nonetheless, in Massachusetts and New York, the manner of electing the President was hotly debated.

The Massachusetts debate unfolded in the newspapers as well as in the legislature. For example, *The Massachusetts Centinel* of October 1 and 8, 1788, set out the contrasting arguments.[77] Points in favor of election by the people included: (1) the national government acted directly upon the people, thus the people should be involved as much as possible in electing the President; (2) just as in Massachusetts, the national executive's powers included vetoing legislation bearing on the rights and interests of the people, so the people should elect the executive; (3) legislatures were elected to pass laws, not to elect others; and (4) legislative election invited cabal and artifice.[78] Arguments in favor of allowing the legislature to elect the electors included: (1) the language seemed to allow the legislature to elect, although some believed "state shall appoint" meant the people shall elect; and (2) it was "impossible" to have an election in a Commonwealth as large as Massachusetts within the time allowed.[79]

The ambiguity of Article II was a central question in the Massachusetts legislature.[80] General William Heath and Dr. Daniel Cony stressed that the rights of the people were paramount.[81] Unless the right of the people to elect had been expressly delegated elsewhere, in a republican

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[74] *McPherson*, 146 U.S. at 29–32.
[75] *Id.* at 29.
[76] Washington "had long been the consensus choice for president." KEYSSAR, *supra* note 14, at 28.
[77] 1 DHFFE, *supra* note 18, 464–67.
[78] *Id.* at 464–65.
[79] *Id.* at 466.
[80] *See generally id.* at 476–510 (providing records and reports of the legislative proceedings on the election's resolutions).
[81] *Id.* at 485–87.

government the people retained that right.[82] Under this view, ambiguity must be resolved in favor of the rights of the people. Dr. Cony recalled that the Massachusetts ratifying convention adopted a resolution that the U.S. Constitution be amended to provide that any rights not delegated to the national government were retained by the state to be exercised by the people.[83] This foreshadowed the Tenth Amendment, which itself became a prominent feature in subsequent debates.[84]

The *New York Journal* issue of November 20, 1788, reported on the Massachusetts debate before the debate began in New York.[85] The New York debate then identified a fundamental flaw with legislative election—though it was not a flaw in the six states whose legislatures chose electors that year. In those states, unlike in New York, all the legislators had themselves been elected that same year. Thus, it might be said that they represented the will of the people in some more plausible sense, even if not directly.[86] But, the same could not be said of legislators elected two, three,

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[82] *Id.* Dr. Charles Jarvis made similar arguments. *Id.* at 485 (referencing the *New York Journal*). Jarvis was an ally of anti-Federalist Sam Adams. In 1796, with "an intense knot of democrats," Jarvis was a "direct heir" to Adams' political organization. JEFFREY L. PASLEY, THE FIRST PRESIDENTIAL CONTEST: 1796 AND THE FOUNDING OF AMERICAN DEMOCRACY 341 (2013).

The Massachusetts Constitution of 1780, Declaration of Rights, Art. IV, embodied the principle that all power not delegated resides in the people: "The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever shall, exercise and enjoy every power, jurisdiction and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled." MASS. CONST. art. IV.

[83] 1 DHFFE, *supra* note 18, at 487.

[84] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). But see Chief Justice Roberts's doubly mistaken paraphrase of the Amendment's text in Shelby County v. Holder, 133 S. Ct. 2612, 2623 (2013), quoted and discussed in Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, but Not States*, 39 SEATTLE UNIV. L. REV. 787, 796–98 (2016).

[85] 1 DHFFE, *supra* note 18, at 485 ("The Constitution . . . seemed to be somewhat ambiguous, and not so full and explicit as to remove all doubts concerning the mode of appointment.").

[86] In three states, the legislatures freely chose to "direct" themselves to elect. 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 20 (Merrill Jensen & Robert A. Becker eds., 1976) [hereinafter 2 DHFFE] (Connecticut); 1 DHFFE, *supra* note 18, at 152–71 (South Carolina); 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 6–7 (Merrill Jensen & Robert A. Becker eds., 1976) [hereinafter 3 DHFFE] (New Jersey). In three states, the legislative choice was influenced by the compressed schedule. 1 DHFFE, *supra* note 18, at 464–66, 476, 484–89 (demonstrating that Massachusetts had no time for a run-off, so the Assembly voted 124-38 for popular election if practicable, but it was deemed not practicable; so, the legislature chose from the top two in the popular election and chose two state-wide); *id.* at 772, 790–92 (demonstrating

or even four years prior to a presidential election. In New York, one-fourth of the state Senate was elected each year to four-year terms.[87] An anti-Federalist senator rebuked the chamber for its refusal to elect based on a joint ballot with the more numerous House, which was elected annually.[88] He emphasized that senators elected up to four years previously did not truly represent the people's wishes concerning who should be elected President.[89] He declared that the Senate's position "overset[] the first principle of elections by the great body or majority of the electors . . . and consequently destroy[ed] the grand principle of freedom or republicanism in our governments . . . ."[90]

The anti-Federalists, such as Sam Adams and Dr. Jarvis, prevailed in securing a bill of rights. The Ninth Amendment assures that the failure to enumerate a right in the Constitution "shall not be construed to deny or disparage other[rights] retained by the people."[91] The Tenth Amendment reserves "to the people," as well as "to the States," the "powers not delegated

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that New Hampshire had no time for a run-off, so the legislature elected if there was no majority); 2 DHFFE, *supra* note 86, at 429–30, 440–41 (explaining that Georgia only had one day). Annual elections were required by each of these states' constitutions: South Carolina Constitution of 1778; New Jersey Constitution of 1776; Georgia Constitution of 1777; Connecticut Royal Charter of 1662, with minor modifications made in 1776 (Connecticut operated under the Charter until 1818); Massachusetts Constitution of 1780; New Hampshire Constitution of 1783. John Adams's *Thoughts on Government*, published in April 1776, was intended to induce southern states in particular to adopt written constitutions. JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), https://founders.archives.gov/documents/Adams/06-04-02-0026-0004 [https://perma.cc/FR4B-M4DW]. Adams specified that elections should be annual. *Id.*

[87] N.Y. CONST. of 1777, arts. X, XI.

[88] 3 DHFFE, *supra* note 86, at 307–08 (reprinting a broadside that does not identify the senator); N.Y. CONST. of 1777, art. IV.

[89] 3 DHFFE, *supra* note 86, at 307–08.

[90] *Id.* Governor George Clinton did not call the legislature into special session until December 7, 1788, which did not allow enough time for a popular election. *Id.* at 199 (chronology). The Senate informed the Governor that it would have provided for popular election of electors had there been time. *Id.* at 244–48. Unable to agree, the legislature defaulted on its constitutional obligation to direct how the state could cast electoral votes. *Id.* It also did not elect U.S. senators until the summer of 1789. *Id.* at 197. In Massachusetts, as well as in New York, the process for electing U.S. senators under Article I, Section 3 was hotly debated. Petitioners in *Moore v. Harper* argue, incorrectly, that in these elections it was determined that state constitutions did not constrain the legislature's exercise of authority under Article I, Section 4 to prescribe the manner of electing senators. Brief for Petitioners, *supra* note 24, at 27–28. To the contrary, in both elections it was argued that under the state's constitution, the "legislature" was comprised of two chambers, each of which had a negative over the other. In both elections, the states followed that constitutionally prescribed procedure. Massachusetts rejected calls for a joint session; New York rejected a scheme in which a chamber could be forced to choose among candidates whom it did not support. 1 DHFFE, *supra* note 18, at 497–98, 511–12; 3 DHFFE, *supra* note 86, at 513, 537–39.

[91] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

to the United States."[92] Together, these two amendments underscore the point that ambiguities about the rights and powers of the people are to be resolved in favor of the people.

In the second and third presidential elections, there was no serious discussion about the method of choosing the President.[93] In dramatic contrast, however, the presidential election of 1800 was bitterly fought, and the issues debated in 1788 and 1789 in Massachusetts and New York took center stage.[94] The unrepresentative, partisan role of state senators elected even four years prior was on display in New York and Pennsylvania, where Federalist Senates refused to pass laws allowing the people to vote in the presidential election. Adding insult to injury, the Pennsylvania Senate refused to honor the judgment that the people expressed in the election just a month before, in October 1800.[95]

The constitutionality of the legislative option was a prominent issue in 1800.[96] On March 28, 1800, during the controversies in New York, U.S. Senator Charles Pinckney delivered an important speech in the U.S.

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[92] U.S. CONST. amend. X. Indeed, at the Constitutional Convention, Edmund Randolph proposed both a proto-Ninth Amendment under which the national judiciary could void state laws that violated "principles of equity and justice" (i.e., fundamental rights that were not enumerated), and a proto-Tenth Amendment, assuring that "the people" retained the right to form any type of republican government they wished (so long as it did not contravene powers delegated to the national government). 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 56.

[93] Again, everyone knew that George Washington would be re-elected in 1792, and political parties had not become fully institutionalized by the time of the first Adams vs. Jefferson contest in 1796, which was a "transitional election in the truest sense." PASLEY, *supra* note 82, at 308. The election featured what might well be considered both cabal and demagoguery, facilitated by legislative election. *Id.* Alexander Hamilton, for example, schemed to have Thomas Pinckney elected President. *Id.* at 204–06. Additionally, state legislative choices were determined by ruling oligarchs. *See id.* at 315, 391 (Delaware was "patently oligarchic"); *id.* at 402 (explaining that the South Carolina oligarchy favored two slave-owning candidates, but the plan backfired by helping Jefferson gain the second spot over South Carolina's Thomas Pinckney).

[94] A comprehensive review of the presidential election of 1800 is outside the scope of this Article, but to learn more, see EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN (2007) [hereinafter MAGNIFICENT CATASTROPHE] 56–68, 87–111, 159–63, 181–88, 200–12, 223–40 (discussing election campaigns in key states for state legislatures and for electors). For debates over the constitutionality of legislative election and the political context of 1800, see TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 73–98, (1994); KEYSSAR, *supra* note 14, at 33–41.

[95] In both states, the Federalists suffered devastating defeats in the ensuing state legislature elections. *See* MAGNIFICENT CATASTROPHE, *supra* note 94, at 87–111, 206–09 (discussing Federalist losses in New York and Pennsylvania). Likewise, the right of the people to vote in the presidential election became the overarching issue in the state elections in Maryland, where the Federalists were also defeated decisively. *Id.* at 202–04.

[96] KEYSSAR, *supra* note 14, at 35–36; KURODA, *supra* note 94, at 73.

Senate.[97] While appearing to acknowledge that the Convention intended that the President be accountable to the people every four years,[98] Pinckney also claimed that, under the Tenth Amendment, state legislatures had complete, conclusive, and exclusive control over how electors were chosen.[99] Whatever the Framers and ratifying states intended and understood, Pinckney argued that because the Constitution had not expressly forbidden legislative election, absolute power belonged to the states and their legislatures through the Tenth Amendment.[100] The amendments that the anti-Federalists had insisted upon to protect the rights of the people were now used as weapons in the hands of those who wished to deny popular rights.

On the other side, in January 1800, James Madison famously expounded on the meaning of the word "State" in the federal Constitution. In the Virginia Resolutions, which Madison wrote, that attacked the Alien and Sedition Acts of 1798, the Virginia legislature said that the Constitution was a compact among the states.[101] This supported a states' rights view, yet in the run-up to the 1800 election, the Virginia legislature issued a January 1800 Report, which Madison also drafted, that clarified the 1798

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[97] 6 ANNALS OF CONG. 126 (1800). The topic of the speech was the Ross Bill, which sought to create a super-committee in Congress to adjudicate disputes about electoral votes. Within days of Pinckney's speech, the *American Citizen* began covering the Ross Bill, "which drew all kinds of political and constitutional fire. The *Republican Watch Tower* editorialized that power derived from the people and noted that one party consistently favored recognizing more power for constituted authorities at the expense of the people." KURODA, *supra* note 94, at 84. Charles Pinckney entered the fray in New York on April 22, 1800, with the publication of his "Republican Farmer" essay by the *American Citizen*, and it was republished broadly. Letter from Charles Pinckney to James Madison (Oct. 26, 1800) (available at National Archives: Founders Online) (stressing the need to elect Republican legislators). As early as May 16, 1799, Pinckney urged others to follow South Carolina's model of having the state legislature choose presidential electors. Letter from Charles Pinckney to James Madison (May 16, 1799) (available at National Archives: Founders Online); Letter from Charles Pinckney to James Madison (Sept. 30, 1799) (available at National Archives: Founders Online).

[98] 6 ANNALS OF CONG. 702 (1800).

[99] *Id.* at 692–93, 702 (using the following phrases: "complete and conclusive," "placed entirely with them," and "not without hopes . . . that the exclusive rights of the State legislatures will be preserved inviolate."). *See also supra* note 24 (explaining Pinckney's value preference for state legislatures and disparagement of the rights of the people to elect their representatives as "theoretical nonsense").

[100] 6 ANNALS OF CONG. 692–93, 702 (1800).

[101] Madison wrote the Virginia Resolutions, and the third paragraph began: "That this Assembly . . . explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact to which the states are parties . . . ." James Madison, *Virginia Resolutions, 21 December 1798*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-17-02-0128 [https://perma.cc/GT2G-V42Q].

Resolutions.[102] Madison now maintained that "state" had many meanings. In the formation of the national government—through ratification under Article VII—the term "State" did not mean governments or legislatures; it meant "the people, in their highest sovereign capacity."[103] Madison further explained, "in that sense the Constitution was submitted to the 'States': it was in that sense the 'States' ratified it . . . ."[104] Only in this sense, Madison insisted, the Constitution was a compact among the "States."[105] The Tenth Amendment did not contradict this understanding.[106]

Underlying the 1800 debates about the constitutionality of legislative choice was the basic question of whether "State" in Article II referred to "the people" in their sovereign capacity or whether it referred to legislatures as organs of state government—which might or might not allow the people to vote.[107] This controversy receded for several decades. During the so-called "Era of Good Feelings," presidential election outcomes were a foregone conclusion.[108] As a practical matter, it did not matter what method a state used to choose its electors.

In 1819, however, Chief Justice John Marshall's famous opinion for the unanimous Court in *McCulloch v. Maryland* emphasized the essential role of "the people."[109] Explicitly rejecting a Tenth Amendment argument,[110] Marshall declared: "From these conventions the constitution

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[102] James Madison, *The Report of 1800, [7 January] 1800*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-17-02-0202 [https://perma.cc/8E7V-ELK9] [hereinafter *The Report of 1800*]. Madison and Pinckney both supported Thomas Jefferson—the divide between them only had to do with whether popular election was "theoretical nonsense." Pinckney to Madison, Mar. 28, 1789, *supra* note 24,

[103] *The Report of 1800, supra* note 102.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] KEYSSAR, *supra* note 14, at 35–36 (disputes over the meaning of "State").

[108] The exception was the election of 1812, which was fairly close. In North Carolina in 1811, the legislature repealed the law for election by districts and replaced it with a law for election by the legislature. As was the case in 1800, there was widespread outrage, and many of the legislators responsible for depriving the people of the right to vote were defeated in the subsequent election. *Id.* at 66; William Webb to James Madison, Dec. 17, 1812 (Library of Congress, Resource Guide to 1812 Election); 36 ANNALS OF CONG. 1910–11 (1820) (recollection of Congressman James S. Smith: "If this be your republicanism, said they, away with it. You have deprived us of the right of exercising one of our most important political rights, and a privilege that we deem sacred; no apology will or can be received. And, sir, they displaced most of the supporters of this measure with a high hand.").

[109] 17 U.S. 316 (1819). *McCulloch* is generally considered one of the most important Supreme Court decisions. The case was argued from February 22–27, and from March 1–3, 1819. Because of the importance of the issues, the Court dispensed with its then-usual rule that only two attorneys could argue for each side. For a snappy summary, see Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 CONST. COMMENT. 679 (2004).

[110] *McCulloch*, 17 U.S. at 402.

derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people . . . ."[111] He famously summarized: "The government of the Union, then . . . is, emphatically and truly, a government of the people. In form and in substance, it emanates from them. Its powers are granted by them and are to be exercised directly on them and for their benefit."[112]

III. 1824–1826: DEBATES IN CONGRESS AND THE TRANSFORMATION OF THE PRESIDENTIAL ELECTION SYSTEM

Just as *McPherson*'s historical narrative did not mention the debates of 1800—claiming no question was raised (though the opposite was true)—the Court's version of history also entirely omitted later debates that were even more consequential.[113] As the election of 1824 approached, single-party domination of presidential elections gave way, and attention turned to the potentially dysfunctional machinery of the electoral college. In a paragraph that listed proposals for constitutional amendments that sought election by districts, the *McPherson* opinion noted that similar amendments were offered as early as 1813, and that many congressmen proposed election by districts in December 1823 (including Senator Thomas Hart

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[111] *Id.* at 403.

[112] *Id.* at 404–05. The question recurred often during the 1830 nullification debates. Madison, who for years had followed a policy of not injecting himself into public debate, now did so. Attached to an unsigned article in the *North American Review* commenting on the congressional nullification debate was a lengthy letter from Madison to Massachusetts Congressman Edward Everett. In it, Madison explained again the manner in which the Constitution was created: "It was formed, not by the Governments of the component States . . . . It was formed by the States, that is, by the people in each of the States, acting in their highest sovereign capacity . . . constituting the people thereof one people for certain purposes." 31 N. AM. REV. 69, 486, 537–38 (1830). The editors of the online version attribute the full article to Madison, but it was written by Everett, with whom Madison had been corresponding since April 1830 regarding nullification. *See* Letter from Edward Everett to James Madison (Apr. 22, 1830) (urging Madison to make his views public: "Nothing more important to the country has been written since the date of the Federalist.") (available at National Archives: Founders Online). Madison also corresponded with one of the chief advocates of nullification, South Carolina Senator Robert Young Haynes, and with its foremost opponent, Daniel Webster. *See* Letter from Robert Y. Haynes to James Madison (Mar. 5, 1830) (attaching speeches in support of nullification) (available at National Archives: Founders Online); Letter from James Madison to Robert Young Haynes (Apr. 3, 1830) (providing a lengthy refutation of Haynes's arguments, which were repeated in Madison's August 1830 letter to Everett) (available at National Archives: Founders Online); Letter from Robert Y. Haynes to James Madison (July 22, 1830) (including an 1835 note in Madison's hand and disagreeing with Madison's refutation in general terms and promising to explain Haynes's position at a later date; *per* 1835 note, no explanation was ever received) (available at National Archives: Founders Online). *See also* Letter from Daniel Webster to James Madison (May 24, 1830) (attaching Webster's speeches in response to Haynes) (available at National Archives: Founders Online).

[113] McPherson v. Blacker, 146 U.S. 1, 29 (1892).

Benton and Representative George McDuffie).[114] *McPherson* said only that these proposals were never "acted upon," and the Court then skipped from December 1823 to 1835.[115] By doing so, the Court missed a crucial chapter of history. Debates from 1824 to 1826 scrutinized the constitutionality of legislative choice as never before, and thereby contributed directly to the transformation of the presidential election system.

The Supreme Court stated explicitly in *McCulloch v. Maryland* that "a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this," and noted that the issue before it did not involve "great principles of liberty."[116] Although the issue of the people's right to vote in presidential elections was significant in the 1800 presidential election, and although there was general acquiescence in legislative choices regarding the electoral college in almost all subsequent presidential elections, the core concept of "consent of the governed" certainly seems a "great principle of liberty" of the sort that *McCulloch* indicated could be contested at any time.[117] Taking his cue from the Supreme Court, Missouri Senator Thomas Hart Benton launched a frontal assault in 1824 on legislative "usurpation" of the right of the people to vote in presidential elections.

In late January and early February 1824, with new Senator Andrew Jackson sitting at the adjoining desk, Benton assailed the legislative option in a rigorous and rhetorically powerful speech.[118] He stated that the language of the Constitution, the *Journal of the Convention*,[119] the *Federalist Papers*, and the records of the state ratifying conventions all proved that it is the people who are to choose the presidential electors.[120] Furthermore, allowing legislators elected two, three, and four years prior to any presidential election to decide how a state's votes should be cast flew in the face of the

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[114] In confidential letters, Madison supported proposals for district election of electors by the people. Letter from James Madison to George Hay (Aug. 23, 1823) (available at National Archives: Founders Online); Letter from James Madison to George McDuffie (Jan. 3, 1824) (available at National Archives: Founders Online).

[115] *McPherson*, 146 U.S. at 34.

[116] 17 U.S. 316, 401 (1819). The issue in *McCulloch* was federal authority to charter a national bank. *See id.* at 400.

[117] *Id.* at 401.

[118] 41 ANNALS OF CONG. 167, 170–78 (1824); H.R. MISC. DOC. NO. 43-12, at 722, 725–28 (1877) (a compilation of all electoral count precedents with appendix of important speeches for use by Congress and the Electoral Commission of 1877, reprinting Benton's speech in the appendix).

[119] The *Journal of the Convention* was not published until 1819. LARSON & WINSHIP, *supra* note 18, at 162. As a result, all prior debate about Article II took place in a vacuum. Aside from limited anecdotal accounts such as provided by James Dickinson, no one knew that the debate at the end of the Convention was between election by the national legislature against election by electors chosen by the people, nor that the Convention had explicitly rejected election of electors by the state legislatures. *See supra* note 50 and accompanying text (anecdotal accounts from Dickinson).

[120] H.R. MISC. DOC. NO. 43-13, at 724–25 (1877).

very idea of representative government.[121] Conceding absolute power to state legislatures allowed a legislature to intervene on the eve of an election to take the right of election away from the people, as happened in New Jersey in 1812.[122]

Benton explained that with a legislative election, the state legislatures themselves would function as the "electoral colleges," and that contradicted every reason for which the electoral college was created.[123] State legislatures were not single-purpose bodies that met once and disbanded. State legislatures were subject to and frequently marked by the influences of cabal, intrigue, and possible corruption that the electoral college was meant to avoid.[124]

The *McPherson* opinion was correct that the proposals introduced by Benton and others in 1823 were not immediately acted upon, but Benton took center stage in the Senate in 1824.[125] One of Benton's notable ideas, identified as a "hypothetical," was that Congress might not count the electoral votes from states that deprived the people of the right to vote.[126] Moreover, his focus on senators elected as much as four years previously was a clear reference to New York—where changing the state's law to allow

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[121] *Id.* at 726.
[122] *Id.*
[123] *Id.* at 726–27.
[124] *Id.* at 727.
[125] *See* 41 ANNALS OF CONG. 327 (1824) ("[P]ublic attention had been excited, and the people were waiting with some anxiety for our decision . . . ."); *id.* at 363 (praising Benton's speech, suggesting it be published—along with any rebuttals—so the voters might judge it; commenting that members of the New York legislature were subjected to scorn for not letting the people elect); *id.* at 366–67 (praising Benton's speech, agreeing that legislative election had been an error, but disagreeing that electoral votes might not be counted: "It is too late to oppose the exercise of this power."); *id.* at 412 ("It would not be denied . . . that it was the intention of the Convention . . . to give to the people the election of their Chief Magistrate."). In a confidential letter sent shortly after Benton's speech, Madison dismissed a monograph by John Taylor of Caroline that claimed the Constitution is a compact among state governments, based in part on the author's proffered definitions of "state" and "people." Letter from James Madison to Robert S. Garnett (Feb. 11, 1824), *reprinted in* 9 THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1910) ("I do not doubt that more competent lights as to the proceedings of the Convention would have saved the distinguished author from much error into which he may have been led by the faint or refracted rays to which he trusted.").
[126] If legislative election was truly a "usurpation" never intended at the founding, Congress could remedy the wrong directly by not counting electoral votes. A constitutional amendment would not be required. Most of Benton's arguments had been made before, but the idea that Congress might not count electoral votes from usurping states was new. Ohio Representative Samuel Shellabarger later argued for power to reject votes on February 11, 1869. CONG. GLOBE, 40th Cong., 3d Sess. 173 (1869) (stating that Congress must have power not to count votes from states whose legislatures usurped the rights of the people under state law). Likewise, during the congressional debate over creation of the Electoral Commission of 1877, Mississippi Representative John Roy Lynch said that Congress could reject electoral votes from a state that deprived a portion of its population of the right to vote in presidential elections. 5 CONG. REC. 1025–26 (1877).

the people to vote was an issue in the 1823 election and again in 1824.[127] That year, the New York Senate blocked a bill to empower the people to vote in presidential elections and, as in 1800 and 1812, the ensuing state election was a political bloodbath for the party that denied the people the right to vote.[128]

When Senator Benton delivered his influential speech in early 1824, the laws of seven states empowered state legislatures to choose electors.[129] By February 1826, when an extended debate in the House about these issues commenced, only two states—South Carolina and Delaware—retained the practice.[130] When a state changed its laws after hearing an argument that using legislative electors was a usurpation (accompanied by a suggestion that electoral votes from usurping states ought not be counted), the change in law might be considered a "practical construction" that recognized legislative election might well be unconstitutional.[131] The *McPherson* opinion overlooked this entire point, hypothesizing that the changes that occurred in the 1820s could be attributed to a gradual shift of public opinion and "different views of expediency."[132] But Benton's argument was not about expediency; rather, he questioned the basic legitimacy of the state legislatures' exercise of power.[133]

The 1824 presidential election gave rise to the widespread claim that a legislative body chose a President through a "corrupt bargain." The election was decided in 1825 in the House of Representatives, where Henry Clay decisively opposed Andrew Jackson, the popular favorite, and engineered the election of John Quincy Adams.[134] That autumn, Jackson launched his second presidential campaign with a call for a constitutional amendment.[135] In December of 1825, Benton chaired a nine-member

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[127] Lisa Thomason, Jacksonian Democracy and the Electoral College: Politics and Reform in the Method of Selecting Presidential Electors, 1824–1833, at 55–61 (May 2001) (Ph.D. dissertation, University of North Texas) (on file with the University of North Texas Library) [hereinafter Jacksonian Democracy].

[128] *Id.* at 57. *Cf. supra* note 95 (elections in New York and Pennsylvania in 1800); *supra* note 108 (elections in North Carolina in 1812).

[129] Jacksonian Democracy, *supra* note 127, at 31, 52–53, 57–61, 71–72, 102, 106, 135–36 (including South Carolina, Missouri, New York, Louisiana, Georgia, Vermont, and Delaware).

[130] Delaware abandoned this practice in 1831. *Id.* at 135–36.

[131] Such "practical constructions" included three states that abandoned legislative election between 1824–1825: Missouri, New York, and Vermont. *Id.* at 52, 56, 105–06 (each state influenced in part by Benton's speech). Practical constructions may also include two states that made changes after Benton and Jackson allied to advocate for presidential election reform in 1825: Louisiana and Georgia. *Id.* at 53, 71–72 (the alliance), 102–03.

[132] McPherson v. Blacker, 146 U.S. 1, 35–36 (1892).

[133] The changes in some states—Vermont in 1824 and Delaware in 1831—were based solely on good government principles and were not influenced by Jacksonian-era politics. Jacksonian Democracy, *supra* note 127, at 105–06, 135–36.

[134] *Id.* at 40–43.

[135] *Id.* at 88.

Senate committee that unanimously recommended a constitutional amendment. Questions of "corrupt bargains" and "legislative usurpations" were interwoven in much of the ensuing discussion.[136]

Senator Benton's committee reported that the right of the people to elect their representatives was anchored in the fundamental principles of a republican government.[137] The people are sovereign, the committee argued, and only through delegation from the people could government exercise legitimate power.[138] In practice, the committee asserted, the way in which the people exercise their sovereignty is through elections, and it is a mockery to declare the people are sovereign if the right to elect is denied them.[139] A legislature that appropriates the right to choose electors—without clearly delegated authority and the people's explicit consent—becomes a "mere usurper."[140] The committee's proposal sought to address both these issues by requiring popular election of electors in districts and by eliminating the contingent election in the House of Representatives. A subsequent debate in the House on resolutions that generally corresponded to the Senate committee's proposals stretched from February to April of 1826.

Although by 1826 the practice of legislative election was dying, and although it had few defenders in the House, the practice received a full airing. One member remarked that competition between the legislature and the people over the right to vote is always "a struggle between liberty and power."[141] A great principle of liberty was at stake. Yet a principal justification for the prior practice was that it had been followed since the founding and, for that reason, it could not be considered a "usurpation."[142]

Some defenders argued that the "right" of the states to choose the President was one of the most important powers secured to the states at the Constitutional Convention and that there was an implicit restriction on Congress's power to propose constitutional amendments that undermined

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[136] S. REP. NO. 19–22, at 1 (1826). Almost thirty years later, Benton explained that membership was expanded from the usual five to nine on the motion of Senator Van Buren. 1 THOMAS HART BENTON, THIRTY YEARS' VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 78 (1897). The members were "carefully selected" by Vice President Calhoun "both geographically . . . and personally and politically as being friendly to the object and known to the country." *Id.* at 78–80.

[137] *See* S. REP. NO. 19-22, at 6 (1826).

[138] *Id.* at 6, 16.

[139] *Id.* at 6 (stating that calling the people "sovereign" in those circumstances would become "a title of derision").

[140] S. REP. NO. 19-22, at 16 (1826). In a confidential letter, James Madison commented favorably on the Senate report and on Senator Benton. Letter from James Madison to Robinson Taylor (Jan. 30, 1826) (crediting Benton both for the report and for considering the need for "Precautions agst. [sic] abuses, and provisions for contingencies . . . .") (available at National Archives: Founders Online).

[141] 2 REG. DEB. 1901 (1826).

[142] *Id.* at 1580, 1866–68 (1826).

the original bargain.[143] Even Massachusetts Congressman Edward Everett seemed to suggest as much, stating that slavery was a political issue, not a moral issue, and implying that the U.S. Constitution could never be amended to prohibit slavery.[144]

The few defenders of the legislative prerogative claimed that the Constitution was a compact among state governments. They relied heavily on the Tenth Amendment and even purported to rely on Madison's definition of "State" in the Virginia Report of January 1800.[145] Others firmly corrected the record regarding Madison's views.[146] They pointed to the actions by the New York and Pennsylvania state legislatures in 1800 and focused on the deplorably similar actions by the New York Senate in 1824.[147] One member even pointed out that if legislatures actually possessed such absolute power, they could authorize directors of a bank or a synagogue to appoint the electors.[148] George McDuffie argued that the "absolute power" argument meant that a legislature might seek to intervene at the last minute and take back the power to choose the electors in defiance of the will of the people, possibly leading to civil war.[149] Few tried to rebut this point. It was an extreme view at the time that legislatures were meant to operate as counterweights to federal authority and that the exercise of legislative power to dictate the outcome of elections had been intended: "[W]hat might be called, violent change; that is to say, change on the eve of a depending election of President," represented "the real efficacy, and just value" of the constitutional design.[150] One defender of legislative power argued simply that, under Article II, a legislature could direct "any body of men" to choose the electors.[151]

The debate ended in 1826 without a vote on the question of legislative usurpation. A parliamentary maneuver—deployed to end debate immediately when the session degenerated into an exchange of insults and

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[143] *Id.* at 1447–49. In 1869, Senator Charles Buckalew would justify his vote against the Fifteenth Amendment on this basis.

[144] *Id.* at 1570–73, 1579–80. New York Representative Michael Hoffman pointedly disagreed that the Constitution could never be amended to prohibit slavery. *Id.* at 1868–69 (1826).

[145] *Id.* at 1501, 1521–22 (1826); *see The Report of 1800, supra* note 102.

[146] 2 REG. DEB. 1891–1913 (1826) (discussing Madison's definition of the word "States" and his statements at the Virginia ratifying convention).

[147] *Id.* at 1896. The ensuing legislative election of electors in New York in 1824 was almost comical. KEYSSAR, *supra* note 14, at 97 ("What followed, over a period of weeks, was a labyrinthine sequence of maneuvers by all parties in both chambers, including deals made and unmade, lies, misrepresentations, dissembling, clandestine meetings, arguments over whether blank votes counted in the total, a double cross followed by a 'double-double cross . . . .'").

[148] 2 REG. DEB. 1415 (1826).

[149] *Id.* at 1373–74.

[150] *Id.* at 1448–49.

[151] *Id.* at 1864–66 (1826). If this were true, it would mean a legislature could designate its senate, possibly elected four years previously, to elect the next President.

threats of duels—limited the vote to other resolutions.[152] By 1832, only one state—South Carolina, the strongest proponent of nullification and secession—continued to deny its people the right to vote for electors.[153]

McPherson mentioned constitutional challenges to legislative election at only one point. The penultimate paragraph of the Court's historical review discussed a leading treatise by Supreme Court Justice and Harvard Law Professor Joseph Story, *Commentaries on the Constitution*.[154] Writing in 1833, without the benefit of Madison's *Notes*, Story acknowledged that the constitutionality of legislatures directly selecting electors was "often doubted by able and ingenious minds."[155] He cited only one example of a challenge to the constitutionality of legislative election: a July 28, 1788 colloquy during the first North Carolina constitutional convention, in which future Supreme Court Justice James Iredell responded to a comment by North Carolina Governor Samuel Johnston.[156] Johnston said that some people thought the state legislatures might appoint the electors.[157] His comment was a rare mention in the ratification debate record of the possibility that state legislatures, rather than the people, might elect—and it was made after eleven states ratified.[158] As soon as Johnston made the comment, it was contested. Iredell responded that he "was of [the] opinion that it could not be done with propriety by state legislatures, because, as they were to direct the manner of appointing, a law would look very awkward, which should say, 'They gave the power of appointment to themselves.'"[159]

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[152] *See id.* at 2003–05; KEYSSAR, *supra* note 14, 101–02 (explaining how two friends of Adams challenged McDuffie to a duel). Henry Clay actually fought a duel at the time, attended by Senator Benton, Clay's relative by marriage. BENTON, *supra* note 136, at 70–77. For a recent study of the remarkable prevalence of violence among congressmen in the antebellum period, see JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR (2018). The House voted against a resolution for district-based election of electors but in favor of a resolution to eliminate one form of legislative election—to eliminate the contingent election in the House. 2 REG. DEB. 2003–05 (1826). That resolution was referred to a committee, but the committee could not agree on a substitute, and the matter did not proceed further. *Id.* at 2005.

[153] Jacksonian Democracy, *supra* note 127, at 130. All other states had abandoned the practice. *Id.* at 151.

[154] McPherson v. Blacker, 146 U.S. 1, 33 (1892).

[155] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1472, at 817 (5th ed. 1891). Writing in 1833, Story cited the first edition of *Elliot's Debates*, which was a citation to the North Carolina ratification convention. *Id.* (citing "3 Elliot's Debates, 100, 101").

[156] 4 ELLIOT'S DEBATES, *supra* note 70, at 105.

[157] *Id.*

[158] *See id.*

[159] *Id.* Thomas Hart Benton stressed Iredell's point in his 1824 speech. 41 ANNALS OF CONG. 172 (1824); H.R. MISC. DOC. NO. 44-13, 725 (1877) ("'[D]irect' . . . always implies an address to a third party, and never to one's self."). Earlier, Constitutional Convention Delegate William Davie had informed the North Carolina convention that the electors were to be chosen by the people. 4 ELLIOT'S DEBATES, *supra* note 70, at 58 (William Davie: "How is [the President] created? By electors appointed by the people under the direction of the state legislatures—by a union of the interest of the people and the state governments.").

Justice Story's *Commentaries* noted that, notwithstanding unspecified but able arguments of those who challenged election by the legislatures, the practice "has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy . . . ."[160] Yet this conclusory remark conflicted not only with the unanimous *McCulloch* decision, in which he had joined, but also with then-recent history. A more accurate synopsis would have been the following: legislative election had been established in practice at the time of the adoption of the Constitution through the election of 1820; yet, following the publication of the *Journal of the Convention* and the controversies of 1824–1826 (which featured able and ingenious arguments that legislative election was unconstitutional), it was largely abandoned. If Justice Story had said this, however, it would have cast a cloud over the constitutionality of South Carolina's remaining practice. This might have inflamed the nullification controversy that Justice Story addressed, and perhaps hoped to quiet, in his *Commentaries*. There, Story argued at length that the Union was not a "compact" among state governments, but was founded instead by the people, as *McCulloch* explained and as James Madison emphasized in his letter to Edward Everett.[161]

IV. 1865–1877: THE REPUDIATION OF LEGISLATIVE ELECTION DURING THE RECONSTRUCTION ERA

Thomas Hart Benton's persistent advocacy for the rights of the people to vote in presidential elections stretched all the way to Reconstruction, both directly and indirectly. Building on an alliance cemented in 1825, Benton and Andrew Jackson continued to argue for presidential election reform—Jackson throughout his presidency and Benton for years beyond that.[162] In 1840, Congress finally published James Madison's *Notes*,[163] and the nation could see for itself for the first time "the more competent lights" that Madison provided.[164] During Benton's last month in the Senate in 1851, another Tennessee populist in the tradition of Andrew Jackson, Representative Andrew Johnson—who had taken up the cause in 1845—introduced a constitutional amendment, referencing the

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[160] McPherson v. Blacker, 146 U.S. 1, 33 (1892).

[161] *See generally*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 306–71, at 221–71 (5th ed. 1891) (providing an exhaustive critique of the claim that the Union is a "compact" among states).

[162] KEYSSAR, *supra* note 14, at 111–12, 115–17. Benton's 1854 memoir was itself a continuation of his argument in favor of reform. BENTON, *supra* note 136, at 79–80 (expressing no despair at past failures: "No great reform is carried suddenly."); H.R. MISC. DOC. NO. 44-13, 722–25 (1877) (recognizing the importance of Benton's 1824 address later at the 44th Congress).

[163] LARSON & WINSHIP, *supra* note 18, at 162.

[164] Letter from James Madison to Robert S. Garnett, *supra* note 125.

proposal that Benton and his committee had made decades before.[165] Also, Benton's 1854 memoir devoted separate chapters to the efforts of 1824 and 1826, and reiterated his committee's unanimous view about legislative usurpation.[166] Andrew Johnson continued to champion this effort as President following the Civil War.[167]

McPherson's historical narrative noted that South Carolina continued to choose electors through its legislature up to and including the election of 1860.[168] But the Court omitted South Carolina's abandonment of that practice.[169] The Court also noted that Florida did elect presidential electors through its legislature in a short-lived innovation in 1868, but said nothing about events in Alabama that same year, which quickly vitiated the idea[170] (an Alabama bill for legislative election drew national condemnation and was vetoed).[171] In like fashion, the Court noted that a section of the Constitution for the new state of Colorado provided that the legislature would choose the electors in 1876.[172] However, the Justices did not turn the page to the next section, which said (and still says) that in all subsequent elections, the people choose the presidential electors.[173] And perhaps most important, the Court's narrative did not mention the curb on legislative power wrought by Section 2 of the Fourteenth Amendment.[174] The *McPherson* decision thus omitted important history about the legal, constitutional, and political history of electoral voting in 1865–1869.[175]

A. President Johnson and South Carolina Lead the Way

Immediately following the Civil War, President Andrew Johnson and South Carolina removed the last vestige of legislative usurpation. In

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[165] CONG. GLOBE, 31st Cong., 2d Sess. 627 (1851).

[166] BENTON, *supra* note 136, at 37–41, 78–80 (discussing the efforts of 1824 and 1826, respectively).

[167] President Johnson opposed the Fourteenth Amendment as a whole, but a compromise measure that he supported would have applied a modified Section 2 specifically to presidential elections. JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 139–40 (1984). The modification would have limited Section 2 to denial of the right to vote on the basis of race or previous condition of servitude. *Id.*

[168] McPherson v. Blacker, 146 U.S. 1, 32–33 (1892).

[169] *See id.*

[170] *See id.*

[171] *See infra* Section IV.C.

[172] *McPherson*, 146 U.S. at 33; COLO. CONST. of 1876, schedule §§ 19–20.

[173] *McPherson*, 146 U.S. at 32–33.

[174] *Id.*

[175] A full review of this period is beyond the scope of this Article. For further details, see Michael Fitzgerald & Mark Bohnhorst, Presidential Ballots and Reconstruction: The Last Serious Attempt at Legislatures Casting Electoral Votes (unpublished manuscript) (on file with the authors) [hereinafter Presidential Ballots and Reconstruction]; Mark Bohnhorst, Reed Hundt, Kate E. Morrow & Aviam Soifer, *Presidential Election Reform: A Current National Imperative*, 26 LEWIS & CLARK L. REV. 437, 450–61 (2022) [hereinafter *Presidential Election Reform*].

June 1865, Johnson told a contingent of prominent ex-Confederates from South Carolina that he was "going right to the people as far as I can."[176] He appointed Benjamin F. Perry as provisional Governor after having commented at his meeting with South Carolina elites that Perry was perhaps "too much of a people's man" to suit them.[177] At South Carolina's (all-white) 1865 convention, Governor Perry proclaimed that the legislature's prior practice of choosing presidential electors had been a "gross error" and "usurpation."[178] The 1865 convention went on to pass a resolution that the legislature provide for the people to choose the electors.[179]

In 1868 South Carolina went one step further. A second constitutional convention convened under Congressional Reconstruction—this time with Black suffrage and a majority of Black delegates.[180] This convention discussed the effect of Section 2 of the Fourteenth Amendment.[181] South Carolina added the right to vote for presidential electors into its state constitution.[182] Congress then re-admitted South Carolina and five other southern states to the Union, subject to the fundamental condition that their constitutions "shall never be amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized."[183]

The 1865 resolution of South Carolina's constitutional convention and the 1868 Constitution, as well as several state statutes and the federal statute readmitting South Carolina to the Union, including the condition that the rights established in its Constitution would not be changed, might all be accurately described as "practical constructions." They shared the

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[176] 8 ANDREW JOHNSON, THE PAPERS OF ANDREW JOHNSON 280–85 (Bergeron ed., 1990).
[177] *Id.*
[178] *See* JOURNAL OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA 14–15 (1865) (including that the government was "a white man's government, and intended for white men only . . . .") [hereinafter SOUTH CAROLINA JOURNAL]. Perry wrote to Johnson several times, keeping him apprised of developments. 9 ANDREW JOHNSON, THE PAPERS OF ANDREW JOHNSON 76, 94–95 (Bergeron ed., 1990). The day before the address, Perry wrote, "I send in my message tomorrow, which is a strong one; sustaining your [Johnson's] reconstruction policy." *Id.*
[179] SOUTH CAROLINA JOURNAL, *supra* note 178, at 16, 68, addendum of resolutions (September 20, 1865). On October 2, James Orr, former Speaker of the House, wrote President Johnson to thank him for his recent pardon and inform him that Orr was likely to be elected Governor. 9 ANDREW JOHNSON, *supra* note 178, at 76, 124–25. He informed President Johnson that he had "little doubt" that the legislature would promptly pass the resolution. *Id.*
[180] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 318 (1988).
[181] 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, 810–813 (1868) (discussing the loss of representation if Black people were disenfranchised and the hope that Congress might allot two additional representatives if they were enfranchised).
[182] S.C. CONST. of 1868, art. VIII, § 9 ("Presidential electors shall be elected by the people.").
[183] An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 20, 15 Stat. 73 (1868).

view that legislative usurpation was always an error and that the resumption of the practice would violate Section 2 of the Fourteenth Amendment. *McPherson* simply ignored these developments.[184]

B. Section 2 of the Fourteenth Amendment and Broader Criticism of Legislative Election

In June 1866, Congress directly addressed the ambiguity in Article II, Section 1 when it sent the Fourteenth Amendment to the states.[185] Section 2 of the Fourteenth Amendment embodies the principle that a state may not deny eligible voters the right to vote without incurring a penalty. In fact, Section 2 specifies that if this principle is not followed in all federal elections, specifically including presidential elections (as well as in specified state elections), the state "shall" lose representation in the House (and thus in the electoral college) on a proportionate basis.[186] The drafting history demonstrates that this was intended to address directly the possibility that state legislatures might attempt to resume their exclusionary practice—as in South Carolina's history of depriving the people of the right to vote in presidential elections.[187] Legislatures might or might not possess that power, but under Section 2, they could exercise it only at great cost.[188]

The requirements of Section 2 were clearly understood. Almost immediately after Congress sent the Fourteenth Amendment to the states, Unionist-governed Tennessee ratified the Fourteenth Amendment and was readmitted to the Union.[189] Governor William T. Brownlow acted upon

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[184] McPherson v. Blacker, 146 U.S. 1, 32–33 (1892).

[185] *Presidential Election Reform*, *supra* note 175, at 450–53.

[186] *Id.*

[187] *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 3039–40 (1866).

[188] *Presidential Election Reform*, *supra* note 175, at 450–54. By June 1866—after repudiation of legislative election in South Carolina the previous year—the entire nation had turned against the legislative option. Moreover, experience with the most closely analogous practice—election of U.S. senators by state legislatures—cast a shadow over the practice of legislative election more broadly. In July 1866, within weeks of the promulgation of the Fourteenth Amendment, the Senate passed a bill to impose uniform procedures on state legislative elections of senators. Act of July 25, 1866, ch. 245, 14 Stat. 243. The debate on the measure referred to ambitious, partisan and corrupt legislatures: legislative election was termed a "mischief, an admitted evil." CONG. GLOBE, 39th Cong., 1st Sess. 3727–34 (1866). President Johnson agreed and promptly signed the bill into law. Two years later, on July 18, 1868, Johnson proposed a constitutional amendment for popular election of senators. Message from President Andrew Johnson to the Senate and House of Representatives (July 18, 1868) (proposing constitutional amendments). He declared that no detailed explanation was required: "The objections to the election of Senators by the legislatures are so palpable that I deem it unnecessary to do more than submit the proposition for such an amendment . . . ." *Id.* Johnson stressed the high ground of principle: election of senators by the people is more consistent with "the genius" of the American system of government. *Id.*

[189] JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 24 (1997) [hereinafter NO EASY WALK]. Tennessee's action was the first and most contemporaneous "practical construction" of Section 2. Leading Nashville papers covered these developments. *Id.* at 31.

Section 2's encouragement of universal male suffrage.[190] In an address to the Southern Loyalist Convention, Brownlow said that "enfranchising the Negro" was politically important (sixty or seventy thousand more votes "to weigh in the balance against rebelism") and that to do so was "proper and just."[191] In a message to the legislature, he pointed out that when the Fourteenth Amendment was ratified, if Tennessee did not extend suffrage to the freedmen, Tennessee's representation in the House would be reduced from nine to six.[192] Tennessee adopted universal male suffrage in February 1867.[193]

C. Reconstructed States Face White Supremacist Terror (July–November 1868)

Just as southern states were ratifying the Fourteenth Amendment and being readmitted to the Union, these same newly reconstructed states faced an electoral crisis.[194] This crisis would lead to the last serious attempt at legislative usurpation of the right of the people to vote in a presidential election.[195] *McPherson* stated only that the Florida legislature chose the state's electors in 1868 but said nothing about any other events.[196]

Significantly, the issues of Black male suffrage and selection of presidential electors intersected with the politics of Radical Reconstruction.[197] The electoral vote issue became the subject of national attention, and ultimately provoked an urgent national debate in 1868.[198] Under the Military Reconstruction Acts of 1867, ten ex-Confederate states convened Republican-dominated constitutional conventions based upon equal male suffrage.[199] Most states were readmitted to the Union in time for the 1868 presidential election.[200] Widespread fears that the Republican candidate, Ulysses S. Grant, would lose helped convince congressional

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[190] The term "universal male suffrage" is a common term in Reconstruction-era scholarship. It refers to the universal right to vote for all men, regardless of race, property, income, etc.
[191] NO EASY WALK, *supra* note 189, at 24.
[192] *Id.* A deprivation of the right to vote for President, although not an issue at the time, would have reduced Tennessee's representation in the House from nine to one.
[193] *Id.* at 25.
[194] Presidential Ballots and Reconstruction, *supra* note 175, at 6.
[195] *Id.*
[196] McPherson v. Blacker, 146 U.S. 1, 33 (1892).
[197] Radical Reconstruction (which involved the implementation of Black suffrage and other measures) was well underway by early 1867, as Congress took over the reconstruction of the southern states from President Johnson's administration, creating new state governments under the protection of the U.S. military and extending the right to vote to Black men.
[198] *See* Presidential Ballots and Reconstruction, *supra* note 175, at 6–15 (reprising the national debate); *Presidential Election Reform*, *supra* note 175, at 454–55.
[199] *See* FONER, *supra* note 180, at 276–77.
[200] *See* MICHAEL W. FITZGERALD, SPLENDID FAILURE: POSTWAR RECONSTRUCTION IN THE AMERICAN SOUTH 90–91 (2007).

Republicans to suggest drastic remedies.[201] At their instigation, Florida's new Republican government suddenly resurrected the notion of legislative appointment of presidential electors.[202] This proposal was adopted in early August 1868,[203] obviating the need for a popular vote in the face of Ku Klux Klan mobilization across the South.[204] This rapid enactment minimized public debate. The recent overwhelming majority vote for Republican reconstruction in Florida suggested some legitimacy, but the new law was prompted largely by the ferocity of the terrorist campaign.[205] While the public debate in Florida had been truncated, suggestions that other southern states might follow suit with legislative selection of electors provoked widespread Democratic protests and led the press to enter the fray.[206]

Because of Florida's quick adoption, Alabama, as the second state to pursue legislative appointment of electors, became the primary focus.[207] At the time Florida acted, Alabama's congressional delegation urged their Republican allies back home to act, and the Alabama legislature did so quickly.[208] Yet the newly installed Republican Governor, William Hugh Smith, hesitated. Smith was a native Alabamian who had remained loyal to the Union.[209] Nonetheless, Smith was probably the most conservative of all the southern Republican Governors on racial matters.

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[201] THE EVENING STAR, Washington, D.C., July 28, 1868; HARTFORD COURANT, July 29, 1868; NATIONAL INTELLIGENCER, Washington, D.C., July 30, 1868.

[202] JERRELL H. SHOFNER, NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION 204 (1975).

[203] 1868 Fla. Laws 166–67.

[204] *See* ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 47–64 (1971).

[205] WILLIAM W. DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 527 (1913).

[206] *See, e.g.*, *Choice of Presidential Electors*, N.Y. TIMES, Aug. 5, 1868; NEW YORK TRIBUNE, Aug. 12, 1868; *Governor Smith, of Alabama, Vetoes the Bill Providing for Choice of Electors,* CHICAGO TRIBUNE, Aug 12, 1868.

[207] Florida's bill passed on August 6, Alabama's passed on August 8, and Alabama's Governor, William H. Smith, vetoed it on August 11, 1868. N.Y. TIMES, Aug. 12, 1868.

[208] *Congressman Thomas Haughey, et al. to Governor W. H. Smith (July 28, 1868)*, ALABAMA DEPARTMENT OF ARCHIVES AND HISTORY: GENERAL CORRESPONDENCE FOR JULY 1868 FROM THE ADMINISTRATIVE FILES OF GOVERNOR WILLIAM H. SMITH, https://digital.archives.alabama.gov/digital/collection/cwrg/id/18102/rec/32 [https://perma.cc/7GWF-FQ23]. In both Florida and Alabama, the Republican-dominated legislatures were split. Formal protests were filed in Alabama, including a protest that legislative election was never intended by the fundamental law of the land and a protest that it transgressed the principle of universal male suffrage. Similar criticisms appeared in the press. *See* N.Y. TIMES, *supra* note 207. An editorial in a leading Tennessee paper, which had followed Governor Brownlow's implementation of Section 2 of the Fourteenth Amendment, echoed the views of Andrew Jackson and Andrew Johnson. The editorial stated that the paper was certain that legislative election violated the republican principles on which the nation was founded; the newspaper also believed the measure violated Section 2 of the Fourteenth Amendment. *A Radical Juggle Foiled*, NASHVILLE UNION & DISPATCH, Aug. 11, 1868, at 2; *The Proposition to Have No Election in November,* NASHVILLE UNION & DISPATCH, Aug. 13, 1868, at 2.

[209] MICHAEL W. FITZGERALD, RECONSTRUCTION IN ALABAMA: FROM CIVIL WAR TO REDEMPTION IN THE COTTON SOUTH 171 (2017).

He assumed office after a disputed election in which a Democratic boycott apparently prevented the enactment of the state's Reconstruction Constitution until Congress decided otherwise.[210] Under these circumstances, outreach to the more law-abiding elements of the white opposition became Smith's priority as he sought bipartisan legitimacy for his shaky government.[211] So, he vetoed the electoral college bill, citing its undemocratic nature. Smith noted that the bill would take the vote away from the freedmen who had just been enfranchised.[212] Smith's action won him Democratic admiration, and it largely resolved the debate within the Republican press about the legislative selection of electors.[213] In practical terms, Smith's veto settled the issue, and Alabama's notion of legislative appointment of electors found few outside defenders.[214]

Yet, Smith's actions provoked some serious misgivings among his fellow Alabama Republicans in the legislature, including both Black and white Radicals.[215] Any fair vote seemed impossible during the terrorist upsurge, especially after the army's profile receded following the restoration of civil rule.[216] However, Smith refused to organize the state militia, fearing that predominantly Black units would prompt a race war; he also minimized the severity of the Klan's actions in his public statements.[217] Most of the legislators resented being cast as dangerous extremists, particularly after critics leaked threats of physical resistance they had voiced during meetings in the Governor's office.[218] The angry Republican leaders hit upon a solution: the new state Constitution had a provision requiring all voters to take an oath, swearing to respect the civil equality of all men and to abjure violence or intimidation against voters.[219] The legislature had not yet passed implementing legislation, however. Without it, the legality of any future election could be in doubt.[220] The legislature simply adjourned without

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[210] *Id.* at 170–71. Congress received extensive evidence of the campaign of terror and intimidation that had marked the February election. *See* CONG. GLOBE, 40th Cong., 2d Sess. 2858–71, 2895–2904 (1868). The Senate determined that the new Constitution had the support of the majority of the people, "especially" in light of "the grossest fraud and greatest terror that pervaded Alabama during that election." CONG. GLOBE, 40th Cong., 2d Sess. 2900 (1868) (Sen. Pomeroy). The House concurred in admitting Alabama. CONG. GLOBE, 40th Cong., 2d Sess. 3094, 3097 (1868).

[211] FITZGERALD, *supra* note 209, at 205–06.

[212] *See* S. JOURNAL, 1st Sess., at 124–27 (Ala. 1868).

[213] Presidential Ballots and Reconstruction, *supra* note 175, at 13–14.

[214] *Id.* For discussions of the political context of this dispute, see FITZGERALD, *supra* note 209, at 163–204.

[215] Presidential Ballots and Reconstruction, *supra* note 175, at 14.

[216] *Id.* at 12.

[217] *Id.* at 11–12.

[218] *Id.* at 12–13.

[219] *See* ALA. CONST. of 1868, art. VII, § 4.

[220] WILLIAM WARREN ROGERS JR., RECONSTRUCTION POLITICS IN A DEEP SOUTH STATE: ALABAMA 1865–1874, at 90 (1st ed. 2021).

acting on the Governor's veto.[221] They were not scheduled to return until November 1868, which left open the possibility that the legislators might override Governor Smith's veto and choose the state's electors themselves, with some semblance of legal legitimacy.[222]

Alabama's impasse lasted for weeks, propelling continued national discussion of the electoral college issue well into that fall.[223] Despite all the national praise that Smith's veto received, the Alabama legislature was now able to frustrate an election through inaction. Republican campaign activities largely ceased because few activists or voters would risk their lives for an election that might never occur.[224] Governor Smith now faced a deteriorating situation, and he was forced to call the legislature back into session. But the Radicals in the legislature stood firm, essentially giving the Governor an ultimatum.[225] They appointed a delegation to meet with President Andrew Johnson, seeking guarantees that Johnson would order the army to protect the electorate.[226] They also requested that Governor Smith accompany their delegation to Washington, and Smith complied.[227] In their meeting with the President, the Republicans did receive the public guarantees they sought, even from the generally reactionary President Andrew Johnson.[228] The legislature then passed a bill implementing the required oath, and preparations for the election of Alabama's presidential electors proceeded as planned.[229]

All parties benefited politically from this negotiated outcome. President Johnson sounded statesmanlike; Governor Smith got his election; and the freedmen won a measure of army protection. That November, somewhat surprisingly, Grant carried Alabama despite the white majority and substantial Klan violence in the northern part of the state.[230] In more predominantly Black areas within the central "Black Belt," voters surged to the polls in decisive numbers.[231] Even in the face of widespread Klan terrorism, the response among Republican voters was persistence to hold popular elections. The extended debate over Alabama's actions, and the actual result, solidified a national consensus that legislative choice of presidential electors violated democratic norms. That consensus then supported a proposal to assure that the problem would never recur.

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[221] Presidential Ballots and Reconstruction, *supra* note 175, at 15.
[222] *Id.* at 15.
[223] Governor Smith issued his veto on August 11, the legislature adjourned the following day, and Smith did not call the legislature back into session until mid-September. *See id.* at 16–17.
[224] *Id.* at 15.
[225] *Id.* at 16.
[226] *Id.*
[227] ROGERS JR., *supra* note 220, at 98.
[228] *See* N.Y. TIMES, Sept. 30, 1868; N.Y. TIMES, Oct. 7, 1868.
[229] Presidential Ballots and Reconstruction, *supra* note 175, at 17.
[230] TRELEASE, *supra* note 204, at 120–22 (1971).
[231] FITZGERALD, *supra* note 209, at 188.

D. A Proposed "Sixteenth Amendment" to Guarantee Popular Election

On December 9, 1868, President Andrew Johnson sent his final annual message to Congress.[232] For the second time in five months, he asked Congress to consider a constitutional amendment regarding presidential elections. Such an amendment was introduced in the Senate the next month.[233] The Alabama election confirmed that popular election of the President had become Democratic and Republican orthodoxy. Even in this extraordinarily partisan era, the proposed amendment was supported by members of both parties. Democratic Senator Charles Buckalew from Pennsylvania was the chief author; Republican Senator Oliver P. Morton from Indiana, the relevant committee chair, was the other principal proponent.[234]

The Senate committee supported the amendment.[235] Sidestepping the issue of what type of popular election would be conducted, the measure simply required that electors be elected by the people. The states would retain initial discretion to determine what form of popular election to utilize; however, mirroring Congress's power over congressional elections under Article I, Congress would have the ultimate power to stipulate a uniform rule if it wished to do so.[236]

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[232] *See* President Andrew Johnson, Fourth Annual Message to Congress (Dec. 8, 1868).

[233] For proceedings and debates on the proposed Sixteenth Amendment, see CONG. GLOBE, 40th Cong., 3d Sess. 668–71, 674, 704, 711, 1041–44, 1224–26, 1287–92 (1868). The amendment provided in relevant part as follows: "Each state shall appoint, by a vote of the people thereof qualified to vote for Representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress . . . and the Congress shall have power to prescribe the manner in which said electors shall be chosen by the people." *Id.* at 711.

[234] *Id.* at 668–71, 711, 1042–44, 1285–89, 1291 (1868).

[235] *Id.* at 668. The consensus about the right of the people to vote for President is reflected in the ratification history of Section 2 of the Fourteenth Amendment. While there was immense hostility in the South to the penalty feature that some considered a *de facto* enfranchisement of the freedmen, leading texts cite no evidence that anyone objected specifically to extending the right to vote to presidential elections. *See generally* NO EASY WALK, *supra* note 189 (tracing the course of initial rejection and ultimate ratification throughout the South); JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984) (tracing the course of ratification across the nation). The consensus is also reflected in the diametrically opposed views of the chief sponsors on the central question of race. Buckalew was philosophically committed to white supremacy. William W. Hummel, Charles R. Buckalew: Democratic Statesman in a Republican Era 48–53 (1963) (Ph.D. dissertation, University of Pittsburgh) (explaining the view that emancipation inevitably would lead to a war of extermination). Morton was philosophically committed to human freedom. Chapter nine of his 2017 biography is titled "A Radical Champion for African Americans." A. JAMES FULLER, OLIVER P. MORTON AND THE POLITICS OF THE CIVIL WAR AND RECONSTRUCTION, at 234–73 (2017).

[236] CONG. GLOBE, 40th Cong., 3d Sess. 668, 711 (1868).

The proposal proceeded as a companion to the Fifteenth Amendment and was to be known as a "Sixteenth Amendment."[237] Combining the two drafts made sense. Section 2 of the Fourteenth Amendment had created what could be characterized as "indirect rights"—sharp prods to be enforced by a penalty, both to induce states to enfranchise the freedmen and to help assure that male citizens would vote for presidential electors. States could withhold these rights if willing to suffer the penalty.[238] The Fifteenth Amendment closed that loophole for the freedmen; the proposed Sixteenth Amendment would have closed it with respect to all presidential elections.[239]

The Senate debated the proposed Sixteenth Amendment at considerable length and, on February 9, 1869, voted first to combine this proposal with the Fifteenth Amendment and then voted, with more than a two-thirds majority, to approve the combined proposals.[240] Senator Morton stressed the danger, highlighted earlier in the 1826 debates in Congress, that a state legislature might intervene at the last minute, change the result of an election, and trigger civil war.[241] Senator Buckalew also stressed the threat of legislative corruption:

> [H]ere is an amendment proposing that the people shall have secured to themselves the right of choosing presidential electors; that it shall not be taken or snatched from them by intrigue or corruption of the Legislatures . . . that the corruption of a few votes in a State shall not turn the whole scale and change elections[.][242]

There were references to the prior year's controversies in Florida and Alabama and to South Carolina's constitutional requirement that the people elect the electors.[243] Senator Buckalew, who generally adhered to states' rights and racist doctrines, dismissed the South Carolina constitutional provision as a nullity.[244] A subsequent committee report

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[237] *Id.* at 711.

[238] *See supra* Section IV.B.

[239] *Cf.* Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 547 n.51 (2001) (discussing the relationship between Section 2 of the Fourteenth Amendment and the proposed Sixteenth Amendment).

[240] CONG. GLOBE, 40th Cong., 3d Sess. 1042, 1044 (1868).

[241] *Id.* at 711, 1042.

[242] *Id.* at 1289.

[243] *Id.* at 1042, 1288.

[244] *Id.* at 1288. Senator Buckalew had missed the crucial votes on Section 2 and the Fourteenth Amendment in June 1866. CONG. GLOBE, 39th Cong., 1st Sess. 3038–42 (1865). He did not refer to Section 2, which the South Carolina constitutional convention had specifically considered. *Supra* note 181 and accompanying text. Buckalew voted against the

Buckalew wrote, on the other hand, characterized this as an open question.[245] Some members of Buckalew's committee obviously did not agree that state constitutions could be considered a nullity.[246]

The proposed Sixteenth Amendment was the first amendment dealing solely with the electoral college in over fifty years to pass the two-thirds threshold in either house of Congress, providing substantial evidence of deep bipartisan support for popular election. Yet, *McPherson*'s historical sketch did not mention it.[247] Whatever Senator Buckalew's personal views might have been, his Senate committee report (similarly not mentioned in *McPherson*) offers further evidence that state legislative "plenary power" over presidential elections was never "conceded."

E. Senator Oliver P. Morton's 1874 Senate Report

McPherson cited at length one specific item of Reconstruction history, a passage from an 1874 Senate Report written by Indiana Senator Oliver P. Morton:

> The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. Thay [sic] may be chosen by the legislature . . . and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect

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Fifteenth Amendment on states' rights grounds, maintaining that the requisite number of the original states would not have ratified the Constitution had they believed that it would empower three-fourths of the states to force them to allow Black people to vote in state elections. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1639, 1641 (1868). Similarly, Buckalew opposed the requirement that the southern states could never withdraw the rights of universal male suffrage that Congress had required in their new constitutions, arguing that the "republican form of government" referenced in the Constitution is limited to the concept of republican government as it was understood in 1787. CONG. GLOBE, 40th Cong., 2d Sess. 3027–28 (1867). Buckalew was absent for the vote on the Thirteenth Amendment but would have voted against it. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1863). He voted for an amendment that would have denied citizenship to Black men and barred them from assuming any federal office or position of trust or profit. *Id.* at 1424 ("No negro, or person whose mother or grandmother is or was a negro, shall be a citizen of the United States and be eligible to any civil or military office, or to any place of trust or profit under the United States.").

[245] S. REP. NO. 40-271, at 18 (1869).

[246] The committee included two senators who had voted on Section 2 of the Fourteenth Amendment (Benjamin Wade, Ohio, and Henry Anthony, Rhode Island) and Alabama Senator Willard Warner, who advocated for Alabama's 1868 bill and was intimately familiar with the debate. S. JOURNAL, 40th Cong., 3d Sess. 97 (1869).

[247] *See* McPherson v. Blacker, 146 U.S. 1, 32–33 (1892).

> Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[248]

The passage epitomizes the rhetorical style for which Senator Morton was famous.[249] A great deal of evidence undermines his claim, however.

For instance, Justice Joseph Story (whom the Court quoted in the preceding paragraph) wrote that the constitutionality of legislative choice had often been "doubted by able and ingenious minds."[250] Morton's assertion was further contradicted by Thomas Hart Benton's suggestion in 1824 that Congress might not count electoral votes from states that usurped the right of the people to vote.[251] Moreover, Senate Report 19-22 characterized legislative election as mere usurpation when it takes place without the consent of the people.[252] Numerous Representatives also spoke during the lengthy debate on the issue in 1826.[253] And finally, many "practical constructions" during Reconstruction undermined Morton's claim,[254] and it was contradicted by Senator Buckalew's March 1869 report for a select committee, of which Morton was a member.[255]

Morton's attempted analogy to legislative selection of U.S. senators does not help his claim. The original U.S. Constitution contained two separate provisions concerning the election of senators. The first provision states that senators "shall be . . . chosen by the Legislature" of each state.[256] This provision was a direct delegation of power to an existing legislative body to act, specifically to elect senators. It is similar to a number of other direct delegations for legislatures to take specific actions, such as ratifying constitutional amendments. The Supreme Court has held that when the Constitution empowers the legislature to act, not to pass legislation, the state's constitutional provisions relating to legislation do not apply.[257] For example, a Governor could not veto either a legislature's choice of a U.S.

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[248] S. REP. NO. 43-395, at 9 (1874).

[249] FULLER, *supra* note 235, at 198–233 (2017). Morton was known as a powerful orator who could seize on a telling argument and pound his adversaries with it relentlessly to advance his point. *Id.* at 86. He also was a foremost practitioner—perhaps even the first practitioner—of "waving the bloody shirt." *Id.* at 32. Morton deployed the absolute power of state legislatures argument in a similar fashion to dramatize the need for constitutional reform.

[250] *McPherson*, 146 U.S. at 33 (quoting Story Const. 1st ed. § 1466).

[251] *See supra* note 126 and accompanying text.

[252] *See* S. Rep. No. 19-22, at 16 (1826); *supra* notes 137–40 and accompanying text.

[253] *See Presidential Election Reform*, *supra* note 175, at 460 n.71 (2022).

[254] *See supra* Section IV.A–C.

[255] *See supra* notes 246–47 and accompanying text.

[256] U.S. CONST. art. I, § 3, cl. 1.

[257] *See* U.S. CONST. art. V; Hawke v. Smith, 253 U.S. 221, 229 (1920) (explaining the authority to ratify was delegated to the legislature, and legislative referendum under state constitutions does not apply since ratification does not involve legislation).

Senator or a state legislature's decision to ratify a constitutional amendment. Article II, however, has no analogous provision. Article II specifically requires each "state" to choose and appoint presidential electors every four years, but not each legislature.[258]

The second provision concerning the selection of U.S. senators dictates that each state legislature "shall . . . prescribe[]" the "[m]anner of holding Elections for Senators."[259] The language in this separate provision of Article I requires a legislature to legislate, not to take action itself.[260] But a state legislature can only legislate in the manner specified by its state's constitution.[261] Moreover, this specific language does not necessarily refer to the existing legislature. Once a law has been "prescribed" by a legislature it remains the law until repealed unless it includes an expiration date.

The U.S. Senate directly addressed the different meanings of these two provisions in the February 1866 controversy about seating John Stockton, a Democrat from New Jersey. The New Jersey legislature had elected Stockton in joint session by a plurality vote, but thirty-eight New Jersey legislators filed a protest.[262] The lengthy U.S. Senate proceedings considered a wide array of law regarding how representative bodies elect, ranging from ancient Rome to the College of Cardinals to banking corporations.[263] The Senate also discussed New Jersey's first Constitution of July 2, 1776, statutes passed under that Constitution, and all subsequent New Jersey law.[264] The closely-divided Senate concluded that the legislature, meeting in joint session, was required by law to elect by majority vote, that the joint session could not ignore this, and that Article I, Section 3, Clause

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[258] *Compare* U.S. CONST. art II, § 1, cl. 2 ("Each State shall appoint . . . ."), *with* U.S. CONST. art. I, § 3, cl. 1 ("[T]wo Senators from each State [shall be] chosen by the Legislature thereof . . . .").

[259] U.S. CONST. art. I, § 4, cl. 1. This clause is analogous to Article II, Section 1, Clause 2, which provides that legislatures "may direct" the "Manner" of "appointment." Some of the language from both provisions seems drawn from Article V of the Articles of Confederation, which provided that each state's legislature "shall direct" the "manner" of "appoint[ing]" representatives to Congress. ARTICLES OF CONFEDERATION of 1781, art. V. Under the Articles, however, nearly every state's Constitution governed how delegates were chosen. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 479 (2022). This historical fact belies the suggestion that analogous language in the Constitution was intended to set legislatures free from the constraints of their constitutions.

[260] *See* U.S. CONST. art. I, § 4.

[261] *See, e.g.*, Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916) (explaining that a state's redistricting plan under Article I is subject to a state constitutional right of the people to petition and vote on legislation through referendum); Smiley v. Holm, 285 U.S. 355 (1932) (explaining that a redistricting plan under Article I is subject to the Governor's constitutional power to veto legislation); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (explaining the state constitutional power of the people to initiate legislation applies to redistricting under Article I).

[262] CONG. GLOBE, 39th Cong., 1st Sess. 1565 (1865).

[263] *Id.* at 1599.

[264] *Id.* at 1564–73, 1589–1602, 1635–48, 1666–67.

1 delegated only the power to elect, not the power to make or change the law.[265]

Michael Morley, a modern proponent of the independent state legislature doctrine, has suggested that the Stockton proceedings support the doctrine.[266] Morley's argument focuses on the report of a divided committee that recommended Stockton retain his seat.[267] The committee rationale—explained by its chair, Illinois Senator Lyman Trumbull—was that no existing law would restrict the power of a joint session of the legislature to adopt whatever rule it wished, and that the legislature meeting in joint session had long established its own rules.[268] But, significantly, the full Senate disagreed and voted for an amendment that reversed the committee's recommendation.[269] Several senators expressly supported the argument within the election protest that the thirty-eight New Jersey legislators filed. They claimed that terms of the existing law, first enacted in 1794, still governed and that the law had to be interpreted in light of the New Jersey Constitution of July 2, 1776, which required a joint session of the legislature to elect by majority vote.[270] In sum, the state Constitution did matter: the legislature could not be "independent" enough to ignore existing law.

In *McPherson*, the Court did not mention the Stockton matter, and it introduced its discussion of the 1874 Report with anodyne language—"[i]n this report it was said . . . ."[271] Chief Justice Fuller cited the Report as part of

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[265] Only Senator William Fessenden said the legislature, by concurrence of the separate bodies, might disregard existing law. *Id.* at 1567–68. Neither Stockton, nor Senator Trumbull, who presented the case for seating Stockton on behalf of the relevant committee, agreed. *Id.* at 1591, 1597 (tracking the debate: Stockton asserted that the legislature could not set aside an existing positive law; Trumbull was "not [] prepared to concur in the [argument] that no provision of law of a previous Legislature would in any manner bind the Legislature called on to perform the act [of electing a U.S. Senator]," and saw this case as one in which there was no pre-existing law). Due to the complexity of the issues and the nature of legislative proceedings, it is impossible to be certain on what specific theory the Senate acted, or even if there was a rationale that commanded a majority view. Clearly, however, the legislature did not have "plenary" power to do what it did.

[266] Morley, *supra* note 44, at 62–63. Petitioners and their amici in *Moore v. Harper* do not mention the Stockton proceedings, which further refute their erroneous assertion that in elections governed by Article I, Section 3, and Article I, Section 4, a state legislature could disregard its constitution. *See generally* Brief for Petitioners, *supra* note 24. *Cf. supra* note 90 (similarly, the records from the first presidential elections in Massachusetts and New York do not support petitioners' arguments).

[267] Morley, *supra* note 44, at 64–65.

[268] CONG. GLOBE, 39th Cong., 1st Sess. 1564–65, 1597 (1865).

[269] *Id.* at 1565, 1668, 1677.

[270] *See id.* at 1595 ("[I]t is clear to my mind that the Legislature, in 1794 . . . had in view this constitutional provision which required a majority vote . . . ."); *id.* at 1591 ("[I]t was that old and precedent law which directed . . . .").

[271] McPherson v. Blacker, 146 U.S. 1, 34 (1892). Michael Morley said that the *McPherson* opinion quoted the 1874 Report "approvingly in support of the independent state legislature

the historical record, and the Court's own analysis contradicted the Report's more extreme assertions. For example, the Court repeatedly said that state legislatures are creatures of their state constitutions.[272] And the actual holding in *McPherson* was that the "State"—and not the legislature—has exclusive power over the manner of appointment of presidential electors.[273]

F. The Election of 1876: the Colorado Constitution and the Electoral Commission

Reconstruction was finished after the contested and chaotic presidential election of 1876, which was resolved with the aid of an Electoral Commission on which both Oliver P. Morton and Justice Field served.[274] The *McPherson* opinion, in which Justice Field joined, said only the following about that election: "Even in the heated controversy of 1876–1877 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged . . . ."[275]

Colorado's legislature did choose the state's electors in 1876. Still, there was no reason to suggest that this constituted a usurpation of the rights of the people or that it was otherwise unconstitutional. Acting in what James Madison referred to as their highest sovereign capacity,[276] the people of Colorado ordained and established a Constitution in which they delegated to the legislature the power to elect their electors in 1876, the year that Colorado became a state.[277] At the same time, however, they preserved the authority of the people to elect forever afterward.[278] Rather than providing evidence that legislatures possess "plenary" power, these Colorado Constitution provisions are a practical demonstration of the principle that the people retain sovereign control over their legislatures, within the confines of the U.S. Constitution.

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doctrine," which the Court "enthusiastically endorsed." Morley, *supra* note 44, at 65, 70. Others strongly disagree. *See, e.g.*, Smith, *supra* note 259, at 445, 530 n.400 ("[N]ot supported by any reasonable reading of the case"); Mark, The Constitutionality of Citizen Initiative for Reforming the Presidential Election System, 59–63 (2020), https://static1.squarespace.com/static/5a7b7d95b7411c2b69bd666f/t/5fcc232874a40730fb894414/1607213876032/Constitutionality+of+an+Initiative.pdf [https://perma.cc/XX3X-KQYL] (itemizing multiple instances in which the *Bush v. Gore* litigation team similarly mischaracterized or misrepresented the 1874 Report).

[272] *See McPherson*, 146 U.S. at 25 (1892).

[273] *Id.* at 35. In other words, no state legislature is entitled to assert its own version of Louis XIV's famous declaration, "L'etat, c'est nous."

[274] *See generally* ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 817–33 (remarks of Commissioner Morton), 974–94 (remarks of Commissioner Field). For a brief summary of the election, see KEYSSAR, *supra* note 14, at 122–23, 428.

[275] *McPherson*, 146 U.S. at 33.

[276] *The Report of 1800*, *supra* note 102.

[277] COLO. CONST. of 1876, art. XIX, § 19.

[278] *Id.* at § 20.

Senator Morton's claim that it was "undoubtedly" true that state laws, state constitutions, and other organs of state government could not interfere with a legislature's absolute power over presidential elections was contradicted during the proceedings of the Electoral Commission of 1877. Several times, for example, Morton asked pointed questions, apparently seeking to enlist support for his contention that state legislatures can ignore state constitutions in setting the rules for either congressional or presidential elections; the repeated reply was that provisions of state constitutions do apply so long as they do not directly conflict with the U.S. Constitution.[279]

Moreover, the role of state constitutions in presidential elections was litigated before the 1877 Commission in the matter of the disputed electoral votes of South Carolina. The South Carolina Constitution required the creation of a voter registry,[280] which was never done. Advocates for electors who were pledged to Rutherford B. Hayes argued that the state Constitution did not apply to federal elections; advocates for the Tilden electors claimed otherwise.[281] In separate opinions, several—but not all—of the pro-Hayes Commissioners did mention the absolute or plenary power doctrine.[282] This was not the basis of any decision, however. The pro-Hayes Commissioners ruled that "it may be the duty of the legislature to enact such a [voter registry] law."[283] They determined, however, that "failure . . . to provide a system for the registration of persons . . . does not render nugatory all elections . . . ."[284] Justice Bradley's separate opinion explained the basis for this facet of the ruling—the constitutional provision was directory only, which meant the elections were "voidable" but not "void."[285]

For their part, the Democrats did not concede that state legislatures possessed plenary power to disregard state constitutions. They claimed that state constitutions did apply to presidential elections, and they rejected the

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[279] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 337 (explaining that a state may provide in its Constitution that certain persons shall not be candidates for any offices); *id.* at 487 ("The constitution of each State and the United States Constitution are equally binding upon legislature and governor."); *cf. id.* at 396 (explaining that if state legislatures "have the supreme authority to direct on this subject," legislatures can designate individuals as "a body corporate" and confer "the sole and exclusive power [to] appoint [presidential electors].").

[280] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 671; S.C. CONST. of 1868, art. VIII, § 3: ("It shall be the duty of the General Assembly to provide from time to time for the registration of all electors.").

[281] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 682–84.

[282] *Id.* at 832–33, 853, 968 (referring to plenary power, entirely untrammeled legislative power, and exclusive authority).

[283] *Id.* at 702.

[284] *Id.*

[285] *Id.* at 1039–42. *See generally id.* at 1019–41 (Justice Bradley's comprehensive and clear separate remarks, which explain the issues in this and other cases and the reasons for counting the Hayes electoral votes).

absolute legislative power argument in no uncertain terms.[286]

In their South Carolina ruling, the Hayes Commissioners declined to endorse an argument that Justice James Story had made during the 1820 Massachusetts constitutional convention. There, Justice Story cited the "unlimited" discretion of state legislatures over federal elections as one reason not to include a requirement for election by districts in the state constitution.[287] The Hayes electors quoted at length from Story's argument, but the Electoral Commission did not adopt any such reasoning.[288]

The Hayes electors acknowledged that legislative power was subject to "the obligations of the amendments of the [U.S.] Constitution about suffrage and such regulations as Congress may be authorized to make."[289] This clearly invoked both Section 2 the Fourteenth and the Fifteenth Amendments. Indeed, the point was emphasized in January 1877, during the congressional debate over the creation of the Electoral Commission.[290] Mississippi Representative John Roy Lynch (who was born into slavery) said that Congress must have the power to consider wholesale violations of these

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[286] *Id.* at 287. "And the provisions of the Constitution that each State shall appoint electors must be construed to mean that such State, according to the provisions of its own constitution, shall appoint electors . . . . It is only *the State*—the constitutional republican State—a State of the Union under its written republican form of government, proceeding according to its constitution, which constitution is constantly subject to Federal supervision, that can appoint an elector." *See id.* at 878 (stating that legislature is one component of state government and is subject to the state's Constitution, which is the expression of the people in their sovereign capacity).

[287] JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 59–60 (1821).

[288] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, 683; *see supra* text accompanying notes 285–87 (Commissioners' ruling). Michael Morley attributed considerable significance to Story's 1820 statement, but he did not address its use before the Electoral Commission. Morley, s*upra* note 44, at 39–40; *see also* Smith, *supra* note 259 (critiquing Morley's argument, stating only one of three delegates who spoke to the point in 1820 supported Story's argument; it is impossible to know the basis of the Massachusetts state constitutional convention's action).

[289] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 682.

[290] 5 CONG. REC. 1025–26 (1877) (discussing a supposition that a legislature had declared that only white citizens may vote for electors: "It may be said . . . the representation in Congress would be reduced . . . ." But "this may be done at the next succeeding apportionment of Representatives, but not before . . . ." Rep. Lynch rejected that limitation: "It is clear to my mind that, when a State shall have violated the fundamental principles and conditions of republican government in choosing its electors, and the United States Government through its legislative department has ample power to inquire into the validity of such an election, and if necessary set it aside."). Rep. Lynch's view was consistent with Section 23 of the Ku Klux Klan Act of 1870. Enforcement Act of 1870, ch. 114, § 23, 16 Stat. 140, 146 (1870). The law established a *quo warranto* action to challenge the right to office of anyone elected as a result of violations of the Fifteenth Amendment, but it withheld federal court jurisdiction for the office of presidential elector and for elections to Congress and the state legislatures. *Id.* That left it up to each house of Congress to determine whether to seat members and, in Rep. Lynch's view, for Congress to determine whether to count votes from a state that has violated the fundamental principles of republican government.

amendments in connection with counting the electoral votes.[291]

Another important issue implicated in Senator Morton's 1874 Report, and addressed directly by the Electoral Commission, concerned the role of the state judiciary. If the state legislature was delegated absolute power to the exclusion of existing laws and the state constitution, what role would remain for the state's judiciary? An extreme implication of the 1874 Report, adopted by the concurring opinion in *Bush v. Gore*, is that state courts have limited authority to interpret a legislature's laws and to apply the state's Constitution and that, by contrast, federal courts do have jurisdiction to second guess state court decisions regarding state law.[292] This notion finds no support whatsoever in the Electoral Commission proceedings and directly cuts against the federalism concerns identified as central in recent U.S. Supreme Court decisions that limit federal protection of voting rights.[293]

Justice Field (sitting as a commissioner) upheld the right and absolute power of state courts to interpret state statutes. He emphasized that when a state's highest court interprets a state statute, that court's interpretation is treated as part of the legislative text.[294] Other commissioners said essentially the same thing.[295] The issue, which was central to the dispute over the votes in Florida, was not about the role and power of the courts—everyone agreed about that; rather, the question litigated was about timing—could a decision be considered if it was rendered after electors were appointed and had cast their votes?[296] The Hayes Commissioners ruled that

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[291] 5 CONG. REC. 1026 (1877).

[292] *See* Vikram D. Amar & Akhil R. Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 37–38 (2022) (citing Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J. concurring), specifically, Justice Kavanaugh's footnote regarding federal court jurisdiction to set aside state court ruling based on state law and the state constitution). The Supreme Court has accepted review of a case that raises the extreme version of the independent state legislature doctrine in the context of Article I. Moore v. Harper, 868 S.E.2d 499 (N.C. 2022), *cert. granted*, No. 21-1271 (June 30, 2022).

[293] *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (holding that voting inherently imposes a burden and voters must comply with certain rules imposed, even if inconvenient); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that there is no judicial review of partisan gerrymandering); Shelby County v. Holder, 570 U.S. 529 (2013) (holding that part of the Voting Rights Act was unconstitutional when it used forty-year-old data).

[294] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 977.

[295] *Id.* at 959. Commissioner Garfield noted that there is no question whether construction of a statute given by the state's highest court is binding on others and is treated as part of the statute. In his book on the 1876 presidential election, Chief Justice William Rehnquist appears to have agreed: "Field's strongest point was probably the principle that a decision of a state's highest court was considered to be law just as surely as if enacted by the legislature." WILLIAM REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 169 (2004).

[296] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 166 (framing of the issues by Shellabarger).

it could not.[297] As Justice Bradley (sitting as a commissioner) explained, prior to the appointment of electors, each state was free to provide whatever machinery it wished "for securing and preserving the true voice of the State in appointing electors . . . [the State may even require] attendance of the supreme court or any tribunal to supervise the action of the board, and to reverse it if wrong."[298] Prior to appointment, power lay with the "state," not just with the legislature; after the appointment and the casting of votes, state power—extending to state judicial power—ended and authority shifted to the national government.

The Electoral Commission proceedings also help decipher *McPherson*'s offhand and cryptic reference to a "limitation upon the State in respect of any attempt to circumscribe the legislative power."[299] One clue to solving this puzzle is what the parties argued. The briefs seem to contain one, and only one, discussion of "circumscribing" legislative power:

> Any substantial departure from the manner prescribed must necessarily vitiate the whole proceeding. If, for example, the appointment of electors should be made by the governor of a State, when its legislature had directed that they should be chosen by the qualified voters at a general election, the appointment would be clearly invalid and have to be rejected. So, too, if the legislature should prescribe that the appointment should be made by a majority of the votes cast at such election, and the canvassers, or other officers of election, should declare as elected those who had received only a plurality . . . of the votes, or the votes of a portion only of the State, the declaration would be equally invalid as not conforming to the legislative direction; and the appointment of the parties thus declared elected could only be treated as a nullity.[300]

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[297] *Id.* at 196 ("[A]ll proceedings of the courts [of the state] . . . subsequent to the casting of the votes of the electors on the prescribed day, are inadmissible for any such purpose [i.e., to contest the appointment of the certified electors].").

[298] *Id.* at 1021, 1024; REHNQUIST, *supra* note 295, at 170; PAUL LELAND HAWORTH, THE DISPUTED PRESIDENTIAL ELECTION OF 1876, at 231 (1906) ("With admirable acumen and calculation they [the Hayes Commissioners] placed themselves squarely upon the line of division between Federal and state powers."); *id.* at 337–39 (explaining the Commission's various rulings). The Minnesota Constitution provides that the Canvassing Board itself includes two Justices of the Minnesota Supreme Court and two judges of the district court, along with the Secretary of State. MINN. CONST. art. VII, § 8. Surely, the Minnesota legislature does not have "plenary" power to ignore the state Constitution and establish its own system for canvassing votes in presidential elections.

[299] Amar, *supra* note 292, at 16 (citing McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

[300] *Brief of A.A. Ellis*, *in* U.S. SUPREME COURT RECORDS AND BRIEFS, 1832–1978: MCPHERSON V. BLACKER U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS 20–21 (Making of Modern Law 2011).

This passage is a quotation from Justice Field's separate opinion in the Commission's consideration of the electoral vote in Florida,[301] in which Justice Field stated that the final decision of a state's highest court about the meaning of state law, even if made after the votes had been cast, should be treated as part of the statute itself and applied retroactively.[302] Specifically, Florida's State Canvassing Board had excluded some returns that it decided were "irregular, false or fraudulent."[303] The effect was to change an approximately eighty vote lead for Tilden to a forty-five vote win for Hayes.[304] To Justice Field, the state court ruling, which held that the Canvassing Board did not have the discretion to exclude the returns, was dispositive;[305] thus, the action of election officials was tantamount to conducting the election in only part of the state and certifying candidates who had lost the popular vote as winners. To read *McPherson*'s reference to "circumscribing legislative power"[306] as a suggestion that state courts do not have complete authority to interpret state laws and constitutions is unsupportable. Justice Field's argument, from which the phrase appears to have been derived, was premised on precisely the opposite proposition.[307]

Justice Field voted against Senator Morton's position on almost every issue that came before the Electoral Commission.[308] In a long paragraph, *McPherson* incorporated a good deal of what Justice Field and others who sided with Tilden said about state constitutions. The reference to "circumscribing" legislative power is part of that paragraph.[309] This portion of Chief Justice Fuller's unanimous opinion—which set out a core aspect of the Court's legal reasoning—is in irreconcilable tension with Morton's 1874 Report, which the Court nonetheless cited as an illuminating historical document.[310]

The relevant "practical construction[s]" of the 1877 Electoral Commission were that: (1) state constitutional provisions might well be relevant, (2) Article II, Section 1, Clause 2 confers exclusive power over appointment of electors on each "State," and (3) in that context, state courts are the final expositors of the meaning of state statutes and constitutions.

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[301] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 974.
[302] *Id.* at 977.
[303] *Id.* at 978.
[304] REHNQUIST, *supra* note 295, at 104–05.
[305] ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 976–77.
[306] McPherson v. Blacker, 146 U.S. 1, 25 (1892).
[307] Note also that the Court referred to "legislative power," and not to the power of whatever legislature happens to be sitting at the moment. Legislative power is the power to pass laws, which generally remain on the books and—as interpreted by the state's courts—continue to be binding whatever the predilections of a particular sitting legislature.
[308] *See* KEYSSAR, *supra* note 14, at 123. The Electoral Commission decided the issues "in a series of straight (eight to seven) party line votes." *Id.*
[309] McPherson v. Blacker, 146 U.S. 1, 25 (1892).
[310] *See id.* at 34.

McPherson appeared to accept all these propositions.[311]

IV. REASSESSING *MCPHERSON*: FROM HISTORICAL AMNESIA TO THE PERNICIOUS DOGMA OF TODAY'S WOULD-BE USURPERS

As noted, *McPherson* was an easy case. Whichever way the Court ruled, it would affirm some type of popular election. And the Court held only that the district system for the people to elect their presidential electors was not unconstitutional. Legislative usurpation simply was not an issue before the Court.

In fact, *McPherson* endorsed fundamental principles that those who objected to legislative elections had emphasized since 1787. *McPherson* affirmed that the people are sovereign, noting that "representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity."[312] Chief Justice Fuller's opinion also noted that the term "state" can have multiple meanings. He observed that the Constitution "frequently" refers to a state as a political community, but also refers to states "in terms to the people of the several states and the citizens of each state."[313] In support of this point, the Court cited *Texas v. White*, which declared that the fundamental idea of republican government is that the people constitute the sovereign state.[314] Chief Justice Samuel P. Chase's majority opinion declared that even when the government of Texas seceded from the Union, the "state" of Texas continued to exist in the form of its people.[315] The people of Texas remained entitled to a republican form of government as guaranteed by Article IV, Section 4 of the U.S. Constitution; within that clause, Chase insisted, "state" means the "people" and not the government.[316]

To repeat, in *McPherson*, legislative usurpation was not an issue. It was not necessary for the Court to confront the contradiction between the founding principles of American democracy that it affirmed and a practice that existed at the creation of the new nation, but otherwise had long since

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[311] Indeed, one part of the Court's decision considered and upheld a Michigan Supreme Court decision that effectively re-wrote the state's new law, agreeing that statutory language "may be rejected." *Id.* at 41. Petitioners and their amici in *Moore v. Harper* do not mention the Electoral Commission, though issues that are central to *Moore v. Harper*—the roles of state constitutions and the power of state courts—were litigated before the commission. *See generally* Brief for Petitioners, *supra* note 24.

[312] McPherson v. Blacker, 146 U.S. 1, 26 (1892).

[313] *Id.* at 25.

[314] Texas v. White, 74 U.S. 700, 720 (1868) ("The people . . . constitute the state. This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge, in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.").

[315] *See id.* at 725.

[316] *Id.* at 720.

been repudiated and abandoned.

McPherson did say this, however: "The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive."[317] Insofar as the "construction" and "meaning" to which the Court referred was that a state may arrange for any method of popular election that it chooses, that statement is hardly controversial. As Justice Story put it, no one had questioned the power of a state to choose electors through any mode of popular election.[318]

Yet, if one were to read *McPherson*'s construction and meaning to be that a state legislature has *carte blanche* to dispense with popular election,[319] the history that overwhelmingly refutes such an interpretation

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[317] *McPherson*, 146 U.S. at 36.

[318] *Id.* at 33.

[319] The syllabus and headnotes for the *McPherson* opinion, written by different editors, reveal conflicting interpretations mirroring those mentioned in the text. The syllabus in United States Reports, written by J.C. Bancroft Davis, the Court's Reporter of Decisions, suggests the Court held that state legislatures have exclusive power, that state legislatures may appoint, and that the historical narrative merely confirmed the Court's understanding of constitutional text. *Id.* at 1. That synopsis also states that Article II "was not amended by the Fourteenth and Fifteenth Amendments," and that the amendments do not secure a right to vote for presidential electors. *Id.* Davis is notorious, however, particularly for his knowingly false synopsis in another case under the Fourteenth Amendment, *Santa Clara County v. S. Pacific R.R.* 118 U.S. 394 (1886). In that case, Davis asserted that Chief Justice Waite had said at the beginning of oral argument that the Court unanimously agreed that corporations are "persons" protected by the Fourteenth Amendment. Justice Waite said no such thing, and the Court had made no such determination. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 149–53 (2018). Additionally, Davis was known to refuse to make corrections in opinions, even when they were requested by the Justices. Justice John Marshall Harlan once complained to the Chief Justice in another case: "I have read the head-notes . . . . They are awful and are enough to make you . . . sick." *Id.* at 151. In contrast, the *McPherson* headnotes in the Supreme Court Reporter, which were written by editorial staff members at West Publishing Company, made no mention of a power of state legislatures to appoint electors directly. *See* McPherson v. Blacker, 13 S. Ct. 3 (1892). These headnotes said that the holding regarding Article II was based on the Court's reading of history. In fact, the summary of the decision in these headnotes declared that the Fourteenth and Fifteenth Amendments do secure "additional rights and guaranties . . . to citizens in respect to voting at national elections . . . ." *Id.* Unfortunately, Reporter Davis's inaccurate descriptions often were consistent with the beliefs of many Gilded Age judges, including a majority of the Supreme Court Justices. Numerous judicial opinions and secondary sources support Grant Gilmore's pithy claim that "[the] few people . . . who have ever spent much time studying the judicial product of the period have been appalled by what they have found." *See* Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 L. & HIST. REV. 249, 251 (1987) [hereinafter *Paradox of Paternalism*]. Undoubtedly, the most notorious Supreme Court decision of the era was *Plessy v. Ferguson*, 163 U.S. 537 (1896), but the Court perpetrated many other outrages and repeatedly legitimated overt racism, such as permitting insurmountable barriers to the right to vote—despite the guarantees of the post-Civil War Amendments. *See, e.g.*, *Paradox of Paternalism*, at 256–63, 268–71; Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition on Voluntary Peonage*, 112 COLUM. L. REV. 1607 (2012).

should not be ignored. Indeed, the lessons to be drawn from that history plainly fail the Supreme Court's most recent articulation of the "uniformity" test, which requires that a practice "has been open, widespread, *and unchallenged* since the early days of the Republic . . . ."[320] In fact, the practice of legislative election was repudiated again and again in the antebellum period and ultimately abandoned in the face of those repudiations.[321] It was rejected even in the context of white terror after the Civil War.[322] Legislative election was briefly implemented in the new state of Colorado in 1876.[323] Still, even this temporary measure was adopted through a vote of the people and not through a power grab at their expense.[324] To read *McPherson* as allowing a state legislature to supplant the popular vote badly misreads even its dictum, and entirely ignores the actual history surrounding this radical proposition.

For more than a century, *McPherson* quietly lay on the shelf. The people voted for electors in every presidential election in every state. One additional, practical construction was added in 1932–1933, when Congress proposed the Twentieth Amendment (changing the start dates of congressional and presidential terms), and the states quickly and unanimously ratified the new amendment.[325] Therefore, if an election were ever to devolve to the House, the President would be chosen by the freshly-elected House, not its predecessor. Congress's explanation of the new amendment stated that the power of a legislature elected two years earlier to choose the President was "a power that should not exist"; indeed, preventing a lame-duck legislature from electing the President was one of the three primary purposes of the amendment.[326] The states evidently agreed.[327]

During the Court's rush to judgment in *Bush v. Gore*, the Court dusted off *McPherson*, and the historical amnesia from over a century earlier begot alarming potential dogma—albeit within a per curiam opinion

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[320] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137 (2022) (emphasis added).
[321] *See supra* Parts II–III.
[322] *See supra* Section IV.C.
[323] COLO. CONST. of 1876, schedule, §§ 19–20.
[324] *Id.*
[325] U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January . . . .").
[326] S. REP. NO. 72-26, at 4–5 (1932); *see also* Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 746 (2012) ("It is inconceivable that we should allow something as illogical as that [outgoing legislature electing the President] to adhere as a barnacle to our Constitution . . . ." (quoting a statement of Rep. Celler)).
[327] *See* Larson, *supra* note 326, at 732 (explaining that the speed of ratification surprised even the chief proponent).

that expressly disclaimed any precedential value.[328] The briefs submitted by the Bush litigation team[329] repeatedly characterized the *McPherson* opinion's reference to its historical review as an interpretation of the constitutional language.[330] At most, however, this was a (mistaken) conclusion about the history of the relevant constitutional text that even the *McPherson* opinion described as ambiguous.[331] Bush's lawyers repeatedly cited the 1874 Senate Report, but they mischaracterized it as a document that *McPherson* had cited with "approval," as though the 1874 Report represented that Court's own analysis.[332]

The 5-4 *Bush* majority said the following about the right of the people to exercise their sovereign powers:

> The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. This is the source for the statement in *McPherson v. Blacker*, 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 . . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors . . . .[333]

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[328] 531 U.S. 98 (2000). In deciding *Bush v. Gore*—which the majority described as "the minimum procedures necessary to protect the fundamental right of each voter"—the majority specifically noted that "[o]ur consideration is limited to the present circumstances." *Id.* at 109.

[329] "Litigation team" here includes both the lawyers for candidate Bush and the lawyers for the Florida legislature.

[330] Brief of the Florida Senate and House of Representatives as Amici Curiae in Support of Neither Party at 2, Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836); Brief for Petitioner at 43, Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836); Brief of the Florida House of Representatives and Florida Senate as Amici Curiae in Support of Neither Party and Seeking Reversal at 3–5, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949); Brief for Petitioners at 19–20, 29, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949).

[331] McPherson v. Blacker, 146 U.S. 1, 27 (1892).

[332] For a full itemized account of all the mischaracterizations, see Bohnhorst, *supra* note 271, at 59–64. The mischaracterizations were repeated in *Moore v. Harper*. Brief for Petitioners, *supra* note 24, at 40–42.

[333] Bush v. Gore, 531 U.S. 98, 104 (2000) (citations omitted) (quoting Oliver P. Morton's 1874 Report, S. REP. NO. 43-395, at 9 (1874)).

This is pure dicta.[334] That said, the passage is deeply disturbing. When read against the full historical record, alongside what the *McPherson* opinion said about the Constitution, the assertion is also profoundly mistaken.

McPherson said neither that legislative power "is plenary"—in the sense of being independent of the state's constitution—nor that the reference to "plenary power" was based on the text of the Constitution.[335] In fact, *McPherson* both acknowledged that that constitutional text was ambiguous, and used a few historical snippets to conclude only that "plenary power" had been "conceded" as a matter of "practical construction."[336] This was a substantial historical error regarding the context of legislatures usurping the rights of the people.

The quoted passage from *Bush v. Gore* badly misreads *McPherson* in a second major way. The passage refers to "its power to appoint," meaning the "legislature's power."[337] The Constitution does not say the legislature has the "power to appoint," but, neither did the *McPherson* opinion.[338] Both texts clearly say that "the State" is to appoint.[339]

The passage's major error is that it repeats—and in effect endorses—the extreme states' rights philosophy of John C. Calhoun of South Carolina: it assigns absolute power to state legislatures. Yet it is abundantly clear that the nation never accepted that philosophy. That is not what was intended and was opposed from the beginning.[340] It was overturned,[341] and fully and finally repudiated by the Civil War and the constitutional amendments that followed.[342] Congressmen repeatedly warned that this separatist approach would allow even "violent" efforts by legislatures to intervene in elections to change the results.[343] It also would empower state legislators, elected as much as four years earlier, to decide who will be elected President. When the per curiam opinion in *Bush v. Gore* asserted that this "of course" was the law and that there was "no doubt" about it,[344] the Justices not only misread

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[334] Whatever the *McPherson* opinion is thought to have said about a legislature's power to deprive the people of the right to vote would also be dicta.

[335] *McPherson*, 146 U.S. at 25 ("The legislative power is the supreme authority except as limited by the constitution of the State . . . . *If* the legislature possesses plenary authority . . . ." (emphasis added)).

[336] *Id.* at 27 ("[W]here there is ambiguity or doubt . . . contemporaneous and subsequent practical construction are entitled to the greatest weight."); *id.* at 35 (the practical construction was decisive: "From this review [of history] . . . from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

[337] Bush v. Gore, 531 U.S. 98, 104 (2000).

[338] *McPherson*, 146 U.S. at 35 ("In short, the appointment and the mode of appointment of electors belong exclusively to the states under the constitution of the United States.").

[339] *Id.*; *see also* U.S. CONST. art. II, § 1, cl. 2.

[340] *See supra* Part II.

[341] *See supra* Part III.

[342] *See supra* Part IV.

[343] *See supra* notes 149–50; *Presidential Election Reform*, *supra* note 175, at 442 n.10.

[344] Bush v. Gore, 531 U.S. 98, 104 (2000).

McPherson and distorted the constitutional text: they also entirely ignored the most directly relevant constitutional text—specifically, Section 2 of the Fourteenth Amendment.

It is logically—as well as textually—impossible that individuals could have "no federal constitutional right to vote for electors for President of the United States"[345] when the Constitution explicitly provides that a state's denial or abridgment of "the right to vote at any election for the choice of electors for President"[346] will give rise to a severe penalty for that state.

To no one's surprise, Texas's Supreme Court brief submitted in December 2020 (supported by seventeen states as amicus curiae), which sought to overturn the 2020 presidential election and to send the election to the state legislatures, invoked the 1874 Report that *McPherson* quoted but did not endorse, and anchored its argument in *Bush v. Gore*.[347] Fortunately, Texas and its amici did not prevail.[348] The January 6, 2021 assault on the Capitol followed, fueled in part by the chimera of state legislatures intervening to overturn a presidential election. The misguided notion has not dissipated, and petitioners in *Moore v. Harper* continue to use and abuse *McPherson*.[349]

Yet, even if the independent state legislature doctrine takes root, there is a clear precedent for Congress to act.[350] In 1877, in the context of the most hotly contested presidential election in the nation's history, it was made clear by advocates for Republican electors—electors of the party responsible for framing and ratifying the Fourteenth and Fifteenth Amendments—that those amendments seriously constrain state legislative authority over presidential elections. Congress is not bound by misinformed and misguided judicial dicta—particularly when such dicta, and the violence it may provoke, might again threaten the Republic.

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[345] *Id.*

[346] U.S. CONST. amend. XIV, § 2.

[347] Brief in Support of Motion for Leave to File at 16, 21–22, 25, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155). Pennsylvania responded that Texas's argument was "untethered from the actual state of the law" and that Texas was merely taking a quotation out of context. "Rather, in *McPherson*, this Court was simply quoting from a Senate Report." Opposition to Motion for Leave to File Bill of Complaint and Motion for Preliminary Injunction, Temporary Restraining Order, or Stay at 21–22, Texas v. Pennsylvania, 141 S. Ct 1230 (2020) (No. 22O155).

[348] Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020).

[349] Brief for Petitioners, *supra* note 24, at 42.

[350] In 1821 and again in 1869, Congress declined to count electoral votes from states that had violated fundamental rights of the people—the right to settle, and the right of a citizen to hold office. *Presidential Election Reform*, *supra* note 175, at 446–47. In 1824 Senator Benton said that Congress may have the power to not count electoral votes from a state that has deprived the people of the right to vote in presidential elections, and in 1869 Rep. Shellabarger echoed his point. *See supra* note 126 and accompanying text. In 1877, the Hayes electors argued that state power to appoint electors is constrained by the Fourteenth and Fifteenth Amendments. *See supra* note 293 and accompanying text; ELECTORAL COMMISSION PROCEEDINGS, *supra* note 71, at 682.

V. CONCLUSION

Beginning in 1787, the Constitution assumed that the people would choose the electors. Of course, the then-current definition of "We the people" was narrow, and the constitutional text concerning the electoral college was not entirely clear. Many who sought to protect the rights of the people were persuaded to allow ratification of the Constitution on the promise that it would be amended. The last two of the first ten amendments assured the people that rights not specified would still be respected and that the people themselves would retain inherent powers.

From the founding through the election of 1824, only three presidential elections were genuinely contested. Each time, state legislative election of electors was utilized to some extent, and each time it was also denounced. Between 1824 and 1826, in the aftermath of the most powerful of these denunciations, the number of states with laws that deprived the people of the right to vote in presidential elections dropped from seven to two. By 1832, there was only one such state left: South Carolina, the leading proponent of nullification and, ultimately, secession.

But even South Carolina repudiated its old practice after the Civil War. In 1866, Congress acted to remedy the original constitutional ambiguity by making it clear in Section 2 of the Fourteenth Amendment that any denial or abridgment of the right to vote in presidential elections by all male citizens of the state—except for "Indians not taxed" and "participants in rebellion or other crime"—would come at a steep cost. A state that abridged the right would have its representation and electoral votes reduced. The states ratified this amendment.

Legislative usurpation was tried again, in a serious way, but this time in 1868 and in Florida and Alabama. The more extensive debate in Alabama demonstrated that, in the wake of the Civil War, the nation was finally committed to the basic democratic principles articulated by James Wilson, Thomas Jefferson, and James Madison at the founding. The Civil War was fought largely to vindicate these ideals. The public repudiated the Alabama legislature's action in bipartisan fashion, emphasizing that popular elections must be held, even in the face of a vicious terrorist campaign.

This history was forgotten or entirely ignored by the U.S. Supreme Court in 1892 and again in 2000. Historical amnesia gave rise to the false premise of "plenary power" for state legislatures. The efforts of former President Donald Trump and his supporters to undermine the will of the people in the 2020 presidential election sought to turn that plenary power doctrine into dogma in ways that again threatened the Republic.

This Article analyzed the historical use and abuse of the independent state legislature doctrine in the context of presidential elections under Article II of the Constitution. By describing a concept as a doctrine, many Justices believe they can maintain their claim to be textualists while

dressing up even radical departures from the Constitution in doctrinal garb.[351]

The independent state legislature doctrine is anchored in the belief that any word in the Constitution means only one thing. Therefore, the doctrine would have it that because the term "legislature" often refers to each state's institutional legislature, it always must mean an institutional legislature. The Petitioners in *Moore v. Harper* cite this notion.[352] However, as even *McPherson* proves, the underlying assumption is false.[353] The term "State" does not mean the same thing consistently throughout the Constitution; sometimes, for example, the term embodies "the people" within a state.

Equally important is how words are used in connection with one another. Chief Justice Marshall's seminal ruling in *McCulloch v. Maryland* elaborated on this point. The Constitution uses both the term "necessary" and the phrase "absolutely necessary"; the different usages, Chief Justice Marshall explained, imply different meaning.[354]

Here, the Constitution uses the word "Legislature" (or the phrase "Legislature of the State"), but it also uses the grammatically distinct phrase, "Legislature thereof."[355] These different usages have different meanings. As demonstrated, Article II uses "Legislature thereof" as the genitive of possession.[356] This grammatical form fits the constitutional function. Under Article II, the state legislature directs the "manner" of appointment of electors so that the state itself can appoint electors.[357] The legislature is not separate and independent from the state but is a part of the state, engaged in the elective enterprise jointly with the state. It is clear that the language of Article I, Section 4 parallels that of Article II, Section 1: "Legislature thereof" means the same thing in both provisions—a legislature that is a part

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[351] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (referring to the innovative "major question doctrine" in administrative law).

[352] Petition for Writ of Certiorari, *supra* note 1, at 28. *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. 847, 851 (2015).

[353] *See supra* note 317 and accompanying text.

[354] *See* McCulloch v. Maryland, 17 U.S. 316, 414 (1819); U.S. CONST. art I, § 8 ("necessary and proper"); U.S. CONST. art I, § 10 ("absolutely necessary"). Chief Justice Marshall goes on to say, "[s]uch is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense . . . . It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies." *McCulloch*, 17 U.S. at 414. "This word [necessary], then, like others, in [sic] used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." *Id.* at 415.

[355] *Compare* U.S. CONST. art I, § 4 ("Legislature thereof"), *with* U.S. CONST. art IV, § 3 ("Legislatures of the States") (illustrating the difference between genitive of possession and genitive of association).

[356] *See supra* notes 52, 59–60 and accompanying text.

[357] U.S. CONST. art II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct . . . .").

of the state playing its role in the law-making function for federal elections, as the Supreme Court has repeatedly held with respect to Article I.[358]

The foregoing examples fit within a broader pattern, in which two different grammatical forms are used to refer to two fundamentally different functions. On one hand, the word "legislature," either standing alone or in the genitive of association (denoted by an "of" phrase), is used whenever an existing institutional legislature is to take some specific action unrelated to legislating or to elections.[359] In contrast, the genitive of possession ("thereof") is used in provisions having to do with federal elections.[360] The Constitution even uses the "thereof" grammatical form in connection with the actions state executives may take in filling vacancies in Congress.[361]

One elementary rule for the interpretation of legal texts is that every word and every provision is to be given some effect. What does "thereof" mean? Petitioners and their amici do not say. The origin of the term in the drafting of Article II is clear enough—it carried forward the intent of the Committee of Eleven and the Committee of Style that the legislature's role in presidential elections would be subsidiary, not primary or independent.[362] The Committee of Style then employed the term with precision to cover all elective processes through which the power of the people—the true sovereign in republican governments—was to be transferred to the representatives of the people in Congress.

This Article showed that the Framers were deeply concerned about corruption and cabal, particularly in state legislatures. The Constitution, ordained and established by "We the people," was a grand experiment that brought the creation of the national government close to the people in unprecedented ways. The Framers specifically rejected the idea that state legislatures would ratify the new governmental format they launched, fearing that demagogues could easily defeat ratification. They clearly did not embrace the idea that the state legislatures would choose presidential

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[358] *See supra* note 262 and accompanying text.

[359] *See, e.g.*, U.S. CONST. art IV, § 3 (admission or creation of states in the Union, "the Legislatures of the States"); *id.* art. IV, § 4 (application for protection, "Legislature"); *id.* art. V (application for a convention to propose amendments, "the Legislatures of two thirds of the several States"); *id.* (ratification of constitutional amendments, "the Legislatures of three fourths of the several States"); *id.* art. VI (required oath of members, "of the several State Legislatures").

[360] *Id.* art. I, § 3 ("chosen by the legislature thereof"); *id.* art. I, § 4 ("prescribed . . . by the Legislature thereof"); *id.* art. II, § 1 ("as the Legislature thereof may direct").

[361] *Id.* art. I, § 2 ("Executive Authority thereof" issues writs of election for vacancies); *id.* at § 3 ("Executive thereof" may make temporary appointments to the Senate). In contrast, the "thereof" form is not used in Article IV, Section 4. *Id.* art. IV, § 4 (applying for protection can be performed by "the Executive (when the Legislature cannot be convened)").

[362] *See supra* notes 49–50 and accompanying text (Committee of Eleven, membership and deliberations); notes 55–58 and accompanying text (Committee of Style); notes 51–52, 59–60 and accompanying text (use of genitive of possession by both committees); notes 54, 61 and accompanying text (comments by members of both committees, Madison (father of the Constitution) and Morris (principal author of the final draft)).

electors. Instead, they sought two things: first, to assure that the national government expressed the will of the people—as far as practicable at the time and within their world view—and second, to ward off the corruption they associated with legislative bodies. Years later, the Thirty-Ninth Congress had compelling reasons to fear that states, newly readmitted to the Union after the Civil War, would find multiple ways to deny or abridge the popular vote: hence, Section 2 of the Fourteenth Amendment.

Petitioners in *Moore v. Harper* allege that the North Carolina Supreme Court invoked vague state constitutional provisions requiring fair and free elections.[363] Yet even the history of neighboring South Carolina demonstrates that concepts embracing the popular vote had deep roots and concrete meaning. James Madison, for example, condemned the "unjust" and "unequal[]" system of legislative appropriation in some states, "particularly South-Carolina, with respect to *Charleston*, which is represented by 30 members."[364] Although ameliorated to some extent by constitutional amendments in the decades leading up to nullification,[365] South Carolina's legislature continued to be malapportioned until 1865. President Andrew Johnson commented that the majority of white voters had been politically enslaved, and the 1865 South Carolina constitutional convention responded directly.[366]

The genius of the U.S. Constitution lies in its division of power. The idea of an absolute or plenary power that can subjugate a majority to a permanently entrenched minority, divorced from control by the sovereign people, flies in the face of what the Framers sought to accomplish. Such unchecked power does violence to the nation's core and its ongoing commitment to representative democracy through majority rule. Indeed, one check proposed by Edmund Randolph during the Constitutional Convention was that federal courts have the power to void state laws violating "principles of equity and justice."[367] That is what the North Carolina Supreme Court did in *Moore v. Harper*. Nothing in the U.S. Constitution bars the people of a state from empowering their state courts to protect the

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[363] Petition for Writ of Certiorari, *supra* note 1, at 34–36.

[364] 10 DHRC, *supra* note 70, at 1260. Petitioners in *Moore v. Harper* note that it was the South Carolina Constitution of 1778 that created this injustice. Brief for Petitioners, *supra* note 24, at 30. The Constitution of South Carolina was drafted by the legislature as if it were a piece of ordinary legislation. DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 4 (1989). Madison was right to criticize the legislature for creating a system of notoriously unequal representation.

[365] FEHRENBACHER, *supra* note 364, at 7.

[366] *See supra* notes 176–79 and accompanying text (discussing simultaneous correction of the "gross error" of "usurpation" of the right to vote in presidential elections). *See generally* SIDNEY ANDREWS, THE SOUTH SINCE THE WAR 47–83 (Boston 1866). The all-white Constitutional Convention did not address the injustice of disenfranchisement of Black people.

[367] 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 56 ("[T]hat any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice.").

right of the people to vote. Even in the context of the 1876 presidential election—the most intensely litigated election in U.S. history—the notion that state constitutions and state courts could be ignored was firmly rejected. It should be firmly rejected again.