No. 21-1271

In the Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,
PETITIONERS

v.

REBECCA HARPER, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR *AMICI CURIAE* SCHOLARS OF THE FOUNDING ERA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Other Authorities

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professional historians and law professors who hold appointments in university departments of history and law schools. Their published writings cover the origins of the American Revolution, the adoption of state and federal constitutions during the Revolutionary

[1] All parties provided written blanket consent to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to fund its preparation or submission.

era, and the developments that gave the American constitutional tradition its distinctive character. They believe that the developments described herein will provide the Court with an informed understanding of critical aspects of Founding Era ideas about congressional elections and their regulation under both the federal and state constitutions.

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SUMMARY OF ARGUMENT

This case turns on the Elections Clause, which states that rules for "the Times, Places, and Manner of holding" congressional elections "shall be prescribed in each State by the legislature thereof." Petitioners contend that the reference to "legislature" in the Elections Clause means that state legislatures, when adopting these regulations, are unconstrained by substantive limits imposed by the state's constitution and may act independently of any other branch of the state's government. Respondents contend that a state legislature is *constituted* by the state's constitution and thus constrained to follow requirements it imposes. On Respondents' interpretation, the state legislature has no authority to act, and arguably no existence, outside the legal framework of the state constitution that created it.

Which of these interpretations is consistent with the original public meaning of the Elections Clause? That question cannot be answered simply by gazing at the text, which does not explain how those words would have been understood when the Constitution was adopted. To settle the matter, we must also ask what the historical evidence shows about how the Clause would have been understood when the Constitution was adopted in light of *the public standards of the eighteenth century.*

One can answer that question only by engaging the rich record of constitutional deliberations that remains the great legacy of the Revolutionary era. In 1776, Americans initiated a burst of state constitution-making that was historically unprecedented. This was a period of dramatic political experimentation and intellectual ferment that shaped a new language of politics. Words like *constitution, sovereignty, representation, rights, consent, republic, law,* and even *legislature* received new meanings. How those words were deployed in the pamphlet debates before 1776 differs from the way they were deployed a decade later. Novel concepts, such as *popular ratification* or the *confederated republic*, were introduced. All became subjects of intense debates that historians have spent generations reconstructing.[2]

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[2] Relevant sources include: BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (2001); MARC KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1999); DONALD LUTZ, POPULAR CONSENT AND POPU-

As historians who have studied and written extensively about the constitutional history of the revolutionary era, our answer to the question driving this litigation is clear. The original public meaning of the Elections Clause did **not** give the state legislatures exclusive power to regulate congressional elections, unchecked by the state constitution or other branches of state government. Nothing in the records of the deliberations at Philadelphia or the public debates surrounding ratification supports that contention. There is no evidence that anyone at the time expressed the view that Petitioners now espouse; nor would anyone have attempted to disprove an idea that had never been broached. Petitioners' interpretation is also historically implausible in view of the framers' general fear of unchecked power and their specific distrust of state legislatures. There is no plausible eighteenth-century argument to support Petitioners' view.

The Respondents' interpretation, in contrast, treats the word "legislature" as it was ordinarily understood in revolutionary America. The legislature is a lawmaking body created by the state constitution. It has no legal authority to legislate outside the constitution, let alone contrary to it. On this interpretation, the Elections Clause grants to the state legislatures the power to regulate elections to Congress, a lawmaking institution that the Constitution itself had just created. But it does not take the extraordinary further step of liberating the legislatures from the constraints of state laws and constitutions.

LAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); CONCEPTUAL CHANGE AND THE CONSTITUTION (TERENCE BALL & J.G.A. POCOCK EDS., 1988).

Had these rival interpretations been publicly debated in 1787-88, the great mass of evidence in the historical record shows how emphatically Petitioners' claim would have been rejected.

The current scholarly understanding of the historical context of the Elections Clause supports the following conclusions:

First, from 1776 on, Americans understood that their adoption of written constitutions marked an unprecedented and inherently experimental innovation in the history of government—creating a system where the government's power derived solely from constitutions representing the supreme fundamental law. During the crisis of independence (1774-76) political power effectively flowed to an extra-legal network of provincial conventions and the Continental Congress. But the colonists were eager to restore legal government. In 1776 they began writing constitutions to achieve this end. In doing so, they became acutely aware of the difference between their emerging conception of a written constitution as supreme fundamental law and the dominant principle of the eighteenth-century British constitution, under which the King-in-Parliament could overturn any constitutional practice, no matter how venerable.

Second, Americans broadly agreed that these legislatures should be a "miniature" or "mirror" of the polity, "equally" embodying its interests and sentiments. That ideal has important implications for our modern understanding of partisan gerrymandering.

Third, in 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, including the subject matter of the Elections Clause.

Fourth, while Petitioners make little use of this ample documentary record, they do rely extensively on the document known as the Pinckney Plan and other material that relates to the work of the Committee of Detail, where the Elections Clause originated. But documentary editors long ago concluded that the version of the Pinckney Plan that Petitioners cite was not the one the Committee of Detail considered, because that version could not have been written before 1797. Other reservations limit the confidence scholars can place in materials drafted by Edmund Randolph and James Wilson, also members of the Committee of Detail.

Fifth, in contrast to their speculations about the Committee of Detail, Petitioners ignore the Convention's debate of August 9, which offers the best evidence of the framers' intentions about the Elections Clause. That debate proves that the Clause was conceived to secure two main ends. It recognized that substantive questions about congressional elections still needed resolution, and these would best be answered by allowing the States to explore different modes of election. Second, it empowered Congress to "make or alter such regulations," either defensively, to correct the misuse of this authority by the States, or creatively, to impose uniform regulations nationally.

Sixth, although the Elections Clause was a significant source of controversy during the amply documented ratification debates of 1787-88, none of the criticisms Anti-

Federalists directed against it or the defenses Federalists provided in its support ever implied that the Clause granted state legislatures unique authority to regulate congressional elections unconstrained by their state constitutions or the legal powers exercised by other branches of government. The absence of such suggestions makes sense, because the dominant political sentiment and theories of democratic governance at the time would not have contemplated empowering state legislatures in that way.

ARGUMENT

I. THE AUTHORITY OF STATE LEGISLATURES DERIVED SOLELY FROM THE NEW STATE CONSTITUTIONS THAT AMERICANS BEGAN ADOPTING AS THEY PREPARED TO DECLARE INDEPENDENCE IN 1776

A century before the U.S. Constitution was drafted, John Locke published his Two Treatises of Government. In Chapter XIII of the Second Treatise, "Of the Subordination of the Powers of the Commonwealth," Locke wrote that "in a Constituted Commonwealth . . . there can be but *one Supream Power*, which is *the Legislative*." But he then observed that "the Legislative being only a Fiduciary Power to act for certain ends, there remains still *in the people a Supream Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 366-67 (LASLETT ED., 1963).

Locke's arguments in The Two Treatises set a foundation for the constitution-making projects the American revolutionaries launched in 1776. The legislative power originated in the people, who could delegate it to the institutions they created, and reclaim it when the institutions

violated their trust. The legislative power need not be delegated to the legislature alone; it could be shared with the executive, which, in seventeenth-century Anglo-American thinking, subsumed the judiciary as well. Locke devoted the final two paragraphs of this chapter to the problem of rotten boroughs—chartered townships devoid of voters but holders of seats in the House of Commons. Locke insisted that it remained "the interest, as well as intention of the People, to have a fair and *equal Representative*." Yet Locke offered no constitutional remedy to these evils. *Id.* at 372-74.

In the late spring of 1774, news that Parliament had adopted the Boston Port Act and Massachusetts Government Act reached the colonies. Almost immediately royal government in most American colonies collapsed, and power flowed to the provincial conventions that served as surrogate legislatures. These bodies drew their authority from both their local populations and the Continental Congress. But the colonists were eager to replace this "extra-legal" apparatus with duly constituted, legal governments. As the colonies moved toward declaring independence in 1776, the Continental Congress urged those colonies that had not yet begun to form new governments to do so. Acting through their provincial conventions, these emerging states and commonwealths began writing their first constitutions. WOOD, CREATION, 127-32; Jack N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS 96-97 (1ST ED.,1979).

Americans thereby pioneered a new concept of constitutional governance, in which a written constitution adopted at a fixed historical moment became the source of the legal authority that the new state governments wielded. Legislatures were now the literal embodiment of

popular sovereignty, and the circumstances of their creation and their powers of deliberation and action stemmed from —and were limited by— that popular will, as defined by their state constitutions.

Whereas the earlier colonial charters represented a grant of legal privileges from the Crown to the people, state constitutions reflected the will of the people. The North Carolina Constitution, adopted in 1776, put the matter simply: "That all political power is vested in and derived from the people only." FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS 2787 (VOL. 5, 1909). The Maryland Constitution, adopted the same year, similarly stated "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole." *Id.* 1686 (VOL. 3, 1909). Elaborating on this idea, the Massachusetts Constitution of 1780 asserted: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." OSCAR HANDLIN & MARY FLUG HANDLIN, THE POPULAR SOURCES OF POLITICAL AUTHORITY 443 (1966). A state constitution, then, represented the original delegation of power from the people to their government, a compact based on the consent of the governed. WOOD, CREATION at 268-73; LUTZ, WHIG POLITICAL THEORY at 43-52, 72-84; J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 524-26 (1979).

Americans grasped the novelty of this experiment and the differences between their conception of a constitution

and the British model. As the author (likely Thomas Paine) of Four Letters on Interesting Subjects (1776) put it, "The truth is, the English have no fixed Constitution" because "the legislative power, which includes king, lords and commons, is under" no restriction. FOUR LETTERS ON INTERESTING SUBJECTS, *in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805 at 384 (CHARLES S. HYNEMAN & DONALD S. LUTZ EDS., 1983). Any act of Parliament could alter or overturn any constitutional practice, no matter how venerable. Even the great liberties of Magna Carta were subject to statutory modification.

The American state constitutions operated in a radically different fashion. State constitutions described what powers each branch of government possessed and how each branch would function. Despite variations among them, the early constitutions all created republican forms of governments with executive, legislative, and judicial branches. Each constitution described the conditions required for a lawful meeting of its state legislature, specifying its structure (bicameral or unicameral), its time of meeting, how and by whom its members would be elected, qualifications for holding office, the basis of apportionment of representatives, and the procedures by which bills would become laws. In effect, then, the state constitutions created the legislatures. They had no authority outside of the process and structure mandated by the state constitution. LUTZ, POPULAR CONSENT at 104-5, 131-54; KRUMAN, BETWEEN AUTHORITY AND LIBERTY at 35-86; ADAMS, FIRST AMERICAN CONSTITUTIONS at 164-217, 230-55.

The structure of the early constitutions reflected the colonists' experience with royal government prior to the

Revolution. As a result, the state constitutions dramatically reduced the powers of the executive and enhanced the power of the legislature. WOOD, CREATION at 132-43, 155; KRUMAN, BETWEEN AUTHORITY AND LIBERTY at 123-26. In the constitutions written in 1776, governors were stripped of prerogative powers that their royal predecessors had wielded. Instead of being appointed by the Crown and serving at its pleasure, they were elected by the legislature and subject to term limits. Governors lost most of their patronage powers, could no longer call or dissolve the assemblies, and could not serve in multiple branches of government. Most importantly, all the constitutions written in 1776 deprived governors of their powerful deterrent to the popular will: the ability to veto laws passed by the legislatures. WOOD, CREATION at 132-61; LUTZ, POPULAR CONSENT at 104-7; ADAMS, FIRST AMERICAN CONSTITUTIONS at 271-75.

Whereas governors were seen during this early period as threats to the people's rights, legislatures were thought to be the branch of government most responsive to the people's sentiments and wishes. WOOD, CREATION at 162-73; KRUMAN, BETWEEN AUTHORITY AND LIBERTY at 61-86; ADAMS, FIRST AMERICAN CONSTITUTIONS at 23-25. In addition to their traditional powers over taxation and legislation, state legislatures gained new powers over appointments. In most states, the legislature now elected the governor. In many states, the legislature gained broad authority to appoint state judges, as well as many lesser administrative and patronage positions. WOOD, CREATION at 143-61; KRUMAN, BETWEEN AUTHORITY AND LIBERTY at 116-23; LUTZ, POPULAR CONSENT at 85-128; ADAMS, FIRST AMERICAN CONSTITUTIONS at 264-66.

The structure of government under the early state constitutions meant that there were few institutional checks on the legislatures' power and their capacity and propensity to make unjust, inequitable, or capricious laws. The lack of a gubernatorial veto freed the legislatures from executive oversight. At the same time, since the courts had not yet fully embraced their role in reviewing legislation—through the doctrine later known as judicial review—the judiciary played a minimal role in overseeing laws passed by the state legislatures.[3] This arrangement allowed the state legislatures to rise to a position of dominance within the state governments.

Nevertheless, even in that period, the state legislatures did not possess the same independence that the King-in-Parliament enjoyed after 1688. In contrast to the provincial conventions that had emerged from 1774-1776, the authority of the new state legislatures came not from the people directly but from the superior authority of the state constitution. In fact, the provincial conventions either wrote their state's constitution or arranged the elections of delegates who would perform that task. WOOD, CREATION at 319-35; ADAMS, FIRST AMERICAN CONSTITUTIONS at 29-48. Once these constitutions were written, the provincial congresses stopped meeting. Thus, when

[3] The origins of the American practice of judicial review is (as many readers of this brief will know) a long-studied subject. The most recent survey of this topic is ROBERT J. STEINFELD, TO SAVE THE PEOPLE FROM THEMSELVES: THE EMERGENCE OF AMERICAN JUDICIAL REVIEW AND THE TRANSFORMATION OF CONSTITUTIONS (2021). William Treanor identified four cases from the Revolutionary era in which courts invalidated statutes on state constitutional grounds, in contrast to seventeen cases between 1787 and the issuance of the *Marbury* decision in 1803. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

American political leaders of the revolutionary era had a choice, they did not choose to empower freestanding legislatures as the basis of government. Instead, they wrote individual state constitutions in which the legislature's authority was subordinate to, and derived from, the authority of the state constitution, which in turn, received its authority from the people. Far from being independent, legislatures under the first state constitutions had no separate existence apart from the constitutions which created them. WOOD, CREATION at 127-43, 313-19.

II. THE FRAMERS OF THE FIRST CONSTITUTIONS WERE CONCERNED WITH ENSURING A TRUE CORRESPONDENCE BETWEEN SOCIETY AND THE COMPOSITION OF REPRESENTATIVE ASSEMBLIES

Americans wrote extensively about the drafting of these new constitutions and the governments they created. The most influential initial contribution to this debate came from John Adams. In his pamphlet Thoughts on Government, Adams introduced a metaphor for representative government that became commonplace in American thinking over the next decade.

That metaphor was that an elected legislature should ideally be a "miniature" of political society. "The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly," Adams wrote.

> It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. Great care

> should be taken to effect this, and to prevent unfair, partial, and corrupt elections.

ADAMS, THOUGHTS, in 1 AMERICAN POLITICAL WRITING at 403.

When Adams wrote of equality, he meant something more substantial than the idea that every voter had an equal right to participate in free elections. Equality, as used here, held that some proportional relationship should tie the interests that constituted the larger society with the composition of their elected representatives. To overweigh the political influence of some interests and to undervalue others would corrupt the constitution and the true principle of representation. *See generally* RAKOVE, ORIGINAL MEANINGS at 203-43.

The image of the representative assembly as a miniature of society was not an American invention. It had originated in the constitutional controversies that disrupted England during its civil war of the 1640s and was echoed by Locke in the Second Treatise. ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING at 71-78 (2014); LOCKE, TWO TREATISES at 372-74. Knowing that their population was doubling each generation, Americans believed that a system of equal representation would require adjustment over time. As the author of Four Letters put it,

> A Constitution should lay down some permanent ratio, by which the representation should afterwards increase or decrease with the number of inhabitants; for the right of representation, which is a natural one, ought not to depend upon the will and pleasure of future legislatures.

FOUR LETTERS, in 1 AMERICAN POLITICAL WRITING at 387.

Nor did the ideal of the legislature-as-miniature evaporate after the first constitutions were adopted. Theophilus Parsons invoked it in an influential tract written during the protracted debates (1776-80) over the drafting of the Massachusetts constitution. HANDLINS, POPULAR SOURCES at 341. The image recurred as soon as the Federal Convention began discussing congressional representation. "The Legislature ought to be the most exact transcript of the whole Society," James Wilson declared. George Mason agreed. "The requisites in actual representation are that the [representatitves] should sympathize with their constituents; sh[oul]d think as they think, [and] feel as they feel." 1 RECORDS (FARRAND, ED.) at 132-34.

Yet the problem of translating this ideal of equality into political practice remained a great challenge. By modern standards, the Founding era's conception of who was actually a member of the polity seems defective and unjust. The dominant rule of political representation in colonial America had been to grant legislative seats to the existing units of local governance—townships, cities, and counties—while awarding additional seats when population disparities warranted them. The framers of the state and federal constitutions did not yet conceive the electorate as a mass of individual voters. Moreover, the relatively small size of the proposed national House of Representatives, when compared to the state legislatures, would require some other solution than simply allocating congressional seats to existing units of local governance. Some new electoral entity or entities would have to be cre-

ated, and they would exist not as visible units of government but for the sole purpose of conducting elections. Finally, as we discuss next, Americans became increasingly concerned that legislatures in practice represented a threat to these ideals.

Even so, these ideals of the legislature-as-miniature and electoral equality remained deeply embedded in American politics and highly influential in the constitutional debates of 1787-88.

III. IN THE DECADE AFTER THE FIRST STATE CONSTITUTIONS WERE ADOPTED, CRITICISM OF THE PERFORMANCE OF THE STATE LEGISLATURES BECAME A DRIVING FORCE IN AMERICAN POLITICAL THINKING, SHAPING THE AGENDA OF THE FEDERAL CONVENTION AND THE CONTEXT WITHIN WHICH THE ELECTIONS CLAUSE WAS DRAFTED

Precisely because they were the dominant institution of government, the state legislatures became the object of intense criticism. The burdens of supporting the war compelled legislatures to adopt numerous laws that citizens deemed to be unjust, capricious, or inequitable. Those burdens also limited their capacity to execute their constitutional duties to the federal union under the Articles of Confederation.

Historians have many explanations of the origins of the Constitution. Yet nearly every scholar of this subject agrees that disillusionment with the performance of the state legislatures was the dominant concern that led to the Federal Convention. *See generally* WOOD, CREATION at 306-89. One classic proof of this rests on James Madison's effort to shape the Convention's agenda. His famous analysis of the Vices of the Political System of the United

States (April 1787) is a sustained indictment of the multiple failings of the state legislatures: of their inability to recognize the genuine national interest, their incapacity to "fulfil their obligations to the Union," and their propensity to enact improper and unjust legislation, a propensity so "alarming," Madison wrote, "because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, in MADISON: WRITINGS at 69-80. Madison's preferred answer to this last problem was to give the national government a negative (or veto) over all state legislation. LETTER OF MADISON TO WASHINGTON, APRIL 16, 1787, MADISON: WRITINGS at 81-82; *see* RAKOVE, ORIGINAL MEANINGS, 51-53; WOOD, CREATION at 471-75.

This mounting dismay with the state legislatures is essential to this case for two reasons.

First, it explains the continued creativity of American constitutionalism during this period, notably including the restoration of an executive veto over legislation; the evolution of a doctrine of judicial review of legislation; and the recognition that, in contrast to the Continental Congress, the national government should be empowered to enact, execute, and adjudicate its own laws, without relying on the States to implement them. *See* Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, BOSTON COLLEGE L. REV. (forthcoming) at 15-20, *available at* https://ssrn.com/abstract=4245950. When the framers designed the three independent departments of the new federal government, they drew their

most important lessons from the experience of republican government in the States.

Second, and more specifically, this attitude toward the state legislatures explains why the Federal Convention adopted the Elections Clause in the belief that Congress needed residual authority to regulate the conduct of its own elections. Far from wishing to empower the legislatures as independent unconstrained entities, as Petitioners suggest, the framers intended to keep the state legislatures in check. *See* Zagarri, *Historian's Case* at 20-26.

IV. THE "PINCKNEY PLAN" IS A MISLEADING DOCUMENT CREATED BY CHARLES PINCKNEY YEARS AFTER THE CONVENTION, AND THE COMMITTEE OF DETAIL THEREFORE COULD HAVE MADE NO "DELIBERATE" CHANGE TO ITS LANGUAGE

Before summarizing the legislative history of the Elections Clause, one specious account of its origins needs dispelling.

Petitioners rely on a famously misleading document to create an incorrect drafting history of the Elections Clause, a document they describe as the "Pinckney Plan." Petitioners misread that text, which was not part of the drafting history but was written at least a decade after ratification. They thereby construct a false narrative and an invented imputed intent. They argue that "[t]he Constitution's drafting history confirms that the allocation of authority to regulate elections specifically to each State's legislature was a deliberate choice." Pet. Br. at 15-17. An apparent change in wording emphasizes the "deliberateness" of the choice, a claim they repeat three times. According to Petitioners, the Committee of Detail *began*

with the text of the "Pinckney Plan" with an alleged provision stating "[e]ach State shall prescribe the time & manner of holding elections …" *Id.* at 15-17. The Petitioners then assert that the Committee of Detail instead assigned responsibility to the state *legislatures*. Petitioners insist this change was intentional:

> [T]he earliest draft of the Clause, proposed in the Philadelphia convention as part of the Pinckney Plan, would have [assigned responsibility to the States]. Crucially, however, the Committee of Detail deliberately changed the Constitution's language to specify that state legislatures were to exercise that power, not any other state entity and not the state as a whole.

Id. at 2.

In fact, there is no official Pinckney plan in the Convention's records. The document the Petitioners quote was created by Charles Pinckney long after the Convention. Pinckney did circulate a plan at the outset of the Convention. It was never formally debated, though it was referred to the Committee of Detail. The Convention did not keep any copy of the Pinckney Plan in its official papers.

In 1818, when John Quincy Adams was preparing the official *Journal of the Convention* for publication, he wrote Pinckney to request a copy of the original plan. Pinckney replied that he had four or five drafts, but "I send you the one I believe was it." Records, 595 (Appendix D, The Pinckney Plan). Adams included this document as furnished by Pinckney in the *Journal* in 1819. JOURNAL, ACTS AND PROCEEDINGS OF THE CONVENTION 71 (THOMAS B. WAIT, 1819).

From the moment that Adams published Pinckney's plan, its accuracy was challenged. James Madison and Rufus King both denied that this was the plan Pinckney had submitted in 1787. Madison spent considerable time proving there was "'irresistible'" evidence that the plan as sent to Adams was never introduced. BILDER, MADISON'S HAND at 233. Jonathan Ellliot's *Debates on the Adoption of the Federal Constitution* included a note by Madison discrediting the document. 5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 129, 578-579 (VOL. 5, 1845).

When the Committee of Detail papers became available at the turn of the twentieth century, the legendary textual scholar J. Franklin Jameson identified a brief document in James Wilson's hand as a sequence of extracts from the original plan. Notably, those extracts only refer to "The Time of the Election of the Members of the H.D. and of the Meeting of U.S. in C. assembled." 1 DOCUMENTARY HISTORY OF RATIFICATION OF CONSTITUTION at 245-247. They make no reference to either the manner of holding elections or the state legislatures.

In 1902, Gaillard Hunt, Chief of the Library of Congress Manuscripts Division, reported that the supposed "Pinckney Plan" was written on "paper not made when the convention sat in 1787." Both the "plan" and Pinckney's 1818 letter bore a 1797 watermark. 3 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED XVII, (GAILLARD HUNT ED., 1902). The following year, after meticulously reviewing the evidence, Jameson concluded that "the so-called draft has been so utterly discredited that no instructed person will use it as it stands

as a basis for constitutional or historical reasoning." J. FRANKLIN JAMESON, THE STUDIES IN THE HISTORY OF THE FEDERAL CONVENTION OF 1787 117 (1903). When Max Farrand published his *Records of the Federal Convention of 1787* in 1911, he, too, carefully reviewed the evidence in an appendix on "The Pinckney Plan," concluding "that it was probably copied or prepared in 1818." 3 RECORDS at 602. That conclusion has been accepted by every serious textual scholar ever since. It is this discredited document that Petitioners cite.

No documentary evidence therefore exists to show that the words Petitioners cite date to May 1787. They do not appear in the surviving documents of the Committee of Detail. There is no evidence that the Committee of Detail ever considered them, much less "deliberately changed" them. This portion of the Petitioner's argument rests on a catastrophic misreading of the documentary record and a deliberation that is entirely imaginary.

One final mention needs to be made of two other unofficial manuscripts of the Committee of Detail. *See* William Ewald, *The Committee of Detail*, 28 CONSTITUTIONAL COMMENTARY 198, 216-17 (2012) (noting the unclear provenance and difficulty of interpreting the Randolph and Wilson notes). The first, written largely by Edmund Randolph, contains language relating to the Senate ("Each State shall send two members using their discretion as to the time and manner of choosing them."). Randolph changed "send" to "appoint" and "members" to "senators" and, with a carat, inserted "the legislature of" at the beginning of the sentence. RECORDS at 141. Petitioners propose that the insertion of this last phrase demonstrates the Committee's substantive intent. A much more

plausible explanation is that Randolph made this clarifying insertion simply because the state legislatures would appoint the senators. In any event, the insertion does not provide reliable evidence about the Committee's intent.

The second manuscript, in James Wilson's handwriting, presents two versions of the Elections Clause. Wilson initially proposed that the time, place, and manner of elections for the House would be prescribed "by the Legislatures of the several States." *Id.* at 153. But Wilson deleted this passage and then drafted another version covering both houses. It is substantially identical to Art. I, Sect 4: "The Times and Places and the Manner of holding the Elections for the Members of each House shall be prescribed by the Legislatures of each State; but their Provisions concerning them may, at any Time, be altered and superseded by the Legislature of the United States." *Id.* at 155. Petitioners do not contend that Wilson's draft supports their position.

Collectively the surviving manuscripts from the Committee of Detail show heavy revisions. Nothing of legal substance can be reliably inferred from insertions, deletions, and second thoughts derived from these unofficial manuscripts.

V. THE FRAMERS INTENDED THE ELECTIONS CLAUSE TO ANSWER TWO ENDS: TO EXPERIMENT WITH STILL UNRESOLVED QUESTIONS ABOUT CONGRESSIONAL ELECTIONS, AND TO EMPOWER CONGRESS TO DEFEND ITS OWN ELECTIONS AGAINST THE ABUSE OF THAT POWER BY THE STATES. ONE POTENTIAL ABUSE WOULD BE ELECTION SCHEMES THAT VIOLATED THE NORMS OF DEMOCRATIC EQUALITY INHERENT IN THE IMAGE OF THE LEGISLATURE AS A MINIATURE OF THE POLITY

In contrast to their speculations about the Committee of Detail, Petitioners perplexingly ignore the Convention's August 9 debate, which offers the best evidence of the framers' original intentions and clearly informs any historically grounded explanation of the Elections Clause's original public meaning.

In its August 6 report to the Convention, the Committee of Detail followed Wilson's wording, as noted above, with one change: it deleted "and superseded" from the second part of the Elections Clause. *Id.* at 179.

The Convention's August 9 discussion began with Madison moving to replace "each House" with a specific reference to the House of Representatives. The entire debate is well-documented in the Convention records. *Id.* at 240-42. The motion was quickly rejected. The Convention then split the Clause into two and approved the first half unanimously. There was, therefore, consensus that the state legislatures would act first in setting election arrangements.

At this point, Pinckney and John Rutledge moved to delete the second half of the Clause. In Madison's words, "[t]he States they contended could & must be relied on in

such cases," without congressional supervision. *Id.* at 240. One could again note that the two South Carolinians were seemingly referring to the States, and not merely their legislatures. But Madison's note is so brief that one hesitates to enhance the interpretation.

Madison recorded five responses to the Pinckney-Rutledge motion: two from Nathaniel Gorham and Rufus King of Massachusetts; one from Gouverneur Morris; one from Roger Sherman; and by far the longest, his own. All agreed that congressional review and alteration were essential and safe measures. Their underlying concern was that Congress would need this power as a defensive measure to protect its own authority and even its existence.

Madison, however, went much further than his colleagues. Several major questions about the election of the House still needed resolution, he argued:

> Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures, and might materially affect the appointments.

Id. at 240-241. "Times and Places" might be relatively pragmatic matters of convenience, but the points relating to "'"manner" were more substantive. The question of voting by ballot or vivâ voce, for example, implicated different conceptions of republican citizenship. Even more important, Madison was also asking what, exactly, was being

represented: the state as a whole or the particular interests clustered within a congressional district, a novel entity whose sole purpose would be to elect representatives?

Yet even in posing this question, Madison was worrying about the potential misuse of power by the state legislatures. The key phrase "times places & manner of holding elections" involved "words of great latitude," which would make it "impossible to foresee all the abuses that might be made of the discretionary power" given the States. *Id.* at 240. Though the House of Representatives was manifestly designed to represent the people, not the institutional state legislatures, whenever the latter "had a favorite measure to carry, they would take care to mould their regulations as to favor the candidates they wished to succeed." *Id.* at 241.

In this analysis, that molding of regulations explicitly invoked the principled concern with inequality that John Adams and others had linked to their ideal of a representative assembly acting as a miniature of society. In a single prescient sentence that foretells the history of partisan gerrymandering, Madison wisely observed that "the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Nat[iona]l Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter." *Id.* at 241. Here, again, the concept of equality that Madison invoked was concerned with the weight of political interests, and not simply the equal right of individual citizens to vote freely.

These observations must have been decisive, because the Pinckney-Rutledge amendment was then rejected without even a roll call. The Convention then made one

final change, replacing the phrase "provisions concerning them" with "but regulations in such cases." This change "was meant to give the Natl. Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether." *Id.* at 242.

This legislative history supports three conclusions about the original intentions underlying the Elections Clause.

First, while the Convention could have considered proposing uniform national regulations for the conduct of congressional elections, it defaulted that responsibility to the state legislatures. There were good reasons for this decision. The States already had their own conventions about conducting elections, and these traditions deserved respect. More importantly, because the existing models of representation within the States could not be translated nationally, into one uniform system of national representation, some period of experimentation was essential before one could decide whether national uniformity was desirable.

Second, this deference to state authority did not imply that the framers of the Constitution were optimistic about how the States would act. Their views of the state governments in general and their legislatures in particular were deeply suspicious. If circumstances made the "Times, Places and Manner" element of the Elections Clause a virtual necessity, the second half of the Clause, empowering Congress to oversee and supplant the decisions of the state legislatures, better reflected the dominant political concerns of the Convention. It was the worry or fear that some states might impair the federal election system that

made this nationalist aspect of the Elections Clause so essential.

Third, nothing in the extant records of the deliberations at Philadelphia supports the contention that the framers conceived the Elections Clause as a mechanism to make the state legislatures the sole institution of state government competent to have responsibility for devising regulations relating to congressional elections. This proposition is wholly anachronistic. There is no positive story one could tell—or even invent—to suggest the framers would have intended the Elections Clause to have so narrow and restrictive a meaning. Given the dynamic nature of American constitutionalism in this era, it seems inconceivable that they would have used this single clause to preempt the States from attempting to form more perfect republican governments. As Alexander Hamilton remarked in the opening paragraph of The Federalist, "[i]t has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." 13 DOCUMENTARY HISTORY at 494 (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 1 at 27).

VI. THE AMPLY DOCUMENTED DISCUSSIONS OF THE ELECTIONS CLAUSE THAT OCCURRED DURING THE RATIFICATION DEBATES OF 1787-88 CONFIRM AND AMPLIFY THIS INTERPRETATION

The Elections Clause was frequently discussed in the state ratification conventions and public commentaries.

Alexander Hamilton devoted three essays of The Federalist (Nos. 59-61) to it. Unsurprisingly, Federalists and Anti-Federalists raised parallel charges that either the state legislatures or Congress could respectively abuse their authority by commanding voters to trek to distant polling places. Unsurprisingly, too, Anti-Federalists augured more dire warnings. North Carolina Anti-Federalists worried that a sitting Congress could use its revisionary power to alter the *times* of elections to extend its own *tenure* in office. 30 DOCUMENTARY HISTORY at 283. The obvious answer was that this was not only a gross misreading of the plain text but also a fundamental error in constitutional judgment. "They have no written constitution in Britain," Governor Samuel Johnston replied. "They have certain fundamental principles and legislative acts, securing the liberty of the people. But these may be altered by their Representatives, without violating their Constitution, in such manner as they may think proper." *Id.* at 284-85.

Other exchanges in the ratification conventions, however, echo the discussions at Philadelphia. The most important was the concern with electoral inequality. In Massachusetts, Francis Dana argued that state electoral provisions "may not be agreeable to the spirit of the Federal Constitution. It is not enough that a State send its complement of representatives, but all people ought to have equal influence, and the State regulation is unequal and unjust." 6 FRANCIS DANA, SPEECH OF JAN. 17, 1788, DOCUMENTARY HISTORY at 1232. Madison echoed this theme in the Virginia convention, offering an expansive interpretation of its intent. Arguing that election regulations "should be uniform throughout the Continent," he noted that "[s]ome States might regulate the elections on the principles of equality, and others might regulate them

otherwise." When this desire for national uniformity proved impractical, Madison continued, the framers agreed "to leave the regulation of these, in the first place, to the State Governments, as being best acquainted with the situation of the people, subject to the controul of the General Government, in order to enable it to produce uniformity, and prevent its own dissolution." 10 DOCUMENTARY HISTORY at 1260. In this interpretation, Madison treated uniformity as an aspiration, but equality as a guiding principle of representation.

Arguably the best statement of aspirations came from the Anti-Federalist pamphlet, *Letters from a Federal Farmer*. Its twelfth letter subjected the Elections Clause to sustained criticism, not over its potential abuse, but for not ensuring that representatives would be selected by majority votes, which was "by far the most important question in the business of elections." *The Federal Farmer* recommended voting by districts rather than statewide; increasing the number of districts to make the House more "democratical," or a better miniature; and most intriguingly, devising rules of repeat voting to produce majoritarian results, not unlike the modern scheme of ranked choice voting. In other essays, *the Federal Farmer* and another major Anti-Federalist pamphleteer, Brutus, argued that the Constitution would violate the egalitarian principle because the relatively small size of the House of Representatives—as compared, say, to the House of Commons with its 558 members—would make it too crude a miniature to capture the diversity of the American population.[4] 14 BRUTUS, III, DOCUMENTARY

[4] The Farmer and Brutus may well have been the same person: Melancton Smith, a moderate New York Anti-Federalist leader.

HISTORY at 122-24; *see also* RAKOVE, ORIGINAL MEANINGS at 228-34.

These and other comments not cited here indicate that the implementation of the Elections Clause was seriously discussed in these debates. But none of these remarks indicates any concern with the putative proposition that the state legislatures were the sole institutions empowered to regulate elections in every respect. Nor was it ever suggested that the legislatures were no longer governed by their state constitutions.

CONCLUSION

How, then, would a thoughtful citizen have viewed the original public meaning of the Elections Clause at the point of its adoption?

On one interpretation, the Clause imposes a mandate on the States commanding that state legislatures have an *exclusive* power to regulate congressional elections and precluding that power from being checked by state courts or even the state constitution. This interpretation is historically implausible, given the American revolutionaries' general fear of unchecked power and the framers' evident mistrust of the state legislatures.

The second interpretation, in contrast, reads the word "legislature" in its ordinary sense, as it would have been understood then and would be understood today. The legislature is a lawmaking body created by the state constitution. It has no authority to act outside the constitution or contrary to it. The Elections Clause grants to the state legislatures, thus conceived, the duty and power to regulate congressional elections. But it does not take the extraordinary further step of liberating the legislatures from the constraints of state law and their own constitutions.

From the perspective of eighteenth-century Americans, the first interpretation looks distinctly peculiar. It defies the ordinary meaning of the word "legislature." There is no evidence that any actual person held it. There is no obvious eighteenth-century argument to support it. If the two interpretations had been explicitly and publicly debated, the great mass of surviving historical evidence in the historical record indicates that the Petitioners' argument would have been emphatically rejected.

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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