Eradicating *Bush*-League Arguments Root and Branch:

The Article II Independent-State-Legislature Notion and Related Rubbish

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The biggest news of OT 2020 was what *didn't* happen: In the run-up to, and aftermath of, yet another tight and hard-fought presidential election, the Supreme Court declined to double down on some of the worst aspects of the execrable *Bush v. Gore*[3] opinions of twenty years ago.

Yet a close look at the Term reveals that there was a brief moment of genuine constitutional peril, a week when it seemed quite possible that the Court might once again—as it did in 2000—besmirch itself and plunge the country into a jurisprudential abyss.

In the days preceding the election of 2020, a veritable carnival of litigants—let's call them *Bush*-Leaguers—teed up several cases based on a seemingly plausible but ultimately preposterous constitutional theory that had won the support of three notable justices back in 2000. Echoing the Rehnquist-Scalia-Thomas concurrence in *Bush v. Gore*, the 2020 *Bush*-Leaguers correctly noted that Article II authorizes each state "legislature" to decide how that state's presidential electors are to be chosen. From this correct starting point, *Bush*-Leaguers quickly careened off course, claiming that state courts could not properly tweak state voting laws

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[3] 531 U.S. 98 (2000) (per curiam). The case is sometimes referred to as *Bush II*.

to bring these laws into alignment with state constitutions (as construed by these state-court jurists). Perilously, four justices at various points in the autumn of 2020 appeared to fall for this beguiling *Bush*-League idea—an idea often referred to as the "Independent State Legislature" (ISL) theory. None of the other five justices came close to explaining all the reasons—and there are several—why this theory fails.

In what follows, we show why *Bush*-League arguments were wrong twenty years ago; how they were shown to be wrong by sound scholarship in the ensuing years; and why they are even more wrong today, thanks to recent and dispositive Supreme Court case law. All sensible constitutionalists—whether on the Court or off it, whether originalists or precedentalists, whether left or right of center—should bury *Bush*.

We also aim to demonstrate that the errors and evils of *Bush v. Gore* went far beyond the ISL ideas at the heart of the Rehnquist-Scalia-Thomas concurrence. *Bush* was wrong in just about every way that it is possible for a case to be wrong. If ever there were a bad seed, *Bush* was it. The recent efforts to revive and rehabilitate *Bush*'s reputation are thus genuine cause for jurisprudential concern—even alarm. We urge today's Court to make a sharp and clean break with *Bush* as soon as possible—and in any case, well before the next contested presidential election, which may be quite harrowing enough without any monkey business from the Court.

I. The Bad Seed in a Nutshell

The *Bush v. Gore* litigation in 2000 went through several rounds, but the most momentous ruling occurred on December 12, 2000. That day, a majority of the Court

held that the ongoing recounting of votes in various Florida counties, as overseen by the Florida Supreme Court, violated the Equal Protection Clause because this recount was proceeding in different ways and under different standards throughout the state. Rather than remanding the matter to the Florida courts to devise recounting procedures that would satisfy the *Bush* Court's newly minted equal protection rules, a majority consisting of five Republican-appointed justices ended the vote recounting and thus guaranteed that Republican candidate George W. Bush would become the President.

Within hours, notable scholars came out swinging, condemning the *Bush* Court's decision in the strongest possible terms on a wide range of issues implicated by the case.[4]

Were these scholars right to do so? And why does any of this matter today?

As we shall show, the early and harsh critics were indeed right. (We take pride that we ourselves were among them.) And all this matters because the Constitution matters, because our constitutional culture matters, and because elections matter. The entire American constitutional project is imperiled if judges, lawyers, law professors, law students, lay opinion leaders, and the citizenry more generally grossly misunderstand first principles of American constitutional law

[4] Jeff Rosen captioned his cover story for the *New Republic* "Disgrace" and proclaimed the Court's decision "a shabby piece of work." Jeffrey Rosen, *Disgrace*, NEW REPUBLIC (Dec. 24, 2000), https://newrepublic.com/article/70674/disgrace. In the *Los Angeles Times,* Akhil concluded by saying that he would tell his students that they must accept the Court's ruling but that they should not respect it. Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES (Dec. 17, 2000), https://www.latimes.com/archives/la-xpm-2000-dec-17-op-1126-story.html. Early scholarly articles and book chapters by distinguished constitutional scholars piled on. Jed Rubenfeld railed against the "illegality," "breathtaking indefensibility," and "wrongness" of the justices' action, proclaiming it "worse even than the notorious *Plessy*." Jed Rubenfeld, *Not as Bad as* Plessy. *Worse.*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 20, 20–21 (Bruce Ackerman, ed. 2002). Jack Balkin and Bruce Ackerman were no less emphatic. *See, e.g.,* Jack M. Balkin, *Legitimacy and the 2000 Election*, *in id.* at 210, 210 (describing the Court's decision as "illegal[]"); Bruce Ackerman, *Off Balance*, *in id.* at 192, 195–96 (characterizing the Court's arguments as "preposterous" and its ultimate ruling as an "act of usurpation").

and American democracy. And strong post-decision criticism was particularly important back in late 2000 and early 2001 because the Court had rushed into the case at breakneck speed, without the usual deliberative timetable enabling scholarly expertise to guide the Court pre-decision, via amicus briefs and the like.

True, some prominent conservative scholars tried to push back against the early and harsh critics of *Bush*.[5] But until 2020, the harsh critics' view had become increasingly orthodox among scholars of all stripes and, seemingly, among the justices themselves. Court insiders reported that several current and retired justices had come to view the case with profound embarrassment. Many conservative legal academics began to admit, quietly, that the case reeks. In a 2015 *Time* magazine survey of constitutional scholars, *Bush v. Gore* was repeatedly condemned as one of the worst decisions of the previous half-century. Perhaps most telling of all, no majority opinion of the Court had ever cited the case with approval.[6]

Many sophisticated commentators thus had good reason to think that *Bush v. Gore* had been quietly plowed under. Perhaps the time was not yet ripe for loud judicial denunciation of the case, à la *Dred Scott*[7] and *Plessy*[8]. But surely, many thought, *Bush*

[5] Sad to say, several of the most notable defenders of the indefensible were and still are closely linked in the public mind to the University of Chicago Law School, the sponsor of the very volume in which we today voice our views. *See, e.g.*, Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended, in* THE VOTE: BUSH, GORE & THE SUPREME COURT 13 (Cass R. Sunstein & Richard A. Epstein, eds. 2001); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, *in id.* at 98; Richard A. Posner, Bush v Gore*: Prolegomenon to an Assessment, in id.* at 165; RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).
[6] *See* AKHIL REED AMAR, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA 10 & 437 n.2 (rev. ed. 2018); *see also* Andrea Sachs, *The Worst Supreme Court Decisions Since 1960,* TIME (Oct. 6, 2015), https://time.com/4056051/worst-supreme-court-decisions.
[7] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
[8] Plessy v. Ferguson, 163 U.S. 537 (1896).

was viewed by polite society and by the justices themselves as an embarrassing judicial fart that we could all pretend not to hear or smell.

Alas, in 2020, it became clear that *Bush* has in fact not been laid to rest in our constitutional culture. There are powerful efforts afoot to revive certain aspects of this misbegotten ruling. And thus it becomes imperative to explain—once more, with feeling—just how wrong the case was, in so many ways.[9]

For starters, the *Bush* Court's overeager jump into the electoral-college controversy ran counter to text, structure, precedent, and prudence.

The Constitution's text expressly makes each congressional house the "judge" of elections to its own chamber.[10] And for analogous reasons, the Constitution's text also makes Congress (though not the vice president individually!) the ultimate arbiter of contested electoral votes for the presidency.[11]

The underlying structural logic here is emphatically democratic. The Constitution creates a democratic pyramid in which earlier-mentioned and more directly democratic institutions form the popularly legitimated building blocks supporting later-mentioned and rather more elitist institutions. The Preamble comes first, making clear to all that the Constitution itself derives from a special popular mandate—from We, the People, directly, as embodied in special ad hoc conventions selected in uniquely democratic fashion.[12] In 1787–88, more folk were legally

[9] We aim today to offer readers a definitive one-stop-shopping evisceration of *Bush v. Gore*—and to offer that evisceration at a moment when various forces on and off the Court seem bent on reviving the case and restoring its reputation. If, as we believe, the case truly deserves to rot in judicial hell, the legal community deserves a comprehensive statement of its most egregious faults and a full response to the various *Bush* apologists over the years.

[10] U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[11] *See* U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

[12] *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY ch. 1 (2005).

allowed to vote on how they and their posterity would be governed than had ever been allowed to vote on anything, anywhere, in the entirety of human history.[13] Next, Article I structures a democratic legislature in which the first-mentioned House consists of members chosen directly by voters—a sharp break with the pre-existing Congress under the Articles of Confederation. Article II structures the ensuing tier of the democratic pyramid. That Article envisions a president who is not, strictly speaking, directly elected, but whose indirect selection will be initiated by a process that will likely involve ordinary voters, and will be ultimately certified by Congress meeting in special joint session. Finally, Article III at the narrow apex of the pyramid provides that federal judges and justices will be chosen by a rather less directly democratic process, via presidential nomination and Senate confirmation.

The obvious architecture of this grand structure is that presidents should pick justices, but justices should not pick presidents. When justices do the picking, the democratic pyramid is improperly inverted; smaller, less democratic building blocks are dangerously bearing too much weight, and the entire democratic edifice is at risk of toppling.

In all closely contested presidential elections prior to *Bush v. Gore*—1800–01, 1824–25, and 1876–77—Congress, not the Court, decided the matter, and rightly so. The idea that the Supreme Court should have thrust itself into any of these electoral college contests would have seemed bizarre to the jurists and statesmen of those eras.[14]

[13] *See id.* at 7–10 & 503–07 nn.1–12; AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 at 225–27 (2021).
[14] In 1876–77, Congress chose to involve certain individual members of the Court as adjuncts to Congress itself, not as the Supreme Court sitting as such, as happened in *Bush*.

Having impetuously and arrogantly decided to leap onto center stage rather than wait in the wings—God forbid that Congress be allowed to play the lead role prescribed by text, structure, and tradition!—the *Bush* Court at a minimum should have acted in either a stately or lawyerly fashion (ideally, both). Alas, the Court's actions flunked both the demands of statecraft and the demands of law.

As a matter of pure pragmatism and putting aside all legal niceties,[15] the best argument for Supreme Court intervention was that America in late 2000 was deeply and closely divided. The country needed a wise, unifying, and respected decision-maker—a Hercules, a Solomon, a bevy of Platonic guardians—to save the day.

Put concretely, in late 2000 the incoming House and Senate were set to be narrowly and sharply divided. Although the (legally irrelevant) national popular vote clearly favored Gore, the (juridically decisive) national electoral vote would come down to a single raucous and fractious state. As Florida would go, so would go the nation, legally. Alas, the Florida popular vote was a statistical dead heat.[16] Someone needed to step forward to lead the country. Who better than America's most trusted branch post-Watergate and post-Vietnam—namely, the federal judiciary?

But if this was the best pragmatic and realpolitik reason for judicial intervention, the Court should have offered America a unanimous or nearly unanimous decision, in the tradition of *Brown*[17] and the *Nixon Tapes Case*[18]. If such a consensus decision seemed achievable when

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[15] *Cf.*POSNER, *supra* note 5 .

[16] Florida would not have been tied had it not been for the disastrous butterfly ballot used in Palm Beach county. As most honest observers understood at the time, and as later scholars have confirmed, the misleading design of this ballot caused Gore to lose thousands of votes, far more than Bush's margin of victory in the final official tally. *See, e.g.* Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida,* 95 AM. POL. SCI. REV. 793 (2001).

[17] Brown v. Bd. of Education, 347 U.S. 483 (1954).

[18] United States v. Nixon, 418 U.S. 683 (1974).

the *Bush* Court initially decided to leap onstage, but later became unlikely as the justices examined matters more closely, a truly wise Court would have stepped back by dismissing the writ of certiorari as improvidently granted.

The least statesmanlike resolution of all was what the *Bush* Court eventually gave the country: a final line-up that was not merely closely and sharply divided, but partisan in the ugliest imaginable way. The five justices most praised by candidate Bush in the preceding months aimed to stop the recount and crown him king, while the four justices most lauded by candidate Gore aimed to continue a recount in which he seemed to have the momentum.

In fact, upon close inspection, the five justices in the majority didn't really agree among themselves, although they pretended to do so for appearance's sake. Two justices sincerely (but erroneously) believed in one theory (equal protection), while three other justices embraced a different—and almost logically inconsistent—theory (Article II ISL). The only thing that truly united the narrow majority of the Court (all Republican appointees) was that the recounting must stop and the Republican candidate must win.

None of the foregoing pragmatic criticisms would be decisive if the legal arguments advanced by the majority justices actually held water. Alas, what the *Bush* Court said and did was lawless in the extreme.

The equal protection argument sincerely endorsed by two justices in the majority (O'Connor and Kennedy) and by a third justice who opposed ending the recount (Souter) was not only wrong, but also almost self-refuting. The recount was in fact designed to mitigate some of the most glaring racial and class inequalities of the initial count itself; the judicially supervised recount ordered by the Florida Supreme Court was more truly

equal than Florida's initial, wildly uneven and less judicially supervised tally. True equality argued for continuing the recount, not squelching it.

Plus, the O'Connor-Kennedy opinion (technically, a per curiam) had almost no precedential support or precedential logic backward or forward. Looking backward, we find no prior Court ruling remotely close on its facts. Looking forward, the *Bush* justices themselves openly announced that the case should not set a precedent for later cases.[19] The ruling was thus pure ad hocery—a judicial train ticket good for one day only. And few believe that if the parties were reversed, the same justices would have done for Gore what they did for Bush. Viewed in this light, the decision was the very antithesis of neutral principles.

And on the issue of remedy, the *Bush* Court also bungled, badly. The justices refused to allow the Florida courts to continue the recount: Time was up, said the Supremes. In reality it wasn't, and the Florida Supreme Court should have been the one to decide, under state law, whether it was more important for Florida to get the recount done fast or done right.

Nor does the *Bush* equal protection argument fare any better if viewed through the lens of originalism. The Fourteenth Amendment's Equal Protection Clause was emphatically designed as a rule regulating civil rights, and was universally understood at the time of its drafting and ratification as utterly inapplicable to political rights such as voting. The clause speaks of "persons" as pointedly distinct from "citizens." Indeed, it was particularly aimed to elaborate the rights of aliens—paradigmatic nonvoters, as a rule.[20]

[19] 531 U.S. at 109 ("Our consideration is limited to the present circumstances . . . .").
[20] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 185–88 (2012); *see also* Minor v Happersett, 88 U.S. (21 Wall.) 162 (1875).

Of course, in most situations, this might seem a pedantic quibble, because almost all of the countless Supreme Court cases relying on the Equal Protection Clause to protect voting rights can be justified under a different clause, the Article IV provision guaranteeing each state a proper republican form of government.[21] But this Article IV clause is inapt in presidential elections, which are governed by an entirely different matrix of constitutional provisions in which strict voting equality need not be the rule. For example, under the express terms of Article II, a state legislature could (if permitted by its state constitution)[22] directly pick electors even if that legislature were controlled by a party that lost the statewide popular vote in the most recent election.

Which takes us straight to the Article II ISL argument endorsed by three other *Bush* justices—Chief Justice Rehnquist and Justices Scalia and Thomas, whom we shall call the *Bush* three. This argument was actually even more self-refuting than was the equal protection argument, whose obvious flaws it was designed to sidestep. The *Bush* three failed to understand that a state legislature is properly defined and bounded by the state constitution that gives the legislature life. When state jurists attend to the state constitution in interpreting state election statutes, these judges are enforcing Article II, not undermining it. Even if a state constitution somehow does not apply *of its own force,* it nevertheless applies whenever a state legislature prior to a presidential Election Day has *chosen to incorporate* state constitutional principles into its state legislative schema for presidential elections, as the Florida legislature plainly had chosen to do prior to Election Day, 2000. This is a right and choice given to state legislatures by Article II

[21] U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").
[22] On the enormous importance of this parenthetical proviso, see *infra* note 118.

itself. By disregarding this elemental and elementary point, the *Bush* three thus violated the very Article they were claiming to champion. Their argument not only fails, it implodes. It self-contradicts.

To make matters worse, it is extremely hard to believe *both* the equal protection and the Article II argument, as the three concurring justices purported to do.[23] Without their willingness to join the equal protection argument, even as they held their noses, there would have been no single opinion of the Court. Even inexpert journalists in the moment would have seen in a flash that a majority of the Court had in fact rejected each of the only two arguments put forth by Bush's lawyers for ending the recount. Only three justices truly believed in the equal protection argument: O'Connor, Kennedy, and Souter (and of course Souter thought the recounting should continue). And only three justices (Rehnquist, Scalia, and Thomas) truly believed in the Article II argument.

II. Wading Into the Weeds

A closer look at *Bush v. Gore* makes all this more clear.[24]

[23] The more one insists on the plenary power of state legislatures under Article II to call the shots in presidential elections, the more awkward it is to also insist that the state must satisfy a superstrict system of voting equality, down to uniform microstandards for evaluating chads, regardless of the counting and recounting system established by the legislature itself. Much of the recount unevenness that the *Bush* per curiam complained about was in fact the product of a decentralized/checkerboard election system that had been devised by the state legislature pursuant to Article II—the very system the *Bush* three purported to champion, even as they also purported to join the per curiam attacking that system.

[24] Some of this section borrows heavily from Akhil's 2009 Dunwody Lecture, delivered in Florida in the presence of several of the state jurists who prominently participated in the *Bush v. Gore* litigation, and first published as Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009) [hereinafter *Dunwody Lecture*].

A. Equal Protection

The Bush lawyers' theory of equal protection focused on claims of disuniformity in the judicially monitored recount process. But these claims needed to be considered against the backdrop of the disuniformity of *the original counting*: Different counties used different ways of generating the initial count that the *Bush* Court effectively reinstated when it ended the recount.

Given the flaws of the original count, the *Bush* Court's equal protection argument gets it exactly backward. The late November and early December 2000 recount monitored by Florida judges had *fewer* equality glitches than the initial, less-monitored counts on Election Day and shortly thereafter. The recount aimed to correct some of the most glaring inequalities of the original count.

Concretely, nonwhite voters were roughly *ten times* as likely not to have their votes correctly counted as were white voters—and this in a former slave state, a former Confederate state, a former segregationist state, a state with a sorry history of open and avowed racial disenfranchisement late into the twentieth century.[25] True, the recount was imperfect (as are most things in life), but the recount's imperfections were not systematically racist, as were some of the structural inequalities in the initial count.[26] In many ways, the recount process unfolding under the Florida Supreme Court represented the last best chance to *reduce* and judicially *remedy* the inequalities, inaccuracies, and disenfranchisements that had tainted the initial counting process.

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[25] *See* Laurence H. Tribe, *eroG .v hsuB: Through the Looking Glass*, *in* BUSH V. GORE, *supra* note 4, at 50.

[26] On the importance of effects and not merely intent in the voting context, see Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

Some of the problems that seemed to surface in initial and intermediate stages of the recount might well have been cured by later corrective action from state judges, had these judges been allowed to proceed without interference from the U.S. Supreme Court, and with Congress waiting in the wings as the ultimate monitor and constitutionally mandated final judge.

Alternatively, the U.S. Supremes might have identified their specific concerns about the unfolding recount and remanded the matter to state courts with guidelines for a still-better recount process. Instead, by abruptly demanding an end to the recount process—NOW!—the *Bush* Court simply froze in place inequalities of the same sort, and of a greater extent and more racially imbalanced nature, than the inequalities the Court claimed to care about. According to the *Bush* per curiam,

> [T]he standards for accepting or rejecting contested ballots might vary not only from county to county but within a single county from one recount team to another. . . . A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. . . . This is not a process with sufficient guarantees of equal treatment.[27]

But if the Florida recount was constitutionally flawed, why wasn't the initial Florida count—which the Court's judgment in effect reinstated—even more flawed? The initial count, we must remember, featured highly uneven standards from county to county. Different counties used different ballots (including the infamous butterfly ballot), and even counties using the same ballot used different interpretive standards in counting them. This happened not just in Florida, but across the country. Were all these elections unconstitutional?

[27] 531 U.S. at 106–07 (citation omitted).

The idea that the Constitution requires absolute perfection and uniformity of standards in counting and/or recounting ballots is novel, to put it gently. For decades, if not centuries, American voters have been asked to put their "X" marks in boxes next to candidate names, and human umpires have had to judge if the "X" is close enough to the box to count. On Election Day, different umpires officiating in different precincts have always called slightly different strike zones. If these judgments are made in good faith and within a small zone of close calls, why are they unconstitutional? And if they are unconstitutional, then every election America has ever had was unconstitutional.

Regardless of what the U.S. Supremes may themselves have thought at the time, it was a mistake to believe that the Florida recount process was proceeding in some especially bad-faith manner that should have caused that process to be viewed with more suspicion than the initial counting process, which occurred without much judicial oversight. The *Bush* Court claimed that its newfangled equality principles applied only to judicially supervised state recounts, and not necessarily to other aspects of the electoral system.[28] But the Court gave no reason for this absurdly ad hoc limitation. The key facts of the case cut precisely against the per curiam: Generally speaking, cheating is *less* likely when judges and special masters—and the eyes of the world—are watching a recount unfold; and a court with a statewide mandate could help mitigate inequalities across different parts of the state. True, in a recount it might at times be foreseeable that a

[28] *Id.* at 109 ("The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

particular ruling might tend to favor a given candidate, but this is also true of various rulings made during or even before initial counting.

Critics of the recount, both on and off the Supreme Court, were far too quick to think they had somehow established smoking-gun evidence of foul play—"*Aha*!"—whenever they pointed to certain changes in counting protocols over time or certain variations across space. True, various Florida counties in the past had not counted dimpled chads. But the Florida Supreme Court had not blessed this past practice, and no uniform anti-dimple rule applied in the many sister states that, like Florida, affirmed the primacy of voter intent.[29]

Facts matter. If, for example, certain precincts in 2000 had particularly high rates of dimples or other mechanical undercounts, that might well be evidence of chad buildup or machine deterioration over the years. A strict anti-dimple rule that made sense in 1990 might not have been sensible a decade later, given older machines, more buildup, and a higher incidence of machine undercounts.

So too, the chad rule in precincts with short lines might not sensibly apply to precincts with much longer lines, where some voters may have felt a special need to vote fast so that others could take their turns. If the rates of dimpled chads or other undercounts were especially high in precincts where lines were longest and voters were most hurried (or were especially elderly and frail, or especially unlikely to understand English-language instructions about the proper use of punch-card styluses), it might well make sense to treat dimples in those precincts as particularly likely to reflect genuine attempted votes rather than intentional nonvotes.[30]

[29] *See, e.g.*, Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996).
[30] *See* Tribe, *supra* note 25, at 45–46.

These sorts of issues could not have been easily addressed in each precinct on Election Day itself. But, they were just the sort of problems that a statewide court might have been able to sensibly address with an adequate factual background developed in the very process of recounting, a process in which fine-grained data about the precinct-by-precinct (and even machine-by-machine) distribution of each sort of voting problem would become available. The *Bush* Court, however, short-circuited the whole recount and remedy process, privileging the less accurate, less inclusive, and more discriminatory initial counting process—and privileging that highly unequal process in the name of equality, no less!

As previously noted, the *Bush* Court per curiam failed to cite even a single case that, on its facts, came close to supporting the majority's analysis and result. To be sure, we can find lots of forceful voting-equality language in the Supreme Court's pre-*Bush* case law. But on their facts, these cases were mainly about citizens simply being denied the right to vote (typically on race or class lines) or being assigned formally unequal voting power, with some (typically white) districts being overrepresented at the expense of other (typically black) districts.

The Equal Protection Clause was, first and foremost, designed to remedy the inequalities heaped upon blacks in America. The Fifteenth Amendment extended this civil-rights idea by prohibiting race discrimination with respect to the vote. Yet state governments in the former Confederacy, including the Florida government, mocked these rules for most of the twentieth century. For decades, most American blacks were simply not allowed to vote. When Congress finally acted to even things up with the Voting Rights Act of 1965, inequality persisted as a practical matter. In Florida, for example,

black precincts in 2000 typically had much glitchier voting machines, which generated undercounts *many times* the rate of wealthier (white) precincts with sleek voting technology.[31] In raw numbers, this sizable inequality vastly exceeded the picayune discrepancies magnified by the *Bush* Court. Undermaintenance of voting machines, chad buildup, long voting lines in poor precincts—these were some of the real ballot inequalities in Florida 2000.

In Florida 2000, those who were the most serious about real equality, as envisioned by the architects of Reconstruction, persuasively argued that the government should not ignore the very large and racially nonrandom voting-machine skew. Rather, the government should do its best to minimize and remedy that skew, albeit imperfectly, via manual recounts. Even if such recounts were not required by equality, certainly they were not prohibited by equality.[32] In fixating on the small glitches of the recount rather than on the large and systemic defects of the machines, the *Bush* Court majority turned a blind eye to the real inequalities staring them in the face, piously attributing the problems to "voter error" (as opposed to outdated and seriously flawed machines) and inviting "legislative bodies" to fix the mess for future elections.[33]

B. Article II ISL

In his concurring opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, declared that by straying from the text of the election law adopted by the Florida legislature, the Florida Supreme Court had violated Article II, section 1, clause 2 of the Federal Constitution. That clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof

[31] *See* Tribe, *supra* note 25, at 50.
[32] *See* 531 U.S. at 147 (Breyer, J., dissenting).
[33] 531 U.S. at 103–04 (per curiam).

may direct," presidential electors. For these three justices,[34] the key word here is *legislature*. The U.S. Constitution says that the state legislature gets to make the rules about how presidential electors are to be chosen. And, the argument runs, if the state judiciary disregards those rules, the Federal Constitution itself authorizes federal judges to step in to protect the state legislature's federally guaranteed role. Various modern commentators have dubbed this the Article II "independent-state-legislature" (ISL) theory. On this view, the Federal Constitution empowers each state legislature to discharge its Article II duties independent from—and unencumbered by—the state constitution and the state judiciary interpreting that constitution.

In 2000, this ISL theory first arose in a lawsuit filed in state court as *Palm Beach County Canvassing Board v. Harris*, an earlier round of the *Bush* recount litigation.[35] In a unanimous decision handed down in late November 2000, the Florida Supreme Court openly referred to its decades-long tradition of construing the Florida election statute in light of the Florida Constitution when it ordered the state official responsible for certifying election results to accept manually recounted ballots returned by county boards of election past a statutory deadline. In particular, the Florida justices stressed the right to vote as expressed in the Florida Constitution's Declaration of Rights:

> Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . . Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.

[34] And for many subsequent scholarly apologists, such as Professors Epstein and McConnell and Judge Posner. *See supra* note 5.
[35] 772 So. 2d 1220 (Fla. 2000) (per curiam).

> Technical statutory requirements must not be exalted over the substance of this right.[36]

For this reason, the Florida Supreme Court declared that provisions of the Florida Election Code for presidential elections were valid only if the provisions "impose no 'unreasonable or unnecessary restraints on the right of suffrage" guaranteed by the state constitution.[37] On December 4, 2000, in *Bush v. Palm Beach County Canvassing Board* (which came to be known as *Bush I*) the U.S. Supreme Court unanimously vacated the Florida Supreme Court's ruling and remanded to the state court for more explanation.[38] The *Bush I* Court had granted review to address, inter alia, the following question:

> [W]hether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day . . . changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner of selection under Article II, § 1, clause 2 of the United States Constitution.[39]

Media attention and the parties' briefing in that first Supreme Court foray focused extensively on the Article II questions.[40] The oral argument in the first Supreme Court hearing also zeroed in on whether the Florida Supreme Court had "made" law and thereby deprived the Florida legislature of its prerogatives, in violation of Article II.

Because the basis of the Florida Supreme Court's initial ruling was not entirely clear, the U.S. Supreme Court ended up resolving *Bush I* without ruling at all on the merits of the Article II question. As the *Bush I* Court put it, "there is considerable uncertainty as to the precise ground

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[36] *Id.* at 1237 (internal footnote omitted); *see also id.* at 1239 ("[T]he right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution . . . .").
[37] *Id.* at 1236.
[38] 531 U.S. 70 (2000) (per curiam) (*Bush I*).
[39] *Id.* at 73.
[40] *E.g.* Brief for Petitioner at 36–50, *Bush I*, 531 U.S. 70 (2000) (No. 00-836); Reply Brief of Respondents Al Gore, Jr., & Fla. Democratic Party at 14–19, *Bush I*, 531 U.S. 70 (2000) (No. 00-836).

for the [Florida Supreme Court's] decision . . . . This is sufficient reason for us to decline at this time to review the federal questions asserted to be present."[41] Accordingly, the *Bush I* Court merely remanded the case for clarification by the state judiciary.

As part of its remand in *Bush I*, the Court foreshadowed events to come in the later, more (in)famous *Bush II* by quoting from an 1892 case, *McPherson v. Blacker*, on the meaning of Article II:

> Although we did not address the same question petitioner raises here, in *McPherson v. Blacker,* 146 U.S. 1, 25 (1892), we said: "[Article II, § 1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence, the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot itself be held to operate as a limitation on that power."[42]

Article II and the offhand meaning given to it in *Blacker* made a return appearance in the second—and dispositive—Supreme Court go-around in the Florida matter, in the concurring opinion for three justices. In the immediate aftermath of *Bush*, several notable conservative scholars praised the *Bush* three's Article II ISL argument.[43]

Alas, many other scholars at the time and in the ensuing years allowed the ISL argument to fly under the radar screen. The ISL theory did not clearly command five votes in *Bush*;[44] and, as we have already seen, *Bush* said and did *so many* other troubling

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[41] *Bush I*, 531 U.S. at 78 (internal quotation omitted).
[42] *Id.* at 76 (alteration in original).
[43] *See supra* note 5.
[44] The majority opinion did in one brief passage nod toward ISL:

> 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*, 146 U.S. 1, 35 (1892), that

things requiring careful refutation. So why bother with an argument that did not receive five square votes in *Bush* and has never received five votes in any later case?

Bother we must today, because an entire generation of young conservatives in the Federalist Society and similar circles[45] have been taught to parrot and admire the *Bush* three's ideas. As we argued long ago,[46] and as we shall argue again today, the *Bush* three's ideas were truly fake news—erroneous and outlandish on Day One. But these memes, alas, have in recent years apparently gone viral in various right-wing legal circles. Many young conservatives were evidently *Bush*-League activists and *Bush*-League law clerks in OT 2020. So bother we must today because one of the *Bush* three now sits as the Court's most senior justice, and an extremely influential justice at that. Bother we must because this Justice, Clarence Thomas, quite evidently continues to subscribe to the sincere but misguided ideas he embraced back in 2000. And bother we must because there are now at least

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> 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. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).

Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (internal citation omitted).

[45] See, e.g., https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html

[46] *E.g.* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000);Vikram Amar & Alan Brownstein, Bush v. Gore *and Article II: Pressured Judgement Makes Dubious Law*, 48 Fed. Law. 27, 30–33 (2001); *Dunwody Lecture*, *supra* note 24.

two members of the current Court beyond Justice Thomas who seem to agree with the original *Bush* three.

Thus, we now stress—because it matters—that the Rehnquist/Scalia/Thomas ISL theory flew in the face of: (1) original constitutional understandings; (2) definitive actions by state legislatures themselves (the very bodies ISL claims to care about); and (3) the best reading of Supreme Court case law circa 2000.

1. Originalism—Text, History, Structure

ISL theory comes in two parts. First, it claims that under Article II (and also, apparently, under the companion language of Article I, governing congressional elections)[47] each state legislature enjoys a federal right to have its enactments relating to election logistics fully implemented notwithstanding any conflicts between its enactments and the state constitution that creates and bounds the legislature itself. Second, ISL says that, if any state constitutional limits do in any way constrain a given state legislature, *federal* courts must decide what those limits are, and how best to interpret state election statutes. Prominent believers in ISL are coy about whether their approach means *de novo* review by federal judges, or instead federal review with some (limited) deference to state judicial and executive interpretations. But make no mistake: either way it does not mean business as usual, in which federal courts almost invariably accept state law as pronounced by state adjudicatory entities.

[47] For one possible difference between the words of the relevant companion clauses, see *infra* note 92.

Both halves of this "we-must-protect-the-state-legislatures" theory are, as an originalist matter, not just lawless—that is, not grounded in the law—but actually law-defying. They stand lawful federalism on its head. The theory invokes constitutional provisions designed to protect states against federal interference (including interference from federal courts) and instead uses these provisions to disrespect both the wishes of the state peoples who create, empower, and limit their legislatures, and the wishes of the elected legislatures themselves. The theory gives near carte blanche to *federal* judges, when the key point of Article II's election language (and the companion language of Article I) was to empower *states*.

Let's start with constitutional text: Articles I and II do create powers and duties on the part of the "Legislature" of each state.[48] But what, precisely, is a state "legislature" for these purposes? One aspect of this question is definitional: who must or can be counted as a "legislature?" Can a "legislature" include a veto-pen-wielding governor? Can it consist of an independent agency, or the people themselves engaged in direct democracy via initiatives and town meetings? Another aspect is whether the "legislature," however defined, can override state constitutional directives on how elections must be run.[49]

[48] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); 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 . . . .").

[49] These two aspects—the first of which might be seen as broadly "procedural" and the second broadly "substantive," blur at the margins. Definitionally, we might say that a "legislature" under a given state constitution is a body that includes a veto-pen-wielding governor. But of course we might also say that, definitionally, a "legislature" under that very same state constitution is a body that must allow absentee voting (even for congressional and presidential elections) or an entity that may not pick presidential electors itself or try to reserve a power to judge contested presidential elections. On this latter—and critical—point, see *infra* note 118. For a recent—and, we believe, unsuccessful—effort to posit a sharp distinction between these two aspects, see Michael T. Morley, *The Independent State Legislature Doctrine,* 90 FORDHAM L. REV. 501 (2021).

Remarkably, the *Bush* three advocates of ISL offered nothing—*nothing!*—to suggest that anyone at the Founding would have understood state "legislature" to mean a free-floating body untethered to the state constitution. Or, a body whose legislative work-product would be free from state court jurisdiction and instead subject largely or wholly to federal judicial interpretation.

In fact, the meaning of state "legislature" was well accepted and bore a clear public understanding at the Founding: A state "legislature" was an entity created and constrained by its state constitution.

The creation of new, republican state constitutions up and down the American continent was a truly transcendent achievement in the late 1770s, acclaimed and revered by Americans everywhere. These new state constitutions were the very heart and soul, legally, of the American revolution.[50] These state constitutions were universally understood as creations of the American people themselves. So of course state constitutions were understood as supreme over state legislatures at the Founding! And of course state courts could—and did—enforce these state higher laws against state legislatures themselves. Notable state judicial review under state constitutions in fact predated the Philadelphia Convention, *Federalist No. 78*, and *Marbury v. Madison*.[51] Indeed, state constitutions formed the basic template for the Federal Constitution itself in 1787–88.[52]

[50] *See* AMAR, *supra* note 13, at 152–62; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 127–32 (rev. ed. 1998).
[51] 5 U.S. (1 Cranch) 137 (1803).
[52] *See* AMAR, *supra* note 13, at 186–96.

The clear language and logic of the Article VI Supremacy Clause emphatically confirmed the general supremacy of state constitutions over mere state statutes, in the very same breath that the document similarly affirmed the supremacy of the Federal Constitution over mere federal statutes. The clause textually enumerated five types of law, and in every instance, the *textual* order of each type of law tracked its *lexical* order, from highest law to lowest law: The U.S. Constitution came first, then federal statutes, then federal treaties, then state constitutions, then state statutes. *In that order, both textually and legally*: "[1]This Constitution, and [2] the Laws of the United States which shall be made in Pursuance thereof; and [3] all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in [4] the Constitution or [5] Laws of any State to the Contrary notwithstanding."[53]

An analogy here will drive the point home.[54] The Appointments Clause states: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[55] Imagine that Congress passed a law vesting appointment power for an assistant Attorney General in the Attorney General, the head of the Justice Department. Would sensible interpreters argue that the President does not have the right to require that his Attorney General refrain from appointing person X as assistant Attorney General? No, even though the Constitution clearly distinguishes here between the "President" and "Heads of Departments." Most everyone would concede presidential power to

[53] U.S. CONST. art. VI, cl. 2. For more on this textual and lexical ordering, and its profound implications for the status of federal treaties vis-à-vis federal statutes, see AMAR, *supra* note 12, at 302–07 (citing, among other things, John Marshall's pointed reminder in *Marbury* that the Supremacy Clause listed the Constitution first, before later-mentioned and lower-level types of law).
[54] This analogy is drawn from Amar, *supra* note 46, at 1046–47.
[55] U.S. CONST. art. II, § 2, cl. 2.

cabin Attorney General power here and would not read the reference to "Heads of Departments" to mean "Independent Heads of Departments." IHD theory—to coin a phrase—makes no sense because there exists a backdrop understanding of unitary executive power over executive department heads. The president is his underlings' master, their superior.

So too, as a backdrop principle, state people and state constitutions are masters of state legislatures.[56] Thus we should not read the words of Article II, section 1 (or the similar words of Article I, section 4, for that matter) as excluding control by state peoples and state constitutions. Since the Revolution, every state legislature has been defined and circumscribed, both procedurally (e.g., *What counts as a quorum? Is the governor involved in legislation?*) and substantively (e.g., *What rights must the legislature respect?*) by its state constitution, which in turn emanates from the people of each state. When a state legislature violates the procedural or substantive state constitutional limitations upon it, it is no longer operating as a true state legislature for these purposes.

The matter is really no different from what Chief Justice John Marshall said in *Marbury v. Madison* and what Alexander Hamilton said before that in the *Federalist No. 78*, and what the Constitution itself said even earlier in the Article VI Supremacy Clause and elsewhere: When *Congress* enacts an unconstitutional bill, its actions simply cease to have the force of law. The same first principles hold true when a state legislature enacts a bill violative of its state constitution.

In this regard, consider Article I, section 4, which vests backup power to regulate

[56] In both the ISL and IHD contexts, the backdrop historical and structural principle was also expressly textualized in the Federal Constitution itself—in the Article VI Supremacy Clause and the Article II Vesting Clause, respectively.

various aspects of congressional elections in "the Congress." No sober person would suggest that this provision vests final substantive power in Congress to do things forbidden by other parts of the Federal Constitution itself, a Constitution that indeed creates and bounds Congress. Imagine, for example, a Congressional statute proclaiming John Smith by name as ineligible to run for Congress, in obvious violation of the spirit of the Article I, section 9 bans on federal bills of attainder.[57] Or imagine a Congressional statute proclaiming Catholics ineligible, in plain contravention on the Article VI ban on federal religious tests,[58] to say nothing of the later First Amendment. No one would seriously suggest that federal courts lack power to interpret federal statutes regulating congressional elections with an eye towards harmonizing those statutes with constitutional rights. Nor would anyone deny that Congress has in fact deputized federal courts to perform these very functions.

All this is of course true for every provision of Article I that vests power in Congress. But the point is particularly sharp when we juxtapose "the Congress" and "the Legislature" of "each state" in Article I, section 4. If the *federal* Congress is quite obviously not independent of the *federal* Constitution, why should anyone think that the *state* legislature in this very same clause is somehow independent of its *state* constitution?

Indeed, at the Founding, the "legislatures" of each state to which Articles I and II refer were, as a general matter, far from free agents. Voters in many states claimed the power to formally "instruct" their state representatives and thus legally bind them on specific issues. The right to instruct had appeared explicitly in the constitutions of at least five states, namely, the

[57] U.S. CONST. art. I, § 9, cl. 3 ("No Bill of attainder . . . shall be passed.").
[58] U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be Required as a Qualification To any Office or public Trust under the United States.").

Pennsylvania and North Carolina Constitutions of 1776, the Vermont Constitutions of 1777 and 1786, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784.[59]

Founding-era state legislatures were not independent sovereign entities; they were then, and state legislatures remain today, delegatees of the sovereign power of the people. That is why the devices of instruction, recall, referendum, and initiative (to say nothing of judicial review) do not improperly invade the powers of state legislatures, but instead operate as mechanisms that further define the scope of state legislatures' legitimate authority. The Tenth Amendment preserves broad power of the people of the states to shape governments in whatever ways they want, and the Guarantee Clause of Article IV generally requires the federal government to respect and protect—not disregard and override—these state choices about how to create, divide, limit, and implement lawmaking powers.[60]

Chief Justice Marshall made a remarkably similar point in rejecting the application of the Fifth Amendment's Takings Clause to states in the seminal 1833 *Barron v. Baltimore* case.[61] It would be not just wrong, he reasoned, but perverse, to invoke constitutional provisions designed (as were many components of the pre–Civil War Bill of Rights)[62] to *limit* federal power and preserve state autonomy to instead

[59] *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154 (1991).
[60] *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). As Hamilton recognized, so long as it remains majoritarian and responsive to popular will, many a type of state government will generally comport with the Guarantee Clause. THE FEDERALIST NO. 21 (Alexander Hamilton); *see* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).
[61] 32 U.S. (7 Pet.) 243 (1833). *Barron*, it will be recalled, was decided prior to the Fourteenth Amendment, which was pointedly designed to reverse *Barron*'s rule. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).
[62] *See* AMAR, *supra* note 61; *see also* Amar, *supra* note 59, passim.

expand federal court authority over state institutions, including state courts. A Supreme Court that cares about federalism has no business twisting or ignoring the text and public meaning of parts of the Constitution to undo the powers that states were intended to enjoy.

Early practice under the new Federal Constitution provides still further reason to reject the *Bush* three's ISL ideas. Four of the six state constitutions that were adopted or revised in the Constitution's earliest years of operation—George Washington's first term—regulated the manner of federal elections, and in so doing cabined the power of the state legislature. The Delaware Constitution of 1792 explicitly required that voters elect congressional representatives "at the same places" and "in the same manner" as state representatives. Three other state constitutions—Georgia's in 1789, Pennsylvania's in 1790, and Kentucky's in 1792—required "all elections" to be "by ballot" rather than *viva voce*. Though congressional and presidential elections were not specified as such, provisions by their express terms applied to *all elections*—popular elections for statewide offices, to be sure, but also biennial elections for federal House members and any popular elections for presidential electors that might be held in the future. Early statesmen read these provisions to mean just what they said.[63]

[63] DEL. CONST. of 1792, art. VIII, § 2; GA. CONST. of 1789, art. IV, § 2; Pa. Const. of 1790, art. III,§ 2; KY. CONST. of 1792, art. III, § 2. Shifting gears, the Kentucky Constitution of 1799 required that federal and state elections be held by voice vote. KY. CONST. of 1799, art. VI, § 16. Though this marked a major substantive change in election regulation, this 1799 provision was every bit as inconsistent with ISL theory as its "ballot" predecessor in Kentucky's first constitution. It is worth mentioning that these provisions constrained governors as well as state legislatures, and that governors would have to obey these limits even when discharging the power conferred by Article I, section 2 to the "Executive Authority [to] issue Writs of Election to fill" House vacancies. Thus, there is no "Independent State Governor" (ISG) theory" that would apply here, and we are not aware of anyone who has even argued for one. For more on these early constitutions, see the important new work by Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. (forthcoming 2022).

In addition, at least two early states that provided for vetoes for general legislative action employed such vetoes in the process by which federal election rules were made. In Massachusetts, bills regulating federal elections were not considered by the legislative houses alone but were presented to—and subject to disapproval by—the governor. And in New York, such bills were subjected to a council of review that included not only the governor, but also members of the state judiciary.[64]

Thus, the Constitution in both Articles I and II takes state legislative bodies as it finds them, subject to pre-existing control by the people of each state—the ultimate masters of state legislatures—and the state constitutional limits that those people create[65]. And of course the Constitution also plainly recognizes the general role of state courts as the last word on the meaning of state law, including state constitutions, even when those constitutions constrain state legislatures.

A quick note on our tally. Obviously, prior to 1787, no state constitution would have aimed to regulate Article I congressional elections and Article II presidential elections because Article I and Article II did not yet exist. The U.S. Constitution did not truly commence operation until early 1789, and over the next four years, only six states revised their prior constitutions or adopted new ones: Georgia in 1789; Pennsylvania and South Carolina in 1790; and Delaware, Kentucky, and New Hampshire in 1792. As noted, Delaware quite pointedly repudiated the ISL notion; Georgia, Pennsylvania, and Kentucky also expressly did so, albeit in more general language. Modern ISL theorists have identified no strong evidence from the other two states, South Carolina and New Hampshire, indicating that constitution-makers affirmatively embraced ISL ideas. In these states, the issue simply may not have arisen, or constitution-makers may have preferred, for reasons of pure policy, to leave their state legislatures untrammeled in regards to federal elections.

[64] *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 759–61 (2001). As the New York episode evidences, state judges in some places had legislative roles. Also, state legislators at times had judicial roles; several states at the Founding vested judicial duties in the upper chamber of the state legislature. The superstrict distinction that ISL proponents rely upon—a sharp delineation between state legislatures and state courts—simply did not exist at the Founding.

[65] *See* Amar & Brownstein, supra note 46, at 31.

To see all this one final way, let us return to the key text of Article II. If, for all the reasons we have identified, the term "legislature" cannot mean "independent legislature," why is it there? The most obvious explanation relates to efficiency and expense. The Framers knew that each of the thirteen then-existing states had an ordinary standing legislature, and Article II created a simple, inexpensive, and self-executing default that, *unless a future state constitution specified otherwise by creating a special ad hoc legislative body or process*, the state's ordinary pre-existing state legislature would be the body to adopt federal election regulations. And, to repeat, nothing in the Federal Constitution suggests that the *ordinary* state legislature would have federal carte blanche to act in *extraordinary* ways contrary to the general rules limiting the legislature in the very state constitution that created and bounded that legislature.

In 1787, state appointment practice varied widely under then-existing state constitutions. In some states, legislatures had wide appointment authority; in other states, executives played a larger role alongside others (often, council members).[66] Also, within a given state, different appointment rules sometimes applied to different appointments. In the absence of Article II's mention of "legislature," it thus might have been unclear in some states who was to play the default role in directing the manner of appointment of the Federal Constitution's newly created presidential electors. Going forward, however, Article II's text rather plainly gave each state, via any future state constitution or state constitutional amendment it might adopt, broad authority.[67] A future state constitution could thus directly regulate the elector-appointment process itself in whole or in part; create a special legislative body or legislative process to do the

[66] *See generally* WOOD, *supra* note 50, at 148–150, 407, 433-35, 452.
[67] So too, Article IV's Republican Government Clause guaranteed each state its existing governmental system while allowing future republican reforms of that system at the state constitutional level. *See supra* note 60.

regulation; and/or continue to allow the ordinary legislature to direct electoral appointment, even allowing the legislature to make appointments itself[68]—all subject to whatever general rules that future state constitution might provide. That is why, textually, Article II empowers "Each State" *as such* to "appoint" electors and says merely that the state legislature "may"—not "shall" or "must"—"direct" the "Manner" of appointment. With all this in mind, the reader should now re-read the words of Article II, with our emphasis added: "Each *State shall* appoint, in such a Manner as the *Legislature* thereof *may* direct . . . ."

2. State Legislative Practice

A second and entirely distinct refutation of *Bush*-Leaguers is equally devastating: Even if state constitutions somehow do not apply *of their own force*, they would almost always apply because they have been *incorporated by reference* by the state legislature itself—a key argument nowhere addressed by *Bush*-Leaguers on or off the Court.

Undeniably, even if each state legislature were somehow free to ignore the state constitution that creates and bounds it, each state legislature could *choose* to abide by its state constitution and to invite state courts to enforce the provisions of that constitution as the basic backdrop of all election-law statutes. In fact, each state legislature, including Florida's, generally has so chosen, at least implicitly. This simple fact also guts the second part of the *Bush* three's ISL argument—namely, that *federal* courts must protect

[68] This is to be distinguished from the federal legislature, which of course lacks comparable appointments power under other parts of Article II.

the *state* legislatures. State legislatures have already indicated whom they want to protect their interests: *state* adjudicatory bodies.

Notice, importantly, that Articles I and II do not say that state legislatures should be the final word on all aspects of federal elections, but only that state legislatures shall (Article I) or may (Article II) lay out the "manner" of holding federal elections. But the manner of (s)election of officials may certainly involve other branches; surely a state legislature may properly enlist state agencies[69] and state courts to put the state legislature's plan into effect. And that is exactly what state legislatures have done in almost all states in almost all elections. In dialogue with state courts over the years, *and mindful of the accountability to state electorates and constituencies that state judges have (and that federal judges lack),* state legislatures have chosen to incorporate into state statutes state constitutional norms and state judicial involvement to vindicate those norms. Especially in light of the historical links between state legislatures and state judicial bodies,[70] it is implausible to think that state legislatures have chosen to have federal, rather than state, judges decide what state statutes mean.[71]

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[69] But compare Justice Gorsuch's provocative remarks (joined by Justice Alito) in a pre-election case brought by North Carolina Republicans challenging a ruling by the North Carolina State Board of Elections. The Justice relied on his own plain-meaning textualist analysis of the North Carolina state constitution, pooh-poohing the idea that he should seek out definitive state court rulings or otherwise "rifl[e] through state law." Based on his own two-sentence(!) glance at, and his own confident interpretation of, the state constitution, he expressed strong doubt that "the North Carolina General Assembly could delegate its Elections Clause authority to other officials." Moore v. Circosta, 141 S. Ct. 46 (2020) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief). In earlier cases, Justice Gorsuch has been a prominent advocate for a robust nondelegation doctrine for federal lawmaking. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting). In *Moore*, he evidently tried to use a variant of ISL ideology to move toward imposing a strict nondelegation vision on state governments in the context of federal elections.

[70] *See supra* note 64.

[71] *See* Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. LL. REV. 661, 680–81 (2001).

One big reason state legislatures have consistently involved state courts and state constitutions in federal elections is the practical need to align state and federal voting systems. As a rule, voters use a unified ballot and participate in a unified election schema—when to vote, where to vote, how to vote—to elect candidates in both systems.

To see this point clearly, consider a thought experiment in which the Florida Supreme Court in 2000 had, in response to that fateful remand in *Bush I*, said the following quite clearly and several days before the Supreme Court impulsively jumped back onstage in *Bush II*:[72]

> Just as Article II of the U.S. Constitution empowers the Florida legislature to direct the process of selecting presidential electors, Article II of course also allows the Florida legislature, if it chooses, to cabin its own power in light of our state constitution, and to delegate the last word to resolve and manage disputed presidential elections in Florida to the Florida judiciary. We hereby hold that the Florida legislature has done just that by deputizing us, the Florida judiciary, to construe the Florida statutes and regulations regarding presidential elections against the backdrop of the Florida Constitution.
>
> Indeed, the Florida legislature has empowered us, the Florida judiciary, to equitably adjust and modify the sometimes hypertechnical and confusing maze of election regulations and code provisions so as to bring the letter of election law into harmony with the spirit and grand principles of the state constitution.
>
> As our longstanding case law makes clear, the Florida Constitution emphatically affirms the people's right to vote and right to have every lawful vote reflecting a clearly discernable voter intent counted equally. We need not decide today whether, in a presidential election, the Florida Constitution applies *of its own force.* Rather, we hold that the Florida Constitution applies simply because the Florida legislature has *chosen to make it applicable* and has deputized us to vindicate its spirit in presidential elections here in Florida.
>
> This legislative power is not merely consistent with Article II; it derives from Article II. In general, no federal court (not even the U.S. Supreme Court!) may lawfully intervene to "protect" the Florida legislature from the Florida courts in the name of Article II, for any such federal court intervention would itself violate the very principle of Article II being asserted. To repeat: pursuant to Article II, the Florida legislature has designated the Florida judiciary as its chosen deputy in this matter.
>
> Doubtless Article II would have been satisfied had the Florida election statute explicitly stated that "every provision of this presidential election code should be construed or judicially revised to conform to the letter and spirit of

[72] For an earlier version of this idea, see *Dunwody Lecture*, *supra* note 24, at 953–56.

> the right to vote under the Florida Constitution's Declaration of Rights, as that Declaration has been and will continue to be definitively construed by the Florida judiciary." We believe that the Florida statute has done just that in substance, albeit in different words.
>
> Here is why: *The Florida Election Code rules for presidential elections are the same as the Florida Election Code rules for other elections, including state elections for state positions.* It is absolutely clear that the Florida Constitution does apply to these other elections. It is equally clear that this Court—the Florida Supreme Court—is broadly empowered to protect the fundamental state constitutional right to vote in these state elections, even if protecting that right may require this Court to go beyond and behind the strict and at times hypertechnical words of the statutes and regulations. Unless the state legislature clearly indicates otherwise—*and it has never done so*—the same interpretive principles concerning the importance of the right to vote and the authority of Florida judges to construe all rules and regulations against the backdrop of that right apply to presidential elections as well.
>
> For example, if a voter were to use an ink pen rather than a lead pencil to fill in the oval bubble that appeared next to a candidate's name on a printed ballot, longstanding Florida case law makes it clear that this pen mark would ordinarily constitute a valid vote, even if the instructions told voters to use number two pencils when marking their ballots. Given that pen marks on a particular ballot should be counted in an election for state representative, or for any other state, local, or federal official, *surely the presidential-election section of the ballot should be handled the same way*. It would be odd indeed—absent a very clear legislative indication to the contrary—to count pen marks everywhere else on this ballot and yet refuse to count virtually identical pen marks in the presidential-election section of the very same ballot.

The takeaway here is that unless the state legislature speaks very clearly to the contrary, it is most sensible to assume that the legislature wants the *entire* ballot and the *entire* election process to be governed by the same basic rules. Since the state-election parts of the ballot are undeniably controlled by the state constitution operating of its own force, the federal election parts of the ballot should be controlled by the state constitution *because state legislatures have chosen to create unified ballots, with a unified electoral timetable and unified electoral logistics and unified electoral implementation*.

Even before the Constitution was ratified, leading Federalists predicted that states would do just that, and publicized this fact as a great systemic virtue of the document's envisioned

model of cooperative federalism. Thus, Alexander Hamilton concluded his *Federalist No. 61* by extolling "the convenience" of enabling states to "hav[e] the elections for their own governments and for the national government" on the same date and, presumably, in the same manner.

In any event, if there be any fair doubt about whether in a given instance the legislature of state X did in fact mean to incorporate state constitutional norms, this fair doubt is to be resolved by the state supreme court, which is of course the definitive expounder of the meaning of state law.[73]

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[73] The incorporation of state constitutional norms thus need not be explicit—or at least there is no proper warrant for the U.S. Supreme Court to demand explicitness if state courts think otherwise. There is no general federal common law of state statutory interpretation—no general requirement, for example, that state statutory interpretation must be "textualist," even if the U.S. Supreme Court were to embrace "textualism" (whatever that might mean) as its own general approach to federal statutory interpretation. Federal courts should in general not dictate to state courts how they should construe state law in a situation in which federal law, properly understood, is utterly indifferent—that is, a situation in which either interpretation of a fairly disputable substantive state law at issue fully vindicates all relevant federal-law interests. For more discussion and elaboration, see *infra* TAN 110-22.

To view the matter from another angle, let us concede, arguendo, that questions concerning the "true" meaning of state congressional and presidential election laws are, technically, federal questions under Articles I and II, respectively. Even so, the desired functional uniformity to be achieved in most situations (as exemplified by Florida in 2000) is not uniformity *across* states (to be accomplished by the U.S. Supreme Court's promulgation of one-size-fits all rules of interpretation of state election statutes), but rather uniformity *within* each state. The functional and structural idea is for each state that so desires to have a tolerably uniform election scheme harmonizing its rules for state candidates and its rules for federal candidates—that is, congressional and presidential candidates. (So too, the original Constitution aimed to harmonize voter-eligibility law for state assembly races with voter-eligibility rules for congressional contests.) Where federal law aims to piggyback on state-law systems so as to achieve state-desired intrastate uniformity as opposed to interstate uniformity, federal courts should adjudicate formal federal-question cases by copying state courts. *See generally* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957). We suspect that this point would have been far more clear to all observers in 2000 had Florida's election involved razor-thin contested races for various state offices implicating the exact same chad/voter intent/etc. issues as did the razor-thin presidential contest that same day. Alas, because only the presidential contest was a statistical toss-up, many commentators and justices wrongly saw the dispute as a

For this reason, exercise—even significant exercise—of state judicial power vindicates rather than violates the choice made by the state legislature. To be sure, whenever a legislature provides for judicial enforcement of its work, there is always a risk that courts might err in discerning the best meaning of statutes. But as long as state courts are truly acting as courts and doing what they usually do and have usually done[74]—expounding state law in good faith—there is no basis for officious federal court involvement, much less federal court second-guessing, de novo, the "real" meaning of state election law.

3. Pre-*Bush* Precedent

What about the cryptic language in *Blacker*[75] mentioned in *Bush I* and relied on by the *Bush II* opinions? Does/did *Blacker* truly support the daft notion that, at least for Article II (and perhaps Article I?) purposes, state legislatures somehow float independently of and outside the very state constitutions that created and bounded them? Actually, *Blacker*'s dictum, fairly read, says very little about the "independence" of state legislatures under Article II.

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uniquely federal matter warranting an unduly robust role for the nine eminences on One First Street.

Finally, note that in states whose written laws, whether statutory or constitutional or both, permissibly aim to regulate federal elections somewhat differently from state elections, *see infra* note 86, state supreme court expositions of these state laws should generally be conclusive for federal courts for the simple reason that Articles I and II were designed to give states leeway here, and state courts are of course key components of states. Federal courts are not. *See infra* note 81.

[74] *See infra* Section V.

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

On its facts, *Blacker* did not in any way involve a conflict between what a state constitution said or a state people wanted, on the one hand, and what the elected legislature preferred, on the other. Instead, the question in *Blacker* was whether the legislature's chosen method of selecting electors by means of district-by-district (as opposed to statewide) election was permissible under Article II. The *Blacker* Court quite correctly upheld the legislature's choice in this regard. There was never any claim that the legislature's enactment conflicted with, or needed to be harmonized with, the state constitution. The only question was whether what the legislature chose was permissible under the *federal* Constitution.[76] Thus, *Blacker* was a case in which Michigan was using popular election of presidential electors, not a case in which a state legislature was resisting the will of the people, as expressed in their state constitution. Nor did the case in any way involve an ostensible conflict between the wishes of the legislature and the views of the state judiciary. As such, the case on its facts had nothing—*nothing!*—to do with the independent state legislature theory or doctrine.

True, the *Blacker* opinion did mention and purport to rely on an 1874 report written by Senator Perry Morton of Indiana that contained the following sentences:

> This power [to appoint Electors] is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by 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.[77]

[76] *See* Schapiro, *supra* note 71, at 669.
[77] *See Blacker*, 146 U.S. at 35 (quoting S. REP. NO. 43-395, at 9 (1874)).

But Morton cited no historical authority for his assertion, which, as we have seen, ran counter to much of what was said and done at the Founding. What's more, the *Blacker* Court itself cast strong doubt on the ISL idea when it elsewhere stated in the opinion that "[t]he legislative power is the supreme authority *except as limited by the constitution of the State*."[78] This part of *Blacker* is never quoted, much less explained, by the majority or concurring opinions in the *Bush* litigation.

In any event, if the case for ISL is to be built on Supreme Court authority, twentieth-century decisions—decisions post-*Blacker*—strongly undercut the *Bush* three.

Consider first the 1916 case of *Ohio ex rel. Davis v. Hildebrant*.[79] Ohio's state constitution included a provision that legislative power was vested not only in the state legislature, but also "in the people[,] in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly."[80] The Ohio General Assembly passed a redistricting act for congressional elections, and enough persons petitioned for the measure to be subject to voter approval through a referendum. In that referendum, voters rejected the redistricting act. In *Hildebrant*, the Supreme Court squarely rejected ISL as applied to Article I, which authorizes state legislatures to regulate congressional elections. The *Hildebrant* Court held that "the referendum constituted *a part of the state constitution* and laws and was contained within *the legislative power* and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the state was

[78] *Id.* at 25 (emphasis added). See also supra TAN 42 (quoting cryptic *Blacker* comment that "the legislative power of appointment could not have been successfully questioned *in the absence of any provision in the state constitution* in that regard") (emphasis added).
[79] 241 U.S. 565 (1916).
[80] *Id.* at 566.

yet valid and operative, is conclusively established to be wanting in merit."[81] In other words, a state legislature under Article I is not independent of its state constitution, but is rather bound by it. And, we would add, the same holds true for Article II. Article I's rules for state legislative regulation of congressional elections are structurally and intratextually akin to Article II's rules for state legislative regulation of presidential elections.[82]

Consider next the 1932 case of *Smiley v. Holm*.[83] The two houses of the Minnesota state legislature had passed a bill dividing the state into nine new congressional districts following a decennial census, but the bill was returned by the governor without his approval. The Minnesota legislature took the position that under Article I, section 4 of the Federal Constitution, the governor's approval was not necessary for the redistricting measure to go into effect. The U.S. Supreme Court disagreed, ruling that ordinarily "the exercise of the authority [to regulate congressional elections] must be in accordance with the method which the State has prescribed for legislative enactments."[84] Because normal laws in Minnesota were subject to gubernatorial veto under the state constitution, the redistricting measure returned by the governor could not be effective.

[81] *Id.* at 568 (emphasis added). The *Hildebrant* Court also made crystal clear, contra ISL ideology, that the U.S. Supreme Court should generally consider state supreme court interpretations of state election laws as dispositive: "As to the state power . . . it is obvious that the decision below [of the state supreme court] is conclusive on the subject . . . ." *Id.* at 567–68.
[82] On the use—and importance—of intratextualism in constitutional interpretation, see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).
[83] 285 U.S. 355 (1932).
[84] *Id.* at 367.

Together, *Hildebrant* and *Smiley* put the lie to ISL in its strong form. The "legislature" in Article I means "legislative process" as structured by state constitution. And what is sauce for Article I should also be sauce for Article II.

The *Bush* three concurrence championing ISL ideology simply ignored all this (just as it ignored founding understandings and expectations, and state legislative practice), making no mention whatsoever of *Hildebrant* and *Smiley*.

III. *Bush*-Pruning: Post-2000 Case Law

Post-*Bush* cases have built squarely upon *Smiley* and *Hildebrant* and have authorized state constitutions to displace state legislatures altogether in certain aspects of congressional elections covered by Article I. In these cases, even conservative justices have squarely rejected the *Bush* three's ISL ideas, at least for Article I (and thus, we would argue, for Article II as well). These cases make even more clear that the Federal Constitution in general takes state legislatures as it finds them, subject to state constitutional limitations—limitations that that state courts are empowered to enforce.

In 2015, the Court decided a landmark case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[85] The *AIRC* Court ruled that Article I allowed the people of Arizona, via their state constitution, to do congressional redistricting through an independent redistricting commission created by a popular initiative—a commission not controlled by the ordinary state legislature.

[85] 576 U.S. 787 (2015) (*AIRC*).

Poetically, Arizona voters had passed the initiative in question—Proposition 106—in November 2000, the very same day as the presidential election that led to *Bush*.[86] Arizona's legislature argued that Article I prevented the state from giving the power to draw congressional districts to an entity distinct from the ordinary state legislature itself.

In rejecting this ISL argument, the *AIRC* majority opinion penned by Justice Ginsburg relied extensively on *Hildebrant* and *Smiley*, and in the process strongly undercut the ISL logic of the *Bush* three. One alumnus of the *Bush* majority actually joined the Court's opinion, albeit a justice who had never squarely endorsed the *Bush* concurrence: Anthony Kennedy.

The *AIRC* majority opinion made emphatically clear that when the U.S. Constitution refers to a state "Legislature" in the context of a provision calling for state lawmaking,[87] the word "Legislature" means a state lawmaking process *as prescribed by the state constitution*. It's hard to imagine language that more plainly repudiates the core ISL idea than the language used by the *AIRC* Court: "*Nothing in [Article I] instructs, nor*

[86] Poetic, too, is the implicit reminder here that presidential Election Day is also state-law Election Day; the two electoral systems are tightly integrated in virtually every state—a key consideration that ISL ideologues fail to appreciate. *See supra* note 73. Quoting Hamilton's *Federalist No. 61*, the *AIRC* majority itself drew attention to the "convenience" of allowing each state to unify and harmonize the timing and manner of its state and federal elections. 576 U.S. at 819. And, of course, the majority recognized that states have the legitimate discretion to manage state and federal elections differently. *Id.* at 819 n.25.

[87] The Court distinguished the issue at hand from situations in which the Constitution authorizes state legislatures to perform functions different from fashioning general regulatory policy—as when Article V gives state legislatures a role in ratifying federal constitutional amendments, and Article I (pre–Seventeenth Amendment) gave state legislatures the power to pick U.S. Senators. *Cf.* Hawke v. Smith, 253 U.S. 221 (1920); Leser v Garnett, 258 U.S. 130 (1922). For an argument that even these cases and settings do not support ISL, see Amar, *supra* note 46.

has this Court ever held, that a state legislature may [regulate] the . . . manner of holding federal elections in defiance of provisions of the State's constitution."[88]

If "Legislature" in Article I means "legislature free to do what it wants unconstrained by state constitutions," *AIRC* could not have come out the way it did. Full stop. And, we hasten to repeat, what is sauce for Article I's rules about state legislative regulation of congressional elections should be sauce for Article II's rules about state legislative regulation of presidential elections.

AIRC was a 5-4 ruling, decided over the dissents of the Court's conservative wing. But in 2019 *AIRC* was embraced by all the Court's conservatives in a case about partisan gerrymandering of congressional districts, *Rucho v. Common Cause*.[89] Indeed, Chief Justice Roberts, who had dissented in *AIRC*, wrote for the majority in *Rucho*, where the Court—quite plainly and in direct opposition to ISL theory—blessed the invocation of state constitutional constraints (in Florida, no less!) enforced by state courts against state legislatures in congressional elections, and directly built upon *AIRC*'s key holding by pointing approvingly to measures in Michigan and Colorado that were in all relevant respects identical to the Arizona initiative measure at issue in *AIRC*.

The Chief Justice's remarkable language is worth savoring: "The States . . . are actively addressing the [congressional-district gerrymandering] issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). . . [And] in November 2018, voters in Colorado and Michigan

[88] 576 U.S. at 817–18 (emphasis added).
[89] 139 S. Ct. 2484 (2019).

approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6."[90] Note that this passage expressly mentioned that Michigan's and Colorado's constitutional provisions applied not just to state legislative districting, but also to congressional districting under Article I. Note also that this key passage expressly endorsed both the legitimate authority of the Florida Constitution to constrain the Florida legislature, and the legitimate authority of the Florida Supreme Court to interpret and implement that state constitution—even to the point of invalidating an enactment of the Florida state legislature. This *Rucho* passage was thus as square a repudiation of ISL—both prongs—as is possible to imagine. And, to repeat, much of this passage was all about federal elections in *Florida* as regulated by the *Florida Supreme Court* using the *Florida Constitution* to trump the *Florida legislature*. Take that, *Bush* three! Justices Thomas, Alito, Gorsuch and Kavanaugh all joined this passage in full.

This brings us back to our key intratextual claim[91] that Article I and Article II are in this respect *in pari materia*. If ISL is wrong for Article I, as *AIRC* and *Rucho* make clear it is, so too it is wrong for Article II.

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[90] *Id.* at 2507.

For two recent state supreme court cases invalidating the state legislature's congressional district map (as well as its state-legislative district map) as violative of the state constitution (as construed, of course, by the state supreme court itself), see *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); and *Harper v. Hall*, No. 413PA21, 2022 WL 496215 (N.C. Feb. 14, 2022). Relying on, inter alia, *Rucho*, *Smiley*, and *AIRC*, *Harper* explicitly rejected the ISL argument raised by the North Carolina Republicans. *See id.* at *41–*42.

[91] The *AIRC* dissenters themselves explicitly embraced the notion that the term "Legislature" at various points in the Constitution should be informed, intratextually, by the interpretation that word has been given elsewhere in the document. 576 U.S. at 829 (Roberts, C.J., dissenting)

Consider once again the relevant texts. Article I, section 4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." We could reorder this language (without changing its meaning) to say: "The Legislature of each State shall prescribe the manner of electing members of Congress." Article II, section 2 says: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to the electoral college] . . . ." We could likewise reorder this language (also without changing its meaning) to say: "The Legislature of each State may direct the manner of appointing members of the electoral college." When we lay the two reformulations side-by-side, the similarity is obvious and overwhelming: "The Legislature of each State shall prescribe the manner of electing members of Congress" and "The Legislature of each State may direct the manner of appointing members of the electoral college."[92]

IV. The Bitter Fruit of the Poisonous *Bush*

Given all this, we were, we confess, surprised and dismayed when we saw the Article II ISL theory sprouting up again like a stubborn weed in the weeks leading into the 2020 presidential election.

On October 26, a week before the election, Justice Kavanaugh weighed in, ominously. The case, *Democratic National Committee v. Wisconsin State Legislature*, involved a lower

(citing Amar, *supra* note 82). For a similar thought, see *Chiafalo v. Washington*, 140 S. Ct. 2316, 2329–31 (2020) (Thomas, J., concurring).

[92] If anything, the language of Article II is less legislature-centric. The technical subject of the key sentence is the "State," not the legislature, and the legislature "may" (rather than "shall") direct the "manner" of (s)election. *See supra* TAN 67-68.

federal court's invocation of the Fourteenth Amendment's right-to-vote principles to enjoin Wisconsin from enforcing its state election laws.[93] Kavanaugh joined four other justices in chiding the district court for intervening in an election so close to the voting date. But then, in a startling footnote, he added:

> A *federal court's* alteration of state election laws such as Wisconsin's differs in some respects from a *state court's* (or state agency's) alteration of state election laws. That said, under the U. S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States "in such Manner as the *Legislature* thereof may direct." §1, cl. 2 (emphasis added). The text of Article II means that "the clearly expressed intent of the legislature must prevail" and that a state court may not depart from the state election code enacted by the legislature. *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *see Bush v. Palm Beach County Canvassing Bd*., 531 U.S. 70, 76–78 (2000) (per curiam); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). In a Presidential election, in other words, a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S., at 113 (Rehnquist, C.J., concurring). As Chief Justice Rehnquist explained in *Bush v. Gore*, the important federal judicial role in reviewing state-court decisions about state law in a federal Presidential election "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.* at 115. The dissent here questions why the federal courts would have a role in that kind of case. *Post* at 45, n.6 (opinion of Kagan, J.). The answer to that question, as the unanimous Court stated in *Bush v. Palm Beach County Canvassing Bd.*, and as Chief Justice Rehnquist persuasively [!!!] explained in *Bush v. Gore*, is that the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.[94]

Two days later, three other justices joined the fray in *Republican Party of Pennsylvania v. Boockvar*.[95] In this case, Pennsylvania Republican *Bush*-Leaguers directly invoked the Article II

[93] 141 S. Ct. 28 (2020) (mem.).
[94] *Id.* at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) (citations cleaned).
[95] 141 S. Ct. 1 (2020) (mem.).

ISL theory to ask the Roberts Court to step in to undo rulings by the Pennsylvania Supreme Court tweaking the date by which mail-in ballots needed to be sent in.

The state supreme court had acted to accommodate the state constitutional right to vote in the face of COVID. The state statutes facially required all mail-in ballots to be *received* by 8pm on Election Day, but the state supreme court ruled, long before Election Day, that the state constitution allowed votes to be counted provided they were *postmarked* by Election Day and received no later than three days thereafter. Part of the logic was that a hard-to-predict-in-advance COVID spike on or just before Election Day might make it impossible or dangerous for some voters who had been planning to vote in person to do so as planned, and that a relaxed mail-in deadline would better vindicate the fundamental right to vote enshrined in the state constitution.

As applied to elections directly and undeniably governed by the state constitution—for example, state legislative elections—this tweaking was uncontrovertibly within the proper sphere of the state justices. And the state legislature had given no indication in its statutes that different deadlines and procedures should apply to the presidential election. Thus the state legislature implicitly incorporated the state constitution into its unified general election laws and implicitly invited the state courts to play their traditional election role for all parts of the election, even if the presidential election strictly speaking somehow fell outside the ambit of the state constitution operating of its own force.[96] And of course, *AIRC* and *Rucho*, to say nothing of *Hildebrandt* and *Smiley*, gave additional strong support to what the Pennsylvania Supreme Court had done. Under

[96] To repeat, the ultimate decision about what Pennsylvania's election law did and did not mean, implicitly and explicitly, is a decision reserved to the Supreme Court of Pennsylvania, not the Supreme Court of the United States. *See supra* notes 73, 81; *infra* TAN 110-22.

the logic of these cases, the state constitution did indeed apply of its own force even to congressional and presidential elections.

Yet Justice Alito, joined by Justices Thomas and Gorsuch (but not, notably, by Justice Kavanaugh) condemned the Pennsylvania Supreme Court and urged his colleagues to leap onstage, in a re-enactment of *Bush v. Gore*. Justice Alito's embrace of the *Bush* three's Article II ISL theory was emphatic and unrepentant:

> The Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office. *See* Art. I, §4, cl. 1; Art. II, §1, cl. 2; *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam) . . . . It would be highly desirable to issue a ruling on the constitutionality of the State Supreme Court's decision before the election. That question has national importance, *and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.* See *Art. I, §4, cl. 1; Art. II, §1, cl. 2. For these reasons, the question presented by the Pennsylvania Supreme Court's decision calls out for review by this Court—as both the State Republican and Democratic Parties agreed when the former applied for a stay*.[97]

What is perhaps most astonishing is that none of the four current justices (just one shy of the number needed to blow up presidential elections yet again) who invoked the

[97] 141 S. Ct. at 1–2 (statement of Alito, J.) (emphasis added) (citations cleaned). Although due allowance should be made for impassioned judicial rhetoric, Justice Alito's claim that an ISL reading is necessary to avoid rendering the relevant constitutional text "meaningless," is flatly wrong. *See supra* TAN 66-68. Once it is seen that this rhetorical claim is, strictly speaking, false, the claim loses all legal and logical force. Contrary to Justice Alito's assertion, both ISL and non-ISL readings of the text make the clause *meaningful*, although the two readings attribute quite different meanings to the text. The question, then, is simply this: Which reading is more sound as a matter of text, history, structure, precedent, and so on?

ISL notion, nor any of the *Bush I* justices, nor any of the *Bush II* concurring justices, carefully engaged the manifold and manifest problems with the theory. No history, no discussion of state legislative practice, and no awareness, even, of the incorporation-by-reference argument, which provides its own distinct, sufficient, and devastating refutation of *Bush*-League ideology. No originalist or structural explanation for why Article II would ever single out one state lawmaking institution and immunize it from the state constitutional definitions and constraints to which it would ordinarily be subject. And no close analysis of cases such as *Hildebrandt, Smiley, AIRC*, and *Rucho*. Instead, Justice Kavanaugh cited *Bush I*—the Palm Beach County case—as if it had made law, even though the Court specifically "decline[d] at th[at] time to review the federal questions asserted to be present."[98] And, unfathomably, neither Kavanaugh nor Alito even mentioned much less distinguished *AIRC* or the subsequent *Rucho* case embracing *AIRC*.[99]

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[98] 531 U.S. 70, 78 (2000) (per curiam). Justice Alito was more coy in his citation to *Bush I*, but the implication was the same.

[99] In early 2021, after the 2020 election craziness had subsided and President Biden was safely in office, Justice Thomas—one of the original *Bush* three, it will be recalled—expressly doubled down on the discredited ISL theory, and indeed cited the *Bush* three's concurrence with evident approval:

> Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding "the clearly expressed intent of the legislature." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring).

Republican Party v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (mem.) (Thomas, J., dissenting from the denial of certiorari) (citations cleaned). In a separate dissent from the denial of certiorari in the same case, Justice Alito, joined by Justice Gorsuch (but not, we note again, by Justice Kavanaugh), also continued to cast his lot with ISL. In doing so, he expressly repeated his troubling *Boockvar* language, and cited not to the *Bush* three concurrence but the *Bush I* ruling—the *Palm Beach* case:

> "The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the

Nor did Justice Kagan, who wrote a dissent in the Wisconsin case[100] joined by Justices Breyer and Sotomayor, set her colleagues straight with the requisite clarity and detail. All Justice Kagan said was:

> At the same time that Justice Kavanaugh defends this stance by decrying a "federal-judges-know-best vision of election administration," he calls for *more* federal court involvement in "reviewing state-court decisions about state [election] law." It is hard to know how to reconcile those two views about the federal judiciary's role in voting-rights cases. Contrary to Justice Kavanaugh's attempted explanation, neither the text of the Elections Clause nor our precedent interpreting it leads to his inconstant approach. *See Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 817–818 (2015); *Smiley v. Holm*, 285 U.S. 355, 372 (1932).[101]

Bench memo to Justice Kagan: The key point is not merely that neither the constitutional text nor the Court's precedents *lead to* Justice Kavanaugh's approach. The point is that text and precedent emphatically *reject and refute* Justice Kavanaugh's approach. One would think that as multiple justices seemed to be on the verge of replaying the *Bush v. Gore* nightmare, there would have been a greater sense of urgency and a more robust explanation of just how jurisprudentially wrongheaded that would be.

> legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." . . . *see also Bush v. Palm Beach County Canvassing Bd*, 531 U.S. 70, 76 (2000) (per curiam).

141 S. Ct. at 738, (Alito, J., joined by Gorsuch, J., dissenting from the denial of certiorari) (citations cleaned). On the plain error of the "meaningless" meme, see *supra* note 97.

On the specific issue of *Degraffenreid*, we actually agree with these three dissenters: The Court should indeed have granted certiorari. But, we hasten to add, the Court should have granted cert precisely to repudiate once and for all the specious ISL claims featured in these dissenting opinions.

[100] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020) (mem.).

[101] *Id.* at 47 n.7 (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting) (alterations in original) (cleaned up).

And what shall we say about recent commentators who are trying to bring ISL back to life? Professor Michael Morley—perhaps the most energetic scholar in this camp—has asserted that the "text of the U.S. Constitution[] [and] the history of the Elections Clause and Presidential Electors Clause . . . strongly support the . . . interpretation[] [under which] only a state's institutional legislature . . . may regulate federal elections."[102] Alas, he has offered no sustained textual or structural analysis and his history comes almost entirely from decades that are either far too late or far too early—far too late to carry much originalist weight and far too early to have strong precedential weight given more recent and definitive Supreme Court case law (*Hildebrant*, *Smiley*, *AIRC*, and *Rucho*).[103]

Morley's treatment of recent precedent also falls short (to put it mildly). He has said that *Bush I* "is perhaps the most important ruling stemming from the 2000 election concerning the independent state legislature doctrine."[104] In fact, as previously noted, the justices in that case chose not to reach the merits of *any* question, saying explicitly that "[we] decline . . . to review the federal questions asserted to be present" in the cert petition.[105] Morley has gone on to assert

[102] Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, https://ssrn.com/abstract=3530136 (Oct. 30, 2020) at 15.
[103] None of Morley's material involves any clear ruling by the U.S. Supreme Court itself (if we put to one side, as we should, the opaque dicta of *Blacker*, *see supra* pp. XX). At best, we think that Morley has interestingly but irrelevantly shown that some nonauthoritative folks have at some times said some unpersuasive things. We should also make clear that we ourselves have not carefully double-checked all of Morley's proffered evidence post-Founding and pre-*Bush*. Given that we find various claims he has made about both the Founding and the *Bush* litigation highly problematic, we caution future scholars against relying uncritically on Morley's other assertions. And although we ourselves have not comprehensively canvassed past and current state constitutions, a recent and extraordinarily detailed piece by Hayward Smith is now bringing to light *dozens* of state constitutions over the years that have regulated congressional and/or presidential elections in ways that squarely contradict ISL ideology. *See* Smith, *supra* note 63. Morley's work has apparently overlooked tons of evidence that Smith is now bringing to light.
[104] Morley, *supra* note 102, at 64.
[105] 531 U.S. 70, 78 (2000) (per curiam). *See supra* note 98 and accompanying text.

that the Court in that case "concluded" that "[c]ertain parts of the Florida Supreme Court's opinion . . . incorrectly suggested that the Florida Constitution might [permissibly] limit the legislature's authority to regulate presidential elections."[106] Wrong again. To repeat: the *Bush I* Court did not "conclude" *anything*.

Morley has also claimed the *Bush I* Court "vacated . . . and remanded so that the Florida Supreme Court could consider the issue exclusively under the Florida Election Code, without allowing the state constitution to influence its interpretation."[107] The Court gave no such direction on remand; it said only that "there is considerable uncertainty as to the precise grounds for the [lower court] decision" and that "[t]his is sufficient reason for us to decline at this time to review the federal questions asserted to be present."[108] So the only (implicit) direction on remand was for the state courts to be more clear in the bases for their decisions.

Indeed, if a unanimous Court in *Bush I* had held what Professor Morley and various careless justices in recent months have said it held, how is it that just two weeks later, in *Bush v. Gore*, a more full-throated articulation of the same proposition—that state constitutions cannot cabin state legislatures in this arena—garnered the votes of only three justices and was explicitly rejected by four?[109]

V. Maintaining Federalism's Garden

[106] Morley, *supra* note 102, at 60.
[107] Morley, *supra* note 102, at 61.
[108] 531 U.S. at 78.
[109] The four objectors were, of course, Justices Stevens, Ginsburg, Breyer, and Souter. Note that in response to criticism by Vikram, Morley later recanted, in the final published versions of his works, some of the most untenable claims that we have cited in this section.

The axiom that state courts rather than federal courts are the ultimate interpreters of state law comes not just from both the Federal Constitution's deep structure and the watershed Supreme Court case of *Erie Railroad Co. v. Tompkins*,[110] but also from a landmark ruling over a century earlier, *Green v. Lessee of Neal*.[111] In *Green*, the Marshall Court emphatically affirmed the proposition that when state courts construe state statutes, those interpretations of state legislative enactments must be respected by federal courts.[112] For decades upon decades, when

[110] 304 U.S. 64 (1938).
[111] 31 U.S. (6 Pet.) 293 (1832).
[112] The matter is of course different if there exists a federal right that depends on whether a state-law interest exists. In these situations, in which state law is logically antecedent to a federal right, a state court cannot be allowed to manipulate the antecedent state-law issue, especially when the dependent downstream federal right is a right against the state itself. For example, if a state court could simply say, however implausibly, that no valid contract was ever made at Time T under state law, and if federal courts could never second guess that implausible claim (by carefully examining state case law as of Time T), the Article I, § 10 Contracts Clause could easily become a dead letter. So too, if a state court simply denies that a state-law property interest was created at Time T, a federal court must be able to say otherwise in order to protect the Fifth Amendment just-compensation right as incorporated against states by the Fourteenth Amendment. *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Ward v. Love Cnty., 253 U.S. 17 (1920); HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. V (Richard H. Fallon, Jr. et al., eds., 7th ed. 2015). In the ISL context, however, there is no dependent federal right at stake.

Cf. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003). Whereas the text, history, and structure of the Seventeenth Amendment do evidence a real federal interest in protecting state governors from their (often malapportioned and gerrymandered) state legislatures in the context of Senate vacancies—see *infra* TAN 113-14—Professor Monaghan does not identify anything truly comparable in Article II aiming to protect state legislatures from state courts in the context of presidential elections. Monaghan rightly worries about willful or bad-faith state courts that rewrite state laws retroactively in ways that threaten various federally protected interests, such as those implicated by the Contracts Clause and the Takings Clause. In these contexts, careful Supreme Court oversight of state-court rulings is warranted. But a general across-the-board rule-of-law concern about possible state judicial willfulness or bad faith cannot allow the U.S. Supreme Court to transmogrify any alleged misinterpretation of state law into a substantial federal question. Otherwise, all state-law rulings would become federal-law issues—goodbye, federalism!

Importantly, Monaghan only fleetingly mentions the main issues at the heart of ISL: whether state constitutions in presidential elections apply either of their own force or simply

federal judges have confronted particularly sensitive state-law questions, these judges have generally understood that they must either follow the lead of state court rulings on point (if such guidance is available) or (if not) certify state-law questions to state courts. Federal courts are not allowed to simply ignore state supreme courts and decide for themselves what state law is or ought to be.

True, state courts might at times misinterpret state constitutions. *But so might federal judges—and indeed, they are generally more likely to do so.* Also, state legislatures have vastly more control over state courts than they do over, say, Justices Gorsuch, Thomas, and Alito (who are not remotely experts on the meaning of fifty state constitutions, to put it mildly).

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because state legislatures have chosen to incorporate them into unified state election laws. (Monaghan discusses the former theory in two pages—1929–30—and the latter issue not at all.)

Indeed, Monaghan's rule-of-law concern that state courts might change the rules retroactively under the guise of mere interpretation is essentially orthogonal to the ISL debate: his discussion of the propriety of the *Bush* II concurring opinion explicitly takes as its starting point the assumption that the concurring Justices' ISL understanding of Article II is correct as a matter of text, history, structure and judicial precedent—an assumption the present article thoroughly debunks. And even applying Monaghan's approach on its own terms to the Florida 2000 situation, we note that long before *Bush v. Gore*, Florida state courts had made clear that the state constitution (as they had construed it and would continue to construe it) applied to, constrained, and supplemented state election statutes promulgated by the state legislature. What's more, on the substantive merits of the voting-law disputes in Florida in 2000—the importance of voter intent, and the need to construe voting law liberally in favor of expansive voting rights, regardless of statutory technicalities and administrative glitches—what the Florida Supreme Court was trying to do in the *Bush v. Gore* litigation was utterly consistent with what that court had been doing for decades. *See, e.g., Palm Beach Cnty Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227–28 (Fla. 2000) (per curiam) ("Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases . . . . 'By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right'"—a right guaranteed by "'[o]ur federal and state constitutions.'") (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)). Monaghan does not so much as mention *Boardman;* nor does he analyze any other pre-2000 Florida voting cases. The court that in fact retroactively changed the rules and changed its stripes—the court that willfully rewrote the law while claiming merely to interpret earlier constitutional texts and prior precedents—was the U.S. Supreme Court, not the Florida Supreme Court. *See Dunwody Lecture*, *supra* note 24.

Does all this mean that federal courts have absolutely no meaningful part in adjudicating disputes concerning federal elections? Certainly not. What it does mean is that federal courts need to leave *state* law to *state* courts and stay focused on enforcing *federal* rights and *federal* policies. In general, there is no Article I or Article II federal right or federal policy that confers special powers or protections upon elected state legislatures vis-à-vis other institutions of state government. Relatedly, there is no substantive federal value, in either Article I or Article II, demanding emphatically literal (or narrow) adherence to the text of state legislative enactments.

In other words, there is in this domain no general federal interest in implementing any particular intra-state separation-of-powers regime or any specific textual interpretative methodology. Instead, whatever federal rights and policies that federal courts can be helpful in enforcing must come either from other parts of the Constitution, or, importantly, from Congress, which has been given a role in both congressional and presidential elections.

As to the Federal Constitution, certainly the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments confer rights that states must respect, under penalty of federal-court enforcement. But state respect for these rights has nothing to do with intra-state separation-of-powers. State legislatures, state courts, state agencies and the people of states acting via direct democracy all must respect the values underlying these landmark Amendments.

True, some provisions of the Constitution, unlike Articles I and II, use specific language that reflects specific historical concerns with some state governmental institutions vis-à-vis others. For example, section 2 of the Seventeenth Amendment, in a single sentence, pointedly differentiates between the legislatures and executive authorities of states, and confers

appointment powers only on the latter.[113] The special concern over malapportionment (and the racial discrimination it often reflected) weighed on the proponents of direct election for U.S. Senators and generated an express Seventeenth Amendment preference for governors over state legislatures in filling Senate vacancies. (Governors, elected statewide, were generally immune from gerrymandering and malapportionment.)[114] But no comparable pointed linguistic contrast between a state legislature and other state organs—much less between a state legislature and the state constitution that creates it—exists in Articles I and II; nor, it is important to add, is there any history to support such distinctions.

In addition to these formal constitutional provisions, the structural principle of federal supremacy could, under certain circumstances, trigger federal scrutiny of state constitutional rules that treat federal-election matters worse than analogous state-election matters. Under *Testa v. Katt* and related cases,[115] state courts cannot disrespect federal claims by excluding them without explanation from state courts while allowing analogous state-law claims. So too, unexplained differential treatment of federal and state voting rules might warrant federal judicial inquiry. Oftentimes there may be innocent

[113] U.S. CONST. amend. XVII, § 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."); *see* Vikram David Amar, *Are Statutes Constraining Gubernational Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 HASTINGS CONSTITUTION. L.Q. 727. (2008).
[114] For elaboration on the precise text of and specific history surrounding the Seventeenth Amendment in this regard, see Amar, *supra* note 113.
[115] 330 U.S. 386 (1947).

explanations,[116] but differential treatment could in some settings suggest problematic disrespect. Once again, the applicable principles would of course constrain all state entities and types of law alike: legislatures, courts, commissions, statutes, initiatives, and constitutions.

As for federal statutes, some may create substantive entitlements that states need to respect and federal courts need to enforce. For example, if Congress were to provide that congressional district lines must be drawn without regard to political partisanship, or with an eye towards remedying historical racial discrimination, those edicts would have to be followed by state districting entities. But again, this would be true whether the state districting entity were the elected legislature or an independent citizen commission or a state court for that matter. Relatedly, the federal statute would of course constrain not just ordinary state statutes, but also state constitutions.

Other federal statutes focus not on substance but on timing: Members of Congress and presidential electors are to be selected/appointed on the federal Election Day.[117] That does not mean that their identity must be known by 11:59 PM on Election Night, but it does mean that the antecedent facts—who voted for whom—have to be locked into place on or before Election Day. Prior to the holding of an election, a state has broad federally approved power to tinker with its election administration regime without running afoul of Congress's designation of an Election Day.[118] But after Election Day, a state cannot reject its pre-election system simply because, say,

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[116] *See AIRC*, 576 U.S. at 819 n.25 ("A State may choose to regulate state and national elections differently, which is its prerogative under the [Election] Clause. *E.g.*, Ind. Code § 3–3–2–2 (creating backup commission for congressional but not state legislative districts).").

[117] 3 U.S.C. § 1.

[118] Note, however, that a state constitution, as definitively construed by the state supreme court, might well constrain the choices of the state legislature long before Election Day. In some states, the state constitution might well prevent the legislature from itself choosing electors. That is, the constitution, best read, might require that ordinary voters must choose the electors. *See, e.g.*, COLO. CONST. sched., § 20 ("The general assembly shall provide that after the year eighteen

the state now knows how close the election is and wants to use its newfound leverage as a decisive swing state to induce the candidates to bid for the state's good will. Such gamesmanship would frustrate the very reason Congress requires states to lock into a system of selection *ex ante*. Here, too, the relevant rules constrain not just state courts but also elected state legislatures and other state governmental entities.[119]

From one angle, state courts are akin to the ballot-counting machines or in-person vote counters themselves; the courts are a relatively ministerial part of the apparatus for determining who validly voted, and for whom. Just as a machine or an individual election official seeks to recognize a valid vote from an invalid one, a judge may do the same thing, albeit at a more categorical level. Provided, of course, that judicial involvement was built into the system that was in place as of Election Day. If it wasn't, then involving the courts could potentially be seen as violating Congress's timeline for making decisions

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hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.").

So, too, a state constitution might well be best read to prevent a state legislature from trying to make itself the "judge" of a contested presidential vote within the state. Such an effort might violate state constitutional separation-of-powers provisions vesting general adjudicatory power in such cases in the regular state courts and not the state legislature. *See, e.g.*, PA. CONST. art. VII, § 13 ("The trial and determination of contested elections of electors of President and Vice-President, [along with various state offices,] shall be by the courts of law . . . .").

The scenarios herein envisioned—attempted power-grabs by state legislatures in the upcoming presidential-election derby—are not outlandish hypotheticals. There are movements now afoot in various right-wing circles to empower red-tilting state legislatures in states that have bluish-purple presidential electorates—Arizona, Georgia, Wisconsin, Virginia, Pennsylvania, and Michigan, to name some of the most obvious jurisdictions. It is not hyperbole to suggest that the outcome of the next presidential election—and even, perhaps, the fate of the world—could pivot on the technical questions at the heart of this footnote and this Article more generally.

[119] We shall not today explore in any detail the many wrinkles of the Electoral Count Act. A quick word, however, is warranted on the Act's provision empowering state legislatures to play a post-election role in the event a state holds an election that "fail[s] to make a choice." 3 U.S.C. § 2. A *failed* election, within the meaning of this statute, is certainly not the same things as merely a *close and hotly contested* election. *See Dunwody Lecture*, *supra* note 24, at 959–60.

about who is elected and appointed; judges, no less than other actors, could be tempted to play games to extort candidates.

But what about the fact that judges, unlike machines, have political biases? Potential bias by judges is present in any setting, and yet we don't as a general matter say that fact forecloses courts from performing their general dispute-resolution and norm-declaration roles throughout our legal system. As long as state judges in congressional-election or presidential-election disputes are engaged in the same kinds of judicial processes and doing the same kinds of interpretive things they have done historically under state law in resolving state election contests, federal courts should defer to state court understandings of state statutory and constitutional law principles.

The bar for finding that a state court has failed this rule-of-law test is thus quite high, just as it is in other areas that remain the domain of pure state law.[120] Not only would the evidence of improper intent by state-court judges need to be compelling before such a finding were made; but also, the precise federal right or policy being infringed by such manipulation would need to be clearly and specifically identified by a second-guessing federal court. If the asserted federal value is simply a due-process concern for regularity and predictability in elections, the state-law interpretations in question would have to be truly outlandish before they would create a substantial federal question.

To recap: The test cannot be whether a state supreme court is suitably "textualist," as various Supreme Court *Bush*-Leaguers might seek to define textualism. The Supreme Court itself is not now and never has been relentlessly textualist, even as some careless justices now threaten

[120] For situations beyond the "domain of pure state law"—situations where federal rights and interests depend on or intertwine with state law—see *supra* note 112.

to impose such a narrow method on states in the context of presidential elections. There is nothing in the U.S. Constitution that speaks to the issue of state court interpretive methodology over state law in general or state presidential-election law in particular. (And surely there is no clear and literal federal statutory or constitutional *text* that speaks to this issue!) A given state legislature, the state people who elect that state legislature, and the spirit of that state's overarching state constitution that gave birth to and sustains that state legislature might well *prefer* a state-law jurisprudence that is more purposive, or more structural/holisitic, or more precedent-based, or more representation-reinforcing, or more democracy-promoting, or more canon-driven, than relentlessly textual. And who is the U.S. Supreme Court to dictate otherwise—*especially* if the Court purports to intermeddle in the name of the state legislature, which, by hypothesis, prefers a different interpretive method![121]

So the proper question for the Supreme Court to ask is not "Was the state supreme court suitably *textualist*?" Nor is the proper question "Did the state legislature *explicitly* and *textually* incorporate by reference the state constitution in its presidential-election-law schema?" Rather, the proper questions are "In the presidential-election case at hand, was the state supreme court doing what it has generally done in other cases (especially cases involving the current presidential-election statute or closely related statutes) in

[121] Suppose a state presidential-election statute says X at time T_1, and is then interpreted by the state supreme court at time T_2 to mean Y (which is rather close to X and in fact best captures the spirit of X, but does undeniably deviate from the strict letter of X). If the state legislature at time T_3 modifies other aspects of the presidential-election statute but leaves intact the X/Y provision, whose T_2 judicial gloss the state legislature quite likes at T_3, would *Bush*-Leaguers on the U.S. Supreme Court truly be faithful to the state legislature—the very state legislature the *Bush*-Leaguers claim to care so much about—if they insist the state law really means X and not Y? Even though this is emphatically not how the U.S. Supreme Court itself goes about federal statutory interpretation, as a general matter? (Statutory precedent routinely—indeed, almost always—trumps textual plain meaning for federal statutes at issue in the U.S. Supreme Court.)

years past?" and "was the state court and/or the state constitution treating presidential elections similarly to state elections?" If the answer to either question is *no*, closer Supreme Court scrutiny is warranted to determine if any genuine federal interest—which must, we repeat, be carefully identified and shown to be truly inherent in federal law—is at risk.

The various statements over the years by *Bush*-League justices and *Bush*-League scholars fall laughably short of this high bar. Casual references to the Article II (and Article I) word "legislature" and careless[122] claims that this word would be "meaningless" unless one embraces full-blown ISL ideology don't cut it. *Bush*-Leaguers have failed to identify any deep and valid federal interest grounded in historical understandings or structural values that would warrant aggressive federal judicial intrusion into the traditionally close partnership between state legislatures and state courts, both operating under the valid superintendence of state peoples and state constitutions. *Bush*-Leaguers actually do violence to the very state legislatures they claim to respect—state legislatures who live under and profess loyalty to state constitutions, who answer to state voters (as do many state judges), and who have historically closely partnered with state judges and other state officials to create integrated and unified intra-state election systems for state and federal races.

VI. Green Shoots? The Chief Justice and Justice Kavanaugh

Much of our analysis thus far has expressed deep disappointment with the work-product of several members of the current and recent Court. But there are also at least two reasons for optimism.

[122] And demonstrably wrong, see *supra* note 97.

First, Chief Justice Roberts got things just right in the October 26 Wisconsin case, where he wrote:

> [T]his case presents different issues than the applications this Court recently denied in *Scarnati v. Boockvar*, and *Republican Party of Pennsylvania v. Boockvar*. While the Pennsylvania applications implicated the authority of *state courts* to apply their *own constitutions* to election regulations, this case involves *federal* intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.[123]

Second, Justice Kavanaugh, who in some sense planted the Court's first kernel of *Bush*-League thinking in the 2020 election cycle in the October 26 Wisconsin case, did not, two days later, join Justices Alito, Thomas, and Gorsuch in their statement that the Pennsylvania Republicans likely had a winning Article II ISL claim on the merits.[124] Why the apparent switch-in-time?

We cannot know for sure. Perhaps we may never know, even after the current justices' papers become public in the distant future. But we can say this: In between Justice Kavanaugh's unfortunate remarks in the Wisconsin case on October 26 and his admirable silence in the Pennsylvania case two days later, various legal commentators—including both of us, along with Professor and former Acting Solicitor General Neal Katyal in the *New York Times*—weighed on

[123] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring in denial of application to vacate stay).
[124] *See supra* pp. 44–46.

this issue to remind the world of the many weaknesses of ISL reasoning.[125] Also, in this very same dramatic two-day window, Amy Coney Barrett formally joined the Court: Chief Justice Roberts administered the judicial oath to Justice Barrett on the morning of October 27.

We have no way to know if the frank and timely expression of our considered views as constitutional scholars in the *Times* had any effect on Justice Kavanaugh's seeming pullback from the edge. But if our timely and *Times*-ly intervention did somehow reach Justice Kavanaugh's desk at a moment when it truly mattered, when the Court was poised on the brink of disaster, then perhaps he did exactly what every good justice should do, always: revisit one's instincts in light of the expert input of scholars.

In mid-December 2000, *Bush II* did not have the benefit of extensive scholarly input. Rather, most of the *Bush* justices galloped off on their own with no real time for academics to saddle up and warn the Justices that they were wildly charging the wrong way—toward a cliff. And at one key perilous moment in OT 2020, it seemed as though the current justices were about to make the same horrible mistake.

The hope that what scholars say might at times matter to the Court—even when those scholars mince no words and speak candidly as true *amici curiae*—is the part of the very *raison d'être* of *The Supreme Court Review,* now in its seventh decade of publication. If (and we admit it's a big if) Justice Kavanaugh in fact switched as a result of scholarly input, this switch in time would be cause for optimism. To borrow an expression that famously appeared more than a half-

[125] Akhil Reed Amar, Vikram David Amar, and Neal Kumar Katyal, *The Supreme Court Should Not Muck Around in State Election Laws*, N.Y. TIMES (Oct. 28, 2020), https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections-state-law.html. This piece went online in the wee hours of the 28th.

century ago here in the pages of *The Supreme Court Review*, it might even be an occasion for "dancing in the streets."[126]

[126] Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn, quoting Motown, in a case all about the *New York Times*).