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THE "INDEPENDENT" STATE LEGISLATURE IN REPUBLICAN THEORY

*by: Franita Tolson**

Abstract

The independent state legislature theory provides that state legislatures are not constrained by their respective state constitutions in exercising the authority that the U.S. Constitution delegates to states over federal elections. In its most extreme form, the doctrine permits state legislatures, in overseeing the mechanics of federal elections, to disregard state court interpretations of state constitutions. Scholars have offered a number of criticisms of this doctrine, noting that it runs counter to the Founding Generation's concerns about the lawlessness of state legislatures; is contrary to historical practice at the Founding; and undermines the constitutional structure in which the more democratically accountable Congress, rather than the states, is vested with final say over federal elections.

This Article contributes to this growing literature by pointing to the constraints, centered in the constitutional text and history, that limit the ability of legislatures to disregard their state constitutions. Specifically, the Electors Clause of Article II, Section 1 provides, "Each State *shall appoint, in such Manner as the* Legislature *thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress . . . ." This text explicitly raises the question: Who is the "state" on behalf of which the legislature deploys power?*

Using this language as its jumping off point, this Article argues that the "state" referenced in Article II, Section 1 refers to its citizens, whose preferences are conveyed to the state legislature through the state's electorate and in the state constitution. Within a decade of the Founding, the selection of officials by the state's electorate became central to the theory of republicanism underlying the Guarantee Clause of Article IV, which predicated the legitimacy of government on majority support. By the adoption of the Twelfth Amendment, which changed the structure of presidential elections, political elites viewed republican government as requiring that state legislatures and, to a lesser extent, federal officials, be accountable to the people who elected them, accountability that prevented state legislatures from exercising their authority over federal elections in blatant disregard of the people's wishes.

The Article concludes that the independent state legislature theory, particularly in its strongest iteration, runs counter to the democratizing effect that the Twelfth Amendment was intended to have on presidential elections. The theory allows the state legislature to disregard the preferences of the people at a juncture in which they are exercising the oversight and accountability at the core of our system of republicanism: during the election of federal officials. Any version of the doctrine, if adopted, has to respect majoritarian preferences.

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I. INTRODUCTION

The independent state legislature theory provides that state legislatures are not constrained by their respective state constitutions in exercising the authority that the U.S. Constitution delegates to states over federal elections. Effectively, in overseeing the mechanics of federal elections—from regulating the times, places, and manner of federal elections under the Elections Clause of Article I, Section 4,[1] to appointing electors under the Presidential Electors Clause of Article II, Section 1[2]—state legislatures can disregard state court interpretations of these governing documents. Scholars have offered a number of criticisms of this doctrine, noting that it runs counter to the Founding Generation's concerns about the lawlessness of state legislatures;[3] is contrary to historical practice at the Founding and that developed soon after ratification;[4] and undermines the constitutional structure in which the more democratically accountable Congress, rather than the states, is vested with final say over federal elections.[5] Even its defenders have noted that, historically, the theory has varied in scope, suggesting that the concept of a truly independent legislature is not

1. U.S. CONST. art. I, § 4, cl. 1.

2. *Id.* art. II, § 1, cl. 2.

3. *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 737–38 (2001); *see also* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1733 (2021) (noting that state legislatures are almost always controlled by the minority party).

4. Michael Weingartner, *Liquidating the Independent State Legislature Theory*, HARV. J.L. & PUB. POL'Y (forthcoming 2023) (manuscript at 33), https://doi.org/10.2139/ssrn.4044138; Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 149, 177 (2023); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo: *Constitutionalizing Historical Gloss in Law and Democratic Politics*, 15 HARV. L. & POL'Y REV. 15, 16 (2020).

5. Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 4 (2022).

constitutionally mandated.[6] But few scholars have queried how the constitutional text ratified an understanding of republican government, indeed of the "state" itself, that requires state legislatures to act in accordance with majoritarian preferences.

Specifically, the Electors Clause of Article II, Section 1 provides that "[e]ach *State* shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress . . . ."[7] This text explicitly raises the question: Who is the "state" on behalf of which the legislature deploys power? Using this language as its jumping-off point, this Article argues that the "state" referenced in this provision is its citizens, whose preferences are conveyed through the voting public to the state legislature.[8] As this Article will show, within a decade of the Founding, the selection of elected officials by the state's electorate became central to the theory of republicanism underlying the Guarantee Clause of Article IV, which predicated the legitimacy of government on majority support.[9] This was a drastic departure from Founding-era beliefs that the state legislatures—and indeed, presidential electors—would exercise independent judgment to act on behalf of the voters with respect to federal elections.[10] By the early nineteenth century, republicanism required that state legislatures and, to a lesser extent, federal officials, be accountable to the people who elected them, accountability that prevented state legislatures from exercising their authority over federal elections in disregard of the people's wishes.

While state legislatures have significant authority under Articles I and II of the U.S. Constitution, Part II of this Article shows that there has been little discussion in the scholarly literature about how constitutional amendments have altered their authority by shifting state legislatures from a more paternal role, in which their discretion was absolute, to one in which the legislatures act as agents for the peo-

6. Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 10 (2020) [hereinafter Morley, *ISL Doctrine I*] ("[L]ower federal courts in recent years have interpreted the Elections Clause and the Presidential Electors Clause as prohibiting state executive officials, as a matter of federal constitutional law, from regulating federal elections without authorization from the state legislature."); *see also id.* at 17–19 (noting that state legislatures would still be constrained by a number of other federal constitutional provisions); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) [hereinafter Morley, *ISL Doctrine II*].

7. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

8. *See* Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051, 2088–91 (2018).

9. U.S. CONST. art. IV, § 4.

10. *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016) (recounting the events leading up to ratification of the Constitution and the Founders' beliefs).

ple.[11] Debates over the independent state legislature theory have focused almost exclusively on the interpretive question of whether the term "state legislature" within the context of the Elections and Electors Clauses refers to the institutional state legislature or the process of legislative decision-making within the state.[12] The latter view would, of course, subject a state legislature to state court interpretations of their state constitution as the legislature exercises authority over federal elections, particularly those provisions governing the right to vote and the conditions under which voting is exercised.[13]

This view of state legislatures as subordinate to the people and their governing documents is consistent with the constitutional text and structure, which underwent an evolution regarding which entity—the state legislature or the people—can claim to act under the aegis of the state. The text of the Electors Clause of Article II specifically imbues the state legislatures with the authority of the state in the allocation of electoral college votes, by vesting authority in each "State" to appoint electors and then tasking "Legislatures" with the job of choosing the manner of appointment.[14] This delineation between the state and the state legislature within the text is often glossed over in the legal scholarship; however, this distinction is hugely important and finds support in *McPherson v. Blacker*, the case that most proponents of the independent state legislature theory often reference to establish its validity.[15] What counts as the "state" has not been a static concept that, in deciding the appropriate vehicle for awarding electoral college votes, makes the choice between the state legislature and the process of legislative decision-making within the state clear-cut; instead, the myopic focus on the term "state legislature" ignores that subsequent constitutional amendments, most notably the Twelfth Amendment, embraced

11. The Twelfth Amendment was intended to change Article II's meaning, yet most commentators have not assessed its impact beyond the technical changes to the presidential election process. For a notable exception, see EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE (2020).

12. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813 (2015) (holding that the Elections Clause embraces the process of legislative decision-making in the state); *see also* Amar & Amar, *supra* note 5, at 19 ("[T]he public meaning of state 'legislature' was clear and well accepted at the Founding: A state's 'legislature' was not just an entity created to represent the people; it was an entity *created and constrained by the state constitution*.").

13. *See* Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 573 ("Our constitutional system provides two sources of protection for civil rights – the federal constitution and state constitutions. The Independent State Legislature Theory would eliminate the second level of protection and, in this way, make voting rights the least protected civil right.").

14. U.S. CONST. art. II, § 1, cl. 2; *see also* Marisam, *supra* note 13, at 4–5.

15. *See generally* McPherson v. Blacker, 146 U.S. 1 (1892) (interpreting the second clause of Article II of the Constitution and the power it grants state legislatures to direct the manner in which the electors of President and Vice President shall be appointed).

a broader conception of the term "state" than that which existed in 1789.

As Parts III and IV demonstrate, a new understanding of the role of the people within their states, and of Founding-era notions of republican government, emerged after the chaos of the 1800 election. During that election cycle, Congress resolved the stalemate over whether Aaron Burr or Thomas Jefferson would be President, the first of several interventions over the next century after the popular election process failed to definitively identify the candidate with majority support.[16] This dispute, which ultimately led to the Twelfth Amendment, not only changed the process for selecting the President, but also altered our understanding of what constitutes the republican government to which each state must adhere to be consistent with the Guarantee Clause.[17]

As Part III shows, the requirements of majoritarianism, for which James Madison and other Founding Fathers advocated in 1787 as central to the theory of republicanism underlying the Clause, were unclear. Many questions remained unanswered. For example, in what circumstances will the requirement of majority permit states to disenfranchise substantial portions of their populations?[18] Can state legislatures act contrary to the wishes of this electorate in holding the national government accountable at a key moment—during the election of the President and other federal officials—provided that state officials are held accountable for these choices in their own elections?[19]

The Twelfth Amendment answered these inquiries by embracing a vision of Article II in which the legitimacy of the presidency was tied to a decisive electoral college win, sanctioned by a majority of the voters in the state either directly through popular election or indirectly through its state legislature.[20] Because republican principles now applied to the structure of presidential elections, this meant that state legislatures were no longer free to disregard the preferences of their voters in exercising their authority over federal elections.

16. FOLEY, *supra* note 11, at 24–25.

17. *See generally* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1535–62 (2014) (arguing that the Twelfth Amendment gave the President a popular mandate that altered the nature of the Executive and its relationship with Congress).

18. *See generally Session of Tuesday, August 7, 1787*, *reprinted in* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 346, 351, 354 (Gaillard Hunt & James Brown Scott eds., Int'l ed. 1920) [hereinafter *Session of Tuesday*].

19. *See generally* The Federalist No. 43, at 223 (James Madison) (Ian Shapiro ed., 2009).

20. FOLEY, *supra* note 11, at 24–25 (arguing that the Twelfth Amendment anticipated that the President would emerge as the winner of a compound majority of majorities in the states key to his electoral college victory).

Part IV explains how, with the ratification of the Twelfth Amendment, "We the Voters" became more important than the amorphous and ill-defined "We the People" in republican theory, which affected the scope of state power over federal elections. Since its actions in regulating federal elections could render a state unrepublican in form, the Twelfth Amendment made the state legislature accountable to the voting public in how it exercised this authority in real time (as opposed to legislators merely standing to account in their own elections for misdeeds committed while in office).[21] Rather than the legislature, the voters—using the medium of political parties, which had been cause for alarm at the Founding—became the conduits of popular preferences.[22] Thus, one cannot have a conversation about the state legislature, institutional or not, without considering the relationship between this entity and the people it purports to represent. The interpretive project is not, and never has been, just about constitutional text, structure, and history; it is also about how the document's political framework, along with the theory of republicanism upon which it is based, has been augmented by subsequent constitutional amendments designed to facilitate the preferences of the people through the political parties and partisan politics.

Indeed, the Supreme Court, in *Chiafalo v. Washington*, embraced a post-Twelfth Amendment vision of Article II that recognized the connection between presidential electors and the will of the people.[23] Just as the relationship between the state legislatures and the people shifted in the early nineteenth century to make the former more accountable, so too has the relationship between the electors and the people. Previously, the electors, like the state legislature, were constrained only by their respective judgments about what is best for the polity; now both are accountable to the people.[24] Instead of the state legislatures having unencumbered power in how electors are allocated, the debates surrounding the Twelfth Amendment reveal that its founders left this authority in their hands *precisely* because it made them more accountable to the people.[25]

21. *See* U.S. CONST. art. IV, § 4 (guaranteeing the right of citizens to elect government officials who may exercise legislative power on their behalf); *see also* Jonathan Toren, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & LIBERTY 371, 382–84 (2007) (discussing the importance of a guaranteed republican government).

22. *See* FRANITA TOLSON, IN CONGRESS WE TRUST?: ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA (forthcoming 2024); *see also* Hawley, *supra* note 17, at 1540.

23. *See* Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

24. *But see* Charles & Fuentes-Rohwer, *supra* note 4, at 20–22 (arguing that *Chiafalo*'s holding—that states can remove elector discretion—is consistent with post-Founding historical practices and modern American political practices, but is not reflective of the text and structure of the Constitution).

25. In his response to this Article, Professor Richard Epstein disagrees with my conception of the state as a reflection of the preferences of its people, rather than its

This Article concludes that when a state legislature exercises its authority under Article I and Article II to regulate federal elections, the legislature is not acting on its own behalf; rather, it is acting on behalf of the state, which, under our system of republicanism, is identified as its people. Post-Twelfth Amendment, state legislatures could no longer disregard the preferences of their electorates in the selection of state and federal officials, at least not without running afoul of republican principles.

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state legislature, because the Twelfth Amendment, in his words, "did not put the people in charge by any form of direct election." Richard A. Epstein, *A Modern Defense of Simple Rules for a Complex World*, 10 TEX. A&M L. REV. 581, 612 (2023). However, my conception of the state is not an inference about constitutional meaning arising from a political dispute, as Professor Epstein contends; rather, it is an inference about constitutional meaning that is, most importantly, moored in the constitutional text, while also being informed by the broader historical circumstances occurring at the time of this language's adoption.

The Presidential Electors Clause of Article II explicitly makes a distinction between the "state" and the "state legislature," a distinction that would make little sense had the Framers intended these terms to be synonymous. In contrast, Article I's Elections Clause (which is the primary focus of Professor Epstein's response) lacks the textual reference to the "state." *See* 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; but the Congress may at any time by Law make or alter such Regulations . . . .").

These textual differences notwithstanding, Professor Epstein misunderstands how the Twelfth Amendment changed our understanding of the role that the people play in our electoral system relative to their respective legislatures, a change that affected both the Elections Clause and the Presidential Electors Clause. *See* Weingartner, *supra* note 4, at 8 ("Despite their textual differences, the Elections and Electors Clauses share two important features. First, each confers the same substantive power on states and Congress. Second, each delegates that power to states—and state 'legislatures'—in an identical manner. To the extent either disrupts the status quo of state legislatures as constrained by state constitutions, they do so in the same way and to the same degree."). The Elections Clause embodies the same conception of a state legislature constrained by the people as Article II since the Twelfth Amendment changed our understanding of what republican government requires as a general matter. The people do not only express their preferences through direct election. Indeed, constitutional provisions do not have to empower the people in this way to impose a requirement of majoritarianism.

Majoritarianism requires only that the people's preferences be the touchstone of republican government, preferences that can be expressed either directly or indirectly. For example, the people often took matters into their own hands in the face of unresponsive and unrepublican state governments, invoking their right to alter or abolish government. I have written about this phenomenon in the context of the Dorr Rebellion. *See generally* Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2381 (2021). Although the rebellion failed, Rhode Island's General Assembly adopted some changes to its election law in order to liberalize access to the ballot in the Rebellion's wake and bring the state in conformity with republican principles. *Id.* at 2399; *see also* TOLSON, *supra* note 22.

In the end, Article I's text and structure, like that of Article II, demonstrates the undesirability of a strong version of the independent state legislature theory in a system in which the people's preferences can become subordinate to the political stagnation and/or manipulation within and between the elected branches, counter to the requirements of republican government.

II. The "Independent" State Legislature in Constitutional Law and Theory: Fact or Fiction?

In recent decades, the U.S. Supreme Court has repeatedly faced, and punted on, the question of whether state courts have the authority to interpret their state's constitution in a manner that conflicts with the election rules adopted by the state's legislature based on the premise that the state legislature has the final say over all rules governing federal elections.[26] A 2015 Supreme Court decision, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, rejected an interpretation of Article I that placed final decision-making authority in the institutional legislature, holding that the term "legislature" embodied the lawmaking process in the state such that voters, through ballot initiative, could shift authority to draw congressional districts from the state legislature to an independent commission.[27]

But the fundamental question of whether the state legislature is free of state constitutional constraints when setting the rules of federal elections is a question that has lingered since three Justices, in *Bush v. Gore*, suggested that the Florida legislature was not bound by the state supreme court's interpretation of the state constitution because the court's pronouncement was a "significant[ ] depart[ure] from the statutory framework."[28] During the 2020 election, the Trump campaign repeatedly pushed this theory before the Supreme Court, and a number of Justices warmed to the idea that federal courts, not state courts, are empowered to determine whether state legislatures have faithfully executed state election laws in the context of federal elections.[29] More recently, a similar argument emerged in *Moore v. Harper*, which concerned the constitutionality of North Carolina's congressional redistricting plan.[30] A dissent penned by Justice Alito,

26. *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020); Scarnati v. Boockvar, 141 S. Ct. 644 (2020); Moore v. Circosta, 141 S. Ct. 46 (2020); Wise v. Circosta, 141 S. Ct. 658 (2020); Bush v. Gore (*Bush II*), 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (per curiam); *see also* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 738 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* (Alito, J., dissenting from denial of certiorari); *Wis. State Legislature*, 141 S. Ct. at 28–30 (Gorsuch, J., concurring); *see also* Carson v. Simon, 978 F.3d 1051 (8th Cir. 2020).

27. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 787 (2015); *see also* Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L.J. 689, 692–93 (2016); Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 Hastings Const. L.Q. 599, 626 (2008).

28. *Bush II*, 531 U.S. at 122 (Rehnquist, C.J., concurring).

29. Shapiro, *supra* note 4, at 5 ("Repeatedly, Justices Thomas, Alito, and Gorsuch, accused state courts (and in one case, the state Board of Elections) of 'rewriting' the laws, without considering whether those state officials had accurately applied precedent and practice or had appropriately taken into account legislative intent and the broader statutory scheme.").

30. Moore v. Harper, 143 S. Ct. 2065 (2023).

and joined by Justices Thomas and Gorsuch, noted that "[t]his Clause could have said that these rules are to be prescribed 'by each State,' . . . [b]ut that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously."[31] Thus, the strong version of the independent state legislature theory, seemingly endorsed by three Justices in *Moore* and three Justices in *Bush v. Gore*, would mean that state courts cannot interpret state constitutions in a way that unduly constrains the authority of state legislatures to determine how presidential electors will be appointed under Article II, or alternatively, set the times, places, and manner of federal elections under Article I.[32]

The argument that the power to set the rules of federal elections belongs to the state legislature and not the state, writ large, is not new.[33] This premise has been contested in the courts for decades, and

31. *Id.* at 1090 (Alito, J., dissenting) (denial of application for stay).

32. *See* Amar & Amar, *supra* note 5, at 14 (explaining that, under the independent state legislature theory, "the Federal Constitution empowers each state legislature to discharge [its] Article II powers and duties independent from—and unencumbered by—the state constitution and the state judiciary interpreting that constitution"). It would also limit the ability of the governor to have any role in the state legislative process that governs federal elections, even though the Supreme Court has long endorsed such a role. *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932). Professor Shapiro has noted that the maximalist version of the theory would also prevent state legislatures from delegating election administration to local officials. Shapiro, *supra* note 4, at 40.

The maximalist version would also be at odds with historical practice. Congress has ratified delegations of authority over federal elections to local officials who had enormous discretion in implementing the laws that governed federal elections under the Elections Clause, further illustrating that the independent legislature was more fiction than fact and that entity has long been constrained by other actors within both the state's political system and in Congress. *See* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091 (2022); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997 (2021).

Courts do not necessarily have to adopt the most extreme version—where state legislatures have the final say on all matters relating to the administration of federal elections—because there are more modest alternatives available that, if not constitutionally required, are at least textually and historically defensible. Morley, *ISL Doctrine I*, *supra* note 6, at 22, 24–25; *see also* Shapiro, *supra* note 4, at 5 (referring to the "maximalist" independent state legislature theory that not only frees state legislatures from the constraints of the state constitution, but also empowers "the Supreme Court to undertake its own textualist interpretation of state election law, de novo, without deference to state courts' interpretations"). Even Chief Justice Rehnquist's concurrence in *Bush v. Gore* seemed to leave some room here, conceding that "[i]solated sections of the code may well admit of more than one interpretation," but emphasizing that "the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies." *Bush II*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

33. Marisam, *supra* note 13, at 5 (arguing that, as a result of the theory, "other state actors cannot review and reject the election rules produced by a state legislature for federal elections in the state"). Nonetheless, it is not clear how much interpretive room the theory leaves state officials in implementing the dictates of the state legisla-

its application has varied.[34] As Professor Michael Morley painstakingly details in his in-depth assessment of the theory, "the admittedly few state courts to consider the issue generally enforced state laws governing congressional elections, even when they violated state constitutional provisions."[35] Many of these decisions date back to the nineteenth century,[36] but so too does an 1892 Supreme Court decision, *McPherson v. Blacker*, that falls short of treating the state legislature as completely distinct from the state, and therefore free of state law, in regulating federal elections.[37]

In *McPherson*, the Court interpreted Article II to permit the state legislature to allocate electors by congressional district, but the Court resisted an interpretation of Article II that would allow the state legislature to act completely independent of the "state," given that both the state and the state legislature are referenced in Article II.[38]

While rejecting the argument that the allocation of electors has to accord with the conception of the "state" as a unit, rather than delegating to subunits (here, congressional districts) the allocation of electors, *McPherson* did not construe the legislature's power to deprive the state of all authority:

> It is said that this clause of the Constitution provides that this appointment shall be made "in such manner as the legislature may direct," and it is claimed that these words are so plenary as to permit the legislature to take this great power from the sovereign State, and, cutting it up, divide it among fourteen disjointed fractions of the territory of the State, each of which shall choose one elector of President and Vice President of the United States. It is sufficient answer to this to say, that under the form of prescribing the manner in which the State shall appoint, the power is not conferred upon the legislature to deprive the State of all appointing power.[39]

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ture, even if officials cannot act counter to these dictates. *See* Morley, *ISL Doctrine II*, *supra* note 6, at 505 (describing a version of the theory that would require "state and local officials to be able to point to some source of statutory authorization for the policies they adopt or restrictions they enforce for [federal] elections").

34. Morley, *ISL Doctrine I*, *supra* note 6, at 9 ("The 1890 edition of Thomas Cooley's *Constitutional Limitations* treatise reflects this understanding, too. The treatise explained, 'So far as the election of representatives in Congress and electors of president and vice-president is concerned, the State constitutions cannot preclude the legislature from prescribing the "times, places, and manner of holding" the same, as allowed by the national Constitution.'" (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 754 n.1 (6th ed. 1890))).

35. *Id.* at 38–45.

36. *See*, *e.g.*, *id.* at 41 (discussing an 1864 New Hampshire Supreme Court advisory opinion that affirmed the power of the state legislature, under Article I and Article II of the U.S. Constitution, to provide absentee voting for military voters).

37. McPherson v. Blacker, 146 U.S. 1 (1892).

38. *Id.*

39. *Id.* at 11 (argument of Henry F. Duffield, Fisher A. Baker, and Mr. Attorney General for plaintiffs in error).

In other words, the state, tasked by the Constitution with appointing electors, is distinct from the state legislature, responsible for "direct[ing] the manner of appointment."[40] The *McPherson* Court defined the state as "in the ordinary sense of the Constitution, . . . a political community of free citizens, occupying a territory of definite boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[41] Moreover, it would be odd for the Court to conclude that the "state," which it painstakingly distinguishes from its legislature, is constrained by "a written constitution" and "the consent of the governed," while the legislature, arguably the lesser organ as the representative body of the state, is free of such constraints. It is nonetheless unclear post-*McPherson* what constraints the state as a "political community of free citizens" can impose on its legislature as it appoints electors, a task undertaken on behalf of the state.[42]

Subsequent decisions have also failed to answer this question in any conclusive way; in fact, later cases implicitly reject the independent state legislature theory just by virtue of their holdings. For example, the Court in *Davis v. Hildebrandt*, which was decided a quarter century after *McPherson*, upheld an Ohio state constitutional provision that allowed the people to approve or reject all legislation, including regulations governing federal elections.[43] Similarly, in *Smiley v. Holm*, the Court held that state legislatures were constrained by state constitutions in drawing congressional districts under the Elections Clause.[44]

40. *Id.* at 25 (majority opinion).

41. *Id.* (quoting Texas v. White, 74 U.S. 700, 721 (1868)).

42. *McPherson* 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. *See* Amar & Amar, *supra* note 5, at 30–31; *see also id.* at 31 ("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.").

43. Davis v. Hildebrandt, 241 U.S. 565, 569 (1916).

44. Smiley v. Holm, 285 U.S. 355, 355 (1932). As Hayward Smith noted in his seminal work on the independent state legislature theory, *Smiley* and other cases suggest that the state legislature does not operate outside of its state constitution in this context:

> As for Supreme Court precedent, the Court itself admitted in *Bush I* that the leading case on the meaning of the Elector Appointment Clause, *McPherson v. Blacker*, does not address the independence of state legislatures. With respect to intertextual analysis, the Court in *Smiley v. Holm* explicitly rejected the argument that state legislatures under Article I, Section 4 act independently of their constitutions when they prescribe the times, places, and manner of holding elections for Senators and Representatives. And while in *Hawke v. Smith* the Court held that state legislatures *do* enjoy independence when they decide whether to ratify a constitutional amendment under Article V, it was careful to explain that such "expression of assent or dissent" was "entirely different" than the authority "plainly give[n] . . . to the state to legislate [with respect to the manner of holding elections]."

Smith, *supra* note 3, at 737–38 (quoting Hawke v. Smith, 253 U.S. 221, 231 (1920)).

Since the independent state legislature theory, by definition, requires that pronouncements by the state legislature be final with respect to federal elections, these holdings are at odds with its core tenet.

Contrary to later precedents, some Justices have read *McPherson* broadly as an endorsement of the independent state legislature theory,[45] but that decision raises more questions about the scope of the theory than it answers. It is also clear that the constitutional history is not the universal endorsement of an unconstrained legislature that some of the more conservative Supreme Court Justices think the Constitution demands. At most, the framing of Article I and Article II suggest that delegates to both the constitutional convention and the state ratifying conventions disagreed over which entity should have the role of appointing electors or regulating federal elections—either the President, Congress, or the people—but these debates did not resolve the question of whether the state legislature was free of any constraints that the people might impose through their governing documents.[46] At the Founding, "legislature" might have meant "legislature"—or to use Chancellor Kent's definition, "the two houses acting in their separate and organized capacities"[47]—but further clarification would be necessary, one would think, if the term "legislature" by definition permitted that body to disregard the constraints of the governing document that created it.[48] In other words, "legislature" does not mean "king," and "broad" power does not mean "unconstrained" authority.

Such a reading would be contrary to the constitutional structure that denies state legislatures the freedom that this theory would seemingly give. As Vik and Akhil Amar note in a recent critique, the constitutional structure makes Congress, not the states, the final arbiter of disputes over presidential electors and congressional elections.[49] The Elections Clause has this congressional veto directly in its text—allowing Congress to "make or alter" state regulations for any reason, a power that the Supreme Court has described as "paramount."[50] Con-

45. *Bush II*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (per curiam) (citing *McPherson*, 146 U.S. at 13, for the proposition that Article II "'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment").

46. *See* Morley, *ISL Doctrine I*, *supra* note 6, at 28–31.

47. James Kent, Commentaries on American Law 261–62 (John M. Gould ed., 14th ed. 1896).

48. Amar & Amar, *supra* note 5, at 31 (describing Supreme Court precedent limiting state legislatures to the constitution of their state).

49. *Id.* at 4; *see also* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195 (2012) (discussing the power of Congress to veto state electoral schemes).

50. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 9 (2013) (describing this power as "paramount"); *see also* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. Rev. 317 (2019) (discussion of the powers bestowed on Congress by the Elections Clause).

gress has, for example, used this authority to set a deadline for the receipt of absentee ballots from American citizens living overseas, a deadline that sometimes exceeds that set by the legislatures of their respective home states.[51] Article I, Section 5 also allows Congress to judge the elections of its members,[52] and in doing so, Congress can refuse to seat representatives elected in violation of the state constitution regardless of a contrary rule offered by the state legislature. Similarly, the role of Congress and the Vice President in overseeing the electoral college vote, and in the process, determining the validity of a state's electoral slate, also allows the federal government to essentially override contrary determinations by the state legislature.[53]

But even then, these arguments, while persuasive in showing that state legislatures are subordinate to Congress—and possibly federal courts[54]—in the regulation of federal elections, do not resolve if and how state law, as interpreted by state courts, constrains this entity. While the Amars' framing of the constitutional structure as "emphatically democratic" because "more directly democratic institutions" serve as a check on the state legislature is a key insight,[55] their proposal underestimates the extent to which the Constitution, at first embodying a fear of state-level democracy, came to embrace the ability of state-level majoritarian politics to be a constraint on state institutions.

Post-Twelfth Amendment, the Founding Generation envisioned that majoritarian politics would be a stronger constraint on state legislatures than they had been when the notoriously anti-party document was ratified and adopted in 1789. By 1804, state legislatures served as a vehicle for the partisan politics that had come to dominate the electorate, where majoritarian sentiment would dictate electoral outcomes for even those offices, like the President, for which the electorate did not directly select. Thus, the underlying structural logic is not only "emphatically democratic" with respect to the structure of the federal government and its oversight, as the Amars assert; it is also "emphatically democratic" with respect to the ability of majoritarian politics to similarly check state institutions.[56]

Recently, some state courts have been reluctant to free the state legislatures from the will of the people, as manifested through their

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51. *See, e.g.*, Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020) (extending Pennsylvania's ballot receipt deadline for mail in ballots to three days after Election Day, which is the deadline for ballots received under the federal Uniformed and Overseas Citizens Absentee Voting Act).

52. U.S. Const. art. I, § 5, cl. 1.

53. *See* Electoral Count Act of 1887, Pub. L. No. 49-90, 24 Stat. 373 (1887).

54. *See* Amar & Amar, *supra* note 5, at 17–18 (noting that the independent state legislature theory empowers federal courts to interpret state election statutes and determine if there are any constraints on the power of state legislatures).

55. *Id.* at 5.

56. *See id.*

state constitutions. In *Pennsylvania Democratic Party v. Boockvar*, for example, the plaintiffs sought to extend the ballot receipt deadline from Election Day, as specified under Act 77 in the state's election code, to three days after Election Day.[57] In resolving this claim, the Pennsylvania Supreme Court was guided by a state law, the Statutory Construction Act, which states that "the object of all statutory construction is to ascertain and effectuate the General Assembly's intention."[58] Clear text always trumps under the law, but ambiguities within statutory language are resolved by resorting to a comprehensive list of factors to derive legislative intent including "the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations."[59] However, the court supplemented its analysis with a source that was not on this approved list: the state constitution. The "Free and Equal Elections" provision of the state constitution states that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[60]

It is beyond dispute that the deadline for the receipt of absentee ballots, as specified within the statute, is not ambiguous; thus, the Statutory Construction Act would normally require a state court to yield to the clear text. In finding that a three-day extension was nonetheless necessary to protect against massive disenfranchisement of voters, the Pennsylvania Supreme Court relied on the Free and Equal Elections provision of the state constitution as well as state statutory provisions governing emergency situations that interfered with an election.[61] The court found that strict enforcement of the deadline would result in extensive disenfranchisement because of the COVID-19 pandemic, a contention that found wide support during the preceding June 2020 primary election in which election boards were unable to process many of the ballots because of overwhelming demand and post office delays.[62]

The U.S. Supreme Court has also recognized the risk of disenfranchisement inherent in allowing those state officials or actors exercising federal functions to use their individual judgment without the constraints of positive state law, be it statutory, constitutional, or otherwise. In *Chiafalo v. Washington*, the Court held that states could replace or fine presidential electors who did not cast their votes in

57. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 365–66 (Pa. 2020).
58. *Id.* at 355–56 (quoting Sternlicht v. Sternlicht, 876 A.2d 904, 909 (Pa. 2005)).
59. *Id.* at 356 (quoting Pa. Associated Builders & Contractors, Inc. v. Commonwealth Dep't of Gen. Servs., 932 A.2d 1271, 1278 (Pa. 2007)).
60. *Id.* (quoting PA. CONST. art. I, § 5).
61. *Id.* at 370 (finding that the COVID-19 pandemic equates to a natural disaster within the context of the statutory emergency code).
62. *Id.* at 363–64.

accordance with the winner of the state's popular vote, as required by state law.[63] *Chiafalo*, of course, presented a different issue than that present in *Boockvar*, even though both cases arose in the context of a presidential election. While *Boockvar* dealt with the mechanics of administering the election,[64] in *Chiafalo* several electors argued that they had independent discretion to cast their ballots for the candidate of their choice after the election, even if their choice was not the choice of the people.[65]

There is, nonetheless, one key similarity between the two cases—the risk of massive disenfranchisement of everyday voters contrary to their right to vote as protected within their governing document. In rejecting the electors' argument under Article II, the Court recognized the role of both political parties and electors as conduits of majority preferences such that states can punish and remove electors who cast ballots for individuals other than the winner of the state's popular vote in the presidential election.[66] The Court endorsed a post-Twelfth Amendment vision of the Electoral College in which the Amendment "brought the Electoral College's voting procedures into line with the Nation's new party system"[67] and codified the expectation that the elector would "'vote the regular party ticket' and thereby 'carry out the desires of the people' who had sent him to the Electoral College."[68] Or, as the *Chiafalo* majority succinctly put it: "No independent electors need apply."[69]

Similarly, the law of Pennsylvania prioritized the right to vote and, by implication, majoritarian politics by constitutionalizing that right to vote, rather than the ballot receipt deadline or any of the provisions of Act 77 that dealt with the administration of the election itself. The Pennsylvania Supreme Court endorsed the same vision of republican government embraced by the Twelfth Amendment, finding that the clear statutory language of Act 77 constituted an "as-applied infringement of electors' right to vote."[70] As detailed in the next Part, post-Twelfth Amendment republicanism, which centers the voting public as the core of majoritarian politics, explains why the court's interpretation of the state constitution to require "all aspects of the electoral process . . . be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees . . . a

63. Chiafalo v. Washington, 140 S. Ct. 2316, 2318 (2020).

64. *See Boockvar*, 238 A.3d at 352–54.

65. *See Chiafalo*, 140 S. Ct. at 2325.

66. *Id.* at 2323–24.

67. *Id.* at 2321 (citing Ray v. Blair, 343 U.S. 214, 224 n.11 (1952)).

68. *Id.* at 2327 (quoting *Ray*, 343 U.S. at 224 n.11); *see also id.* (noting that the Twelfth Amendment "both acknowledg[ed] and facilitat[ed] the Electoral College's emergence as a mechanism not for deliberation but for party-line voting").

69. *Id.*

70. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 369 (Pa. 2020).

voter's right to equal participation in the electoral process" trumped a law that was otherwise facially constitutional.[71]

In reviewing the decision by the Pennsylvania Supreme Court and also a district court that issued a similar extension in Wisconsin, several Justices seeking to breathe life into the independent state legislature theory sought to elevate the prerogatives of the state legislature no matter the impact on the voter.[72] Justice Kavanaugh, in particular, explicitly endorsed a reading of Article II that requires the intent of the state legislature to always prevail.[73] However, in finding that states could shackle their electors to popular sentiment, both *Chiafalo* and *Boockvar* implicitly recognized that during our country's first decades, political elites reimagined republicanism to carve out a larger role for partisan politics and majoritarian preferences than in the decade immediately following the Founding.

The Founding Generation contemplated that the structure of republican government—and the electorate that would safeguard its principles—would be determined by the states.[74] But political elites challenged this intention within a few short years due to the rise of partisan political competition by proposing the Twelfth Amendment.[75] By 1804, republican theory had evolved in ways that fundamentally altered the relationship between the state legislature and the people.[76]

III. What Is Republican Government?: The Voters Versus the State Legislature as the Gatekeepers of Majoritarian Preferences

Scholars have documented the ways in which Founding-era practice at both the state and federal level refuted arguments that state legislatures can act outside of the strictures of their state constitutions in regulating federal elections. Michael Weingartner, for example, points to a number of state constitutional provisions at the Founding that circumscribed the state legislature's authority to regulate federal elections, precedents that stand at odds with an interpretation of Article II that would bar similar efforts to constrain the authority of these entities.[77] Scholars have also looked to this history to reject arguments that state legislatures only have to abide by procedural regulations in the state constitution and can act independent of any substantive constraints. Hayward Smith, for example, points to statements by framers of the Electors and Elections Clauses who voiced the expectation that

71. *Id.* (quoting League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018)).
72. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020).
73. *See id.* at 34 n.1 (Kavanaugh, J., concurring).
74. *See* Smith, *supra* note 3, at 743.
75. Foley, *supra* note 11, at 21–25.
76. *Id.* at 44–45.
77. Weingartner, *supra* note 4, at 36–37.

state legislatures would be substantively constrained, joining a chorus of scholars who also look to Founding-era evidence that legislatures acted pursuant to the ordinary lawmaking processes of their states in regulating federal elections.[78]

But no scholar has examined how the Twelfth Amendment ratified an understanding of republican government that, contrary to how it was conceived in 1789, required government to be accountable to a majority of the voters. Republicanism, despite being a constitutional requirement for the composition of state political systems, has never had a universally applicable definition.

James Madison and the other Founding Fathers, other than drawing knowledge from the great republics of classical antiquity, treated the concept as unnecessary of explanation and ingrained in the American psyche.[79]

In *The Federalist No. 39*, Madison described a republic as a "government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[80] By partaking in the selection of their rulers, who would presumably be virtuous individuals committed to translating popular preferences into policy, the people would happily submit to their authority in return.[81] And a republic, unlike a democracy, could better mitigate the mischiefs of faction.[82] By delegating decision-making authority to a smaller representative body—not beholden to any special interests—to oversee a greater number of citizens spread out over a large geographic area, it makes it unlikely that government would suc-

78. Smith, *supra* note 3, at 757; *see also* Grace Brosofsky et al., *State Legislatures Cannot Act Alone in Assigning Electors*, DORF ON LAW (Sept. 25, 2020, 12:02 PM), http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html [https://perma.cc/2QE9-V22T]; Amar & Amar, *supra* note 5, at 20 ("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.").

79. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 13 (1972) ("[T]he word 'republican' may well not have had any single and universal denotation to the men who inserted it into the guarantee clause. It may, in fact, have had no meaning at all. John Adams complained late in life that 'the word *republic* as it is used, may signify anything, everything, or nothing.'"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 49 (1969) ("[T]he principles of republicanism permeated much of what the colonists read and found attractive. In fact, 'the true principles of republicanism are at present so well understood,' so much taken for granted, so much a part of the Americans' assumptions about politics, that few felt any need formally to explain their origin.").

80. THE FEDERALIST NO. 39, at 193 (James Madison).

81. *See generally* THE FEDERALIST NO. 10, *supra* note 19, at 51 (James Madison).

82. *See id.* at 50–51.

cumb to "unworthy candidates[,] . . . practise[ing] with success the vicious arts, by which elections are too often carried."[83]

But key to this scheme is that these virtuous intermediaries would be responsible for implementing the preferences of the majorities that they govern. *The Federalist No. 43* presented the Guarantee Clause as a bulwark against "aristocratic or monarchical innovations," with Madison noting:

> Whenever the States may chuse to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which it is presumed will hardly be considered as a grievance.[84]

But republicanism's historical connection to monarchy, intended to counter the then-prevailing view of kings as all-powerful rulers accountable only to God and not the people, led many opponents of the Constitution to question this new government that the Founding Generation sought to create.[85] But those who would later govern the new nation under the party label of "Federalists" refuted that the new government would institute a monarchy or oligarchy. By creating a virtuous intermediary to translate the preferences of the majority—the one clear purpose of republican government—Madison believed that the geographic dispersiveness of the population and the patriotism of the chosen representatives would prevent those who lack virtue from obtaining power, setting up a monarchy or aristocracy, and enacting countermajoritarian policies.[86] Indeed, there was almost universal agreement among the members of the Founding Generation that, in addition to obligating the federal government to come to the aid of states facing rebellion,[87] the Guarantee Clause required that states en-

83. *Id.* at 52.

84. THE FEDERALIST NO. 43 *supra* note 19, at 223 (James Madison).

85. *See, e.g.*, "A Columbian Patriot" [Mercy Otis Warren], Observations on the Constitution (Feb. 1788), *reprinted in* 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 284, 288–89 (Bernard Bailyn ed., 1993); ESSAYS OF BRUTUS 1 (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 363, 363–72 (Herbert J. Storing ed., 1981). Even where a king was a hereditary ruler, republican theorists argued that the king was accountable to law (not just God) and that his power derived from the trust of the people. *See generally* JOHN MILTON, THE TENURE OF KINGS AND MAGISTRATES (1650), *reprinted in* JOHN MILTON: THE MAJOR WORKS 273 (Stephen Orgel & Jonathan Goldberg eds., Oxford Univ. Press reissue ed. 2008).

86. *See* THE FEDERALIST NO. 10, *supra* note 19, at 51 (James Madison).

87. *See* THE FEDERALIST NO. 43, *supra* note 19, at 222–24 (James Madison); *see also* Toren, *supra* note 21, at 405 (arguing that the purpose of the Clause is to "(1) [p]rotect[ ] the existing states from upheaval; (2) [*p*]*revent*[ ] the states from changing their government to one not republican; and . . . (3) [p]rotect[ ] the union as a whole from disintegration").

franchise some portion of their population to legitimize these intermediaries making policy decisions.[88]

In short, republicanism required accountability.[89] To this end, periodic elections ensured that elected officials continued to act in the interest of the whole and defy the notion of a hereditary ruler or ruling class.[90] In late eighteenth century republican theory, "there were no hereditary distinctions, no 'empty ornament and unmeaning grandeur,' where only sense, merit, and integrity commanded respect" so that the silent majority excluded from the community of voters had an equal opportunity to become a part of it (at least in theory).[91] Thomas Jefferson corroborated this sentiment, writing to Alexander von Humboldt, a prominent Prussian philosopher and scientist, that "[t]he first principle of republicanism is that the lex majoris partis [majority rule] is the fundamental law of every society of individuals of equal rights."[92]

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88. Countless books and law review articles discuss what constitutes a republican form of government, and most scholars agree that republicanism requires that states extend political rights to their citizens. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 122–23 (1980) (noting that the Guarantee Clause could be the source of the Court's voting rights jurisprudence); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (arguing that republican government requires that "the structure of day-to-day government—the Constitution—be derived from 'the People' and be legally alterable by a 'majority' of them").

89. As Roger Sherman argued during the ratification debates, a republican government is one that has three branches of government, including legislative and executive branches determined "by periodic[ ] elections, agreeabl[e] to an established constitution; and that what especially denominates it a *republic* is its dependence on the *public* or [the] *people at large*, without . . . hereditary powers," a view that appeared to be fairly common during this period. Letter from Roger Sherman to John Adams (July 20, 1789), *in* 6 THE WORKS OF JOHN ADAMS 437 (Charles Francis Adams ed., 1851); *see* THE FEDERALIST NO. 39, *supra* note 19, at 193 (James Madison) (defining a republican government as "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour"); *see also* WIECEK, *supra* note 79, at 17 ("The negative senses of 'republican,' that is, nonmonarchical and nonaristocratic, commanded the assent of most Americans in 1787. Beyond this it is unsafe to generalize about the precise meaning of the term."); WOOD, *supra* note 79, at 53 ("The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution.").

90. 4 THE WORKS OF JOHN ADAMS, *supra* note 89, at 437; WOOD, *supra* note 79, at 46–47.

91. WOOD, *supra* note 79, at 47.

92. Letter from Thomas Jefferson to Alexander von Humboldt (June 13, 1817), *in* 11 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES, 19 JANUARY 1817 TO 31 AUGUST 1817, at 434, 434 (J. Jefferson Looney ed., 2014); *see also* Charles Pinckney, Speech at the Federal Convention (May 14, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (Jonathan Elliot ed., 1891) ("A republic [is] where the people at large, either collectively or by representation, form the legislature."); JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 312 (1820) ("[The] end [of this

The requirement of majority rule was therefore an explicit limit on the ability of the states to substantially disenfranchise their populations; republicanism required that *someone* be able to vote.[93] In fact, James Madison explicitly connected the right to vote to notions of republican government in *The Federalist No. 52*, noting that "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government."[94] The emphasis on the right to vote as the source of the people's authority—and the explicit link between state and federal electors in Article I, Section 2—was intentional.[95] In *The Federalist No. 45*, Madison observed that "[e]ven the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures."[96] Similarly, a supporter of the Constitution calling himself "A Landholder" wrote a spirited defense in *The Connecticut Courant*, noting that, among the advantages of the new government,

> [e]very freeman is an elector. The same qualifications which enable you to vote for state representatives, give you a federal voice. It is a right you cannot lose, unless you first annihilate the state legislature, and declare yourselves incapable of electing, which is a degree of infatuation improbable as a second deluge to drown the world.[97]

The link between state and federal electors in the Constitution's text not only ensured that the qualifications of either group would be coextensive, but also forced states to define the political community for state and federal elections as republican theory required: as a sufficient amount of voters who had the requisite independence to cast a ballot without being beholden to more powerful overlords.[98] The Guarantee Clause, and its requirement of republicanism, became a floor below which no state could fall in crafting this community.

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guarantee] is 'a republican form of government.' The meaning of this expression is not so unsettled here as in other countries, because we agree in one descriptive character, as essential to the existence of a *republican form of government*. This is representation. We do not admit a government to be even in its origin republican, unless it is instituted by representation, nor do we allow it to be so, unless its legislation is also founded upon representation.").

93. Tying the qualifications of federal electors to those qualified to vote for the most numerous branch of the state governments, as Article I, Section 2 dictates, implicitly mandated federal intervention should the states fail to designate voters. *See* U.S. CONST. art. I, § 2, cl. 1.

94. THE FEDERALIST NO. 52, *supra* note 80, at 182 (James Madison).

95. U.S. CONST. art. I, § 2.

96. THE FEDERALIST NO. 45, *supra* note 80, at 103–04 (James Madison).

97. "A Landholder" [Oliver Ellsworth], *Reply to Elbridge Gerry*, CONN. COURANT (Nov. 26, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, *supra* note 85, at 236–37 (arguing that "State representation and government is the very basis of the congressional power proposed").

98. THE FEDERALIST NO. 52, *supra* note 19, at 267–68 (James Madison).

Instead, delegates to the convention worried about a different problem, emphasizing concerns about disqualifying voters who would otherwise be eligible to vote under state law, fearing that this development could lead the people to ultimately reject the proposed constitution.[99] For example, Oliver Ellsworth argued that "[t]he people will not readily subscribe to the Nat[ional] Constitution if it should subject them to be disfranchised. The States are the best Judges of the circumstances [and] temper of their own people."[100] Similarly, George Mason queried, "[W]hat will the people there say, if they should be disfranchised[?]"[101] He concluded that "[a] power to alter the qualifications would be a dangerous power in the hands of the [Federal] Legislature."[102] A majority of the delegates agreed that the structure of Article I, Section 2, which lets states determine voter qualifications for federal elections, would avoid the political blowback that might come from having uniform federal criteria that explicitly disenfranchised those otherwise qualified to vote under state law.[103] An alternative arrangement could be construed as disenfranchising those already within the community of voters, which was fundamentally inconsistent with republican ideals.

After the ratification of the Constitution, republicanism—and its focus on majority rule—was further refined through constitutional amendment and the entry of new states into the union. For the Founding Generation, the structure of republican government—and the electorate that would safeguard its principles—should be determined by the states. But, as the next Part shows, political elites challenged this intention within a few short years following ratification, due to the rise of partisan political competition, by proposing the Twelfth

99. *Session of Tuesday*, *supra* note 18, at 354. Benjamin Franklin argued that he did not think "the elected had any right in any case to narrow the privileges of electors" because the elected often used subterfuge to circumscribe the right to vote. *Id.* (comments of Benjamin Franklin). As James Madison described in his notes:

> [Franklin] quoted as arbitrary the British Statute setting forth the danger of tumultuous meetings, and under that pretext narrowing the right of suffrage to persons having freeholds of a certain value; observing that this Statute was soon followed by another under the succeeding Parliam[en]t subjecting the people who had no votes to peculiar labors & hardships. He was persuaded also that such a restriction as was proposed would give great uneasiness in the populous States. The sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disfranchised, and there are a great many persons of that description.

Id.

100. *Id.* at 351 (comments of Oliver Ellsworth) (arguing that "[t]he right of suffrage was a tender point, and strongly guarded by most of the State Constitutions").

101. *Id.* (comments of George Mason).

102. *Id.*

103. *Id.* at 354 (comments of John Rutledge) (arguing that "restraining the right of suffrage to the freeholders a very unadvised [idea]" because it "would create division among the people [and] make enemies of all those who should be excluded"); *see also id.* at 351 (comments of George Mason) (noting that "[e]ight or nine States have extended the right of suffrage beyond the freeholders").

Amendment. No longer were states free to undermine majoritarian preferences in how they constructed their electorates. Popular politics, embraced by the Amendment, would now dictate outcomes that reflected the preferences of the voters rather than those of the state legislatures.

IV. Shifting from "We the People" to "We the Voters": The Twelfth Amendment as an Expression of Popular Sovereignty

In *Chiafalo v. Washington*, the Supreme Court held that states can fine and/or remove electors who fail to discharge their duties in accordance with the popular vote, as required by state law.[104] Much of the recent scholarship on *Chiafalo* focuses on the majority's use of "historical gloss" to interpret the Constitution, or its reliance on over 200 years of historical practice to vindicate its conclusion that the Twelfth Amendment requires that electors follow state law rather than exercise independent judgment.[105] Some scholars have questioned the validity of this interpretive move, with Professors Charles and Fuentes-Rohwer arguing that the *Chiafalo* majority used historical gloss to trump the plain meaning and structure of Article II, which permits electors to exercise judgment.[106] The Court did so, according to these scholars, as a way of updating "a particular and modern view of political participation—which is best reflected by American political practices—by rejecting an alternative and anachronistic view—which is best reflected by the text and structure of the Constitution."[107]

However, the ratification of and debates surrounding the Twelfth Amendment illustrate that arguments against elector discretion go well beyond post-Founding historical practice to endorsement, as the text of the Twelfth Amendment was adopted with a particular understanding of the word "State" in Article II as it relates to the role of the people in presidential politics. According to its text, the Twelfth Amendment, ratified in 1804, requires that electors vote for the President and Vice President on separate ballots; additionally, the Amendment provides that if no candidate garners a majority of the electoral votes, the top three vote-getters (instead of the top five as under the original Constitution) will go to the House of Representatives, where the candidate who receives a majority of the votes (with each state delegation having one vote) becomes President.[108] This is not just a technical fix. As this Part will show, the Amendment established that republican principles should dictate the structure of presidential elec-

104. Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020).
105. *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note 4, at 19.
106. *Id.* at 31.
107. *Id.* at 19.
108. U.S. Const. amend. XII.

tions and required the outcome to reflect the will of a majority of the state's voters, rather than the people writ large.

The Federalist Papers foreshadow this shift by explicitly tying notions of the virtue central to effective governance to the republic's size. Alexander Hamilton, quoting Montesquieu, noted that the federative republic "may support itself without any internal corruption" and that "[a]s this government is composed of small republics, it enjoys the internal happiness of each, and with respect to its external situation it is possessed, by means of the association, of all the advantages of large monarchies."[109] The internal happiness of each state, or "small republic," likewise turned on a need to "break and control the violence of faction" even from within, a threat that, if magnified across jurisdictions, could undermine a "well constructed Union," as Madison warned in *The Federalist No. 10*.[110] Thus, the shift from prioritizing the preferences of unpredictable numerical majorities to those of smaller electoral majorities more likely to act with virtue was probably inevitable.

By tying the legitimacy of the presidency to the selection of electors who translate the preferences of the majority that either voted for them or the state legislature that appointed them, the Twelfth Amendment endorsed a view of republican government that is voter-, rather than population-, centered. In altering the 1787 design, the framers of the Twelfth Amendment, both in what they changed about the original Electoral College and in what they left the same, clarified that "majoritarianism" centered on political influence rather than population. The text preserved the ability of state legislatures to choose how to select their electors, consistent with the original design.[111] And its use of passive voice regarding the tallying of electoral college votes ("then those votes . . . shall be counted") is power that has evolved over time to allow Congress to affirmatively weigh in on the state process for selecting electors.[112] But the Jeffersonian conception of majoritarianism, unlike the Madisonian vision, anticipated that the President would garner the support of those who held the political power in the state, either through the popularly elected state legislature that chooses electors or through electors selected by voters directly.[113]

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109. THE FEDERALIST NO. 9, *supra* note 19, at 44–45 (Alexander Hamilton).

110. THE FEDERALIST NO. 10, *supra* note 19, at 47 (James Madison).

111. *See* U.S. CONST. amend. XII.

112. *See* Electoral Count Act of 1887, Pub. L. No. 49-90, 24 Stat. 373 (1887). This statute clarified the outline of Congress's power to "count the votes" in discarding or accepting slates of electors, some of which were allocated by popular vote. Congress passed this statute in response to the controversial election of 1876 and the close elections of 1880 and 1884.

113. *See* FOLEY, *supra* note 11, at 31–32, 34; *cf.* 13 ANNALS OF CONG. 492 (1803) (statement of Rep. John Clopton) ("For, sir, however respectful the public attention might have been towards the person who thus becomes Chief Magistrate of the Union, contrary to the intention of the [voters], . . . it cannot be expected that with the

While the requirement that electors vote for President and Vice President on separate ballots might have seemed like a commonsense response to the 1800 Electoral College tie between Thomas Jefferson and Aaron Burr that almost plunged the country into chaos, this aspect of the Twelfth Amendment was deeply tied to respect for the principle of majority rule.[114] By tinkering with the 1787 system, the framers of the Twelfth Amendment intended that the President emerge from an electoral process in which he (or she) is the preference of a compound majority of majorities in states central to his (or her) electoral college victory rather than a mere plurality winner.[115] A mere plurality winner, in contrast, would undermine republicanism's commitment to majority rule.[116] Thus, Aaron Burr emerged as a presidential contender in the election of 1800 despite not being the popular preference, contrary to republican ideals in which the preferences of the people are supposed to hold sway.

During debates on the Amendment, Democratic Republicans emphasized the centrality of majority rule to our system of representative government and, in particular, the danger of electing someone to the presidency who was not the choice of the voters.[117] According to Virginia congressman John Clopton, "When one person is intended for an office and another person actually obtains it, such election, if indeed it can properly be called an election, is not conformable to the will of those by whom it was made."[118] Similarly, Maryland representative Robert Wright argued that the proposed Amendment was not a "party question," but transcended party because it sought to "prevent men not intended to be chosen from being edged into power" and "to set up a man who had not a single vote."[119] The Jeffersonians were, according to Professor Edward Foley, "much more committed to this

acquisition of the office, under these circumstances, he will receive the public confidence.").

114. *See* FOLEY, *supra* note 11, at 44, 161.

115. *Id.* at 41, 44–45.

116. *Id.* at 41. Professor Foley explains:

> Adhering to federalism required Republicans in 1803 to retain the idea, embedded in the Electoral College of 1787, that majority rule in a federal system entails a compound majority-of-majorities. Republicanism, as a philosophy, demands majority rule at the state level. A federal majority is then formed from an overall majority of these subsidiary state-level majorities.

Id. at 30.

117. *See* 13 ANNALS OF CONG. 492 (1803); *see also id.* at 490 (statement of Rep. John Clopton) ("[I]n a Government constituted as our Government is, wherein all the constituted authorities are the agents of the people, the suffrages given for the election of those agents ought ever to be a complete expression of the public will . . . .").

118. *Id.* at 491. *But see id.* at 520, 524, 530 (statement of Rep. Benjamin Huger) (arguing that Representative Clopton has forgotten that "the Government under which we live is formed upon Federative no less than upon Republican principles" and that the proposed amendment would lessen the power of the states).

119. *Id.* at 200–01 (statement of Sen. Robert Wright).

federalist form of majoritarianism than the Philadelphia Convention delegates had ever been" by allowing states in which they were not a majority to continue to allocate electoral votes based on the popular will post-Twelfth Amendment.[120] They also believed that federalism demanded that they leave to each state the decision of how to allocate its electors,[121] but as usual, partisanship tended to color what would otherwise appear to be principled positions.

Importantly, the framers of the Twelfth Amendment anticipated that each state's voting population would be organized by political parties, facilitating majoritarian principles in a way that was unthinkable in 1787.[122] The expectation that republicanism would be filtered through partisan politics is precisely why the Jeffersonians left to each state the decision of how to allocate its electors, recognizing that their party organization was dominant in enough states to secure an electoral victory moving forward.[123] Professor Foley observes:

> [M]embers of the Eighth Congress . . . believe[d] that states would exercise their power to appoint presidential electors in a way that reflected the prevailing political perspective within each state. In particular, once intense two-party competition emerged during the elections of 1796 and 1800, politicians from both parties understood that state legislatures would select methods of appointing electors that would enable the dominant party in each state to promote its own presidential candidate.[124]

Even in states where the Republicans were not a majority, they had, in 1800, been able to beat back efforts by the Federalist-dominated state legislature in Maryland to use a general ticket system in the allo-

120. FOLEY, *supra* note 11, at 30–31.

121. *Id.* at 32–33.

122. *See* NOBLE E. CUNNINGHAM, JR., THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789–1801, at 260 (1957) ("Between the inaugurations of Washington and Jefferson, the two-party system became rooted in American politics. So important had the role of parties become in the political life of the nation that the Constitution itself was soon to be amended to recognize the place of parties, whose rise had made the constitutional provisions for the election of the president and the vice president outdated and unrealistic and had led to the troublesome tie between Jefferson and Burr.")

123. *See* FOLEY, *supra* note 11, at 32.

124. FOLEY, *supra* note 11, at 16; *see also id.* at 189 n.15 ("[I]t is important to emphasize that the Jeffersonians of 1803, in their Electoral College redesign, were looking forward to Jefferson's re-election of 1804 at least as much as they were looking backward to his victory in 1800. Their conception of themselves as the majority party, to be vindicated as such by the redesigned Electoral College in 1804, was based in part on the strength of their midterm victories in 1802 and their still-increasing popularity after the Louisiana Purchase. Finally, the actual voting in 1804 vindicated the Jeffersonians on this crucial point."). Not only were political parties the way to gauge which candidates enjoyed majority support among voters in a particular state, Professor Foley illustrates that the system was ill-equipped to deal with third-party candidates precisely because of the difficulty that individual encounters as he (or she) attempts to amass the popular support that the Jeffersonian experiment envisioned. *See id.* at 4–5, 7.

cation of electors; that fall, Republicans were able to win five electors.[125] The prospect of minor success in Federalist domains further reinforced that leaving the decision to the states would not imperil Republican political prospects.[126] The Twelfth Amendment therefore embodied a type of *voter-centered* majority rule that conflated majoritarianism with major party preferences, and outcomes contrary to the relative political power of the parties were immediately suspect.[127]

For example, Thomas Jefferson corresponded with Speaker of the House Nathaniel Macon regarding Democratic Republican Party success in the 1802 midterms in North Carolina, letters that illustrate this conflation of majoritarianism and majority political party rule. Although their party won 11 of the state's 12 congressional seats, Macon sought to reassure Jefferson after the latter questioned the legitimacy of the election of the lone Federalist from a predominately Republican district:

> [T]he Republican cause is daily gaining ground with us, not only the late elections but the candid acknowledgment of many that they have been deceived fully confirm the fact; . . . and it is worthy of notice that the district which sends the only federalist from the state to Congress, gave a majority of votes to Republican candidates . . . .[128]

125. *The Election of 1800–1801*, LEHRMAN INST., https://lehrmaninstitute.org/history/1800.html#state [https://perma.cc/W9LF-AB64].

126. Letter from Gabriel Duvall to Thomas Jefferson (Dec. 14, 1802), *in* 39 THE PAPERS OF THOMAS JEFFERSON, 13 NOVEMBER 1802 TO 3 MARCH 1803, at 156, 156 (Barbara B. Oberg ed., 2012) (providing information to Jefferson as to "the probable result of a choice of Electors in Maryland by a general ticket" and concluding that district elections are unpopular but "in any rational division of the State, the Republican candidate will succeed in seven of the Eleven districts"); Letter from John Beckley to James Madison (May 5, 1803), *in* 4 THE PAPERS OF JAMES MADISON, 8 OCTOBER 1802–15 MAY 1803, at 574 (Mary A. Hackett et al. eds., 1998) ("N York elections are decisively democratic thro' the State, for both branches, and leave no doubt that the mode for choosing Electors in that state for the presidential Election will be such as the democrats shall prescribe.").

The fact that the relative odds of Republican political success at the state level was part of the calculus behind the Twelfth Amendment was contrary to the expectations of Founders like Alexander Hamilton, who thought that the proposed Amendment would both "strengthen[ ] the connection between the Fœderal [sic] head and the people" and "diminish[ ] the means of party combination, in which also the burning zeal of our opponents will be generally an overmatch for our temperate flame." Letter from Alexander Hamilton to Gouverneur Morris (Mar. 4, 1802), *in* 25 THE PAPERS OF ALEXANDER HAMILTON, JULY 1800–APRIL 1802, at 558, 559 (Harold C. Syrett ed., 1977).

127. CUNNINGHAM, *supra* note 122, at 259 (noting that "[e]ffective organization and aggressive campaigning were the keys to Republican success in the election of 1800. In their attention to party organization and machinery, the Republicans remained constantly aware of the necessity of maintaining popular support. . . . The nature of democracy made it imperative that the people should play a prominent part in party activities, and political machinery was geared to win their votes.").

128. Letter from Nathaniel Macon to Thomas Jefferson (Sept. 3, 1803), *in* 41 THE PAPERS OF THOMAS JEFFERSON, 11 JULY TO 15 NOVEMBER 1803, at 311, 311 (Barbara B. Oberg ed., 2014).

The fact that the Federalists were still competitive in some places, contrary to what Republicans perceived to be majority sentiment, led Republican Thomas McKean, then Governor of Pennsylvania, to note in an 1803 letter to Jefferson that "[t]he people do not always know their own good; and when they do, it is not always pursued . . . ."[129] Yet the fact that Republicans had been successful in the last general election in Pennsylvania assured him that "their late conduct however in this State has not depreciated them, nor do I believe that it will in the next election of President."[130] He cautioned, however, that unless the Constitution was amended, the choice of Vice President could still go to someone who lacked majority support. "I believe," McKean noted, "[the twenty electors] will surrender the choice of Vice-President to the Tories, unless Congress will propose an amendment to the Constitution for discriminating the characters to be voted for."[131]

The centrality of partisanship to the new Amendment was not in doubt.[132] For example, McKean wrote to Jefferson in January 1804 upon signing an Act to ratify the Twelfth Amendment, "We shall, if this amendment shall be adopted by thirteen States, (which I believe it will, tho' probably no more, unless the effects of party shall in the mean time cease) have our next President and Vice-President genuine Republicans, otherwise I doubt it."[133] Moreover, the election of 1800 had led to the decline of the Federalist Party and, by implication, any meaningful opposition to both ratification and the path to the presidency.[134] In elections prior to the ratification of the Twelfth Amend-

129. Letter from Thomas McKean to Thomas Jefferson (Feb. 7, 1803), *in* 39 THE PAPERS OF THOMAS JEFFERSON, *supra* note 126, at 471, 472.

130. *Id.* (promising Jefferson that "in 1804 the twenty electors of President & Vice-President will give their unanimous vote for the present Chief Magistrate").

131. *Id.*

132. *See* Letter from DeWitt Clinton to Thomas Jefferson (June 10, 1802), *in* 37 THE PAPERS OF THOMAS JEFFERSON, 4 MARCH TO 30 JUNE 1802, at 573, 573 (Barbara B. Oberg ed., 2010). Jefferson noted that the prospects of the Republican Party in South Carolina were "very good" and included in his missive a pamphlet that, according to an editorial note, was believed to be *Considerations on the Propriety of Adopting a General Ticket in South-Carolina, for the Election of Representatives in Congress and Electors of President and Vice-President of the United States. Addressed to the People of South Carolina by Crito*. *Id.* at 573–74.

133. Letter from Thomas McKean to Thomas Jefferson (Jan. 8, 1804), *in* 42 THE PAPERS OF THOMAS JEFFERSON, 16 NOVEMBER 1803 TO 10 MARCH 1804, at 243, 244 (James P. McClure ed., 2016).

134. The fact that a bill had been introduced in Massachusetts to divide the State into districts for the purpose of chosen presidential electors in 1803 is notable, given that the State had traditionally been a Federalist stronghold. *See* Letter from Joshua Danforth to Thomas Jefferson (July 16, 1803), *in* 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 128, at 60, 61 ("A motion will be made at the next Session of the Legislature of Massachusetts to divide the State into districts, for the Choice of electors of President &c, but it is very uncertain whether it will succeed, if it should, Massachusetts will give eight or nine Votes to the republican Candidate for President."); *see also* Letter from Joseph Barnes to Thomas Jefferson (Mar. 25, 1804), *in* 43 THE PAPERS OF THOMAS JEFFERSON, 11 MARCH TO 30 JUNE 1804, at 86, 88 (James P. McClure ed., 2017) ("In fine; so highly do I approve, & so ardent is my zeal for the

ment, the Republicans were "endeavoring not only to beat [the Federalists]," according to a New York partisan, but "to beat them *soundly*; that they may be still next Spring and not attempt to intermeddle in the Legislature which is to appoint Electors for P. U S & V.P."[135]

The premise that political parties should filter majority preferences in the selection of the President was not without its controversy. By putting power back in the hands of the people, the Amendment reduced the likelihood that the presidency would be thrown to the House of Representatives, where all states—big and small—enjoyed equal voting power in the selection of the President and could maneuver the presidency into the hands of someone not preferred by a majority of voters.[136] In addition, delegations could only select among the top three candidates instead of the top five, thereby decreasing the likelihood that a political minority could conspire in the election of a fourth or fifth place finisher lacking in majority support. Some representatives opposed the Amendment because of this perceived shift of authority from the states (particularly the smaller states) to the people, given that the Amendment would make it less likely that presidential elections would be resolved by the House of Representatives, where each state delegation has one vote, and would be instead left to the public that was, in the words of one representative, "agitated with violent party rage."[137]

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principles & measures of the present Administration that were my efforts necessary, and were it possible, I would *waft* myself on the wings of friendship & esteem to *Ensure* the re-election of Mr Jefferson—however I am happy in the Opinion there will be but a *feeble* Opposition made especially as the Federalist party, from the general advice I receive, Seems daily to decline.").

135. Letter from Samuel Latham Mitchill to James Madison (Apr. 28, 1803), *in* 4 THE PAPERS OF JAMES MADISON, *supra* note 126, at 558, 558.

136. *See generally* CUNNINGHAM, *supra* note 122, at 211–48 (detailing the election of 1800).

137. 13 ANNALS OF CONG. 518 (1803) (statement of Rep. Gaylord Griswold); *id.* (statement of Rep. Gaylord Griswold) ("The present mode of bringing forward candidates for the office of President and Vice President is the least liable to call forth art, intrigue, and corruption; the uncertainty of the event and the difficulty of making arrangements are strong checks to the artful and designing. But the moment the mode pointed out by this resolution is adopted, the door for intrigue and corruption is open; the candidates and their friends can calculate with certainty and apply the means direct; the power of party, influence of office, art, cunning, intrigue, and corruption, will all be used, and used to effect, because the object is certain."); *id.* at 531 (statement of Rep. Benjamin Huger) ("[W]hen I see (it matters not whether intentionally or from inadvertence) that advantage is about to be taken of this circumstance, that in the moment of party irritation and party zeal, and at a time when it may be truly stated that the influence and interests of the larger States are completely triumphant, and many of the smaller States, unconscious of danger, are enlisted from various causes under their banners; that at such a moment a proposition is brought forward to alter the Constitution in one of its most important features, and, under the plausible pretext of giving effect to the will of the people, the small States are at one blow to be deprived of the checks and safeguards secured to them by the Federal compact in the election of the Executive, and this important branch of the Government is hencefor-

Majoritarianism nonetheless served a legitimizing function, and its reach extended beyond the formal strictures of the Twelfth Amendment to the informal congressional nominating caucuses that selected presidential candidates.[138] The perceived absence of majority sentiment from the manner in which presidential candidates were chosen, by artificially shrinking the pool of available candidates, would lead to attacks on that mechanism from all corners of the political spectrum.[139] The Federalists held a congressional nominating convention in 1800, selecting John Adams as their candidate, but they abandoned the practice in subsequent elections due to their declining political strength.[140] After the election of 1800, Federalists and Republicans alike attacked the Republican presidential caucus as undemocratic and divorced from majority rule; in the words of Republican dissidents, the caucus was "an attempt to produce an undue bias in the ensuing election of president and vice president, and virtually to transfer the appointment of those officers from the people, to a majority of the two Houses of Congress."[141] Republican principles required that the mediating institutions between the government and the people—in this context, the Electoral College—reflect the voters' preferences without the accompanying chaos of direct election that could result in the selection of the wrong individual to the highest office in the land.[142] Some critics viewed the congressional caucuses as an additional intermediary, not constitutionally sanctioned, that could distort this process.[143]

Yet the congressional nominating caucus was designed to throw party support behind a consensus candidate that would avoid a repeat of the election of 1800 in which the House of Representatives would select the President, potentially landing on someone who—like Aaron Burr—did not have the support of the people.[144] The value of the caucus, according to North Carolina Republican (and 1824 caucus attendee) Richard Dodds Spaight, was that it was "consonant to the opinions of the majority of the people; or because that majority, having confidence in the persons recommending, adopt it as their own. . . .

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ward and forevermore to be put entirely and exclusively into the hands of the larger States . . . ."); *id.* at 536 (statement of Rep. Seth Hastings) ("Besides, sir, I fear if the amendment obtains, that it may give a weight and influence to the large States in the Union, in the election of a President and Vice Present, that they ought not to possess . . . .").

138. *See* 1 HISTORY OF U.S. POLITICAL PARTIES: 1789–1860: FROM FACTIONS TO PARTIES 263 (Arthur M. Schlesinger, Jr. ed., 1973) [hereinafter U.S. POLITICAL PARTIES].

139. *See id.* at 264.

140. *See id.*

141. *Id.* (quoting a protest signed by John Randolph and 16 other members of Congress).

142. *Id.* at 270–71.

143. *See id.* at 264.

144. *See id.* at 263.

The avowed object of these recommendations has been to concentrate and unite public sentiment."[145] However, intra-party divisions and the expansion of the electorate led to increased calls for the abolition of the congressional nominating caucus, which, over time, had become increasingly unable to play this role.[146] So long as the caucus continued to result in candidates that had broad support among the public, drama was mostly averted . . . until 1824.

The lack of a consensus candidate in the 1824 election led to the eventual demise of the caucus, which could no longer effectively communicate the preferences of the majority.[147] In 1824, the presidential election was thrown to the House for the first time since 1800, an indication that the congressional nominating caucus could no longer serve the legitimizing function that it had served over the course of five election cycles (where party elites would filter, but still be largely reflective of, majority preferences).[148] This was the first election in which the country had run out of Founders to run for President, and a new crop of leaders vied for the Presidency—John Quincy Adams, the son of a Founding Father; Andrew Johnson, a hero of the War of 1812; and Henry Clay, a powerful senator and eventual leader of the Whig Party.[149] While William H. Crawford, Secretary of the Treasury under James Monroe, was considered by many to be the obvious preference of the caucus leading up to the 1824 presidential election, supporters of the other candidates nominated their preferred candidates in state legislative caucuses designed to compete with the congressional caucus.[150] In 1822, the Tennessee legislature nominated Andrew Jackson; Massachusetts followed suit by nominating John Quincy Adams in 1823.[151] Likewise, the legislatures of Kentucky and Missouri threw their support behind Henry Clay.[152] William Crawford would only receive 41 electoral votes after his selection in a caucus in which only a fraction of congressional Republicans participated.[153] The House of Representatives awarded John Quincy Adams the presidency, an outcome that many Jackson supporters decried as a "corrupt bargain" between Adams and Clay, then Speaker of the House.[154] Cries of a corrupt bargain would motivate Jackson supporters leading into the election of 1828 and form the basis of the second party system.[155]

145. *Id.* at 270–71.
146. *Id.* at 265.
147. *Id.* at 271.
148. *See id.*
149. FOLEY, *supra* note 11, at 59.
150. U.S. POLITICAL PARTIES, *supra* note 138, at 268.
151. *Id.*
152. *Id.*
153. *Id.* at 271.
154. FOLEY, *supra* note 11, at 61.
155. *See id.*

Despite the upheaval of the 1824 election, the ability of political parties to shape and redefine republicanism would not only survive the death of the caucuses and the first party system, but also have significant implications for the scope of federal power over voting and elections. First, political parties blurred the lines between state and federal officials, creating a synergy across branches that were originally supposed to work in opposition to each other.[156] State legislatures became more assertive in putting forward their own candidates, a splinter in the party that led some congressional Republicans to also abandon the caucus and hasten its demise. Federalism—ostensibly preserved by the Twelfth Amendment—could not prevent coordination between officials at each level of government in the context of presidential elections. Political parties also connected state and federal officials in a way that prevented the states' role in the composition of the federal government from cabining federal authority. These entities rendered obsolete the Electoral College's intended purpose of protecting smaller states by making it less likely that presidential disputes would be resolved by the House of Representatives, in which small states had equal voting power with larger states.

Political parties also made it difficult to maintain the independence of the President because electors were committed to vote for the party's slate of candidates in advance of the election.[157] This remained true after the abolition of the congressional caucus and the move toward national nominating conventions. Political parties facilitated coordination across elections that extended beyond the presidency. For example, future Vice President Aaron Burr recruited candidates for New York's General Assembly in the spring of 1800 and campaigned relentlessly, resulting in a sweeping Republican victory for all 13 of New York's General Assembly seats.[158] The Republican dominance in the spring elections ensured that Democratic Republicans would receive all of New York's electoral votes for President that fall. Just as Burr's political maneuvering in the New York state legislative elections was key to the Democratic Republicans' fortunes in the 1800 presidential election that fall, partisan presidential politics would continue to impact and shape state and federal elections moving forward. Thus, the Twelfth Amendment, by elevating the role of both the voter

156. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (arguing that separation of powers has to be viewed through the lens of party competition).

157. *Id.* at 2322–23; *see also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 225 (2000) ("[T]he power of state legislators to pick electors could have given the states considerable leverage over the chief executive had the Electoral College stayed true to its original design. But the emergence of the popular canvass and winner-take-all rule have deprived the College of most of its significance.").

158. JOHN ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 233–34 (1993).

and of political parties in presidential politics, set the stage for state and federal governments that were now accountable to the people.[159]

V. Conclusion

The independent state legislature theory, particularly in its strongest iteration in which the state legislature can disregard both its state's courts and the state constitution in regulating federal elections, runs counter to the democratizing effect that the Twelfth Amendment was intended to have on presidential elections. But above all, any version of the doctrine, if adopted, has to respect majoritarian preferences.

The Twelfth Amendment, largely viewed as a technical fix to Article II after the disastrous presidential election of 1800, endorsed this view of republicanism by elevating the preferences of "We the Voters" over those of the more amorphous "We the People" for whom legislatures could speak largely without direct accountability. With the Twelfth Amendment, the state legislatures were now beholden not to themselves, but to the people. Conflicting with this principle, the independent state legislature theory allows the state legislature to disregard the preferences of the people right at the juncture in which they are exercising the oversight and accountability at the core of the majoritarian principles underlying our system of republicanism: during the election of federal officials.

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159. *Cf.* Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 Utah L. Rev. 859 (arguing that states can gerrymander to maximize the number of districts that mirror the partisan composition of a majority of the electorate and the majority party in the state in order to ensure that state interests are represented nationally); Franita Tolson, *Benign Partisanship*, 88 Notre Dame L. Rev. 395 (2012) (arguing that one safeguard to protect the regulatory interests of states from an overreaching federal government is partisan gerrymandering).