ESSAYS

THE NEW ELECTIONS CLAUSE

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INTRODUCTION

The Elections Clause[1] and Presidential Electors Clause[2] are the constitutional sources of states' authority to regulate federal elections.[3]

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1 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 . . . .").

The "Swiss army kni[ves]" of federal election law, they also have been interpreted as creating special doctrines in a surprisingly broad range of fields such as statutory interpretation, preemption, and separation of powers in state government, as they relate to federal elections.[4]

The Supreme Court's recent ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*)[5] presents a bold new interpretation of the Elections Clause that will reverberate far beyond the issue immediately before the Court. Although the Elections Clause confers power specifically on the "Legislature" of each state to regulate congressional elections, the Supreme Court held that states may enact election laws through any of their "lawmaking processes," including public initiatives and referenda.[6] Moreover, a state may completely prohibit its institutional legislature from regulating certain aspects of congressional elections by conferring that authority on some other entity instead.[7] Applying these holdings, the Court affirmed the validity of a state constitutional amendment in Arizona, enacted through a public initiative, which transferred authority to draw congressional districts from the state legislature to an independent redistricting commission.[8]

Most commentary concerning the Court's ruling focuses on its immediate impact of approving the use of independent redistricting commissions,[9] as seven states have adopted.[10] This Essay contends that *AIRC* is a dramatic expansion of precedent based on sweeping reasoning that reshapes Elections Clause doctrine in largely unrecognized ways

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2 *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to select the President] . . . .").

3 Cook v. Gralike, 531 U.S. 510, 523 (2001); Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam).

4 Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 848–49 (2015).

5 135 S. Ct. 2652 (2015).

6 *Id.* at 2677.

7 *Id.* at 2671 ("[T]he people [of a state] may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.") (citing Transcript of Oral Argument at 15–16, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314)).

8 *Id.* (affirming Arizona's power to "creat[e] a commission operating independently of the state legislature to establish congressional districts").

9 *See, e.g.*, Lyle Denniston, *Opinion Analysis: A Cure for Partisan Gerrymandering?*, SCOTUSBLOG (June 29, 2015, 3:21 PM), http://www.scotusblog.com/2015/06/opinion-analysis-a-cure-for-partisan-gerrymandering/; Edward B. Foley, *The Constitution Needed a Judicial Assist*, OHIO STATE UNIV.: ELECTION L. AT MORITZ (June 29, 2015, 2:32 PM), http://moritzlaw.osu.edu/election-law/article/?article=13151.

10 *Redistricting Commissions: Congressional Plans*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 8, 2015), http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx.

across a range of other fields. This Essay offers a critical analysis of the "new" Elections Clause and its Article II analogue, the Presidential Electors Clause, as they remain in the wake of this tumultuous ruling.

Part I begins by analyzing the *AIRC* ruling itself. Rather than interpreting the Elections Clause's language, the Court attempted to implement what it perceived to be the provision's purpose: facilitating fair congressional elections. This Part argues that the majority opinion is best seen as a legal process interpretation,[11] but may also be viewed as a failed application of John Hart Ely's representation-reinforcing approach.[12] While the majority opinion is consistent with academic and popular opinion concerning redistricting commissions, it was inappropriate given the concrete, specific nature of the term being interpreted ("Legislature"), and is fundamentally at odds with the political theory underlying the Constitution.

The majority sought to further what it believed to be the Elections Clause's purpose by allowing states to insulate and protect the electoral process from politicians. The Framers, however, believed that the political branches themselves are the most important and reliable defenders of democracy; they deliberately and repeatedly chose to entrust most critical aspects of the electoral process to elected officials. The majority's approach could have significant implications in future cases involving clashes between the political branches and judiciary over the power to resolve election disputes and enforce the right to vote.

Part II turns to *AIRC*'s impact on Elections Clause and Presidential Electors Clause jurisprudence. Most basically, the ruling allows states to completely and permanently exclude their institutional legislatures from regulating congressional—and, by extension, presidential—elections, subject to no apparent limiting principle. The ruling also largely settles the issue of delegations under those provisions. It clarifies that, although the Elections Clause confers power to craft rules governing congressional elections specifically on the "Legislature" of each state, this power may be delegated to executive or administrative entities. It leaves undisturbed the Court's previous holding that the Elections Clause authorizes federal preemption of state laws concerning congressional elections, independent of the Supremacy Clause, without triggering a presumption against preemption.[13]

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11 *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (providing the definitive account of the legal process school of thought).

12 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (explaining theory).

13 Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253–54 (2013).

Another likely consequence of the Court's ruling is that, since the Presidential Electors Clause will probably be construed *in pari materia* with the Elections Clause, members of the public will be able to use public initiatives to reallocate their states' electoral votes in presidential elections on a proportional or district-by-district basis, rather than through the prevailing winner-take-all system. Thus, while *AIRC* is a congressional redistricting case, it could dramatically reshape the landscape of presidential politics by putting substantial numbers of electoral votes from traditionally partisan strongholds such as California and Michigan in play.

Finally, and perhaps most significantly, the ruling summarily and unnecessarily rejects the "independent state legislature doctrine." The doctrine provides that, when a legislature enacts a law regulating federal elections under the Elections Clause or Presidential Electors Clause, it is acting under a higher source of power "independent" of the state constitution, and therefore is not subject to substantive state constitutional constraints. Repudiating this doctrine, the Court declared that state laws relating to federal elections are subject to both state and federal constitutional restrictions, thereby facilitating challenges to provisions such as voter ID laws.

Part III surveys the remaining questions concerning the Elections Clause and Presidential Electors Clause that *AIRC* leaves open. Perhaps the most salient issue is the extent to which these provisions implicitly create a special canon of statutory interpretation for state laws governing federal elections. Several courts and commentators have suggested that, since these clauses confer authority specifically on state legislatures, rather than states as entities, courts must be particularly deferential to the plain meaning of laws enacted under them. Courts may not exercise the same interpretive discretion over state laws governing federal elections as they may possess in other contexts.[14] Although this "super-strong" plain meaning approach has been criticized,[15] it is a fair and fundamentally important principle that limits courts' ability to "interpret" the law, after the results of an election are known and a concrete dispute has arisen, to achieve their preferred electoral outcomes.

As the Court's ruling focused primarily on separation of powers at the state level, it also leaves unaddressed some federalism-related issues. Because the Presidential Electors Clause does not expressly authorize Congress to legislate concerning presidential elections, it remains possible that federal authority in that area is more limited than with congressional elections. It is also unclear whether *Printz v. United States*'s constraints on

14 *See, e.g.*, Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring) (concluding that, because the Constitution delegates plenary authority over presidential elections to state legislatures, "the text of [an] election law itself . . . takes on independent significance").

15 *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

commandeering limit Congress's power to direct state and local officials in their conduct of federal (or state) elections.[16] Finally, the Court has held that the Elections Clause implicitly prohibits states from enacting laws designed to benefit or hinder certain candidates.[17] The Court has yet to fully flesh out the scope of this important limit on states' authority over federal elections.

The Elections Clause and Presidential Electors Clause are the sources of a wide range of constitutional doctrines concerning federal elections. While *AIRC*, on its face, addresses only the meaning of "Legislature" in the Elections Clause and the validity of redistricting commissions, the Court's broad reasoning sweeps much further. This Essay offers a first analysis of the "new" Elections Clause in the wake of this ruling.

I. *ARIZONA INDEPENDENT REDISTRICTING COMMISSION*

In *AIRC*, the Court adopted a sweeping interpretation of the Elections Clause, despite other available lines of reasoning that would have permitted it to reach comparable conclusions on narrower grounds. Section A discusses the breadth of the ruling, demonstrating that the Court adopted a particularly far-reaching interpretation of the Elections Clause. Section B explains that the Court's approach is best understood as a legal process interpretation of the clause, which was a particularly questionable approach given the nature of that provision. Finally, Section C shows that the political theory underlying the Court's ruling is fundamentally at odds with that which permeates the Constitution.

A. Breadth of the Ruling

The Elections Clause provides, "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."[18] The people of Arizona enacted an initiative amending their state constitution to transfer authority to determine congressional district boundaries from the institutional legislature to a

16 521 U.S. 898, 935 (1997).

17 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."); *see, e.g.*, Cook v. Gralike, 531 U.S. 510, 524 (2001) (holding that the Elections Clause did not authorize a state to enact a law "plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal").

18 U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

bipartisan commission.[19] The amendment raised two serious questions under the Elections Clause. First, from a purely procedural perspective, the Elections Clause permits only the "Legislature" to enact laws regulating federal elections. The redistricting commission, however, was created by a constitutional amendment that was directly enacted by the people of the state through a public initiative, rather than the legislature. Second, substantively, putting aside the manner in which the amendment was enacted, it strips the legislature of its authority to craft congressional districts and vests that power instead in an independent commission. The appellant,[20] the Arizona state legislature, challenged the amendment solely on substantive grounds, foregoing any procedural arguments.[21] The Court's ruling, however, swept aside objections of either type.

Even if the Court did not wish to adopt the appellant's[22] and dissent's[23] position that independent redistricting commissions are categorically unconstitutional, it could have reached any number of moderate or compromise rulings. For example, it could have held that, although the Elections Clause confers authority to regulate federal elections specifically on institutional state legislatures, the legislature may delegate that power to other entities, such as independent commissions. This approach would have validated the procedural objection to Arizona's commission, since Arizona's institutional legislature was not involved in the creation of the state's redistricting commission, while rejecting the substantive one.

From a policy perspective, it might be objected that legislatures would refuse to voluntarily relinquish their power over redistricting. Four of the seven current congressional redistricting commissions, however, were established by state legislatures and subsequently ratified by voters.[24] A fifth stemmed directly from a constitutional convention.[25] Only two congressional redistricting commissions were created through public

19 ARIZ. CONST. art. IV, pt. 2, § 1.

20 The case was an appeal from a three-judge panel of the U.S. District Court for the District of Arizona directly to the U.S. Supreme Court. *AIRC*, 135 S. Ct. 2652, 2662 (2015); *see* 28 U.S.C. § 2284(a) (2012).

21 Brief for Appellant at 24, 36, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314).

22 *Id.*; *see also* Morley, *supra* note 4 (presenting intratextual argument against validity of the Arizona commission).

23 *AIRC*, 135 S. Ct. at 2678 (Roberts, C.J., dissenting).

24 *See* Act of Nov. 7, 1995, 206th Leg., Second Ann. Sess., 1995 N.J. Laws 2510 (codified at N.J. CONST. art. IV, § 3); S.J. Res. 105, 52nd Leg., First Reg. Sess., 1993 Idaho Sess. Laws 1530 (codified at IDAHO CONST. art. III, § 2); H.B. 2322, 16th Leg., Reg. Sess., 1992 Hawaii Sess. Laws 1029 (codified at HAW. CONST. art. IV, § 2); S.J. Res. 103, 48th Leg., Reg. Sess., 1983 Wash. Sess. Laws 2202 (codified at WASH. CONST. art. II, § 43).

25 *See* MONT. CONST., art. V, § 14(2).

initiatives.[26] Interpreting the Elections Clause as referring exclusively to institutional legislatures therefore would have preserved the majority of commissions that presently exist and realistically left the door open to the creation of others.

Alternatively, the Court could have modified its holding by declaring that, while the term "Legislature" refers to any entity or process to which a state constitution commits "legislative authority,"[27] a state is not free to exclude its "actual" institutional legislature from that definition. In other words, the Court could have interpreted "Legislature" to refer to the institutional legislature, *as well as* any other processes or entities through which the state constitution allows election laws or redistricting plans to be adopted (including either public initiative or approval by a redistricting commission). This view would have been consistent with the Court's Elections Clause precedents, which upheld the use of public referenda[28] and gubernatorial vetoes[29] without categorically excluding institutional legislatures from regulating any aspect of federal elections.

Such reasoning would have led the Court to reject the procedural objection to the Arizona commission, because state laws concerning federal elections may be enacted through public initiative. It would have upheld the substantive challenge, however, because the state constitutional amendment completely excluded the institutional legislature from participating in redistricting. The Court might have felt that this interpretation still would have allowed the institutional legislature to maintain too much control over the redistricting process and other aspects of federal elections. Such concerns could have been alleviated, however, by state constitutional provisions limiting a legislature's ability to override or nullify the outcome of a public initiative[30] or determination of a redistricting commission.

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26 *See* Proposition 20, CAL. SEC'Y OF STATE (Nov. 2010) (codified at CAL. CONST. art. XXI), http://vig.cdn.sos.ca.gov/2010/general/pdf/english/text-proposed-laws.pdf#prop20; Proposition 106, ARIZ. SEC'Y OF STATE (Sept. 2000) (codified at ARIZ. CONST. art. IV, pt. 2, § 1), http://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf.

27 *See AIRC*, 135 S. Ct. at 2668 n.17, 2671.

28 Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

29 Smiley v. Holm, 285 U.S. 355, 365–66 (1932).

30 Indeed, state constitutional provisions authorizing initiatives already contain such restrictions. *See, e.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(6)(B)–(C) (prohibiting the legislature from "repeal[ing] an initiative measure approved by a majority of the votes cast thereon," and requiring a three-fourths vote of the legislature to amend a measure adopted by initiative); CAL. CONST. art. II, § 10(c) ("[The Legislature] may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."); *cf.* ARK. CONST. art. V, § 1 (requiring a two-thirds vote to amend or repeal any measure adopted by initiative).

Finally, the Court also could have adopted a broad reading of "Legislature," as referring to any entity or process through which a state's lawmaking authority is exercised, while holding that the Elections Clause implicitly prohibits delegation of that power. Thus, while the Elections Clause allows the people of a state to adopt a redistricting plan via public initiative—which is one of the state's lawmaking processes—they could not permit an independent commission to do so. By way of comparison, the Constitution, as originally enacted, empowered state legislatures to appoint U.S. Senators;[31] it likely would have been unconstitutional for a legislature to transfer that authority to an executive agency or independent commission.[32]

This interpretation would have been bolstered by the fact that, unlike other constitutional provisions which refer to states as overall entities, the Elections Clause specifically confers responsibility for regulating federal elections on state legislatures in particular. Such a direct delegation to a particular branch of state government reasonably could be construed as implicitly prohibiting that branch from delegating that power to some other entity. The *AIRC* Court summarily rejected this possibility, based solely on a concession from appellant's counsel.[33]

Rather than any of these narrower, compromise possibilities, the Court instead adopted a sweepingly broad interpretation of the Elections Clause that went far beyond precedent. At most,[34] *Ohio ex rel. Davis v. Hildebrant* authorized a state's voters to enact measures concerning federal elections through legislative channels *in addition* to the state legislature, such as public initiatives or referenda.[35] And *Smiley v. Holm* clarified that, when such laws are enacted by the institutional legislature, they remain subject to gubernatorial veto.[36] Neither of those cases compels the

31 U.S. CONST. art. I, § 3, cl. 1.

32 *See, e.g.*, State *ex rel.* Van Alstine v. Frear, 125 N.W. 961, 971 (Wis. 1910) (rejecting pre–Seventeenth Amendment challenge to non-binding public referendum on U.S. Senate candidates, because legislators retained their power and obligation to "exercise their conscientious judgments" on the issue); State *ex rel.* McCue v. Blaisdell, 118 N.W. 141, 147 (N.D. 1908) (same, because "[t]he Legislature still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates"). *See generally* Derek T. Muller, *Legislative Delegations and the Elections Clause*, FLA. ST. U. L. REV. (forthcoming) (manuscript at 5–8), http://papers.ssrn.com/abstract_id=2650432.

33 *AIRC*, 135 S. Ct. at 2671 ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.") (citing Transcript of Oral Argument at 15–16, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314)).

34 I have argued elsewhere that the *Hildebrant* Court actually did not reach the merits of the petitioners' Elections Clause claim, construing it instead as a non-justiciable Guarantee Clause argument. Morley, *supra* note 4, at 861.

35 241 U.S. 565, 569 (1916).

36 285 U.S. 355, 365–66 (1932).

conclusion that the Elections Clause permits a state's voters to completely exclude an institutional legislature from regulating any aspects of federal elections.[37]

Importantly, the Court's ruling contains no limiting principle. Nothing in the opinion turned on the fact that the commission was empowered to determine congressional district boundaries, as opposed to regulating other aspects of federal elections. Since the Court repeatedly denied that the Elections Clause's reference to "Legislature" refers to the institutional legislature,[38] it does not appear there is any core nucleus of authority over federal elections that a state's actual legislature must retain. To the contrary, under the Court's reasoning, the people of a state may completely exclude their institutional legislature from regulating *all* aspects of federal elections, delegating that authority instead to the Secretary of State, an executive agency, or an independent commission, among other possibilities. This is an extremely odd and unsatisfying interpretation of a constitutional provision expressly specifying that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[39] In the Court's view, this clause effectively means "The Constitution of a State may prohibit the Legislature from prescribing the Times, Places and Manner of holding Elections for Senators and Representatives."

B. Competing Theories of Constitutional Interpretation

The majority opinion and principal dissent in *AIRC* dramatically illustrate diametrically opposed theories of constitutional interpretation. The dissent relies on textualism, by focusing on the meaning of the word "Legislature" as used in the Elections Clause;[40] intratextualism, by considering how other clauses in the Constitution use that term;[41] and original understanding.[42] While the majority makes a desultory attempt at

37 *Cf. AIRC*, 135 S. Ct. at 2671 ("[T]he Elections Clause permits the people of Arizona to provide for redistricting by . . . a commission operating independently of the state legislature . . . .").

38 *See id.* at 2671–75.

39 U.S. CONST. art. I, § 4, cl. 1.

40 *AIRC*, 135 S. Ct. at 2679 (Roberts, C.J., dissenting) (explaining that Founding Era dictionaries demonstrate that "'the Legislature' referred to an institutional body of representatives, not the people at large").

41 *Id.* at 2680–83 ("The unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way."); *see also* Morley, *supra* note 4 (setting forth a detailed intratextual analysis of the Elections Clause). *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (explaining intratextualism).

42 *AIRC*, 135 S. Ct. at 2684 (Roberts, C.J., dissenting) ("The history of the Elections Clause further supports the conclusion that 'the Legislature' is a representative body.").

demonstrating that the term "Legislature" actually refers to something other than a state's institutional legislature,[43] most of the opinion provides a non-interpretivist, legal process interpretation of the Elections Clause.

The leading theorists of the legal process school, Henry M. Hart, Jr. and Albert M. Sacks, presented their theory solely as one of statutory interpretation, but prominent commentators have gone on to apply it to constitutional law, as well.[44] Hart and Sacks contend that, when construing a legal text, "[t]he first task . . . is to determine what purpose ought to be attributed to it."[45] They explain that legal enactments "ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably."[46] When a law's actual purpose is unclear, a court may attempt to reconstruct what the purpose of a reasonable legislator would have been.[47] Thus, to apply a statutory or constitutional provision under the legal process approach, a court must seek to implement its underlying purpose, whether actual or constructive.

The *AIRC* majority believed that "[t]he dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation."[48] It was intended to ensure that state officials did not attempt to manipulate the outcomes of federal elections.[49] Particularly since "the initiative and the referendum . . . were not yet in our democracy's arsenal" when the Elections Clause was drafted, its reference to "Legislatures" could not have been intended to prevent states' electorates from regulating federal elections through such means.[50]

The legal process school also stresses institutional competence. Each organ of government has its own structure and processes, and therefore is uniquely competent to handle certain kinds of issues.[51] Consistent with this insight, the *AIRC* majority extolled the importance of independent

43 *Id.* at 2671 (discussing the definition of "Legislature" in Founding Era dictionaries).

44 William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2052 (1994).

45 HART & SACKS, *supra* note 11, at 1125 (emphasis removed); *see also id.* at 1374 (advocating that courts should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can").

46 *Id.* at 1125.

47 *See id.* at 1374, 1378.

48 *AIRC*, 135 S. Ct. at 2672.

49 *Id.*

50 *Id.*

51 HART & SACKS, *supra* note 11, at 4 ("[D]ifferent procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions."); *see also id.* at 160.

commissions in combatting political gerrymandering by legislatures.[52] The Court strained to construe the Elections Clause so as to allow states to assign responsibility for redistricting to what the Court perceived to be the most appropriate institution for the task. Had the majority shared the Chief Justice's doubts about redistricting commissions,[53] it might have adopted a less aggressive interpretation of the Elections Clause.

The Court's reasoning is vulnerable to the standard objections to legal process interpretations. Legal process theory treats the legislative process—and, by extension, the constitutional drafting process—as fundamentally rational. Public choice theory convincingly demonstrates, however, that deliberations of lawmaking bodies are chaotic, path-dependent, and fraught with tradeoffs, negotiations, and compromises.[54] By attempting to further the purpose underlying a legal provision, rather than enforcing its plain meaning, a court is implementing a rule that has not actually survived the bicameral legislative process or constitutional ratification process. As Professor John F. Manning notes,

> [i]f the Court feels free to adjust the semantic meaning of [a legal provision] when the rules embedded in the text seem awkward in relation to the [provision's] apparent goals, then legislators cannot reliably use words to articulate the boundaries of the frequently awkward compromises that are necessary to secure a [measure's] enactment.[55]

The work of John Hart Ely—who was by no means a strict textualist—suggests another, more targeted objection. He argued that courts cannot interpret certain provisions of the Constitution, such as "privileges and immunities" and "equal protection," based solely on their plain text, because the language is too vague.[56] His representation reinforcement theory counsels courts to construe such broad phrases in a manner that will keep open the "channels of political change" and protect "discrete and insular minorities" from oppression.[57] The *AIRC* majority

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52 *AIRC*, 135 S. Ct. at 2677 (explaining that Arizona's voters sought to "restore 'the core principle of republican government'" by "turn[ing] to the initiative to curb the practice of gerrymandering" (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005))); *see also id.* at 2676 (emphasizing that independent commissions "have succeeded to a great degree" in combatting political conflicts of interest (quoting Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1808 (2012))).

53 *Id.* at 2691 (Roberts, C.J., dissenting) (discussing the "partisanship" that has infected Arizona's commission).

54 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–44 (1990).

55 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 111 (2006).

56 ELY, *supra* note 12, at 11–14.

57 *Id.* at 103 & n.97.

likely would enthusiastically agree that its opinion adopts a representation-reinforcing approach, because its whole purpose is to allow states to take steps to prevent politicians from drawing congressional district lines on a partisan basis, for the benefit of entrenched incumbents.[58]

Even apart from the Chief Justice's empirical concerns about the impartiality and fairness of purportedly independent commissions,[59] the majority opinion fails as an attempt at representation reinforcement for one fundamental reason: the term "Legislature" is not the type of broad provision embodying general principles that calls for some outside moral or political theory to meaningfully implement.[60] It is a concrete term, used repeatedly throughout the Constitution itself, most state constitutions during the Founding Era, and the constitutional convention. The nature and context of these references demonstrate that it refers to a specific entity within each state: a body comprised of elected representatives with general, statewide lawmaking authority that periodically convenes.[61]

C. A New Political Theory

The most significant impact of the majority's approach is that it wholeheartedly embraces a political theory concerning the electoral process that is fundamentally at odds with the one underlying the Constitution itself. Whether viewed from a legal process or representation-reinforcing perspective,[62] the majority opinion rests on the view that legislatures cannot be trusted with redistricting authority, because they have structural incentives to succumb to the temptation of political gerrymandering.[63] Indeed, the majority goes so far as to completely ignore the U.S. House of Representatives's interpretation of the Elections Clause in resolving an election contest, dismissing it as a largely party-lines vote.[64]

The Framers, however, were of a very different view. They believed that Congress was the only entity that could be "trusted" with control over

58 *See supra* notes 48–49 and accompanying text.

59 *See supra* note 53.

60 *AIRC*, 135 S. Ct. 2652, 2689–90 (2015) (Roberts, C.J., dissenting).

61 Morley, *supra* note 4.

62 *See supra* Section I.B.

63 *See supra* note 52.

64 *AIRC*, 135 S. Ct. at 2674 (declaring that the House's interpretation of the Elections Clause in *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866), "is not a disposition that should attract this Court's reliance"). The majority did not acknowledge the numerous other authorities that agreed with the House's conclusion that the Elections Clause confers powers specifically on institutional state legislatures. *See* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 198–202 (2014) (citing cases).

the electoral process.[65] Justice Story explains that lodging authority over congressional elections in any entity other than Congress itself would undermine "its independence, its purity, and even its existence."[66] By granting Congress power over congressional elections, the "major evil of interference by other branches of government is entirely avoided, while a substantial degree of responsibility is still provided by regular elections, the interim demands of public opinion, and the desire of each House to preserve its standing in relation to the other institutions of government."[67]

Even aside from Congress's authority to make rules concerning congressional elections under the Elections Clause,[68] each House of Congress has sole authority to determine the elections and returns of its members[69] and to effectively nullify the outcomes of elections by expelling members.[70] Congress is likewise responsible for determining the outcome of presidential elections. The House and Senate have power to count electoral votes,[71] including the authority to reject votes they deem invalid.[72] In the event that a candidate for President or Vice President fails to receive a majority of electoral votes, as determined by Congress, then the House or Senate, respectively, determine the winner of that office.[73] The House also has the power to impeach federal officers,[74] and the Senate is responsible for trying all impeachments.[75]

Allowing Congress to control and even determine the outcomes of federal elections creates a substantial risk of direct partisan manipulation. Yet the Constitution's structure embodies the Framers' repeated, deliberate decisions to entrust Congress with such responsibility. Although the Court's skepticism of allowing the political branches to control the

65 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 220 (Legal Classics Library 1986) (1826); *cf.* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 47 (photo. reprint 2003) (2d ed. 1829) (discussing the need of legislative bodies to be able to defend themselves from encroachments and interference).

66 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 831, at 295 (Bos., Hilliard, Gray & Co. 1833).

67 Morgan v. United States, 801 F.2d 445, 450 (D.C. Cir. 1986).

68 U.S. CONST. art. I, § 4, cl. 1.

69 *Id.* art. I, § 5, cl. 1; *see, e.g.*, *Morgan*, 801 F.2d at 450; McIntyre v. Fallahay, 766 F.2d 1078 (7th Cir. 1985).

70 U.S. CONST. art. I, § 5, cl. 2.

71 *Id.* amend. XII.

72 3 U.S.C. § 15 (2012) (allowing Members of Congress to object to the counting of particular electoral votes).

73 U.S. CONST. amend. XII.

74 *Id.* art. I, § 2, cl. 5.

75 *Id.* art. I, § 3, cl. 6.

electoral process has a valid basis and is widely shared,[76] it runs contrary to the political theory embedded in the Constitution itself.

The Court's willingness to reinterpret even a clear and concrete provision such as the Elections Clause in light of its skepticism about the political branches' ability to fairly handle election-related issues raises questions over the extent to which the Court will defer to Congress's resolution of disputes that more directly impact the right to vote. The same fairness concerns that led the Court to permit entities other than a state's institutional legislature to redraw congressional districts might similarly motivate it to permit entities other than the respective Houses of Congress to determine which congressional candidates should be seated or which electoral votes should be counted. Thus, the theory underlying *AIRC* sets the stage for greater judicial enforcement of the constitutional right to vote and a potential clash with Congress over the scope of its constitutional prerogatives.

II. COLLATERAL IMPACT ON FEDERAL ELECTION LAW

Although *AIRC*'s most immediate consequence is to establish the constitutionality of redistricting commissions, the Court's ruling also impacts Elections Clause jurisprudence in a variety of other, potentially further-reaching ways. Section A explains that a state legislature—defined broadly as including any process or entity that a state constitution authorizes to exercise legislative authority—may delegate power over federal elections to other organs of government. Section B discusses the Court's summary rejection of the independent state legislature doctrine. And Section C examines *AIRC*'s implications for states' rules for allocating presidential electors among candidates. As mentioned earlier, *AIRC* left undisturbed the Court's earlier holding that federal laws enacted pursuant to the Elections Clause which preempt state statutes governing congressional elections are not subject to a presumption against preemption.[77]

76 *See, e.g.*, ELY, *supra* note 12; Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 333 (2007) (embracing independent commissions as "the only realistic way to curb political gerrymandering"); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 838 (1997) ("[W]hile commissions are no panacea, they offer a viable means of restoring a degree of efficiency, fairness, and finality to a state's decennial gerrymander."); *cf.* Cain, *supra* note 52, at 1842–43 (offering recommendations to improve commissions).

77 Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253–54 (2013).

A. Non-Delegation Doctrine

The *AIRC* Court not only adopted an expansive interpretation of "Legislature," but held that any process or entity that qualifies as a legislature may delegate its power under the Elections Clause to other organs of state government.[78] Interestingly, the Court did not cite any authority or offer any analysis in support of its holding, but rather rested this conclusion exclusively on a concession by appellant's counsel.[79]

Prior to this ruling, courts had periodically wrestled with delegation issues under the Elections Clause. Recognizing that the Elections Clause is one of the Constitution's only provisions that "confers a power on a particular branch of a State's government,"[80] some courts had suggested that the provision might implicitly bar legislatures from transferring that power to other entities, or substantially restrict legislatures' ability to make such delegations.[81]

The *AIRC* Court held that the power to regulate federal elections is fully delegable. Because the Elections Clause confers power on both legislatures and Congress, it is reasonable to assume that the same limitations on delegation apply to both entities. In general, Congress may delegate its powers so long as it cabins the agency's discretion based on an "intelligible principle."[82] The Supreme Court has upheld every congressional delegation of authority it has encountered over the past

78 *AIRC*, 135 S. Ct. 2652, 2671 (2015) ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.") (citing Transcript of Oral Argument at 15–16, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314)).

79 *Id.*

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

81 *See, e.g.*, Green Party of Tenn. v. Hargett, 882 F. Supp. 2d 959, 1017–18 (M.D. Tenn. 2012) ("[G]iven the absence of statutory standards for the exercise of the State Elections Coordinator's discretion," a state law authorizing the coordinator to develop criteria for determining whether a group qualifies as a minor political party is not "a permissible delegation of legislative authority."), *rev'd* 700 F.3d 816 (6th Cir. 2012). Of course, it still would violate the Elections Clause for an organ of state government to attempt to regulate federal elections in the absence of a delegation from an entity or process that qualifies as a "Legislature." *See* Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008) ("Even if the Ohio General Assembly could delegate its authority to a member of the executive branch . . . , there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which [federal elections are conducted]."); Grills v. Branigin, 284 F. Supp. 176, 180 (S.D. Ind. 1968) ("[The Elections Clause] clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly . . . ."), *aff'd* Branigin v. Duddleston, 391 U.S. 364 (1968).

82 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

eighty years.[83] It has approved delegations based on exceedingly vague criteria, allowing agencies to set standards that are "fair and equitable"[84] or that serve "the public interest, convenience, or necessity."[85] Based on these precedents, most commentators contend that the non-delegation doctrine is effectively dead,[86] and surprisingly few mourn its loss.[87]

The Court has never directly addressed whether the Elections Clause imposes any constraints on the power of state legislatures or Congress to delegate their authority to regulate federal elections. Even assuming that some limit exists, it is likely nothing more than the "intelligible principle" standard to which other delegations of federal legislative authority are subject.[88] Thus, it will be virtually impossible for a litigant to successfully challenge even sweeping and effectively standardless delegations by legislatures over election-related regulations to independent commissions, executive officials, administrative agencies, or local entities.

B. Independent State Legislature Doctrine

Aside from its approval of redistricting commissions, perhaps the most important and far-reaching aspect of *AIRC* was the Court's summary rejection of the independent state legislature doctrine. The doctrine recognizes that, when a legislature enacts a law that applies to federal elections, it is acting "by virtue of a direct grant of authority" from the Elections Clause and Presidential Electors Clause.[89] Thus,

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83 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000); *cf.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 420–21 (1935).

84 Yakus v. United States, 321 U.S. 414, 423 (1944).

85 NBC v. United States, 319 U.S. 190, 216 (1943).

86 Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of Its Resurrection Prove Unfounded*, 16 ST. JOHN'S J. LEGAL COMMENT. 1, 39 (2002) ("It will certainly be a long time before a court of appeals is once again moved to bring the doctrine out from the shadows into the sunlight.").

87 *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165 (2004) ("[T]he nondelegation doctrine, as a general requirement that Congress must circumscribe the discretion of administrative agencies, should be rejected."); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory."); *cf.* Sunstein, *supra* note 83, at 315–16 (arguing that nondelegation canons of statutory interpretation, rather than a substantive nondelegation doctrine, exist).

88 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

89 Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam); *see also supra* note 3 and accompanying text.

> Although laws governing federal elections must be enacted through the "legislative process" set forth in the state constitution, . . . a state constitution cannot restrict the [substantive] scope of the power and discretion that the U.S. Constitution bestows on the state legislature to regulate the manner in which federal elections are conducted.[90]

As the Supreme Court stated in *McPherson v. Blacker*, the Constitution's delegations specifically to state legislatures of power to regulate federal elections "operat[e] as a limitation upon the State in respect of any attempt to circumscribe th[at] legislative power," including through "any provision in the state constitution in that regard."[91]

Under the independent state legislature doctrine, if a state law concerning federal elections conflicts with a state constitution, the law prevails. For example, in *In re Plurality Elections*, a Rhode Island statute required a candidate for federal office to receive only a plurality of votes in order to win.[92] The state constitution, in contrast, required candidates for public office to receive a majority of votes to prevail.[93] The Rhode Island Supreme Court held that, because state legislatures act pursuant to their authority under the U.S. Constitution when enacting laws regulating federal elections, the law was enforceable regardless of any contrary provision in the state constitution.[94] Numerous other courts[95] and commentators[96] have recognized and applied the doctrine.

Without so much as acknowledging any of these authorities—including the Court's own statement in *McPherson*—the *AIRC* majority summarily repudiated the doctrine. It held, "Nothing in th[e] [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."[97] As

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90 Morley, *supra* note 64, at 199–200 (quoting Smiley v. Holm, 285 U.S. 355, 368 (1932)).

91 146 U.S. 1, 25 (1892).

92 8 A. 881, 882 (R.I. 1887).

93 *Id.*

94 *Id.* at 881–82.

95 *E.g.*, PG Publ. Co. v. Aichele, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012), *aff'd on other grounds*, 705 F.3d 91 (3d Cir. 2013); State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286–87 (Neb. 1948); *In re* Opinions of Justices, 45 N.H. 595, 601 (1864); *see also* Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944).

96 Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 835 (2001); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962); Morley, *supra* note 64, at 198–204; Emory Widener, Jr., Note, *The Virginia Absent Voters System*, 8 WASH. & LEE L. REV. 36, 37 (1951); Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 87 (1937).

97 *AIRC*, 135 S. Ct. 2652, 2673 (2015).

mentioned earlier, the Court dismissed the House of Representatives's endorsement and application of the independent state legislature doctrine as a largely partisan maneuver,[98] and completely ignored a Senate committee report recognizing the doctrine.[99]

Under the majority's ruling, a state legislature (as well as other entity or process that qualifies as a "Legislature" under the Elections Clause) is bound by substantive restrictions set forth in the state constitution when enacting laws governing federal elections. Such laws, such as proof-of-citizenship or voter identification requirements, may therefore be challenged on state, as well as federal, constitutional grounds.[100] The Court thus has ratified additional barriers to state efforts to protect the integrity of federal elections.

C. Reallocating Presidential Electors

The *AIRC* Court's interpretation of the Elections Clause likely applies to the Presidential Electors Clause as well, as the two provisions are typically read *in pari materia*.[101] Just as the Elections Clause empowers the state "Legislature" to regulate the time, place, and manner of congressional elections,[102] the Presidential Electors Clause grants the "Legislature" power to regulate the process for choosing presidential electors.[103] The *AIRC* majority interpreted the term legislature in the Elections Clause to include public initiatives and referenda. It is likely to interpret the Presidential Electors Clause the same way.

Commentators have long debated the constitutionality of reallocating a state's electoral votes for President through a public initiative or referendum.[104] Under *AIRC*, voters likely may use the public initiative

98 *Id.* at 2674.

99 *See* S. REP. NO. 43-395, at 9 (1874).

100 *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104–05 (2014); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); *cf.* Morley, *supra* note 64, at 190 ("The standards that the modern Supreme Court has adopted for determining the constitutionality of election laws are consistent with over a century-and-a-half of state constitutional precedents that long predate most federal voting rights cases.").

101 *See* Oregon v. Mitchell, 400 U.S. 112, 124 n.7 (1970) (Black, J., announcing the judgment of the Court) ("It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."); *see also* Burroughs v. United States, 290 U.S. 534, 544–45 (1934).

102 U.S. CONST. art. I, § 4, cl. 1.

103 *Id.* art. II, § 1, cl. 2.

104 *Compare* Michael McLaughlin, Note, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943, 3000 (2008) (arguing that initiatives may not be used to change state laws relating to federal elections), *and* Nicholas P. Stabile, Comment, *An End Run Around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the*

process to change the way in which states allocate their electoral votes in presidential elections. All states except for Nebraska[105] and Maine[106] allocate their electoral votes on a winner-take-all basis, meaning that the presidential candidate who receives a plurality of the state's popular vote receives all of that state's electoral votes. For example, in the 2012 election, Barack Obama received 60.24% of the popular vote in California, yet was awarded all 55 of that state's electoral votes.[107]

At least three main alternatives exist. States could follow the example of Nebraska and Maine by awarding presidential electors on a district-by-district basis to the presidential candidate who receives the most votes in each congressional district.[108] The candidate who receives the most statewide votes would be awarded the state's two additional electors. Under this system, Obama would have received 43 of California's electoral votes, and Romney would have received 12.[109] Alternatively, a state's electors could be awarded in proportion to the percentage of the statewide popular vote received by each candidate who exceeds some minimum threshold. Under this approach, California would have awarded 34 of its electoral votes to Obama, and 21 to Romney.[110] Some commentators

Method of Distributing Electors, 103 NW. U. L. REV. 1495 (2009), *with* Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631, 641 (2008), *and* David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575, 599 (2006) (defending the constitutionality of using public initiatives to change the method for allocating a state's electoral votes). *Cf.* 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, 629 (2008) ("A strict textual view suggests that initiated reform is unconstitutional; case law and policy arguments show the question is more uncertain. Reasonable judges could reach opposite conclusions on the question.").

105 NEB. REV. STAT. § 32-1038(1) (2015).

106 ME. STAT. tit. 21-A, § 802 (2015).

107 FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 28 (2013), http://www.fec.gov/pubrec/fe2012/federalelections2012.pdf.

108 *Supra* notes 105–06.

109 David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2012 and 2008 Elections*, DAILY KOS (Nov. 19, 2012, 12:30 PM), http://www.dailykos.com/story/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections (specifying that Obama won 41 of California's 53 congressional districts, as well as the statewide vote, and Romney won 12 congressional districts).

110 *See* RHODES COOK, AMERICA VOTES 30: 2011–2012 ELECTION RETURNS BY STATE 10 (2014) (specifying that Obama won 60.2% of the statewide vote in California and Romney won 37.1%). Approximately 2.7% of the popular vote was split among twelve third-party and independent candidates. FED. ELECTION COMM'N, *supra* note 107, at 28. None of them received enough votes to be allotted an elector. The "extra" electors that

instead have recommended various schemes for awarding a state's electoral votes based on the outcome of the national popular vote.[111]

In states that generally cast their electoral votes for a particular party's candidate, politicians from that party likely could prevent the institutional legislature from changing the method for allocating electoral votes. Under *AIRC*, activists and voters may use the initiative process to circumvent party bosses and ensure their state's electoral votes more closely reflect the views of the state's electorate as a whole. Petitions for such initiatives were circulated in California in past election cycles, but none received enough signatures to be placed on the ballot.[112] Particularly since initiatives often are introduced in off-year election cycles, when voter turnout is lower,[113] it is reasonably possible that such a measure—like the Arizona initiative that gave rise to *AIRC* in the first place—might succeed. *AIRC* thus opens the door to potential realignments in presidential politics.

III. REMAINING QUESTIONS

AIRC has reshaped Elections Clause doctrine and resolved several longstanding controversies concerning its meaning.[114] This Part discusses some important questions that remain. Section A argues that the Elections Clause should be read as imposing a special duty on state and federal courts to apply the plain meaning of state laws relating to federal elections. Section B questions whether Congress's authority to regulate congressional elections is truly coextensive with its power to regulate congressional elections under the Elections Clause. Section C discusses possible "commandeering" concerns with federal election statutes. Finally, Section D examines implicit limits on the power the Elections Clause grants states to regulate congressional elections.

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neither Obama nor Romney won directly likely would have been split between Obama and Romney on a pro rata basis.

111 *See, e.g.*, Vikram David Amar, Response, *The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237 (2011).

112 *See, e.g.*, Memorandum from Katherine Montgomery, Initiative Program Manager, Cal. Sec'y of State, to All County Clerks/Registrars of Voters and Proponent (Feb. 2, 2011), elections.cdn.sos.ca.gov/ccrov/pdf/2011/february/11008km.pdf (transmitting official title and summary for Ballot Initiative #10-0024, entitled Electoral College Reform Act); Letter from Anthony F. Andrade, Jr., Proponent, to Edmund G. Brown, Jr., Att'y Gen., State of Cal. (May 21, 2007), http://oag.ca.gov/system/files/initiatives/pdfs/07-0016%20(2007-05-22_07-0016_A1NS).pdf (submitting amendments to proposed ballot initiative #07-0016, entitled Electoral Reform California).

113 *See* Nicole E. Lucy, *Mediation of Proposition 187: Creative Solution to an Old Problem? Or Quiet Death for Initiatives?*, 1 PEPP. DISP. RESOL. L.J. 123, 139 n.100 (2001) (citing sources).

114 *See supra* Part II.

A. Strict Statutory Construction and the Democracy Canon

Perhaps the most significant Elections Clause doctrine the *AIRC* Court did not address is its requirement that both state and federal courts take special care to enforce the plain text of state election statutes, rather than applying their own judicial gloss or other doctrines, such as Professor Rick Hasen's "Democracy Canon."[115]

As discussed throughout this Essay, the Elections Clause and Presidential Electors Clause are grants of constitutional authority to state legislatures—construed broadly by the *AIRC* Court as embracing any lawmaking entity or process authorized by a state's constitution—rather than to states as a whole. The Supreme Court has recognized that this specific delegation of authority imposes a special duty on other governmental entities to ensure that they apply election laws as written by the legislature, rather than with the flexibility and discretion they otherwise might be permitted to apply.

In *Bush v. Palm Beach County Canvassing Board*, the Supreme Court observed that, "[a]s a general rule, [it] defers to a state court's interpretation of a state statute."[116] When a legislature enacts a law regulating a presidential election, however, it is acting "by virtue of a direct grant of authority made under [the Presidential Electors Clause]."[117] Laws enacted under the Presidential Electors Clause—and, by extension, the Elections Clause—require a special interpretive approach.

Seven Justices went on to apply such an approach in *Bush v. Gore*.[118] Chief Justice Rehnquist's concurrence, in which Justices Scalia and Thomas joined, stated that, when a legislature acts under the Presidential Electors Clause, "the text of the election law itself . . . takes on independent significance."[119] Courts have a unique duty to ensure they do not "depart[] from the statutory meaning" of such laws, even if they generally would have such interpretive power.[120]

The four-Justice dissent written by Justice Souter echoed this sentiment, recognizing that the U.S. Supreme Court's responsibility was to ensure that the Florida Supreme Court had not "displaced the state legislature's" enactments, and that the "law as declared by the court" was not "different from the provisions made by the legislature, to which the

115 Hasen, *supra* note 15.
116 531 U.S. 70, 76 (2000) (per curiam).
117 *Id.*
118 531 U.S. 98 (2000) (per curiam).
119 *Id.* at 113 (Rehnquist, C.J., concurring).
120 *Id.* at 115.

National Constitution commits responsibility for determining how each State's Presidential electors are chosen."[121]

Applying a super-strong plain meaning construction of laws regulating federal elections—indeed, all elections—promotes fair outcomes because it minimizes the opportunity for partisan manipulation. Election laws are enacted before election disputes arise, behind at least a partial "veil of ignorance."[122] Because the legislature often will not know which candidate will benefit from a particular rule, there is an increased likelihood that the rule will be fair.[123] When courts must interpret and apply the rule, particularly after an election is over, they generally know which candidates and political parties will benefit from different possible interpretations. There is a substantial risk that such knowledge may color courts' views, leading to rulings that are at least partially outcome-driven. Indeed, some courts have gone so far as to recognize that adopting an unexpected interpretation of the rules governing an election after-the-fact can amount to a due process violation.[124] Limiting courts' discretion to interpret election rules may ameliorate the possibility of their partisan bias improperly influencing the outcome of election litigation.

B. Federal Regulation of Presidential Elections

Another issue the Elections Clause raises is whether Congress's authority over presidential elections is coextensive with its power over congressional elections. The Elections Clause expressly permits Congress to "make or alter" state election laws;[125] the Presidential Electors Clause lacks analogous language. The material difference in language between the Elections Clause and Presidential Electors Clause has not caused the Supreme Court pause, however. Rather, the Court held that the federal government has inherent authority to regulate presidential elections.[126] This issue might be ripe for more careful consideration, however, in light

121 *Id.* at 130 (Souter, J., dissenting); *see also* Reform Party v. Black, 885 So. 2d 303, 312 (Fla. 2004) ("[A]lthough the judiciary has the power and authority to construe statutes, it cannot construe statutes in a manner that would infringe on the direct grant of authority to the Legislature through the United States Constitution."); *cf.* Roe v. Alabama, 68 F.3d 404, 406–07 (11th Cir. 1995) (holding that a state court's construction of an election law contrary to its plain meaning violated voters' constitutional rights).

122 JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

123 Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1378–82 (2012).

124 *Roe*, 68 F.3d at 406–07; Griffin v. Burns, 570 F.2d 1065, 1078–79 (1st Cir. 1978).

125 U.S. CONST. art. I, § 4, cl. 1.

126 *See supra* note 101; *cf.* Amar, *supra* note 111, at 260 (arguing that the Elections Clause empowers Congress to regulate presidential elections because congressional and presidential elections occur simultaneously, and rules concerning the latter may affect turnout for the former).

of the Court's recent attention (such as it is) to the language and meaning of the clause, as well as the strict limits it has imposed on the scope of Congress's power to enforce constitutional rights under Section 5 of the Fourteenth Amendment.[127]

C. Commandeering and Federal Election Law

The Court has yet to squarely address whether *Printz*'s anti-commandeering prohibitions[128] apply to laws enacted pursuant to the Elections Clause and whatever authority Congress might possess over presidential elections. Nevertheless, it appears that anti-commandeering challenges to federal voting laws are unlikely to succeed.

Printz held that it is "fundamentally incompatible with our constitutional system of dual sovereignty" for Congress to "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[129] It invalidated interim provisions of the Brady Handgun Violence Prevention Act,[130] enacted under the Commerce Clause,[131] which required "state and local law enforcement officials to conduct background checks on prospective handgun purchasers."[132]

Over a century before *Printz*, the Court had held that state election officials may be called upon to "fulfil [sic] duties which they owe to the United States" in connection with federal elections.[133] And in *Branch v. Smith*, a four-Justice plurality held that federal laws requiring state officials to engage in tasks relating to federal elections do not amount to unconstitutional commandeering, because they simply "regulat[e] (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations" under the Elections Clause.[134] That ruling drew a stinging dissent from Justices Thomas and O'Connor, who questioned the plurality's refusal to apply *Printz* to the Elections Clause.[135]

Many commentators have argued that the Elections Clause expressly authorizes commandeering of state officials, at least for congressional elections. Commandeering proponents point out that the types of statutes

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127 City of Boerne v. Flores, 521 U.S. 507 (1997).

128 Printz v. United States, 521 U.S. 898, 935 (1997).

129 *Id.*

130 Pub. L. No. 103-159, § 102(a)(1), 107 Stat. 1536, 1536–39 (1993) (codified at 18 U.S.C. § 922(s)(2), (s)(6)(B)–(C)), *invalidated by Printz*, 521 U.S. at 935.

131 *Printz*, 521 U.S. at 923–24.

132 *Id.* at 902.

133 *Ex Parte* Siebold, 100 U.S. 371, 387 (1879).

134 538 U.S. 254, 280 (2003) (plurality opinion).

135 *Id.* at 301–02 (O'Connor, J., concurring in part and dissenting in part).

the clause expressly authorizes Congress to enact necessarily must be implemented by state and local election officials.[136] Consistent with this view, courts have rejected anti-commandeering challenges to the National Voter Registration Act (NVRA),[137] which requires state officials to make voter registration forms available at certain public offices and proscribes detailed requirements for their processing.[138] Paul McGreal, however, offers a persuasive argument that the Constitution's "text, history, precedent, [and] structure," as well as "prior government practice," demonstrates that Congress may not commandeer state and local officials under the Elections Clause.[139]

Other commentators[140] sidestep the Elections Clause issue by contending that, even if Article I does not authorize Congress to commandeer state officials, it may do so when enacting laws under Section 5 of the Fourteenth Amendment.[141] The Court also has yet to directly address this theory. Such an approach might be more persuasive than an argument under the Elections Clause itself, since the Fourteenth

136 Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237–38; Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 897 (2002); Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 82–83 (1996); *see also* Amar, *supra* note 111, at 259–60; Michael S. Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. 1359, 1372 n.84 (2014).

137 Pub. L. No. 103-31, 107 Stat. 77, 77 (1993) (codified in scattered sections of 39 U.S.C. and 52 U.S.C. (2012)).

138 Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) ("Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators."); *see also* Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1997) (affirming the NVRA's constitutionality because the Elections Clause empowers Congress to direct states to amend their laws governing federal elections); Ass'n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995) (pre-*Printz* case affirming NVRA).

139 Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 553–54 (2001).

140 Caminker, *supra* note 136, at 239–40; Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 24–25 (2007); Brian C. Brook, Note, *Federalizing the First Responders to Acts of Terrorism via the Militia Clauses*, 54 DUKE L.J. 999, 1005–06 (2005); *see also* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 940 (2013); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 888–89 (1998). *But see* Michael D. Hatcher, Note, Printz *Policy: Federalism Undermines* Miranda, 88 GEO. L.J. 177, 189–90 (1999).

141 U.S. CONST. amend. XIV, § 5.

Amendment abrogates state sovereignty in a variety of ways[142] and, unlike the Elections Clause, applies equally to congressional and presidential elections. Federal election laws would be subject to closer scrutiny, however, because Congress is not permitted to legislate under Section 5 unless the statute is both congruent and proportional to a constitutional violation.[143]

D. Limits on State Authority

A final Elections Clause issue that also remains for future resolution is the limit of states' authority to enact laws concerning federal elections. States have no inherent power to regulate federal elections; their only power to do so comes from the Elections Clause and Presidential Elections Clause.[144] The Court has explained that the Elections Clause grants states broad power to enact a "complete code for congressional elections," concerning not only "times and places," but also "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[145] It allows states "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[146]

This broad delegation of authority is subject to implied limits not set forth in the Constitution's text. The Court has held that the Elections Clause is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[147] States therefore lack power to enact laws governing congressional elections that fall into any of those categories. The Court has applied this principle to invalidate state laws that attempted, directly or indirectly, to impose term limits for Congress. In *U.S. Term Limits, Inc. v. Thornton*, it struck down a statute prohibiting a candidate from appearing on the ballot if he or she already had served a specified number of terms in

142 *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 518 (2004) (recognizing that Congress may abrogate states' sovereign immunity when legislating under Section 5, but not Article I).

143 City of Boerne v. Flores, 521 U.S. 507 (1997).

144 Cook v. Gralike, 531 U.S. 510, 523 (2001); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804–05 (1995); *see also* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam).

145 Smiley v. Holm, 258 U.S. 355, 366 (1932).

146 *Id.*

147 *U.S. Term Limits*, 514 U.S. at 833–34.

the U.S. House or U.S. Senate, though the person could still run as a write-in candidate.[148]

Likewise, in *Cook v. Gralike*, it held unconstitutional a law that required negative messages to be printed on the ballot next to the names of candidates who refused to support a particular constitutional amendment imposing term limits for Congress.[149] The Court explained that the provision "is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal."[150] It added, "'[B]y directing the citizen's attention to the single consideration' of the candidates' fidelity to term limits, the labels imply that the issue 'is an important—perhaps paramount—consideration in the citizen's choice . . . .'"[151] The Court concluded that such an attempt to "dictate electoral outcomes" is "not authorized by the Elections Clause."[152]

The Court has never enforced the Elections Clause's implicit limits on states' authority outside of the term limits context. Its holding that states lack power to "dictate electoral outcomes" or "favor or disfavor a class of candidates"[153] is potentially far-reaching, however. Many facially neutral election laws may systematically benefit or hinder candidates from a particular party. It is unclear whether the Elections Clause's restriction on state power hinges on the intent of the legislature or the effects of a statute, and how closely the Court will scrutinize a law's effects to determine whether it impermissibly affects an election's outcomes. Excluding candidates from the ballot, or printing derogatory warnings next to their names on the ballot, are direct and substantial handicaps specific to particular candidates. It remains to be seen whether future Courts will enforce the Elections Clause's implied restrictions broadly to prohibit other measures that might affect the outcome of an election, such as voter identification laws, absentee voting restrictions, or reductions in early voting periods.

CONCLUSION

The Elections Clause sits at a critical intersection of federalism, separation of powers, and constitutional rights. It confers power on a

148 *Id.* at 835 (holding that "a state-imposed ballot access restriction is [not] constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses").

149 *Cook*, 531 U.S. at 514–15.

150 *Id.* at 524.

151 *Id.* at 525 (quoting Anderson v. Martin, 375 U.S. 399, 402 (1964)).

152 *Id.* at 526 (quoting *U.S. Term Limits*, 514 U.S. at 833–34).

153 *U.S. Term Limits*, 514 U.S. at 833–34.

specific branch of state government, expressly authorizes federal preemption of state laws (if not federal commandeering of state officials[154]), and contemplates regulation of the fundamental constitutional right to vote. While *AIRC* has largely settled questions concerning delegation of Elections Clause authority, the independent state legislature doctrine, and the permissibility of reallocating a state's presidential electors through popular initiative (assuming the Presidential Electors Clause is read *in pari materia*), other important issues remain. Perhaps most significantly, whether *AIRC* is viewed as a legal process or representation-reinforcing ruling, the majority's approach raises substantial questions about how far the Court will go in allowing the judiciary to preserve the fairness of federal elections and enforce the right to vote despite express textual grants of constitutional authority over the electoral system to Congress. The Elections Clause thus serves not only as the constitutional basis for a range of election-related doctrines, but perhaps as a harbinger for the reinterpretation of other related provisions, as well.

154 *See supra* Section III.C.