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RECENT CASE

DIRECTV, INC. V. IMBURGIA

Supreme Court Holds California Court's Interpretation Preempted by Federal Arbitration Act

Angelica Sanchez Vega∗

INTRODUCTION

It is no secret that alternative dispute resolution (ADR) has become an important part of the contemporary American legal system. Compared to full-fledged judicial proceedings, ADR methods, including arbitration, offer a more cost-effective alternative. Both private and public entities have embraced the chance to address legal disputes while using resources more effectively. In 1998, for example, President Clinton issued a memorandum to the heads of executive departments and agencies encouraging the use of ADR "[a]s part of an effort to make the Federal Government operate in a more efficient and effective manner."[1] In spite of all of the benefits of ADR, concerns about the innate fairness of these methods of dispute resolution still abound. Nowhere are such concerns more evident than in the context of arbitration agreements between large, sophisticated entities and individual consumers.

Despite concerns as to the implicit fairness of ADR, the enforcement of arbitration agreements in American courts has been markedly strengthened by one important piece of legislation: the Federal Arbitration Act (FAA).[2] The FAA was proclaimed as "[a]n Act [t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the

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1 Memorandum from President Clinton to the Heads of Executive Departments and Agencies (May 1, 1998), http://www.justice.gov/sites/default/files/olp/docs/1998.05.01CLINTON.pdf.

2 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15 (2012)).

States or Territories or with foreign nations."[3] This single piece of legislation has been the subject of a number of Supreme Court cases, including the important *Southland Corp. v. Keating*[4] decision. In *Southland*, the Supreme Court held that the FAA applies in state courts and preempts conflicting state law.[5] On December 14, 2015, the Supreme Court added an additional chapter to the history of the FAA through its decision in *DIRECTV, Inc. v. Imburgia*.[6] The Supreme Court in *DIRECTV* held that California law making arbitration waivers unenforceable is preempted by the FAA.[7]

I. BACKGROUND

At issue in *DIRECTV* were sections 9 and 10 of DIRECTV's service agreement. Section 9 of the agreement provided that any claim would be resolved only by binding arbitration[8] and stated that "if 'the law of your state' made the waiver of class arbitration unenforceable, then the entire arbitration provision" would be unenforceable.[9] Section 10 provided that the FAA governs section 9 of the agreement.[10]

Section 9 was of particular relevance in the state of California. In 2005, the California Supreme Court decided *Discover Bank v. Superior Court*,[11] holding that waivers of class arbitration in consumer adhesion contracts were unconscionable, and thus not enforceable.[12] This holding was eventually dubbed California's "*Discover Bank* rule."[13] It was within this legal context that, in 2008, Amy Imburgia and Kathy Greiner commenced a lawsuit in California state court against DIRECTV.[14] About three years of litigation ensued, but then in 2011 the United States Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion*.[15]

Concepcion held that the FAA preempted California's *Discover Bank* rule.[16] Given the development produced by *Concepcion*, DIRECTV asked

3 Federal Arbitration Act, 43 Stat. at 883.

4 465 U.S. 1 (1984).

5 *Id.* at 16–17.

6 136 S. Ct. 463 (2015).

7 *Id.* at 471.

8 *Id.* at 466 (citing Joint Appendix at 128, *DIRECTV*, 136 S. Ct. 463 (No. 14-462)).

9 *Id.* (quoting Joint Appendix, *supra* note 8, at 129).

10 *Id.* (citing Joint Appendix, *supra* note 8, at 129).

11 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

12 *Id.* at 1103, 1108.

13 *Concepcion*, 563 U.S. at 340.

14 *DIRECTV*, 136 S. Ct. at 466. Imburgia and Greiner sought damages for early termination fees that they alleged violated California law. *Id.*

15 563 U.S. 333 (2011).

16 *Id.* at 352.

the trial court to send the matter to arbitration pursuant to section 9 of the service agreement.[17] The trial court, however, denied DIRECTV's request, and the company appealed.[18] The California Court of Appeal affirmed the trial court's decision, noting that under California law as existing when DIRECTV drafted the agreement, such prohibition on class arbitration was unenforceable.[19] Furthermore, the court of appeal found that while *Concepcion* invalidated California's rule, the FAA gives the parties the freedom to choose governing law irrespective of federal preemption.[20] To support its conclusion, the court of appeal set forth two reasons: (1) the provision stating that the FAA governed was a general provision of the service agreement, while the provision voiding arbitration if the "law of your state" found a class arbitration waive unenforceable was a specific provision; and (2) the common law rule that ambiguous language in a contract should be construed against the drafter of the contract.[21] The California Supreme Court denied discretionary review and DIRECTV filed a petition for a writ of certiorari, which was granted.[22]

II. ANALYSIS

Justice Breyer delivered the opinion for the majority. The majority framed the issue as "not whether [the California Court of Appeal's] decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act."[23] In particular, as the majority explained, the issue was whether the California Court of Appeal's decision rested upon "grounds as exist at law or in equity for the revocation of any contract" as prescribed by the FAA.[24] The majority's opinion answered this question in the negative.

According to the majority, the California Court of Appeal interpreted the language "law of your state" to include invalid state law.[25] Such interpretation was deemed unacceptable by the Court because it precludes arbitration contracts from standing on equal footing with other types of contracts.[26] In support of its conclusion, the majority outlined six reasons.

17 *DIRECTV*, 136 S. Ct. at 466.

18 *Id.*

19 *Id.* at 467 (citing Imburgia v. DIRECTV, Inc., 170 Cal. Rptr. 3d 190, 194 (Cal. Ct. App. 2014), *rev'd*, 136 S. Ct. 463 (2015)).

20 *Id.*

21 *Id.*

22 *Id.* at 467–68.

23 *Id.* at 468.

24 *Id.* (quoting 9 U.S.C. § 2 (2012)).

25 *Id.* at 469.

26 *Id.* ("After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way.").

First, contrary to the opinion of the California Court of Appeal, the majority found that the contract language was not ambiguous.[27] In the majority's view, absent any other indication in the contract, the contract's provision for "the law of your state" is governed by its ordinary meaning: *valid* state law, not including *invalid* state law.[28] Second, California law itself clarified how to interpret the language in question.[29] Citing *Doe v. Harris*,[30] the majority noted that California law incorporates the California Legislature's power to change the law retroactively, and thus the law as announced in *Harris* would govern the scope of the phrase "law of your state."[31] Third, from the majority's perspective, the California Court of Appeal's reasoning did not suggest that it would apply the same reasoning in any other context outside of arbitration.[32] According to the majority, there is

> nothing in [the court of appeal's] opinion (nor in any other California case) suggesting that California would generally interpret words such as "law of your state" to include state laws held invalid because they conflict with, say, federal labor statutes, federal pension statutes, federal antidiscrimination laws, the Equal Protection Clause, or the like.[33]

Fourth, the California Court of Appeal's language focused exclusively on arbitration, which suggested to the majority that the court of appeal meant to limit its holding to the particular subject matter of arbitration.[34] Fifth, the Court outright rejected the suggestion that state law, in this case California's *Discover Bank* rule, maintains independent force after prior invalidation by a Supreme Court decision.[35] Sixth, no additional principle was invoked by the court of appeal suggesting that the same interpretation of the phrase "law of your state" would be applied by California courts in other contexts outside of arbitration.[36] While the majority recognized the court of appeal's invocation of the specific exception to the agreement's general adoption of the FAA, such a reading "tells us nothing about how to interpret the words 'law of your state' elsewhere."[37]

Justice Thomas provided a brief dissent in which he restated his belief that the FAA does not apply in state courts, and as such he would affirm

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27 *Id.*
28 *Id.*
29 *Id.*
30 302 P.3d 598, 601–02 (Cal. 2013).
31 *DIRECTV*, 136 S. Ct. at 469.
32 *Id.*
33 *Id.* at 469–70.
34 *Id.* at 470.
35 *Id.*
36 *Id.*
37 *Id.*

the decision of the California Court of Appeal.[38] The more detailed critique of the majority's opinion was presented by Justice Ginsburg, who, joined by Justice Sotomayor, took a more critical view of the FAA's expanding scope. In her dissent, Justice Ginsburg explained that given the precedent on the subject of the FAA, she "would take no further step to disarm consumers, leaving them without effective access to justice."[39]

Justice Ginsburg's dissent focused on the role of DIRECTV as the drafter of the agreement, and she considered it "particularly appropriate" to interpret any ambiguity against DIRECTV.[40] This common law rule of interpretation had "particular force" because the California Court of Appeal applied it to a standardized contract.[41] Furthermore, according to Justice Ginsburg, the plaintiffs were unlikely to anticipate in 2007—when they entered into the agreement with DIRECTV—the Supreme Court's 2011 *Concepcion* decision invalidating their state's *Discover Bank* rule.[42] In Justice Ginsburg's view, the interpretation of the contract given by the California Court of Appeal was "not only reasonable, [but also] entirely right."[43]

As a preliminary matter, Justice Ginsburg framed arbitration as "a matter of 'consent, not coercion.'"[44] Accordingly, in Justice Ginsburg's view, "[a]llowing DIRECTV to reap the benefit of an ambiguity it could have avoided would ignore not just the hugely unequal bargaining power of the parties, but also their reasonable expectations at the time the contract was formed."[45] Moreover, Justice Ginsburg noted that historically the

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38 *Id.* at 471 (Thomas, J., dissenting). Justice Thomas's belief that the FAA only applies in federal courts, and not in state courts, stems from disagreement with the Supreme Court's decision in *Southland*. Justice Thomas's reasoning on this point was further detailed in his dissent in *Allied-Bruce Terminix Cos. v. Dobson*, where he stated:

> [N]ot until 1959—nearly 35 years after Congress enacted the FAA—did any court suggest that § 2 [of the FAA] applied in state courts. . . . The explanation for this delay is simple: The statute that Congress enacted actually applies only in federal courts. At the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes.

513 U.S. 265, 286 (1995) (Thomas, J., dissenting) (citing Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 407 (2d Cir. 1959)).

39 *DIRECTV*, 136 S. Ct. at 471 (Ginsburg, J., dissenting).

40 *Id.* at 472.

41 *Id.* at 475.

42 *Id.* at 472 (quoting Imburgia v. DIRECTV, Inc., 170 Cal. Rptr. 3d 190, 196 (Cal. Ct. App. 2014)).

43 *Id.* at 473.

44 *Id.* (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010)).

45 *Id.* at 475.

Supreme Court has respected state court interpretations' of arbitration agreements.[46] Thus, in her view, the *DIRECTV* decision is "a dangerous first."[47]

In order to reach such a radically different conclusion from the majority's opinion, Justice Ginsburg's dissent reconciled the reasoning of the California Court of Appeal with the Court's decision in *Concepcion* by adopting a narrower reading of *Concepcion*. According to Justice Ginsburg's dissent, *Concepcion* "held only that a State cannot *compel* a party to engage in class arbitration when the controlling agreement unconditionally prohibits class procedures."[48] Thus, from Justice Ginsburg's perspective, the majority in *DIRECTV* oversteps the framework laid out in *Concepcion*. By overstepping *Concepcion*'s framework, the majority effectively maintains that "it no longer matters whether DIRECTV meant California's 'home state laws' when it drafted the 2007 version of its service agreement."[49]

Justice Ginsburg also underscored the fact that the FAA allows parties to choose governing law.[50] Accordingly, for Justice Ginsburg, the dispositive question is "whether the parties intended the 'law of your state' provision to mean state law as preempted by federal law . . . or home state law as framed by the California Legislature, without considering the preemptive effect of federal law."[51] The latter of these two alternative readings is deemed the more adequate reading in Justice Ginsburg's dissent.[52]

Justice Ginsburg's dissent does concede that the FAA has been construed as a "federal policy favoring arbitration."[53] However, she reminds readers of the limits of FAA application as voiced in the 2010 *Granite Rock Co. v. International Brotherhood of Teamsters*[54] decision. In *Granite Rock*, the Supreme Court cautioned that a presumption favoring arbitration should apply "only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and . . . is legally enforceable and best construed to encompass the dispute."[55] Given the disparity in bargaining power

46 *Id.* at 473.

47 *Id.*

48 *Id.* (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011)).

49 *Id.*

50 *Id.*

51 *Id.* at 474.

52 *Id.*

53 *Id.* at 475 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989)).

54 561 U.S. 287 (2010).

55 *Id.* at 303.

between individual consumers and a sophisticated entity such as DIRECTV, Justice Ginsburg considers the majority's opinion not only a step beyond *Concepcion*, but also a misreading of the FAA that effectively deprives consumers of relief against entities that write prohibitions on class arbitration into their form contracts.[56] According to Justice Ginsburg, the decision in *DIRECTV* holds that "consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms . . . could be construed to protect their rights."[57]

Justice Ginsburg closes her critique of the majority's opinion with a reminder of the context in which the FAA was originally enacted, highlighting that the FAA was meant to enforce arbitration agreements between parties of relatively equal bargaining power.[58] According to Justice Ginsburg, "Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place."[59] Moreover, Justice Ginsburg also points to section 2 of the FAA—on which the majority relies—and its prescription that arbitration provisions ought to be treated like other contractual terms with the implication that such terms should not receive any type of preferential treatment.[60] Justice Ginsburg finally notes the marked divergence of *DIRECTV*'s holding with the way in which mandatory arbitration clauses in consumer contracts are treated abroad.[61] Citing a 1993 European Union Directive which forbids binding consumers to unfair contractual terms,[62] and a subsequent EU Recommendation interpreting the Directive,[63] Justice Ginsburg underscores how consumer disputes in the European Union are arbitrated only when the parties mutually agree on arbitration on a "post-dispute basis."[64]

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56 *DIRECTV*, 136 S. Ct. at 476 (Ginsburg, J., dissenting).

57 *Id.* Highlighting that consumers have not always lacked "the benefit of the doubt," Justice Ginsburg references two previous Supreme Court cases, one dating as far back as 1953. *Id.* at 476 n.3 (citing Wilko v. Swan, 346 U.S. 427, 435, 438 (1953); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000)).

58 *Id.* at 477 (citing Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 170–71 (2010)).

59 *Id.* at 477–78 (citing Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2860 (2015)).

60 *Id.* at 478.

61 *Id.*

62 Council Directive 93/13, art. 3, 1993 O.J. (L 95) 31.

63 Commission Recommendation 98/257, 1998 O.J. (L 115) 34.

64 *Id.* at 478 (quoting Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 847–48 (2002)).

CONCLUSION

The majority in *DIRECTV* anchored its reasoning in the language of the FAA itself, and the status of California's *Discover Bank* rule vis-à-vis federal law. The outcome was not surprising, particularly for those that have followed recent FAA litigation before the Court. However, *DIRECTV* is significant in at least two aspects: (1) it reflects the Supreme Court's sensitivity to the "different" or more stringent treatment that state courts might give arbitration agreements, and (2) it suggests that under the current legal landscape consumer advocates' concerns might be more effectively addressed through legislative action rather than through litigation.

Consumer groups and individual consumers may find the "equal footing" reasoning by the majority to be a little ironic. The Supreme Court is forthcoming about ensuring the equal treatment of all contracts (whether they are arbitration agreements or not), but contrary to what many consumer advocate groups may wish, the majority in *DIRECTV* does not dwell on Justice Ginsburg's concerns regarding the disparity in bargaining power between individual consumers and more sophisticated entities. As caustic to individual consumer rights as such rationale may appear, it is difficult to fault the majority for deeming the language used by DIRECTV to be unambiguous, and applying the ordinary meaning of the phrase "law of your state." The reasoning used by the California Court of Appeal which interpreted "law of your state" to include invalid state law proved simply too odd of an argument for the Supreme Court to accept. After all, to hold that the California Court of Appeal reasonably read the phrase would have required the Supreme Court to dilute the force of its previous *Concepcion* decision, which struck down California's *Discover Bank* rule. Such a retreat would have undoubtedly opened the door to additional questions about the independent force of other state laws previously considered preempted by other Supreme Court decisions.

Regardless of whether or not the holding of *DIRECTV* truly makes consumer form contracts with prohibitions on class arbitration completely invulnerable to attack, as described in Justice Ginsburg's dissent, the outcome of *DIRECTV* should serve as a demarcation, a sort of tipping point, for consumer advocate groups. Justice Ginsburg's dissent echoes several of the practical concerns related to the asymmetric bargaining positions between individual consumers and companies that prohibit class arbitration in form contracts, and raises important questions about the legislative intent of the FAA. However, as time passes and the use of arbitration becomes more commonplace, it also becomes more difficult to ignore its attractive qualities—chiefly its time and cost efficiencies. Nonetheless, after *DIRECTV*, it should be rather clear that any desired rebalancing of bargaining power between individual consumers and sophisticated entities will not be effectuated through the courts, at least not any time soon. Instead, *DIRECTV* calls for consumer advocacy groups to

more aggressively focus their efforts on persuading the legislature to make any desired changes. Of course, legislative efforts would require a higher degree of concerted organization, and such efforts will likely face strong opposition from the entities who will continue to seek the benefits of cost-effective, legally enforceable methods of dispute resolution.

ESSAYS

THE NEW ELECTIONS CLAUSE

*Michael T. Morley**

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.

POLICE CULTURE IN THE TWENTY-FIRST CENTURY: A CRITIQUE OF THE PRESIDENT'S TASK FORCE'S FINAL REPORT

Julian A. Cook, III∗

> *[A] lot of our work is going to involve local police chiefs, local elected officials, states recognizing that the moment is now for us to make these changes. We have a great opportunity, coming out of some great conflict and tragedy, to really transform how we think about community law enforcement relations so that everybody feels safer and our law enforcement officers feel, rather than being embattled, feel fully supported.*
>
> —President Barack Obama[1]

In response to a series of events involving police-citizen encounters, including those in Ferguson, Missouri, and Staten Island, New York, that have strained relations between law enforcement and the communities (primarily minority) that they serve, President Barack Obama established a task force charged with developing a set of recommendations designed to improve police practices and enhance public trust.[2] Headed by Charles Ramsey, Commissioner of the Philadelphia Police Department, and Laurie Robinson, former Assistant Attorney General for the U.S. Department of Justice Office of Justice Programs, and currently a Professor of Criminology, Law, and Society at George Mason University,[3] the eleven-member task force submitted its documented recommendations in May

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1 Press Release, The White House, Remarks by the President After Meeting with Task Force on 21st Century Policing (Mar. 2, 2015), https://www.whitehouse.gov/the-press-office/2015/03/02/remarks-president-after-meeting-task-force-21st-century-policing.

2 Exec. Order No. 13,684, 3 C.F.R. 312 (2014).

3 PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 81 (2015) [hereinafter Report].

2015. In a report entitled the *Final Report of the President's Task Force on 21st Century Policing* (the Report), the task force sets forth in excess of sixty recommendations, which address, among other things: building community trust, police policies, employment of technologies, officer training, and officer wellness and safety.[4]

The Report suggests that effective policing and improved community relations can be achieved through redirected police policies, enhanced communication with—and involvement of—local communities in public safety matters, as well as improved and sensitized law enforcement training.[5] Rather than engage in a comprehensive examination of the Report's proposals, this Essay will address an important theme highlighted by the task force—the importance of reforming police culture—and explain why the well-intentioned recommendations proffered in the report associated with addressing cultural change will face substantial hurdles to successful implementation.

I. REPORT RECOMMENDATIONS

The Report correctly identifies police culture as a principal underlying cause for the strained relations existent between the police and many local communities. It observes that while police investigative practices have become increasingly effective, the public's confidence in the police has either "remained flat" or, particularly in minority communities, has declined.[6] Recognizing that obedience to the law increases when a

4 *Id.* at i.

5 *See id.* at 1–4. The Report has also generated criticism. *E.g.*, Stephen Dinan & Ben Wolfgang, *Obama Seeks to End Immigration Enforcement by Local, State Police*, WASHINGTON TIMES (May 18, 2015), http://www.washingtontimes.com/news/2015/may/18/obama-seeks-to-end-immigration-enforcement-by-loca/?page=all (arguing that the Report's recommendation that the federal government "decouple" itself from state and local law enforcement authorities in immigration enforcement is misplaced); Stuart Schrader, *The Liberal Solution to Police Violence: Restoring Trust Will Ensure More Obedience*, THE INDYPENDENT (June 30, 2015) https://indypendent.org/2015/06/30/liberal-solution-police-violence-restoring-trust-will-ensure-more-obedience (arguing that the Report's recommendations will ultimately enhance police powers, and that it pays too little attention to the disparity among white and minority communities regarding perceptions of police legitimacy); Alex S. Vitale, *Obama's Police Reforms Ignore the Most Important Cause of Police Misconduct*, THE NATION (Mar. 6, 2015), http://www.thenation.com/article/obamas-police-reforms-ignore-most-important-cause-police-misconduct/ (arguing that that the task force paid insufficient attention to structural realities which work to maintain racial inequality and failed to recommend a redirection from alleged harmful police priorities, such as the war on drugs and "broken windows" police practices).

6 Report, *supra* note 3, at 9.

community supports the legitimacy of those employed to enforce it,[7] the Report identifies four procedural prerequisites to achieving this objective: (1) extending dignity and respect to individuals; (2) allowing individuals the opportunity to express themselves during encounters; (3) decision making that is fair and transparent; and (4) conveying motives that the public deems to be "trustworthy."[8]

To this end, the Report proffers several recommendations designed to improve the culture of policing. The recommendations, which are distributed throughout the ninety-nine page report and are contained in five of the six principal topical areas (or "pillars") identified in the document, focus overwhelmingly upon police practices and procedures. For example, the task force suggests that law enforcement "embrace a guardian mindset to build public trust and legitimacy," and that it adopt internal and external procedural polices consistent with this approach.[9] The Report also recommends that police departments become more transparent with respect to their policies, as well as their data reflecting detentions, arrests, and other demographic information.[10] It further suggests that law enforcement agencies develop policies regarding the employment of force that are "clear [and] concise," that are available for public review,[11] and that emphasize the exercise of restraint in appropriate circumstances.[12]

The Report also urges the adoption of community policing policies, which emphasize positive, collaborative relationships between the police and various community members and groups.[13] It states that the "infus[ion]" of a community policing approach "throughout the culture and organizational structure of law enforcement agencies" would help "transform culture within the police department as well as in the community."[14] Significant emphasis is also placed upon training and education, which the Report declares is the "starting point for changing the culture of policing."[15] Finally, the Report delineates an array of measures that it suggests would promote officer wellness and safety. Referencing testimony by Dr. Alexander Eastman during one of the seven "listening sessions" sponsored by the task force, the Report notes that the

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7 *Id.* at 9–10.

8 *Id.* at 10.

9 *Id.* at 11 (Recommendation 1.1).

10 *Id.* at 13 (Action Item 1.3.1).

11 *Id.* at 20 (Recommendation 2.2).

12 *Id.* at 20–21.

13 *Id.* at 41–42.

14 *Id.* at 43 (Recommendation 4.2).

15 *Id.* at 53 (Recommendation 5.1). The task force recommends a more active federal involvement in local and state training initiatives. *Id.* at 53–60.

transformation of police organizational culture is "the most important factor to consider when discussing [officer] wellness and safety."[16]

Individually and collectively, the proffered police organizational reforms are laudable objectives. Embracing a guardian mindset, increasing law enforcement policy and practice transparency, adopting community policing practices, and improving officer training and education are reasoned approaches to the issue of police malfeasance. The problem, however, has less to do with the proffered recommendations than with the incentives on the part of the police to pursue such goals and to retain any successes that are achieved. Without more, successful implementation and permanence of the proffered recommendations are dependent, in large part, upon the initiative and good faith of law enforcement entities across the country. Some departments with problematic cultures might refuse to implement corrective measures. Others might take corrective action with vigor. Yet, even the most willing actor must have sufficient motivation to maintain its successes.

II. SUPREME COURT INFLUENCES

Unfortunately, there exists a heavy wave of influences that run counter to successful organizational reforms. Chief among them are the steady and powerful signals that have been consistently delivered to law enforcement agencies from the Supreme Court since the close of the Warren Court era in 1969. The Warren Court was characterized, in large part, by its comparatively liberal construction of individual constitutional safeguards. It was during this period that the Court rendered the historic *Miranda v. Arizona* decision, which afforded individuals in police custody the right to be informed of their rights to counsel and to remain silent prior to the commencement of interrogation,[17] that the right to counsel was extended to individuals charged with felonies[18] and to certain forms of out-of-court identification procedures,[19] and that a privacy safeguard was recognized in telephonic conversations that occur outside the home.[20]

And it was the Warren Court that decided *Mapp v. Ohio*,[21] the landmark case which extended the reach of the exclusionary rule to the states. In general terms, the exclusionary rule provides that, in the event of a Fourth Amendment breach, the derivative evidence cannot be used at trial. In language that was forceful and clear, the Court found that the rule

16 *Id.* at 62.
17 384 U.S. 436 (1966).
18 Gideon v. Wainwright, 372 U.S. 335 (1963).
19 United States v. Wade, 388 U.S. 218 (1967).
20 Katz v. United States, 389 U.S. 347 (1967).
21 367 U.S. 643 (1961).

of exclusion was a constitutional mandate.[22] It unequivocally considered the exclusionary component an "essential part of the right to privacy."[23] A different interpretation, the Court explained, would render the safeguards against unreasonable searches and seizures a guarantee in word only.[24] The Court reasoned that it was "logically and constitutionally necessary" to extend this mandate to the states in order to give substance to the constitutional guarantees, to incentivize the government to respect these safeguards, and to prevent prosecutorial forum shopping.[25] Yet, during the post–Warren Court era the Court has steadily, and significantly, departed from *Mapp*.

No longer considered part and parcel of the Fourth Amendment, the rule of exclusion is now viewed by a majority of the Court as a remedy of "last resort."[26] It is a remedy that is applied only when appreciable deterrence to purposeful, reckless, or grossly negligent police misconduct can be achieved.[27] Though the exclusionary rule as a principle remains intact, various exceptions to the rule have developed which together have significantly circumscribed the circumstances under which a claimant can avail himself of exclusion.[28] Unquestionably, the most notable exception has been the "good faith" rule, which has operated to exclude Fourth Amendment violations in instances where the police have acted in good faith reliance upon their authorization to conduct a search.[29] By any measure, the exclusionary rule is now a shell of its former self.

In addition, the landscape of individuals eligible to pursue constitutional challenges to police conduct has narrowed significantly since the Warren Court. Consider that in 1960, the Supreme Court in *Jones v.*

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22 *Id.* at 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

23 *Id.* at 656.

24 *Id.* at 655.

25 *Id.* at 655–58.

26 Herring v. United States, 555 U.S. 135, 140 (2009) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

27 *Id.* at 144.

28 *See* Segura v. United States, 468 U.S. 796 (1984) (the independent source doctrine); Nix v. Williams, 467 U.S. 431 (1984) (the inevitable discovery doctrine); Wong Sun v. United States, 371 U.S. 471 (1963) (the attenuated circumstances doctrine).

29 *E.g. Herring*, 555 U.S. at 137 (officer reasonably relied on a "negligent bookkeeping error by another police employee"); Arizona v. Evans, 514 U.S. 1 (1995) (officer reasonably relied on court clerk's determination, later found to be erroneous, that the defendant had an outstanding warrant for arrest); Illinois v. Krull, 480 U.S. 340 (1987) (in conducting a warrantless administrative search, officer reasonably relied upon a state statute later found to be unconstitutional); United States v. Leon, 468 U.S. 897 (1984) (officer reasonably relied upon a search warrant later found to be lacking in probable cause).

United States[30] identified four possible bases upon which standing to pursue a constitutional challenge could be established: (1) legitimate presence on the premises of a search; (2) establishment of a privacy interest; (3) a possessory interest in the evidence searched or seized; or (4) being a target of a government search.[31] Of the four, only the privacy test remains, and it represents the predominant standard through which standing can be established.[32] The privacy test threshold requires an infringement upon a claimant's personal Fourth Amendment protections and does not recognize the assertion of third-party claims.[33]

The Court's diminishment of the right of exclusion and its meaningful narrowing of the class of eligible claimants conveys a powerful signal to law enforcement—not to mention society in general—that the constitutional misdeeds of the police will frequently be overlooked. Simultaneously, the Court conveys that individual constitutional safeguards are not fully guaranteed. As a result, police organizations become emboldened by their expanded investigative latitude, and an aggressive culture of policing is often an accompanying byproduct. No doubt, police work is dangerous, unpredictable, reactive, and riddled with risks.[34] A seemingly innocent encounter can become violent or even deadly with little or no notice. Yet police practices that are overly aggressive can fragment a police-community relationship and destroy the trust necessary for an effectual coexistence.

How to tame aggressive and unconstitutional police practices within the context of effective policing is the ultimate question. It is, however, unrealistic to expect meaningful and sustained cultural change absent sufficient incentives. The reforms detailed in the Report are directed primarily at police organizations and are dependent upon the initiatives of state and local agencies. But goodwill alone will produce little measureable benefit unless accompanied by legislative or judicial mandates

30 362 U.S. 257 (1960).

31 *See id.* at 261, 263–67.

32 Rakas v. Illinois, 439 U.S. 128 (1978). *Rakas* is part of a series of cases in which the Court substantially narrowed the range of individuals capable of pursuing constitutional challenges. *See* United States v. Salvucci, 448 U.S. 83, 90–91 (1980) (finding that "a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction"); Rawlings v. Kentucky, 448 U.S. 98 (1980) (despite owning the narcotics discovered during a search by law enforcement officers, defendant lacked standing to challenge the constitutionality of that search); United States v. Payner, 447 U.S. 727, 734 (1980) (stating that the Court's precedents "do not command the exclusion of evidence in every case of illegality [by law enforcement officials]").

33 *Rakas*, 439 U.S. at 137–38.

34 *See* Report, *supra* note 3, at 61–62 (describing the "physical, mental, and emotional injuries [that] plague many law enforcement agencies").

that penalize police misdeeds. The police are not going to relinquish investigative authority granted by the Supreme Court through voluntary election.

Indeed, a few proffered reforms recommend that the police ignore longstanding Supreme Court precedent. One such proposal suggests that "[l]aw enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause."[35] But in 1973, the Supreme Court in *Schneckloth v. Bustamonte*[36] held "that knowledge of a right to refuse is not a prerequisite of a voluntary consent."[37] And another proposal recommends that "[l]aw enforcement agencies and municipalities . . . refrain from . . . initiat[ing] investigative contacts with citizens for reasons not directly related to improving public safety, such as generating revenue."[38] Yet the Supreme Court has plainly granted law enforcement plenary authority to approach and follow individuals irrespective of the officer's underlying motivation, and this unrestrained freedom exists up until the moment that a seizure occurs within the meaning of the Fourth Amendment.[39]

The answer to the problem of twenty-first century policing is no doubt complex. There is no silver-bullet answer. But the ultimate solution must include a reversal of much of the Supreme Court's jurisprudence in the exclusionary rule context. The diminishment of the right to exclusion has helped foster the problem of aggressive policing, and a reinvigoration of this principle would help reverse this trend. And the natural place to start is by expanding the base of individuals eligible to challenge unconstitutional police practices. A meaningful expansion of this base, in particular the allowance of third-party standing, will not only allow for more widespread challenges to unconstitutional and aggressive police behaviors, but also incentivize police organizations to adapt to this new environment. An expanded landscape of challengers to their practices will motivate police organizations to alter their culture and engage in more constitutionally compliant behaviors. Persistent challenges to police organization practices, coupled with strictly enforced exclusionary rules, are among the big sticks that can help effectuate the changes sought in the Report.

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35 Report, *supra* note 3, at 27 (Recommendation 2.10).

36 412 U.S. 218 (1973).

37 *Id.* at 234.

38 Report, *supra* note 3, at 26 (Recommendation 2.9).

39 *See* Florida v. Royer, 460 U.S. 491, 497–98 (1983) (plurality opinion) (first citing Dunaway v. New York, 442 U.S. 200, 210 n.12 (1979); then citing Terry v. Ohio, 392 U.S. 1, 31, 32–33 (1967) (Harlan J., concurring); and then citing *Terry*, 392 U.S. at 34 (White, J., concurring)).

Notably, third-party standing is currently authorized in the criminal sphere in the context of jury selection. The Supreme Court in *Batson v. Kentucky*[40] held that a prosecutor violated the equal protection rights of a black defendant when he exercised his peremptory challenges to exclude potential black jurors.[41] But it was the Court's decision in *Powers v. Ohio*[42] that allowed for third-party enforcement of the *Batson* principle. In *Powers*, the Court held that a white defendant had third-party standing to assert the equal protection rights of the jurors who were wrongly excluded during jury selection.[43] In reaching this result, the Court reasoned, inter alia, that the defendant would be sufficiently motivated to pursue the equal protection rights of the excluded members of the venire, and that the latter group would be insufficiently motivated to seek legal redress.[44]

The same rationales apply with equal force in the Fourth Amendment context. Defendants are aggrieved by unconstitutional police behaviors when evidence obtained as a byproduct of such actions is introduced against them at trial. Whether obtained in violation of their personal privacy protections or those of someone else, the injury and the motivation to seek vindication of the constitutional infringement is quite significant. When confronted with the prospect of a criminal conviction and possible incarceration, defendants become highly motivated actors to exclude evidence that can produce such undesirable outcomes. For the criminal defendant, it is immaterial whether the Fourth Amendment protections that have been violated belong to the defendant or a third-party. The impetus to exclude remains the same.

And like the wrongly stricken juror, the uncharged individual victimized by unconstitutional police behavior is highly unlikely to pursue a legal remedy. Structural barriers, such as qualified immunity, which largely shields law enforcement personnel from individual liability,[45] and the Eleventh Amendment, which protects the states against civil damages actions,[46] serve as meaningful disincentives to the pursuit of legal redress. In addition, there are practical barriers. Distrust of the legal system, particularly in minority communities, and access to lawyers willing to

40 476 U.S. 79 (1986).

41 *Id.* at 89.

42 499 U.S. 400 (1991).

43 *Id.* at 409.

44 *Id.* at 411, 414–15.

45 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (officers receive qualified immunity for their actions so long as they do not violate clearly established laws or constitutional rights of which a reasonable person would have been aware).

46 U.S. CONST. amend. XI.

assume a civil action against the police are notable impediments.[47] Furthermore, individuals aggrieved by unconstitutional government conduct are less likely than the juror populations at issue in the *Powers* line of cases to pursue legal action on account of financial hardships, childcare difficulties, and misgivings regarding the fairness of the criminal judicial process.[48]

CONCLUSION

The spate of disturbing police-citizen contacts that have recently generated significant media attention has prompted renewed attention upon the propriety of police practices, particularly in minority communities. The comprehensive reforms set forth in the Report certainly provide a useful platform from which this discussion can take place. Yet meaningful reform is dependent less upon the establishment of task forces, the development of innovative ideas, and the art of persuasive argumentation than upon legislative and judicial dictates that mandate change. The Supreme Court's steady and significant diminishment of individual safeguards since the close of the Warren Court era—including the exclusionary rule and the related concept of standing—has contributed to a police organizational culture that has manifested itself in aggressive and unconstitutional behaviors that have seemingly become more pronounced in recent years. However, a robust exclusionary rule, coupled with a vastly expanded landscape of eligible challengers to police practices, can help effectuate a beneficial change in police culture and officer behavior on the ground. It is this sort of change—meaningful access to the enforcement arm of the judiciary, and the court's liberal authority to wield that influence—that are necessary prerequisites to consequential reform. And until these prerequisites are satisfied, I submit that it is doubtful that transformative change in police culture will occur.

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47 MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 69–70 (2012) (arguing, inter alia, that many individuals—minorities in particular—who are victimized by police misconduct are unlikely to pursue legal action out of fear of police harassment and retaliation and distrust of the legal process).

48 Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 355–56 (1999) (noting that jury populations tend to underrepresent minority groups and that the community of non-jurors is, inter alia, more likely than juror populations to have financial resource and child care difficulties, English proficiency issues, and apathy toward the judicial process).

IS STARE DECISIS INCONSISTENT WITH THE ORIGINAL MEANING OF THE CONSTITUTION?: EXPLORING THE THEORETICAL AND EMPIRICAL POSSIBILITIES

*James Cleith Phillips**

For some time, a scholarly debate has raged over whether a commitment to the original meaning of the Constitution allows for the doctrine of stare decisis, whereby courts defer to precedent simply because it is precedent. This Essay explains the range of theoretical possibilities for this seemingly incompatible duo, as put forth by originalism's leading scholars, and situates these various theories on a continuum. The Essay ends with a preview of the difficulties and possibilities that follow from the various empirical answers regarding the relationship between stare decisis and the Constitution at the Founding.

I. THE THEORETICAL POSSIBILITIES

At one end of the theoretical spectrum is the position of strong stare decisis—it always trumps constitutional meaning. This view of the perpetual supremacy of stare decisis is problematic for two reasons. First, it reads three words in the Constitution—"[t]he judicial Power"[1]—as relegating the rest of the text to second-class status. This view further means that originalism, or any theory of constitutional interpretation, is only relevant when a court is dealing with a constitutional matter of first impression. It thus reduces originalism to a theory of stare decisis almost all of the time. Second, under what I call the *Plessy* test—whether a theory of stare decisis would mean *Plessy v. Ferguson*[2] would still be good law—this view fails. While it is possible that the judicial-power tail is designed

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1 U.S. CONST. art. III, § 2.

2 163 U.S. 537 (1896).

to wag the constitutional dog, it does seem odd. Though possible, why would the Constitution elevate the Supreme Court above itself? How, under that scenario, could the judiciary be the least dangerous branch, or could we even have a republic?

The polar opposite position is one where stare decisis is irrelevant as to the meaning of the Constitution. Michael Stokes Paulsen, Gary Lawson, and to a lesser extent, Akhil Amar and Randy Barnett, make arguments along these lines.[3] Paulsen contends that stare decisis is incompatible with any interpretive theory because it ultimately corrupts the theory.[4] For instance, if one ascribes to originalism—that the meaning of the Constitution is what the words originally meant when enacted—then stare decisis is incompatible and following precedent when it is not the original meaning rejects the premise of originalism.[5]

Lawson argues that the logic of judicial review, inherent in the judicial power, rejects stare decisis.[6] This is because it is the duty, not just the

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3 Steven Calabresi "defend[s] the textualism of Amar, Lawson, and Paulsen" by "lay[ing] out an argument as to why the Supreme Court ought often to follow the text of the Constitution, as originally understood, rather than its own precedents." Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006). It is not clear, though, that what Calabresi argues for is the same as what at least Lawson (originally) and Paulsen have argued for.

4 Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) [hereinafter Paulsen, *Intrinsically Corrupting*]. Similar to Lawson's original view, Paulsen argues that:

> [*Stare decisis*] would have judges apply, in preference to the Constitution, that which is not consistent with the Constitution. That violates the premise on which judicial review rests, as set forth in *Marbury*. If one accepts the argument for judicial review in *Marbury* as being grounded, correctly, in the supremacy of the Constitution (correctly interpreted) over anything inconsistent with it, and as binding the judiciary to enforce and apply the Constitution (correctly interpreted) in preference to anything inconsistent with it, then courts must apply the correct interpretation of the Constitution, *never* a precedent inconsistent with the correct interpretation. It follows, then, that if *Marbury* is right (and it is), *stare decisis* is unconstitutional.

Id.; *see also* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2731–34 (2003).

5 Paulsen also argues that stare decisis in constitutional matters is a judge-made doctrine not required by the Constitution itself. To prove this, though, he relies on Supreme Court cases stating such. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1537 n.1 (2000) (collecting cases). This is an odd move for an originalist to make, especially when he is arguing stare decisis is unconstitutional.

6 Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL. 23 (1994) [hereinafter Lawson, *Constitutional Case*]. Lawson moderated his view slightly in a later article, arguing that "[a]fter considering the issue further, and digesting a decade and a half of criticism of my argument by the legal academy, I want to change my conclusion . . . from 'never' to 'mostly never.'" Gary Lawson, *Mostly Unconstitutional:*

power, of a court to say what the law is, and in so doing courts must choose between conflicting laws of differing hierarchical authority, and must independently do so. Thus, if the President claims his actions are constitutional, or Congress alleges its laws are constitutional, a court has an independent responsibility to conduct its own analysis and announce legal conclusions—judicial review does not allow a court to defer its responsibilities. Its duty is to follow the Supremacy Clause and strike down any lesser law that clashes with the Constitution, and precedent is a lesser law. There is therefore no room for a court to delegate its responsibilities to a previous court and to allow a court decision to trump the Constitution itself.[7] And while Lawson acknowledges there is some indeterminacy in constitutional meaning, whenever the meaning is determinable that meaning should trump what previous courts have said.[8]

Lawson acknowledges that one can "plausibly argue" that "when the Constitution authorized judges to decide cases, it must also be taken to have authorized them to use the tools traditionally employed by judges in that endeavor, including the attribution of legal effect to prior decisions" since "[t]he Constitution's framers . . . were well aware of the established British practice of treating precedent as a source of law—a practice that extended to the interpretation of written texts, such as statutes."[9] While calling such an argument "tempting," he states "it sidesteps rather than rebuts the prima facie case against precedent" because "'[t]he judicial Power' is fundamentally the case-deciding power" and this requires adhering to "the sources of law that courts should employ when deciding cases and the hierarchical order of those sources in the event of a conflict among them."[10] Thus, the Supremacy Clause requires the Constitution to trump precedent since it is lower on the totem pole of law, and the Clause essentially limits the exercise of the judicial power and what traditional judicial tools can be incorporated when interpreting the Constitution.[11]

The Case Against Precedent Revisited, 5 AVE MARIA L. REV. 1, 3–4 (2007) (footnote omitted). His new, narrow exception is that "the Constitution only *permits* the use of precedent in constitutional cases . . . [if] the precedent is the best available evidence of the right answer to constitutional questions." *Id.* at 4.

7 I think this may be an inaccurate characterization of what is occurring—a current court is pitting its interpretation of the Constitution against a previous court's interpretation, not pitting the Constitution's text against a previous court's interpretation. That is a different question of supremacy.

8 *See* Lawson, *Constitutional Case*, *supra* note 6, at 31.

9 *Id.* at 29.

10 *Id.*

11 There is a possible problem with this argument. Statutes were known to trump court decisions prior to the Constitution, which would have made stare decisis a nullity in statutory interpretation, limiting it only to the common law, but that doesn't appear to have been the case.

Amar takes a slightly different tack that is not necessarily inconsistent with Paulsen and Lawson's positions since they confine their arguments to stare decisis and original meaning. Amar conceives of what I think of as uppercase Stare Decisis and lowercase stare decisis,[12] and appears to be tapping into Keith Whittington's conceptions of constitutional construction and interpretation.[13] In the scenario of uppercase Stare Decisis—where it is dealing with the meaning of the Constitution—the text trumps precedent and stare decisis is inappropriate. In the scenario of lowercase stare decisis, where courts are dealing with tests or doctrines that allow for the application of the Constitution, stare decisis is very much an appropriate and necessary tool of the judiciary.[14]

Barnett, like Paulsen, Lawson, and Amar, argues that original meaning takes precedence over precedent, and that "permitting original meaning to trump precedent is not nearly so radical as it sounds."[15] Barnett notes the potential problem with rejecting stare decisis: "[It] seems important to the rule of law . . . [as] the stability of constitutional law might be undermined as each Court considers itself completely free to reach different conclusions about the meaning of the text as time goes by."[16] Yet, as Barnett notes, "[n]o one thinks that precedents should last forever. Everyone thinks that some precedent should be rejected."[17] In fact, "many nonoriginalists who now invoke precedent to browbeat originalism themselves appear committed only to the precedents they happen to like, and this is hardly a commitment to the doctrine of precedent at all."[18] Thus, for Barnett:

> The normative case for originalism is based, in large measure, on the superiority of the enacted text over the opinions of the branches of government that it is supposed to govern and limit—including the Supreme Court. An originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist.[19]

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12 *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78–89 (2000).

13 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 195–212 (1999); *see also generally* KEITH E. WITTINGTON, CONSTITUTIONAL CONSTRUCTION (2d prtg. 2001).

14 *See also* Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729 (adopting a position similar to Barnett's, and to a lesser degree Amar's, that allows for precedent that relies on originalism to reach its conclusions, as well as precedent that constructs the doctrinal meaning of constitutional provisions).

15 Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263 (2005).

16 *Id.* at 259.

17 *Id.* at 261.

18 *Id.*

19 *Id.* at 262–63.

The reason this proposition in not so radical in Barnett's view is that the clash of stare decisis and the original meaning of the Constitution will not happen frequently. First, he observes, only about a fifth of the Supreme Court's cases deal with the Constitution, and hence "the doctrine of precedent could survive for any or all cases whose outcome does not concern the original meaning of the text."[20] Second, in the constitutional cases, sometimes "the original meaning is rather abstract, or at a higher level of generality . . . . The Due Process Clause [is an example]."[21] Because of this, and like Amar, Barnett argues that "an original meaning originalist can take the abstract meaning as given, and accept that the application of this vague meaning to particular cases is left to future actors, including judges, to decide"—via "constitutional construction"—"[t]he process of applying general abstract provisions to the facts of particular cases by adopting intermediate doctrines."[22] Though even there not all precedent is created equal, and the principle Barnett proposes is that "judicial constructions of the Constitution that are not inconsistent with original meaning may well be subject to the doctrine of precedent."[23] For instance, for Barnett "content neutrality," despite being a "judicially-created doctrine" that "is by no means a product of the original meaning of the First Amendment, [is] a constitutional construction by which the original meaning of the First Amendment can be applied in concrete cases."[24] Hence, once this doctrine "is adopted, there is no originalist objection to it being considered a binding precedent, even if someone proposes a different way to implement the right of freedom of speech."[25] However, such an intermediate doctrine can be properly rejected once another is proposed that is either "better . . . in implementing the original meaning of the text,"[26] or, if equally good on those grounds, better "enhance[s] the legitimacy of the Constitution."[27]

In dealing with the concern about reliance interests, Barnett argues that "[a]n originalist need not reject legal claims made by particular persons made in reliance on mistaken precedent."[28] Thus, for example, if the Social Security Act is held unconstitutional because it is inconsistent with the Constitution's original meaning, "the government might still be obligated to make good on its promises to those who have relied to their

20 *Id.* at 263. But why isn't Barnett's logic equally extended to statutory interpretation, since statutes are written laws that are inferior only to the Constitution?

21 *Id.* at 263–64.

22 *Id.*

23 *Id.* at 265 (emphasis omitted).

24 *Id.*

25 *Id.*

26 *Id.* at 264.

27 *Id.* at 265.

28 *Id.* at 266.

detriment upon them."[29] Barnett would limit this to "properly tailored reliance claims by individual citizens," and reject reliance claims of "governmental actors or interest groups on the continued existence of unconstitutional powers or institutions," arguing that reliance interests are "usually applied much too broadly to cases where people have 'relied' in much too inchoate a sense."[30]

Barnett further agrees with Amar that "precedent can play an 'epistemic' role" by applying a "presumption of correctness" to past precedent that saddles a new judge with a burden of proof to overcome.[31] However, Barnett would only extend "any epistemic 'presumption of correctness'" to "previous decisions that actually attempted to discern original meaning."[32] Barnett also appears to adopt Caleb Nelson's arguments (detailed later) that early precedent and practices can fix the original meaning of ambiguous clauses of the Constitution such that later decisions should not be able to overturn them.[33] But Barnett would limit this to constitutional terms that are ambiguous—"historically irresolvable"—not just those that are vague.[34]

There are two potential problems with a view that completely rejects stare decisis, at least when it comes to the meaning of the Constitution. First, it creates the potential, especially on a closely divided court, for frequent doctrinal whiplash as the court's personnel or views change, leading to instability that undermines the rule of law, reducing legitimacy of the court and possibly also the Constitution, and trampling on reliance interests. And this is also a position of hubris for a court that overlooks the fallibility of courts—at least it weights the fallibility differently by emphasizing a past court's fallibility while deemphasizing its own, and arguably does little to restrain current courts. But these prudential concerns—if not a part of the text, logic, and structure of the Constitution—are ones that originalism would seemingly not countenance.[35] After all, reliance interests, for example, are policy

29 *Id.*

30 *Id.*

31 *Id.* at 267 (quoting Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81 (2000)).

32 *Id.*

33 *Id.* at 268.

34 *Id.*

35 Paulsen observes that "[s]ome notable would-be originalists accept *stare decisis* as a limitation on, or qualification of, their originalist interpretive premises, without recognizing that such acceptance fundamentally undermines their entire interpretive justification." Paulsen, *Intrinsically Corrupting*, *supra* note 4, at 289 n.2 (first citing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155–59 (1990); then citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–40 (1997) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of

concerns. If an originalist will not allow other policy concerns to trump the original meaning of the text, why should this policy concern be treated any differently if it was not incorporated into the adopted constitutional text? Second, it may be that stare decisis vis-à-vis the meaning of the Constitution's text was, as an original matter, incorporated in "[t]he judicial Power" and a view completely rejecting stare decisis is simply not correct on originalist grounds.

John McGinnis and Michael Rappaport argue in direct response to the arguments of Lawson that the "no-precedent position is unconstitutional."[36] Instead, they contend that "the Constitution's original meaning embraces at least some precedent,"[37] what they call "a very narrow" or "minimal concept of precedent," one that "is actually slightly weaker than the weakest one that was followed historically."[38] Given the ambiguity of the term "judicial Power," they see it as being plausibly interpreted "to include certain traditional aspects of the judicial office that were widely and consistently exercised" since "[s]uch core aspects of an office often come to be identified with the power that the officer exercises."[39] While they note that "the fact that judges deployed a legal concept at the time of the Framing does not necessarily make it a requisite element of Article III's judicial power," they differentiate "[w]idely followed precedent rules" from "particular common law rules," positing that "giving weight to a series of precedents would have been seen as an aspect of judging, not simply as one of a multitude of rules judges happened to apply."[40]

McGinnis and Rappaport further see the "Supremacy Clause and a vibrant precedent doctrine [as] coexist[ing] under the Constitution."[41] This is because of the Supremacy Clause's ambiguity, and "[u]nder [a] narrower

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stability. It is a compromise of all philosophies of interpretation . . . . [*S*]*tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it.")). *But see* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse* Stare Decisis, 93 VA. L. REV. 1437, 1480–81 (2007) (arguing that a "principled popular sovereignty-based originalist" would see that "current enforcement of original meaning is not always necessary and, in fact, on occasion may not be advisable" due to concerns about "constitutional legitimacy" and "the rule of law").

36 JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 169 (2013).

37 *Id.* at 169.

38 *Id.* at 168–69; *see also* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (arguing that originalism is inclusive in that it allows precedent if justifiable under originalist analysis).

39 MCGINNIS & RAPPAPORT, *supra* note 36, at 168; *see also* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012) ("Stare decisis might simply be a recognized common law doctrine . . . [that was] in effect at the time of the Founding . . . .").

40 MCGINNIS & RAPPAPORT, *supra* note 36, at 169.

41 *Id.* at 173.

meaning, the Supremacy Clause would tell the courts to follow the Constitution's original meaning, but to do so in the way that courts traditionally apply the law—by applying the governing law in accordance with applicable precedent doctrine."[42] They further point out that "given this tradition of precedent, an instruction to the courts to ignore precedent would seem odd, and therefore Framing era interpreters might require a clear statement to that effect before concluding the Constitution required it," and "the Supremacy Clause does not contain such a clear statement."[43]

Further, they note that "the practice of applying precedent to statutory interpretations is extremely instructive as to how supreme law was understood to be applied by courts."[44] Because "[t]he history of precedent shows that judicial decisions interpreting statutes were given effect as precedents," despite statutes "hav[ing] been regarded as supreme law," this supports "[a] narrower interpretation of the Supremacy Clause: that the clause instructs the courts to follow supreme law in the manner that courts traditionally apply law—by taking into account applicable precedent rules."[45] This rests on the assumption that interpreting the supreme law of statutes and interpreting the supreme law of a constitution are differences only in degree and not in kind vis-à-vis precedent and judicial power. One could make a good argument they are just a matter of degrees, but also a good argument that, since the legislature can much more easily overturn precedent they disagree with than the sovereign people can amend the Constitution (and maybe the Constitution was not meant to be amended as often as the legislature overturns or revises its laws), the two types of supreme law are more different in kind.

McGinnis and Rappaport also contend that there are "significant differences between following supreme law and following precedent."[46] They note that usually "treating something as supreme law involves following one body of law rather than another," but "nonoriginalist precedent does not involve a body of law in the ordinary sense."[47] Thus, the "Constitution does not authorize courts to issue nonoriginalist precedents," but rather "precedent is the way that the courts deal with mistaken decisions that have previously been made."[48] In short, "[a]llowing precedent law does not involve making precedents supreme law, but instead is orthogonal to the normal situation of making something supreme law."[49] Whatever its technical accuracy, this argument does not

42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.* at 173–74.
46 *Id.* at 174.
47 *Id.*
48 *Id.*
49 *Id.*

make a lot of sense practically. In a system of stare decisis where precedent actually means anything, precedent will trump the original meaning of the Constitution in at least some situations, even if a decision of the Supreme Court is not actually supreme law in the same sense as the Constitution.

McGinnis and Rappaport's general argument still does not seem to get past the problem that the Constitution arguably contains the seeds of its own irrelevance—as precedent piles on precedent, even if it is flatly contradictory to the original meaning of the text, it will eventually carry the day. Unless what is embedded in the Constitution is a "minimal precedent concept requir[ing] only that *some* weight be given" to "a series of decisions."[50]

The middle ground between the poles of complete rejection or complete dominance of precedent would allow for stare decisis to play at least some role in fixing the meaning of the Constitution, but not an unfettered one. These middle views can be placed on the same continuum. The first, closer to the view rejecting stare decisis, only allows it as a tiebreaker. When the meaning of the Constitution is ambiguous to the point that one cannot say one is more likely than the other, then the settled meaning from precedent wins. After all, a decision has to be made since the law, like baseball, does not allow ties. Randy Kozel makes such an argument for "consider[ing] the role of judicial precedent not when it conflicts with the Constitution's original meaning but rather when the consultation of text and historical evidence is insufficient to resolve a case."[51] Thus, "[i]n those situations, deference to precedent can serve as a fallback rule of constitutional adjudication."[52]

The question then becomes: what is a tie? Should it be conceived like in public polling wherein fifty-one to forty-nine is essentially a tie if the margin of error is two percent, but not a tie if it is one-half percent? The possible problem with that is we generally cannot ascribe such precision to legal ambiguity. Or one could possibly inject some standard or level of burden such that we treat dueling meanings as sufficiently equal, and thus let stare decisis be a tiebreaker unless the new meaning is seen as the correct interpretation of the Constitution's original meaning beyond a reasonable doubt, or by clear and convincing evidence (or whatever standard is settled on). But this brings up the other problem—again, it may be that the original meaning of the judicial power incorporated a different concept or use of stare decisis.

Moving further away from rejecting stare decisis on the continuum is the position put forth by Caleb Nelson that analogizes it to *Chevron*

50 *Id.* at 168.

51 Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 105 (2015).

52 *Id.*

analysis.[53] Imagine a range of reasonable meanings—as long as a previous court's interpretation was within that range, it is entitled to stare decisis effect, even if the current court would have chosen a different meaning because they think it is more accurate. But outside that zone of ambiguity—where precedent is "demonstrably erroneous"[54]—stare decisis is given no effect. This approach avoids some of the prudential concerns that afflict positions closer to the rejection of stare decisis, but may or may not be correct as an original matter.

Nelson notes a difference at the Founding between "arbitrary discretion"—a concern of Hamilton's in Federalist No. 78 that thus weighed in favor of precedent constraining judges[55]—and what John Marshall called "mere legal discretion": the "duty" of judges to "draw upon known principles of interpretation to figure out 'the sound construction of the act.'"[56] This "mere legal discretion" or "duty" was often how those of the Founding period referred to interpreting written texts, with Nelson observing that "antebellum lawyers frequently spoke as if courts exercised no will of their own."[57] Of course, as James Madison and others noted, "[w]ritten laws . . . have a range of indeterminacy."[58] In order to provide "the certainty and predictability necessary for the good of society"—something not possible "if each judge always remained free to adopt his own 'individual interpretation' of the inevitable ambiguities in written laws"[59]—Madison believed that the ambiguous provisions of written laws could have the meaning settled via "a regular course of practice," whether by the judiciary or other government actors such as the President.[60]

But the ability of others to fix the meaning of written law was not without limits: Madison distinguished between "whether precedents could expound a Constitution" and "whether precedents could alter a Constitution."[61] Thus, if early interpreters had consistently given a particular meaning to the Constitution, it "might itself be evidence that the

53 Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

54 *Id.* at 1.

55 *Id.* at 9 (quoting The Federalist No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

56 *Id.* at 10 (quoting Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824)).

57 *Id.*

58 *Id.* at 11; *see* The Federalist No. 37, at 196–97 (James Madison) (Clinton Rossiter ed., 1999).

59 *Id.* (quoting Letter from James Madison to Jared Ingersoll (June 25, 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 184 (Phil., J.B. Lippincott & Co. 1865)).

60 *Id.* at 12 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 59, at 143, 145).

61 *Id.* at 13 (quoting Letter from James Madison to N.P. Trist (Dec. 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 59, at 204, 211).

construction was permissible. But if, after giving precedents the benefit of the doubt, subsequent interpreters remained convinced that a prior construction went beyond the range of indeterminacy, they did not have to treat it as a valid gloss on the law."[62] Hence, while "[t]here might be a presumption that past interpretations were permissible . . . once this presumption was overcome and the court concluded that a past interpretation was erroneous, there was no presumption against correcting it."[63]

One can also adopt an identical position to Nelson's, but add that stare decisis still holds even where precedent is "demonstrably erroneous"[64] when there are sufficient reliance interests.[65] Nelson sees the historical evidence as supporting his theory, though he notes some cases that inject reliance interests based on property rights.[66]

Finally, the last middle position is very close to the stare decisis-always-trumps position and tends to be the most accepted modern view.[67] It presumes precedent should be upheld and requires that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[68] This view thus does not always allow for stare decisis to overcome the Constitution's text, but enables it do so more often than any other view outside of the most extreme pro–stare decisis one. This view does not flunk the *Plessy* test, but arguably makes the Constitution's text and original meaning rather impotent creatures.

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62 *Id.* at 14.

63 *Id.*

64 *Id.* at 15.

65 Though that just shifts the analysis to identifying sufficient reliance interests, which will do most of the work under this formulation. And given the arguably substantial reliance interests throughout the South during segregation, would this flunk the *Plessy* test? Some may argue that, while substantial, such reliance interests are not legitimate, but that just raises the question whether or not their constitutionality determines their legitimacy.

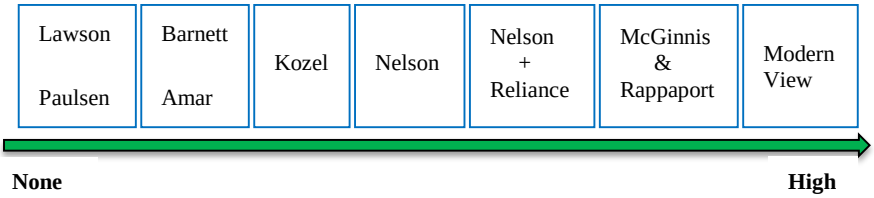
66 *Id.* at 14–21.

67 *See, e.g.*, Charles Fried, Commentary, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1142–43 (1994); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 71 (1991); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1120 n.75 (1995); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 756–63 (1988); *see also* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274 (2005).

68 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

These various scholars' positions can arguably be plotted on a continuum of stare decisis strength. While the polar views are easy to place, one could argue over the order of the middle positions.

TABLE 1. SCHOLARS BY STRENGTH OF STARE DECISIS



II. HISTORICAL POSSIBILITIES AND PITFALLS

In the quest to determine the degree to which stare decisis was originally incorporated into the Constitution's judicial power, one of four historical scenarios is possible. First, whatever form of stare decisis existed at the Founding, adopting a written constitution, and especially our Constitution, completely undermined the doctrine of stare decisis and made it incompatible with our constitutional system, as Lawson and Paulsen argue. This is possible, though it would seem to require "[t]he judicial Power" to be doing some heavy lifting since it's not clear the Supremacy Clause (and even the Oath Clause, in addition) gets one there. After all, if prior to the Constitution, statutes would have been the supreme law of the land and stare decisis still existed under that regime, making something supreme to statutes does not logically throw out stare decisis.[69] And when the Court is deciding whether its current views should trump or give way to the Court's past views, again it is not really pitting the Constitution against precedent, but its current interpretation of the Constitution against a previous interpretation of precedent. This Essay has been entirely focused on horizontal stare decisis—a court being bound by itself—rather than vertical stare decisis—which is where a higher court's ruling binds a lower court. It seems an even harder argument to make that the adoption of the Constitution, especially given Article VI, also obliterated stare decisis in its vertical form such that lower federal courts are not bound by the U.S. Supreme Court.

A second option is that the adoption of the Constitution did not negate stare decisis, but weakened whatever form existed at the Founding. This is more plausible than the obliteration argument, but still requires "[t]he judicial Power" to be doing some, if not most, of the work.

69 However, if statutes were not as systematically superior, or only superior to a slight degree, then adding a constitution to the hierarchy may be different enough to always trump stare decisis.

A third option is that adopting our Constitution had no effect on the doctrine of stare decisis as it existed at the Founding. This is possible, at least with respect to horizontal stare decisis, if the Supremacy Clause functionally existed in the pre–Founding Era in the relationship between statutes and precedent, if the Oath Clause incorporates the notion that following what the courts say the Constitution means is seen as upholding the Constitution, and if "[t]he judicial Power" ensconced in Article III is seen as no different than the judicial power exercised before the Constitution. This is possible, but it also seems intuitively problematic to argue that the adoption of the first written constitution affected no change on the judiciary, and that all of the other clauses did not modify "[t]he judicial Power" in some way.

A fourth and final option is that adopting the Constitution actually strengthened stare decisis, possibly because of the increased supremacy of the Constitution layered on the existing practice of courts saying what the law is. This seems like a hard argument to make, though, at least as to horizontal stare decisis. It is a stronger argument when dealing with vertical stare decisis, given Article VI.

There are a few difficulties in originalist research on the role of stare decisis in "[t]he judicial Power" in light of other constitutional clauses. First, when looking at what courts did prior to the adoption of the Constitution, one can only look at when early American courts were interpreting statutes, not the common law, reducing the number of observations. Second, one has to determine whether the Framing generation viewed judicial interpretation of statutes as categorically different from interpreting a constitution. And third, it takes a while for precedent to accrue that might create a robust system of stare decisis, and in the decade or two after the Founding there may not have been many instances of a clash between the Constitution and judicial precedent—and once we get past those first two decades, the value of judicial practice loses significant weight for originalist scholarship.

In the end, the question of the relationship between stare decisis and the Constitution's original meaning is not a theoretical one—it's an empirical one. To be answered one must sift through the historical data, however difficult. After all, isn't that originalism's point?