STRUCTURAL LIMITATIONS ON THE NON-LEGISLATIVE REGULATION OF FEDERAL ELECTIONS

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The Election Clauses found in Articles I and II of the United States Constitution limit the authority of state administrative agents to develop rules for federal elections—both congressional and presidential. These two Clauses prohibit non-legislative agents from adding to, changing, or contradicting legislatively enacted rules. The Clauses leave some room for non-legislative agents, but only if a State Legislature has clearly delegated regulatory power to them. Even then, the agent's rulemaking must be carefully measured by the delegation using an analysis akin to intermediate scrutiny. The Essay uses the Supreme Court's controversial holdings in Bush v. Gore (2000) and Bush v. Palm Beach County Canvassing Board (2000) as its launch. It then peruses the text of the Constitution, original intent, and historical precedents to build its case. It concludes with three modern problems arising in Ohio, Louisiana and Mississippi to illustrate its thesis.

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I. INTRODUCTION

How far can state executive authorities go when interpreting state election laws? Like modern federal agencies, can they write new election laws? Can they "fill in the gaps," or are they limited to only administering laws written by state legislatures? Part of the answer, of course, rests in state law. It could be that a state, either through its legislature, constitution, or perhaps popular initiative, has delegated rulemaking authority to an executive agent. Whether an executive agent can pass rules or issue binding interpretations of existing law is a function of these delegations. Without proper authority under state law, after all, an executive agent simply cannot act. But what about regulating federal (i.e., congressional and presidential) elections? Assuming that a state has delegated rulemaking authority to an executive agent, can this agent regulate federal elections? Does the federal Constitution prescribe limits? Or is this, too, merely a question of local law? As the majority opinion in *Bush v. Gore*[1] illustrates, the Bill of Rights and the Fourteenth Amendment restrict what local elections officials can do—with both federal and state elections. States cannot pass rules that transcend political participation principles found in the First Amendment, nor can they deny equal protection under their laws within the meaning of the Fourteenth Amendment.[2] This is true for state legislatures, state courts, and executive agents.

Less obvious federal limitations are contained in the Election Clauses of Articles I and II of the United States Constitution. Section 1 of Article II provides that "[e]ach State shall appoint, in such Manner *as the Legislature* thereof may direct, a Number of Electors" to vote for President.[3] Section 4 of Article I, meanwhile, states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof. . .."[4] These Election Clauses—though admittedly ambiguous—suggest that *only* state legislatures can regulate presidential and congressional elections; state executive authorities, constitutional conventions, popular initiatives and even courts are, perhaps, limited in what they can do with federal elections.

This problem also arose in *Bush v. Gore*,[5] which ultimately ruled that Florida's judicially prescribed method of counting votes for President

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1 531 U.S. 98 (2000).

2 *See* Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L. J. 1281 (1997).

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

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

5 531 U.S. 98 (2000).

violated the Equal Protection Clause of the federal Constitution. In the lead-up to this decision, the Supreme Court in *Bush v. Palm Beach County Canvassing Board*[6] addressed whether the Florida Supreme Court's interpretation of Florida's election laws strayed beyond what Article II allowed. "As a general rule," the Court unanimously stated, "this Court defers to a state court's interpretation of a state statute."[7] "But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution."[8]

Because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2,"[9] the Court vacated the Florida Supreme Court's interpretation of Florida's election code and remanded the matter to the Florida court. The Florida Supreme Court was to reconsider relying on extra-legislative sources, like Florida's constitution.

The Florida Supreme Court, on remand, concluded that Florida law—as duly enacted by the Florida legislature—authorized the relief it had previously granted.[10] When the case returned to the Supreme Court, this time titled *Bush v. Gore*, the Chief Justice (Rehnquist), joined by Justices Scalia and Thomas, added his thoughts on the meaning of Article II. The Chief Justice concluded that the Florida Supreme Court violated Article II by deviating from the directions of the Florida legislature: "[in] a Presidential election," the Chief explained, "the clearly expressed intent of the legislature must prevail."[11]

If Chief Justice Rehnquist is correct, the Election Clauses in Articles I and II place federal limits on the authority of non-legislative agents to regulate federal elections. The structural limitations found in Articles I and II require that rulemaking in the context of federal elections rest primarily, if not exclusively, with state legislatures. At bare minimum, executive and judicial agents are not completely free to write or re-write federal election laws. "The clearly expressed intent of the legislature must prevail."

The Chief Justice's thought in *Bush v. Gore* rankled many modern constitutional scholars. Delegation today is the accepted norm—both on the federal level and among the states. Courts generally avoid meddling with

6 531 U.S. 70 (2000).
7 *Id.* at 76.
8 *Id.*
9 *Id.* at 78.
10 *See Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273 (Fla. 2000).
11 531 U.S. at 120 (C.J., concurring).

agency actions, interpretations and rulemaking, at least in the absence of express limitations in charter documents (like the federal and state constitutions).

Moreover, the federal Constitution imposes few structural limitations on state governments. A State agency's authority to regulate federal elections presents, at most, an interesting question of *state* law. It presents no matter for the federal courts. Thus, in the context of *Bush v. Gore*, whether Florida's courts could properly interpret (or even change) Florida's election procedure was not a federal concern—at least as a structural matter.

Had the Election Clauses simply delegated regulatory authority to the "State," this criticism would have certainly been correct. But the Election Clauses do not entrust regulatory authority to States. They authorize state "Legislatures" to act. For this reason, Chief Justice Rehnquist's point—that there are federal structural concerns at play—demands attention.

This Essay concludes that Chief Justice Rehnquist was essentially correct in *Bush v. Gore*; Articles I and II, as amended, place structural limitations on local authority to regulate national elections. Regulation must, according to Articles I and II, begin with the state legislature. While this authority can be delegated to local agents—and perhaps "the people"—it cannot be wrested from the legislature by brute force. A state constitution, for example, cannot limit what the legislature prescribes for federal elections. A state executive agent cannot trump or rewrite a legislative election plan, nor may a state court unilaterally usurp the legislature's role.

The Constitution's preference for legislative regulation, moreover, dictates that delegations must be clear, unmistakable, and adequately canalized. Non-legislative authorities can "fill in the gaps," interpret, and even write, rules to further the legislative aim—when clearly delegated the power to do so—but cannot write rules from scratch, circumvent the legislative plan, or contradict the legislature. And perhaps most importantly, all of this is a federal discussion. State law informs the analysis, but does not end it. Conclusions can only be reached through the lens provided by Articles I and II.

Of course, any analysis short of complete deference to state authorities will not admit easy answers. Students of Administrative Law know that delegation problems are tricky. The crux of the delegation problem—and that suggested here in the context of the federal Elections Clauses—rests with legislative will. What is the intention of the legislature? This kind of problem will not lead to a single answer. A federal judicial aversion to perusing state law for operative constitutional distinctions adds to an uncomfortable feel surrounding the analysis. Still, because Articles I and II reflect a genuine constitutional preference for local "republican" control of

the federal electoral process, the goal is worth overcoming any discomfort and taking up the task. Constitutional guidelines should be established.

II. TEXT BEHIND THE ELECTION CLAUSES

Several provisions in the original 1787 Constitution speak to the various powers of the states. More often than not, the Framers, when apportioning powers, use the word "State" to describe local—as opposed to national—authority. Section 2 of Article I, for example, states that House members "shall be. . .chosen. . .by the People of the several States. . .."[12] Section 8 "reserve[s] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia. . .."[13] Section 10 provides that "No state shall. . .lay any Imposts or Duties. . .,"[14] and "No State shall. . .lay any duty of Tonnage. . .."[15] Article IV requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[16] And so on, with myriad references to "States" scattered throughout the 1787 document.

The Bill of Rights, proposed in 1789, also includes references to the authority of "States"—though not many (given that the document is directed at limiting the new national government). The Second Amendment, for example, speaks to "Militias" and their necessity "to the security of a free State,"[17] thereby suggesting that states—as opposed to only their legislatures—have power over their various militias. Importantly, the Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[18]

Amendments littered across our nation's history routinely speak to powers awarded to, or taken away from, "States." The Fourteenth Amendment famously declares that "No State shall. . .deprive any person of life, liberty, or property. . .."[19] Section 4 of that Amendment prohibits "any State" from paying debts "incurred in aid of insurrection or rebellion against the United States. . .."[20] The Fifteenth Amendment denies to "any State" the authority to use "race, color or previous condition of servitude"

12 U.S. CONST., art. I, § 2, cl. 1.
13 U.S. CONST., art. I, § 8 cl. 16.
14 U.S. CONST., art. I, § 10 cl. 2.
15 *Id.*, cl. 3.
16 U.S. CONST., art. IV, § 1.
17 U.S. CONST., amend. II.
18 U.S. CONST., amend X.
19 U.S. CONST., amend. XIV, § 1.
20 U.S. CONST., amend. XIV, § 4.

as a voting qualification.[21] The Nineteenth does the same for sex,[22] as does the Twenty-fourth Amendment with poll taxes,[23] and the Twenty-sixth Amendment with age.[24] The Eighteenth Amendment, meanwhile, awards to the "several States" "concurrent power" to enforce Prohibition.[25] The Twenty-first Amendment, which repealed the Eighteenth, then states that alcohol cannot be transported into "any State. . .in violation of the laws thereof. . .."[26]

In contrast to this wealth of grants and denials of powers to "States," the Constitutional text only occasionally specifies awards to and restrictions on particular local agents. In addition to the Election Clauses of Articles I and II, section 2 of Article I states that "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."[27] Section 3 of Article I provides that "Senators from each State" are to be "chosen by the Legislature thereof. . .."[28]

The Seventeenth Amendment, which changes Article I, § 3 and provides for the popular election of senators, states that when senatorial vacancies occur, "the executive authority of such State shall issue writs of election to fill such vacancies; *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."[29]

Article IV provides that fugitives "shall on demand of the executive Authority of the State from which he fled, be delivered to the State having Jurisdiction of the Crime."[30] Section 3 in that same Article states that "no new State shall be formed or erected within the Jurisdiction of any other State. . .without the Consent of the Legislatures of the States concerned. . .."[31]

Article V provides that upon the "Application of the Legislatures of two thirds of the several States" Congress "shall call a Convention for proposing Amendments. . .."[32] Proposed Amendments, meanwhile, become part of the Constitution "when ratified by the Legislatures of three fourths of the several States, or by Conventions. . ., as the one or the other Mode of

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21 U.S. CONST., amend. XV, § 1.
22 U.S. CONST., amend. XIX, cl.1.
23 U.S. CONST., amend. XXIV, § 1.
24 U.S. CONST., amend. XXVI, § 1.
25 U.S. CONST., amend. XVIII, § 2.
26 U.S. CONST., amend. XXI, § 2.
27 U.S. CONST., art. I, § 2, cl. 4.
28 U.S. CONST., art. I, § 3, cl. 1.
29 U.S. CONST., amend. XVII, cl. 2.
30 U.S. CONST., art. IV, § 2 cl. 2.
31 U.S. CONST., art. IV, § 3 cl. 1.
32 U.S. CONST., art. V.

Ratification may be proposed by the Congress. . .."[33]

Article VII, meanwhile, bypasses assigning authority to either "Legislatures" or "States" and calls for "Ratification [of the Constitution]. . .[by] the Conventions of nine States. . .."[34]

In sum, the constitutional text usually limits, recognizes, and assigns power to, "States." It occasionally uses specific local agents, like "Legislatures," "Executives," and "Conventions" for these same ends. Left unclear by the text is why specificity is only sometimes used. One assumes that conscious choices motivated the difference. Judged by the constitutional text, however, the details of these choices remain uncertain.

III. THE ORIGINAL INTENT

Prior to the American Revolution, colonists resented the influence of British governors. "Inspired by the English Triennial Act of 1694, some colonies tried to require frequent assembly elections." [35] In an effort to moderate this monarchal abuse, "[m]any colonies. . .tried to limit gubernatorial influence over the members of the assembly. These attempts were notably unsuccessful, and governors exerted substantial influence."[36]

The British legislative model antedating the American Revolution was built on the theory of "virtual representation."[37] While representatives in the Parliament constituted a deliberative body, they all acted for the common good.[38] They did not act on behalf of their local constituents, and the British model did not reflect a truly "republican" form of government.

The American legislatures that emerged during and after the Revolution rejected this "virtual" approach to representative assemblies.[39] Elected representatives under the American model were expected to act in the best interests of their local constituents. Short terms of office proved the rule and voters in most states retained the right "to instruct their representatives and to direct votes on individual issues."[40] Thus, the state legislatures known to the founding generation were "republican." Though not "democratic," they more closely approached the democratic ideal than the assemblies and governors that existed before the Revolution. Indeed, the republican flavor of these new legislative assemblies was meant to cure

33 *Id*.
34 U.S. CONST., art. VII, cl. 1.
35 DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 110 (1990).
36 *Id*.
37 *Id*.
38 *Id*.
39 *Id*. at 111.
40 *Id*.

the abuses of prior British governmental landlords.

In terms of selecting federal representatives (members of the House and Senate), the Framers considered both popular and legislative selection, but clearly never entertained the idea of gubernatorial appointment. In order to accommodate both the large states—which tended to cautiously favor popular elections, proportional representation, and a strong national government—and the smaller states—which tended to favor confederated government and equal representation—the Constitutional Convention's discussion assumed a bicameral legislature.[41] The question then was whether "the people" or their chosen agents would select the members of these two national representative bodies.[42]

Toward this end, Edmund Randolph's "Virginia Plan," which was introduced on May 29, included a resolution calling for a popular election of the first, or lower, house of the national legislature.[43] This house would then, according to Randolph, "itself select the members of the second house from candidates nominated by the state legislatures."[44] The Virginia Plan thus included both popular and republican selection mechanisms. The members of the second house were to be selected by the members of the first—a national, deliberative, republican assembly.

Although Randolph's Virginia Plan preserved a measure of local control over the selection of senators—local legislatures nominated candidates—it remained too national for some. Indeed, some envisioned both houses being held directly accountable to the states. On June 6, for example, Charles Pinckney moved that House members be selected by state legislatures rather than "the people."[45] The motion was easily defeated, but the following day John Dickinson sought to inject more local control over the national legislature by moving "that the members of the 2d. branch ought to be chosen by the individual Legislatures."[46] He offered two transparent reasons: "1. because the sense of the States would be better collected through their Governments; than immediately from the people at large; 2. because he wished the Senate to consist of the most distinguished characters. . ., and he thought such characters more likely to be selected by the State Legislatures, than in any other mode."[47] Over James Madison's objection, Dickinson's motion passed handily.[48]

By June 25, the Convention had come to accept Randolph's plan with

41 *Id.* at 113.
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.* at 117.
48 *Id.* at 117-18.

Dickinson's amendment: "the Senate was to be elected by the state legislatures and the House by the people."[49] Local legislative election of national Senators preserved local power while avoiding the excesses of democracy. Whether a conscious objective or inevitable incident, the Framers' use of deliberative assemblies to select Senators also prevented executive involvement. The closest they came to gubernatorial participation in the selection of national representatives would later be written into sections 2 and 3 of Article I, which respectively direct State executives to "issue Writs of Election to fill. . .Vacancies [in the House],"[50] and to "make temporary [senatorial] Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."[51]

At least in terms of senatorial selection, one can confidently say that the Framers studiously selected state legislatures. Dickinson's thought was not only to empower state government, but also to maintain the Senate as an aristocratic organ of government. Had the authority for selecting Senators been given directly to states, they might have given this power to the people. This would have seriously threatened the Senate's aristocratic airs. By spelling out in the Constitution that state legislatures were to select senators, the Senate would always be distinct from its more common cousin.

Less certainty surrounds why the Framers chose state legislatures—as opposed to the states generally—as the vehicles for prescribing the "time, place and manner" of electing federal representatives and senators. Section 4 of Article I, of course, states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof. . .."[52] Unfortunately, there is little, if any, history explaining why the Convention vested this power in legislatures. At the critical juncture when this topic might have naturally been debated, the conversation in Philadelphia turned to more substantive matters, in particular whether states would enjoy equal or proportional representation in the House and Senate.[53] One can only wonder about the Convention's thoughts on this matter.

Like senatorial selection, the presidential selection process caused a good deal of discussion in Philadelphia. Randolph's Virginia Plan called for the "National Executive. . .to be chosen by the National Legislature. . .."[54] On June 2, James Wilson proposed that the President be popularly

49 *Id*. at 118.
50 U.S. CONST., art. I, § 2, cl. 4.
51 U.S. CONST., art. I, § 3.
52 U.S. CONST, art. I, § 4, cl. 1 (emphasis added).
53 *Id*. at 118-19.
54 *Id*. at 81.

elected through a complicated process involving voters choosing electors who would then select the President.[55] Oddly enough, Wilson's proposal was roundly rejected, and on that same day the Convention approved Randolph's plan: the President would be selected by the national legislature.[56] Dickinson's motion to amend Randolph's model so that the President would be "removable by the National Legislature on the request of a majority of the Legislatures of individual States" was also rejected.[57] Thus, the President would not be popularly selected; neither would states or their legislatures be directly involved in the process. It would be left to the as-yet-undefined Congress.

Adoption of Randolph's proposal was not the end of the matter. Delegates continued to worry about the tyranny of democracy and the necessity of checking the legislative branch.[58] As the national legislature evolved over the course of the summer of 1787, the Convention's view of the Executive changed. Some saw a need to insulate the Executive from what appeared to be a powerful Congress.[59] Popular election emerged as an option; though this solution created its own problems. Roger Sherman, for example, protested that "the people at large. . .will never be sufficiently informed of characters, and besides will never give a majority of votes to one man."[60] Pinckney worried that "the most populous States by combining in favor of the same individual will be able to carry their points."[61]

After weeks of inconclusive debate and reversals of direction—ranging from adopting Randolph's plan to embracing a model based on Dickinson's plan (but using state legislatures to select presidential electors)[62] –the Convention on August 31 delegated the whole matter to an elected "Committee of Eleven."[63] On September 4, this committee reported its now-familiar solution: "Each State shall appoint in such manner as the Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives to which the State may be entitled in the Legislature."[64] Sherman, who was on the committee, defended the plan as ensuring that the President would be "independent of the Legislature."[65] Gouverneur Morris (who was also on the committee) explained that "No body had appeared to be satisfied with an appointment

55 *Id*. at 83.
56 *Id*.
57 *Id*. at 84-85.
58 *Id*. at 86.
59 *Id*.
60 *Id*. at 87.
61 *Id*.
62 *Id*. at 90.
63 *Id*. at 94.
64 *Id*.
65 *Id*.

by the Legislature [, and] Many were anxious even for an immediate choice by the people. . .."[66] Thus, out of compromise and necessity, the Convention embraced what became the constitutional plan; "[e]ach State shall appoint, in such Manner *as the Legislature* thereof may direct, a Number of Electors" to vote for President.[67]

An important commonality between the Framers' ultimate senatorial and presidential selection processes rests in the compromise between popular election and selection by the national legislature. The obvious middle ground was selection by state legislatures. State legislatures, as opposed to states *qua* states, were chosen as a reaction to one of the preferred views —selection by a national, republican legislature. Qualifying State power by focusing it on the state legislature was still republican, though not national.

Of course, an important difference exists. Under Article II, state legislatures "direct" how presidential electors are selected. State legislatures do not necessarily select them—although they can. Under Article I, senators are chosen by the state legislatures—and arguably must be. Thus, the "Legislature" limitation in Article I served a different purpose than the "Legislature" usage in Article II. The former mandated legislative selection to prevent popular selection while the latter used the legislative process to allow states a choice. In both cases, however, the Framers chose "Legislature" as opposed to "State" for studied reasons. Chief among these reasons was an attempt to walk an acceptable line between popular election and national (republican) selection. Local (republican) selection of senators and presidential processes was the compromise written into the 1787 Constitution.

Neither of these histories fully explains why the Framers chose state legislatures to prescribe precisely how federal representatives were to be selected. The Framers agreed that House members were to be popularly elected, borrowing state voting restrictions and conditions.[68] But this would not mandate that the electoral rules needed to conduct elections be developed by a state legislature as opposed to whatever mechanism might be selected by the state. Unfortunately, legislative history on the matter is sparse. Still, one might venture an educated guess.

Section 4 of Article I states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof. . .."[69] Having already delegated to state legislatures the power to select senators, directing these Legislatures

66 *Id*. at 95.
67 U.S. CONST., art. II, § 1, cl. 2 (emphasis added).
68 *See* U.S. CONST., art. I, § 2, cl. 1.
69 U.S. CONST., art. I, § 4, cl. 1 (emphasis added).

to prescribe how Senators would be elected makes perfect sense. The House was then included in Article I, § 4 merely for sake of brevity, clarity and efficiency. In the event, House elections were clearly knotted with senatorial elections by § 4 of Article I. As with presidential elections, the original intent (according to the Framers sitting in Philadelphia) was to vest in state legislatures the job of prescribing rules for both kinds of federal congressional elections.

IV. POST-RATIFICATION HISTORY AND PRECEDENTS

During and immediately after the Civil War, states began expanding the franchise. The Fifteenth Amendment, to use the most obvious example, extended the vote to freed slaves and already-free blacks. But that was not the only extension of the franchise. During the War, several northern states passed laws that allowed military personnel to vote, even if they were not "present" on election day. Before these changes, one generally was required to physically appear at the polling place to cast a vote. Whether away for pleasure or war, one could not vote if not physically present at the polling place.

Because of state constitutional provisions requiring actual presence, these legislative changes were challenged as constituting improper extensions of suffrage under state law in several states. In terms of federal elections—that is, the election of members of the House and presidential electors—a federal constitutional question also emerged: can a state constitution limit the legislature? The Election Clauses, after all, delegated authority to regulate federal elections to state legislatures, not "the people" and their conventions (which commonly wrote state constitutions).

The question was presented to the House of Representatives—sitting in its capacity as Judge of the Qualifications, Elections and Returns of its Members—in *Baldwin v. Trowbridge*.[70] There, Michigan's legislature in the midst of the Civil War passed a law that allowed its soldiers to cast ballots for congressional candidates and presidential electors even though the soldiers were not physically present in Michigan. Because Michigan's constitution required physical presence, the law's validity was questioned. One congressional candidate (Trowbridge) won the election with the assistance of the soldiers' votes. The other (Baldwin) would have won if the soldiers' votes were, under the Michigan Constitution, excluded. The United States House Committee of Elections ruled that the votes were properly cast; the state constitution could not control the legislature in the

70 This account is drawn from Chester A. Rowell, A Historical and Legal Digest of all the Contested Election Cases in the House of Representatives of the United States from the First to the Fifty-Sixth Congress 1789-1901, 200-01 (1901).

context of federal elections. It explained that under the Election Clause power is conferred upon the *legislature*. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine,* as known in the political history of the country? The [C]ommittee [of Elections for the U.S. House of Representatives] have adopted the latter construction.[71]

The full House agreed by a vote of 108 to 30 and Trowbridge was seated.[72]

The same result was reached by the New Hampshire high court in *In re Opinion of Justices*,[73] where the court sustained a legislatively enacted law authorizing soldiers to vote in federal elections where encamped even though it contradicted the state's constitution. According to the New Hampshire court, the Election Clauses delegated this power to the state's legislature.[74] The legislature's choice could therefore not be limited by the state's constitution.

Baldwin and Opinion *of Justices* demonstrate the conventional understanding at the time of the Civil War; powers delegated to the various state legislatures by the Election Clauses cannot be circumscribed by state constitutions. Put more generally, a state legislature cannot be unwillingly stripped of its federal powers under Articles I and II.

The Supreme Court, for its part, did not interpret Article II's Election Clause for another generation after the Civil War. In *McPherson v. Blacker*,[75] Michigan's legislature passed a measure prescribing that the state's presidential electors be popularly elected by congressional district (rather than state-wide)—with the two remaining presidential electors being popularly elected at-large. A federal challenge to this legislative change was brought under Article II's Election Clause, as well as the Fourteenth Amendment. The Supreme Court rejected both challenges. In regard to the Election Clause, the Court observed that

> [i]f the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint

71 *Baldwin v. Trowbridge,* 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866).

72 *See* The Supreme Court of Michigan in *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865), in which the Supreme Court of Michigan had concluded that the legislative act contradicted the state's constitution and was therefore void. This case involved state offices, however, and thus the federal Election Clause argument was not made. *See generally* Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1114 (2009).

73 45 N.H. 595 (1864).

74 The New Hampshire court mentions a similar holding from Vermont, *In re Opinion of Judges* (Vt. 1863), though that opinion cannot be located and verified.

75 146 U.S. 1 (1892).

> ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts.[76]

The fact that not all voters could vote for all presidential electors, the Court reasoned, was no ground for invalidating the measure. After all, "[t]he state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established."[77] "The clause under consideration," the Court reasoned, "does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard."[78] "[T]he insertion of those words," the Court observed, "while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."[79] In sum, Article II's delegation of authority to the legislature did not restrict what kinds of rules the State developed; it merely described how the state could put them in place.

McPherson's conclusion is not objectionable, at least not today. We now recognize that states need not conduct statewide presidential contests, as illustrated by the states today that employ congressional districts to select presidential electors. In contrast, the *McPherson* Court's dicta–that Article II "operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power"[80]—remains in dispute. Chief Justice Rehnquist, remember, seized this thought to resolve *Bush v. Gore* (at least in the minds of three Justices). The Florida Supreme Court, he reasoned, could not change the Florida legislature's electoral plan. If correct, this reasoning would also seem to prevent state constitutional conventions, initiatives, referenda and executive officials from forcibly yoking power

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76 *Id*. at 7.

77 *Id*. at 6-7.

78 *Id*. at 7.

79 *Id*. (emphasis added).

80 The Chief Justice in *Bush v. Gore* relied, in part, on *McPherson v. Blacker*, 146 U.S. 1 (1892), for the proposition that Article II delegates regulatory power over Presidential elections to the states' *legislatures*, not their courts. "In *McPherson v. Blacker*, 146 U.S. 1 (1892), we explained that Art. II, § 1, cl.2, 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *See* 531 U.S. at 113. He concluded that "in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots…." *Id*. at 121. His reading of *Blacker* is a bit of an exaggeration.

from state legislatures. A legislature might give the power away, but it cannot be taken against the legislative will.[81]

The Court's next foray into the Election Clauses came in *State of Ohio ex rel. Davis v. Hildebrant*,[82] where Ohio sought to apply its referendum mechanism to a legislatively drawn congressional districting plan. As explained by Chief Justice White, "[b]y an amendment to the Constitution of Ohio, adopted September 3rd , 1912, the legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly."[83] Following a legislatively adopted redistricting plan in 1915, voters by referendum objected. The plan, under Ohio's constitution, therefore could not take effect.

The Supreme Court concluded, first, that the referendum was generally part of Ohio's legislative process: "As to the state power. . .it is obvious that. . .so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power; and therefore the claim that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit."[84]

Next, the Court observed that

> [s]o far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject. . .we think it is clear that Congress, in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as

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81 This may be where the Chief Justice in *Bush v. Gore* allowed partisan politics to overcome his juridical reasoning. A strong argument can be made that the Florida Legislature delegated the power to interpret its election laws—even presidential election laws—to Florida's courts. The Florida Supreme Court, then, was not stealing the Florida Legislature's authority; it was merely doing its assigned job. This is not to say that the Florida Supreme Court's interpretation of Florida's electoral scheme was correct under Article II. A good argument can be made that the Florida Supreme Court misinterpreted the legislative will by ordering a state-wide recount. As explained below, this question is not merely a state-law matter. It is ultimately a federal constitutional problem.

82 241 U.S. 565 (1916).

83 *Id.* at 566.

84 *Id.* at 567-68.

> thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.[85]

The Court, in sum, thus ruled that common "legislative" processes, like popular and gubernatorial vetoes, are assumed by Article I's Election Clause; especially since Congress, exercising its Article I, § 4 authority over congressional elections, has approved their use.[86] Governors and direct democracy can be involved in regulating congressional elections through vetoes, but still might not be able to instigate regulation or otherwise participate in its development.

Hawke v. Smith[87] represented the Court's third attempt at making sense of the constitutional distinction between "Legislature" and "State." The Court in *Hawke* rejected Ohio's claim that the ratification of a proposed federal constitutional amendment by Ohio's legislature was subject to the same popular veto described in *Davis*. Article V of the United States Constitution provides that amendments proposed by the Congress can either be ratified by state conventions or legislatures: "The method of ratification is left to the choice of Congress."[88] Regardless, the Court observed in *Hawke*, "[b]oth methods of ratification, by Legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."[89]

The Supreme Court in *Hawke* specifically rejected the claim that "the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment."[90] It explained: "This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment."[91] Thus, the Court concluded, ratification must be by a State's Legislature, as a body, and not through a state's legislative process—which, as explained in *Davis,* might

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85 *Id*. at 568. The Court found that "[t]his is the case since, under the act of Congress dealing with apportionment, which preceded the act of 1911, by § 4 if was commanded that the existing districts in a state should continue in force 'until the legislature of such state, in the manner herein prescribed, shall redistrict such state'; while in the act of 1911 there was substituted a provision that the redistricting should be made by a state 'in the manner provided by the laws thereof.' And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged." *Id*. at 568-69 (citations omitted).

86 The Court rejected the suggestion that either the Guarantee Clause or Article I, § 4 prevented Congress from authorizing referenda. *Id*. at 569.

87 253 U.S. 221 (1920).

88 *Id*. at 226.

89 *Id*. at 226-27.

90 *Id*. at 229.

91 *Id*.

include a popular veto. In short, Article V is different.

Although it appears that *Hawke*'s full logic need not apply to Articles I and II, the *Hawke* Court suggested that there was some overlap between the Ratification Clause and the Election Clauses. To support its conclusion concerning what constitutes the "Legislature" in *Hawke*, the Court pointed to the Seventeenth Amendment, which changed Article I's senatorial selection process. As explained in *Hawke*,[92] the Seventeenth Amendment—which provides for the popular election of Senators—was necessary for the very reason that Article I, § 3 required that a State's Senators be "chosen by the Legislature thereof. . .."[93] Because the Constitution delegates to legislatures the power of selecting senators, these legislatures could not delegate their powers to the people. The Seventeenth Amendment's command was necessary to achieve popular selection. *Hawke* thus indicates that the term, "Legislature," used in Article I was not all about process. As in Article V, it was meant in large part to describe a deliberative, representative body. At least this is the case with senatorial selection under § 3 of Article I. Whether this is also true of House elections was not made clear.

Smiley v. Holm[94] answered this question—at least in part. There, the Supreme Court addressed whether Minnesota's governor's signature was necessary for a legislatively enacted redistricting plan. Building on *Davis*, the Court ruled that Article I, § 4's reference to "Legislature" assumes the basic legislative processes spelled out by the state's fundamental charter. Hence, bicameralism—to the extent mandated by the state constitution—is required for the "Legislature" to act, and a state's constitutionally-prescribed gubernatorial veto can be constitutionally applied to its legislature's proposed manner of electing federal representatives. Bicameralism and presentment, the Court concluded, are fundamental aspects of legislative action which were necessarily included in the Framers' reference to "Legislature":

> the term was not one "of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." The question here is not with respect to the 'body' as thus described but as to the function to be performed.[95]

The Court further explained that "Legislature" can have differing meanings in different constitutional provisions.

> The Legislature may act as an electoral body, as in the choice of United

92 *Id*. at 228.
93 U.S. CONST., art. I, § 3, cl. 1.
94 285 U.S. 355 (1932).
95 *Id*. at 365 (citation omitted).

> States Senators under article 1, § 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under article 5. It may act as a consenting body, as in relation to the acquisition of lands by the United States under article 1, § 8, par. 17. Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view.[96]

The Court continued by noting that "[t]he primary question now. . .is whether the function contemplated by article 1, § 4, is that of making laws."[97] Because regulating elections is part of the law-making process, the Court was comfortable concluding that the usual legislative processes—including gubernatorial veto—were appropriate: "As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments."[98]

Smiley draws a functional distinction; when delegated the power to elect senators and ratify amendments, "Legislature" describes a representative, deliberative body. This power cannot be shared and cannot be divested. On the other hand, where the Constitution delegates authority to "Legislatures" to regulate federal elections, as with the Election Clauses in Articles I and II, the Framers meant only to insure some sort of legislative process. The precise contours of this process would be left to the states. All the Constitution demands is that a deliberative, representative body be involved in the first instance. It need not be exclusive and need not be both the beginning and end. Governors can veto electoral regulation—if that is part of the state's legislative process.[99] The people likewise can veto legislative regulation of federal elections.

V. MODERN DEVELOPMENTS

Left unanswered by *McPherson*, *Smiley*, *Davis*, and *Hawke* is whether a state might forcibly wrest from its legislature—using, say, a state constitution—the power to regulate federal elections. The Supreme Court in *Bush v. Palm Beach County Canvassing Board* suggested a state cannot—and that appears to be the accepted view today, as illustrated by Justice Stevens' concurring sentiments over the meaning of Article I's

96 *Id*. at 365-66.

97 *Id*. at 366.

98 *Id*. at 367.

99 Two states, Massachusetts and New York, after all, provided for vetoes at the time of the founding, and the federal government adopted this model. Thus, the Framers were aware of this formality. *Id*. at 368-69.

Election Clause in *California Democratic Party v. Jones*.[100] In *Jones*, the Supreme Court invalidated California's adoption of a blanket primary under the First Amendment. While Justice Stevens disagreed with the majority over its application of the First Amendment, he agreed that California's initiative was likely invalid. This was so, he argued, because the blanket primary—which was also applied to congressional elections—was not adopted by California's legislature: "Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives."[101]

Justice Stevens balked at the suggestion that Article I, § 4 was necessarily intended to embrace a state's legislature as created and empowered by that state's constitution. California's constitution "provide[d] that '[t]he legislative power of this State is vested in the California Legislature. . ., but the people reserve to themselves the powers of initiative and referendum.'"[102] "The vicissitudes of state nomenclature," Justice Stevens opined, "do not necessarily control the meaning of the Federal Constitution."[103]

Justice Stevens pointed to *Baldwin v. Trowbridge*[104] to support his conclusion: "the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State.'"[105] Thus, Stevens concluded, Article I's Elections Clause left the power to regulate federal elections in the legislature, at least in the first instance.[106] It could not be wrested away or replaced by a state constitution.

Also unresolved by the Supreme Court's precedents is whether a legislature might, pursuant to the usual legislative processes, voluntarily divest itself of some or all of its power under the Election Clauses in Articles I and II. The Chief Justice's concurring opinion in *Bush v. Gore* suggests that a legislature cannot—the Chief Justice, after all, went so far as to hold that the Florida Supreme Court, which presumably had been delegated authority to interpret state law, was structurally limited in what it could do. Not even a state court sitting in its interpretive capacity can, according to the Chief Justice, add to or stray from what the legislature has

100 530 U.S. 567, 602 (2000) (Stevens, J., dissenting).
101 *Id*. at 602.
102 *Id*. at 602-03.
103 *Id*. at 603.
104 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866).
105 *Id*. (footnote omitted).
106 *Supra* note 101, at 603

written.

The problem of delegation arose in the context of congressional elections in *Lance v. Coffman*,[107] where a state court redrew Colorado's congressional districts in the absence of a proper legislatively-adopted plan. Not long after the state court's action, the legislature passed a new plan, which was different from that put in place by the state court. This new legislative plan was challenged in state court under Colorado's constitution, which prohibits mid-census apportionment.[108] Those who supported the legislative plan countered by arguing that Article I, § 4 of the federal Constitution precluded the state's courts from drawing districts for congressional elections—at least once the legislature had acted.

The Colorado Supreme Court ruled in favor of the judicial plan in *People ex rel. Salazar v. Davidson*,[109] finding that a judicial apportionment did not offend the Election Clause of Article I, § 4 of the United States Constitution. Hence, implicitly at least, *Davidson* supports the proposition that some kind of delegation can be proper. One can assume, after all, that state courts have been delegated power to interpret state law. They can thus fill in some gaps and fix some deficiencies—perhaps not like they normally do with other state laws, but the power can be put there nonetheless.

Justice Stevens' dissenting opinion in *Bush v. Gore*[110] makes this same point. In response to the Chief Justice's concurring opinion (stating that the Florida Supreme Court had violated Article II), Justice Stevens observed:

The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes.[111]

Justice Stevens thus added to *Smiley*'s legislative process analysis; not only does Article II borrow a state's legislative mechanics—including vetoes and judicial review—the legislature can choose to delegate some measure of electoral authority to the state's courts. Extrapolating from this

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107 127 S. Ct. 1194 (2007). Following the dismissal of a collateral challenge filed by Colorado voters in federal court, the Supreme Court was asked to overturn the apportionment plan. It did not because it concluded the plaintiffs' lacked standing. *Id*.

108 It would seem that this Colorado constitutional limitation would have to give way under Article I's Election Clause and the Supreme Court's suggestion in *Bush v. Palm Beach County Canvassing Board* and Justice Stevens' reasoning in *Jones*. Even assuming a valid delegation to the Colorado courts, the Colorado Legislature should have been free to repeal the delegation or override the state court's regulation.

109 79 P.3d 1221, 1231 (2003) (en banc).

110 531 U.S 98 (2000).

111 *Id*. at 123-24 (Stevens, J., dissenting).

principle, it would seem that voluntary delegations by legislatures to non-judicial agents cannot be completely forbidden by the Election Clauses in Articles I and II, either. This is not to say that state courts and executive agents are free from structural constitutional constraints. It only means that they can be given some power. The devil in this problem resides in the details.

A. The 2008 Election Cycle

1. Ohio

In *Libertarian Party of Ohio v. Brunner*,[112] the Libertarian Party of Ohio challenged an executive order issued by Ohio's secretary of state that purported to restrict ballot access. In 2006, the Libertarian Party had successfully sued Ohio over its previous ballot access measure, a legislatively adopted rule requiring that minor parties collect over 40,000 signatures one year in advance of an election in order to gain ballot access. In *Libertarian Party of Ohio v. Blackwell*,[113] the Sixth Circuit invalidated this law under the First Amendment. Because the legislature had failed to enact another law regulating ballot access for minor parties, Ohio's secretary of state claimed inherent authority under Ohio law to pass Directive 2007-09; this measure required just over 20,000 signatures and relaxed the deadline by twenty days.[114]

The Libertarian Party sued again, this time under both the First Amendment and the Election Clauses in Articles I and II. The Libertarians wished to run a slate of candidates for federal office—including a presidential ticket—as well as local office. They thus claimed that the Directive not only violated the First Amendment, but also violated the Election Clauses in the context of presidential and congressional elections.[115]

The United States District Court for the Southern District of Ohio agreed and enjoined enforcement of the Directive. It found that the Directive's early-filing deadline and signature collection requirement not only violated the First Amendment, but also transcended the secretary's authority under the Election Clauses: "Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates

112 567 F. Supp. 2d 1006 (S.D. Ohio 2008).
113 462 F. 3d 579 (6th Cir. 2006).
114 *Supra* note 114, at 1010.
115 *Id*.

for federal office."[116] Notwithstanding "a dearth of precedent regarding the Constitution's. . .references to the state legislatures," the court concluded that the Election Clauses "provide for no role on the part of the executive branch of state government as to the election of President or members of the House of Representatives."[117]

The court relied primarily on the Supreme Court's holding in *Bush v. Gore*.[118] There, the court found, "[t]hree of the five justices in the majority joined in a concurring opinion which noted. . .[that] '[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.'"[119] "These justices concluded, as an alternative basis for the result reached by the Court, that the role played by the Florida Supreme Court in the recount of votes 'infringed upon the legislature's authority' and violated Article II of the Constitution."[120] "The four dissenting justices," the court observed, "did not appear to disagree that the Florida legislature had exclusive power under Article II. Instead, Justice Stevens, in a dissent joined by Justices Ginsburg and Breyer, contended that the Florida legislature 'intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving election disputes.'"[121] "According to Justice Stevens, the role of the Florida Supreme Court in interpreting state election laws and resolving dispute issues stemmed from specific authority granted by legislation enacted by the Florida legislature."[122]

Turning to Justice Souter's dissent, which was joined by Justices Breyer, Stevens and Ginsburg, the court observed that he "framed the issue as 'whether the judgment of the state supreme court had displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature, to which the national Constitution commits responsibility for determining how each State's Presidential electors are chosen?'"[123] Thus, the District Court concluded, "[t]he seven justices who joined in opinions addressing the authority of the state legislatures under Articles II all recognized the exclusive role given therein. The justices disagreed as to whether the Florida Supreme Court displaced or usurped such legislative authority, an issue not implicated in this case."[124]

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116 *Id*. at 1011.
117 *Id*.
118 531 U.S. 98 (2000).
119 *Id*. (citation omitted).
120 *Id*. (citation omitted).
121 *Id*. (citation omitted).
122 *Id*. at 1012 (citation omitted).
123 *Id*. (citation omitted).
124 *Id*.

In contrast to the role and power of the Florida Supreme Court, the court in *Libertarian Party* observed that "the Directive issued by the Secretary of State does not interpret provisions of legislation or resolve factual disputes arising under Ohio law. Instead, the Directive establishes a new structure for minor party ballot access, a structure not approved by the Ohio legislature."[125] "Even if the Ohio General Assembly could delegate its authority to a member of the executive branch, an issue that is not before the Court, there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which the state of Ohio votes for Senators and Representatives or selects electors to vote for President."[126] "Absent an express delegation of legislative authority, this Court cannot assume that the Ohio General Assembly intended to vest the Secretary of State with the legislative authority conferred in Article I, Section 4 and Article II, Section 1.[127]

The District Court noted that the secretary had been delegated authority to "[i]ssue instructions by directives and advisories. . .to election boards as to the proper methods of conducting elections," as well as to "[p]repare rules and instructions for the conduct of elections."[128] This delegation, however, did not "extend to filling a void in Ohio's election law caused by the legislature ignoring a judicial pronouncement declaring a state statute unconstitutional."[129] Rather than simply fill in small gaps, the court noted, the "Directive. . .purports to create new law."[130] It did so by putting in place a qualifying procedure that "bears no resemblance to any existing Ohio election law."[131] A "general, statutory authority to direct the conduct of electors cannot, as to Articles I and II of the Constitution, serve as a substitute for state legislative action regarding the election of federal officials."[132]

2. Louisiana

Hurricane Gustav made land in Louisiana over the Labor Day weekend of 2008. Unfortunately, Louisiana's qualifying deadline for

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125 *Id*.
126 *Id*.
127 *Id*.
128 *Id*. (citations omitted).
129 *Id*.
130 *Id*. at 1012 n. 2.
131 *Id*.
132 *Id*. at 1012-13. The court accordingly ordered the Libertarian Party's candidates onto Ohio's 2008 ballot. Following this ruling, several additional parties, including the Socialist Party USA, the Green Party, and the Constitution Party, successfully sued to have their presidential candidates included on Ohio's 2008 ballot.

presidential candidates that year fell on September 2,[133] just as the effects of Hurricane Gustav were being realized. Because of Gustav, Louisiana closed its offices in Baton Rouge on Tuesday, September 2 and for the rest of the week thereafter. According to the state's official web page,[134] this included the secretary of state's office,[135] where candidates were required to file their qualifying papers. The secretary's office did not officially reopen until Monday, September 8, 2008.[136]

Once it reopened, the secretary announced that all qualifying papers were due by the close of the business day. This announcement took several minor parties by surprise, especially since notice did not go out until sometime after lunch. (The major parties had apparently been forewarned to qualify within this new time frame.[137]) Suffice it to say that some minor parties, including the Socialist Party USA and the Libertarian Party of Louisiana, did not meet this new deadline. Because these two parties did not qualify on September 8, the secretary ruled that their presidential candidates would not be included on Louisiana's ballot.[138]

In *Libertarian Party of Louisiana v. Dardenne*,[139] both parties challenged the secretary's decision in federal district court. Their principal argument was that the secretary had no authority under Article II's Election Clause to establish a new qualifying deadline. Instead, that task was left to the legislature, or at the very least its clear delegate. If nothing else, the parties argued, it was up to the governor to fix a new deadline using a statute enacted in the wake of Hurricane Katrina.[140] Under this emergency

133 La. Rev. Stat. § 18:1253(E) states that qualifying papers for presidential candidates must be filed with the secretary of state "prior to 5:00 p.m. on the first Tuesday in September of each year in which a presidential election is to be held."

134 *See Press Release: All State Government Offices Closed Tuesday, available at,* http://emergency.louisiana.gov/Releases/090108StateOfficesClosed.html (last visited Nov. 10 2009).

135 The secretary of state's office disputed this fact. However, the District Court preliminarily concluded that the secretary of state's office was closed from September 2 through September 7. *See Libertarian Party of Louisiana v. Dardenne*, No. 08-582 (M.D.La. 2008) (Dkt. # 20) (Order awarding preliminary relief to Libertarian Party of Louisiana).

136 *See Press Release: State Government Offices to Open Monday, available at,* http://emergency.louisiana.gov/Releases/090708state.html (last visited Nov. 10 2009). Neither major party qualified on September 2. A minor party from California, however, did successfully make it to Baton Rouge that day and found someone in the secretary of state's office who was willing to accept its qualifying papers.

137 According to the secretary's records, the Democrats qualified on September 5, 2008, while the Republicans qualified on September 8, 2008. *See Louisiana Secretary of State Multi-Parish Candidate Data Inquiry Candidates for Election Date: 11/04/08, available at,* (http://www400.sos.louisiana.gov/cgibin/?rqstyp=CNDMD&rqsdta=110408&ID=01017141).

138 *See Libertarian Party of Louisiana v. Dardenne*, No. 08-582 (M.D.La. 2008) (Dkt. # 20) (Order awarding preliminary relief to Libertarian Party of Louisiana).

139 No. 08-582 (M.D. La. 2008).

140 La. Rev. Stat. § 29:721.D(1).

measure, after all, the governor was authorized to

Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.[141]

Acting under this grant of power, the governor extended all deadlines in "legal, administrative and regulatory proceedings" to September 12, 2008.[142] The governor's order explained that "as a direct consequence of the disaster, evacuation, and subsequent flooding and power outages, there are extreme challenges to communication networks between citizens, which has created an obstruction to citizens attempting to timely exercise their rights."[143] Because the minor parties qualified before September 12, they argued, they should have been placed on the ballot.

Further, the challengers argued, another Louisiana law delegated power to the governor to "suspend or delay any qualifying of candidates, early voting, or elections. . .upon the certification of the secretary of state that a state of emergency exists."[144] This authorization, the challengers argued, evinced a legislative intent to not give the secretary the unilateral authority to extend or change deadlines. To the extent the Legislature delegated its electoral powers, it gave them to the governor.[145]

Following an emergency hearing, the federal District Court in *Dardenne* agreed with the charge that the secretary lacked authority to set deadlines in Louisiana; on September 23, 2008, it preliminarily enjoined the secretary from enforcing its September 8 deadline and ordered the Libertarian Party presidential ticket onto the ballot.[146] It concluded that the

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141 *Id*.

142 *See Governor Jindal Issues Executive Order on Legal Regulatory Proceedings, available at,* http://www.deq.louisiana.gov/portal/portals/0/news/pdf/JindalOrder.pdf (last visited Nov. 10 2009).

143 *Id*.

144 La. Rev. Stat. § 18:401.1.B.

145 Alternatively, the Libertarian Party of Louisiana argued that the legislatively adopted three-day grace period for "recognized" political parties, *see* La. R.S. § 18:1253E (giving recognized political parties an additional 72 hours from the initial deadline to file their qualifying papers), which was relied upon by the Democrats to justify their filing on September 5, should have controlled. According to the Libertarian Party, which is a recognized party in Louisiana, the grace period should have started to run on the day the secretary re-opened—pushing the deadline to September 11. The secretary claimed the three-day grace period began to run on September 2, notwithstanding the fact that the office was officially closed during this period of time. This meant that the grace period, according to the secretary, expired on September 5, even though the office was closed.

146 *See Libertarian Party of Louisiana v. Dardenne*, No. 08-582 (M.D.La. 2008) (Dkt. # 19) (Order from the bench awarding preliminary relief to Libertarian Party of Louisiana). The District Court concluded that the Socialist Party USA's qualifying papers were defective, and thus refused to place its ticket on the ballot. *Id*.

legislature's original September 2 deadline could not be constitutionally enforced:

> the hurricane forced the evacuation of many of [the parties'] electors who were needed to complete each party's respective qualifying papers, which were due on September 2. Each witness also testified that he encountered numerous problems when trying to communicate with the secretary of state's office regarding whether or not the office was opened or closed the week of September 2. In fact, even after a number of failed attempts by [the Libertarian Party of Louisiana] to contact the office of the secretary of state during the week of September 2, [it] did not receive any response back until 3:15 p.m. on Monday, September 8. The hardships and the extreme circumstances faced by those seeking to file their party's qualifying papers, in the midst of a natural disaster like Hurricane Gustav and the resulting power outages and impediments in many avenues of communication, must be taken into consideration. . ..[147]

Next, the District Court reasoned, the secretary lacked authority to create a new deadline. Because the secretary could not decree a new qualifying date, and since the state claimed no other, the District Court used its equitable powers to fashion a reasonable solution.[148] Because Louisiana's legislature had declared that recognized political parties (like the Libertarian Party of Louisiana) were entitled to file their qualifying papers 72 hours after the close of the initial qualifying, and because the state did not reopen until September 8, the District Court reasoned that the deadline should extend to September 11.[149] Under this deadline, the Libertarian Party had qualified.[150]

Like the District Court in *Brunner,* the District Court in *Dardenne* relied on the literal language of Article II. Article II, the District Court concluded, delegates to state "Legislatures" the authority to regulate presidential elections. The secretary of state exceeded his powers under Article II by unilaterally announcing that September 8, 2008 was the new deadline. He did not point to any authorization, but seemed to claim a naked power. This was not sufficient for the District Court.

Louisiana's secretary took an emergency appeal to the United States Court of Appeals for the Fifth Circuit, which stayed the preliminary injunction the following day. Without addressing the merits of the Article

147 *See Libertarian Party of Louisiana v. Dardenne*, No. 08-582 (M.D.La. 2008) (Dkt. # 20) at 8-9 (Order awarding preliminary relief to Libertarian Party of Louisiana).

148 *Id*. at 5-6.

149 *Id*. at 9-10.

150 The Socialist Party USA, in contrast, was found not to have submitted complete paperwork by this date and thus was not ordered onto the ballot. *Id*

II challenge, the Fifth Circuit in *Libertarian Party v. Dardenne*[151] stated:

The [secretary] has. . .shown that it will suffer irreparable injury if the stay is not granted, and that the stay will serve the public interest. Absentee voters in the military and overseas will receive two ballots with different candidates, with a resulting likelihood of confusion and duplicate voting. We recognize that the stay will inflict harm on the Libertarian Party, but our review of the likelihood-of-success-on-the-merits factor set out below leads us to believe that the harm may well be of their own making. In sum, the factors justifying the stay of the injunction pending appeal in our view outweigh any unacceptable harm to the Libertarian Party likely to result.[152]

In regard to the Libertarian Party's possibly causing its own problem, the Fifth Circuit concluded that the Party might not have had "all the affidavits. . .needed to file on the September 2 deadline."[153] Thus, the Fifth Circuit concluded that regardless of whether the secretary had the authority to create a new deadline, it was possibly the Libertarian Party's fault it missed the old one.[154] The Fifth Circuit accordingly removed Libertarian Party's presidential candidates' names from the ballot.[155]

Following the November election, the Fifth Circuit dismissed the secretary's interlocutory appeal on mootness grounds .[156] The District Court thereafter dismissed the entire case because of mootness.[157] An appeal from this dismissal remains pending in the Fifth Circuit.[158]

3. Mississippi

Brian Moore and Stewart Alexander, the Socialist Party USA candidates for president and vice-president in 2008, sought to qualify in Mississippi using the Natural Law Party's ballot line.[159] In order to qualify in Mississippi, the legislatively established deadline for recognized political

151 294 Fed. Appx. 142 (5th Cir. 2008).

152 *Id*. at 144. The Fifth Circuit's stay ignored the District Court's factual findings and seemed to accept as true the secretary's claims—many of which were disputed. While the District Court found that the secretary was officially closed, for example, the Court of Appeals concluded that the Louisiana Secretary of State's office was possibly open from September 2 through September 5. In any case, this proves the difficulty of establishing facts on an expedited basis.

153 *Id*.

154 *Id*.

155 The Supreme Court refused to intervene. *See Libertarian Party v. Dardenne*, 129 S. Ct. 359 (2008).

156 *Libertarian Party v. Dardenne,* 2009 WL 247904 (5th Cir., Feb. 3, 2009). The Socialist Party USA, which had cross-appealed its denial of preliminary relief, voluntarily dismissed its interlocutory appeal.

157 *See Libertarian Party of Louisiana v. Dardenne*, No. 08-582 (M.D.La. 2009) (Dkt. # 62).

158 *Libertarian Party of Louisiana v. Dardenne,* No. 09-30307 (5th Cir. 2009). The appeal is to be argued on December 3, 2009.

159 The Natural Law Party was a recognized political party in Mississippi.

parties for the 2008 election cycle was Friday, September 5, 2008.[160]

Unlike other election laws in Mississippi,[161] Mississippi's legislatively adopted qualifying date says nothing about the time of day; that is, it does not state that qualifying papers have to be delivered by 5:00 PM or by the close of the business day. It simply says that papers must be delivered "not less than sixty (60) days previous to the day of the election."[162]

Mississippi's secretary of state, who is responsible for receiving and processing candidates' qualifying papers, had neither published a formal rule nor made any public statement about when his office would close on the day of the deadline. Unfortunately for the Socialist Party USA, the secretary's office closed at 5:00 PM on September 5, 2008, meaning it would not accept qualifying papers after this time. When the Socialist Party

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160 Mississippi law requires that qualifying papers for a recognized political party's presidential and vice-presidential candidates be delivered to the secretary of state "not less than sixty (60) days previous to the day of the election." Miss Code § 23-15-785(2). For the 2008 election cycle, this means that a party's qualifying papers were due on Friday, September 5, 2008.

161 Many election laws in Mississippi specifically include 5:00 PM deadlines. Section 23-15-853(2), for example, requires that congressional candidates "qualify with the Secretary of State by 5:00 p.m. not less than twenty (20) days previous to the date of the election." Section 23-15-839(2) states that "[i]n the event that no person shall have qualified by 5:00 p.m. sixty (60) days prior to the date of the election, the commissioners of election shall certify that fact to the board of supervisors which shall dispense with the election and fill the vacancy by appointment." Section 23-15-213 states that "Candidates for county election commissioner shall qualify by filing with the clerk of the board of supervisors of their respective counties a petition personally signed by not less than fifty (50) qualified electors of the supervisors district in which they reside, requesting that they be a candidate, by 5:00 p.m. not less than sixty (60) days before the election and unless such petition is filed within said time, their names shall not be placed upon the ballot." Section 23-15-361(1) states that a "petition [must be] filed with the clerk of the municipality no later than 5:00 p.m. on the same date by which candidates for nomination in the municipal primary elections are required to pay the fee…." Section 23-15-309(1) states that "Nominations for all municipal officers which are elective shall be made at a primary election, or elections, to be held in the manner prescribed by law. All persons desiring to be candidates for the nomination in the primary elections shall first pay Ten Dollars ($10.00) to the clerk of the municipality, at least sixty (60) days prior to the first primary election, no later than 5:00 p.m. on such deadline day." Section 23-15-359(3) states in the context of primary elections that "[p]etitions for offices described in…this section…shall be filed with the State Board of Election Commissioners by no later than 5:00 p.m. on the same date by which candidates for nominations in the political party primary elections are required to pay the fee…." *See also* Miss. Code § 23-15-299(3) (stating that "Assessments…must be paid by each candidate to the Secretary of the State Executive Committee with which the candidate is affiliated by 5:00 p.m. sixty (60) days before the presidential preference primary in years in which a presidential preference primary is held"); *id*. § 23-15-721(3) ("ballots must be received by the registrar prior to 5:00 p.m. on the day preceding the election to be counted."); *id*. § 23-15-807(e) (requiring that campaign finance reports be "the report shall be due in the appropriate office at 5:00 p.m. on the first working day before the date specified in paragraph (b) of this section."). The Legislature, moreover, has recognized relevant differences between presidential elections and elections for state and local offices. Section 23-15-637, for example, states that "[a]bsentee ballots received by mail, *excluding presidential ballots*…must be received by the registrar by 5:00 p.m. on the date preceding the election…." (Emphasis added.)

162 Miss. Code § 23-15-785(2).

USA's papers arrived shortly after 5:00 PM, personnel in the office refused to open the door. The Party's presidential candidates were thus precluded from appearing on Mississippi's 2008 ballot.

The Socialist Party USA's presidential ticket challenged the secretary's decision under the First and Fourteenth Amendments, as well as the Election Clause of Article II.[163] Regarding the latter, the Socialist Party argued that the secretary did not have the constitutional authority to establish a 5:00 PM filing deadline.[164] The District Court in *Moore v. Hosemann*[165] quickly rejected the Socialist Party's arguments. As it explained in a subsequent written opinion, "the Secretary of State's decision to close his office at the traditional hour of 5:00 p.m. . .was reasonable and was not inconsistent with the state's election statutes. . .."[166] The secretary's decision therefore did not violate Article II's Election Clause.[167]

The Socialist Party took an emergency appeal to the Fifth Circuit, but was denied relief.[168] Following the election, the party voluntarily dismissed its interlocutory appeal[169] and returned to the District Court, which thereafter dismissed the complaint on mootness grounds.[170] An appeal from this dismissal is pending in the Fifth Circuit.[171]

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163 *See Moore v. Hosemann,* No. 08-573 (S.D. Miss. 2008).

164 The secretary argued in the District Court that the question was purely a matter of state law, and that state law implicitly established 5:00 PM as the deadline. The secretary relied on Mississippi Code § 25-1-98 for the proposition that the Legislature intended 5:00 PM to be the ballot deadline. Section 25-1-98, however, is not an election law; it is not even a specific measure that applies to the secretary of state. Rather, it is a general law that requires "all state offices" to maintain regular office hours. Moreover, it states: "The provisions of this section shall not be construed to limit the hours of operation of any agency or to abrogate any action taken during hours other than those stated…."

165 2009 WL 649700 (S.D. Miss. 2008).

166 *Id*. The court also concluded that "defendant's decision to close at 5:00 p.m. did not violate plaintiffs' due process rights because even if the decision was contrary to state law (which this court did not consider that it was), consistent with state law, it was not one of the 'rare, but serious, violations of state election laws that undermine the basic fairness and integrity of the democratic system' warranting relief under the Fourteenth Amendment." *Id*. Further, the court rejected the plaintiffs' claim that "the Secretary of State was estopped from refusing the qualifying documents because the Secretary's office allegedly stated to Mr. Moore that a late filing would be accepted…." *Id*. The court added in a closing footnote that "plaintiffs' problem arose because they missed the deadline, not because they were unaware of the deadline. Plaintiffs knew the office closed at 5:00 p.m. and simply failed to get there in time." *Id*. at n.3.

167 *Id*.

168 *See Moore v. Hosemann*, No. 08-60899 (5th Cir. 2008).

169 *Id*. (dismissed Nov. 24, 2008).

170 *See Moore v. Hosemann,* No. 08-573 (S.D. Miss. 2008) (Dkt. # 24) (dismissing case).

171 *Moore v. Hosemann,* No. 09-60272 (5th Cir. 2009). The appeal was argued on November 4, 2009.

VI. A RECOMMENDED FRAMEWORK FOR THE ELECTIONS CLAUSES

Should California's people—through popular initiative—be allowed to regulate federal elections? Should Ohio's secretary of state be allowed to create a new federal election law to replace one discarded by a federal court? Does Louisiana's secretary of state have inherent constitutional authority to impose a new qualifying deadline for presidential candidates following a natural disaster? Can Mississippi's secretary of state decide to close at 5:00 PM on the legislatively prescribed qualifying date?

The Framers envisioned state legislative involvement in the selection of the newly formed national legislatures' members. Article I's Election Clause was a compromise; state legislatures would select senators, and the precise manner and time of choosing them, because the Framers chose not to let the federal House of Representatives do it. The Framers did not delegate the power directly to the states because they feared popular elections. They recognized that states might opt for this path if given the choice. The Election Clauses in Articles I and II were geared toward defeating this choice. They borrowed local republicanism—representative democracy—to fashion the Senate's membership.

Likewise, Article II's Election Clause reflects a middle ground between national legislative selection and popular election of the president. The Framers authorized state legislatures to direct the selection of presidential electors because they loathed monarchy, feared democracy, and favored republicanism.

From the text, history and post-ratification precedent, it appears that several guiding principles can be developed. First and foremost, as the Court made clear in *Bush v. Palm Beach County,* this problem presents a federal question. Consequently, state law cannot be dispositive. As described below, state law fills in much of the puzzle; but ultimately the arrangement has an overarching federal dimension.

Second, the regulation of federal elections—whether presidential or congressional—must originate with, and ultimately remain with (as a matter of local law),[172] the state legislatures. State constitutions, as the Supreme Court suggested in *Bush v. Palm Beach County Canvassing Board*, cannot constrain the legislature's authority over federal elections. Articles I and II represent awards of power to state legislatures. These powers cannot be forcibly removed.

This is not to say that state constitutions must be ignored. A legislature's make-up and processes will necessarily be defined by a state constitution. For example, the legislature may be unicameral, bicameral,

[172] Congress is always free, of course, to meddle with congressional elections under Article I, § 4.

suffer gubernatorial veto, or not—all at the pleasure of the state constitution. But a state constitution can only define the processes of legislative enactment; it cannot constrain the substance of what the legislature does in terms of federal elections. Nor can a state constitution remove the legislature from the process, or even provide it with only a subsidiary role. The legislative process required by Articles I and II must begin with the legislature. Vetoes and judicial review are permitted, but this is a far cry from a unilaterally executive or judicial rewriting of federal election laws.

Contrary to popular review of legislative action—which appears to be proper—popular referenda and initiatives cannot properly be used in the first instance to directly regulate federal elections. Justice Stevens in *Jones* correctly expressed skepticism in this regard. It is one thing to allow a popular veto, which like a gubernatorial veto simply rejects what the legislature has developed, and quite another to allow the people to write election laws from scratch—at least without the legislature's consent and direction. Popular participation in the development of federal election laws appears to be inconsistent with the Framers' preference for representative government in this regard.

Third, legislatures can constitutionally delegate portions of their federal regulatory power to executive, judicial and popular agents. While the Seventeenth Amendment proves that Article I's senatorial selection clause was meant to restrict legislative delegations, the Seventeenth Amendment would also appear to have lifted this impediment. Like section 4 in Article I, the Seventeenth Amendment now directs state legislatures to prescribe rules surrounding the election of senators. Unlike the old senatorial selection mechanism, neither the Seventeenth Amendment nor Article I, § 4 would seem to preclude delegation. Coupled with the modern development of administrative law, precluding delegation altogether in the context of prescribing rules would present an unnecessarily draconian limitation on government.

Because of the Framers' preference for republicanism, however, delegations in the realm should be clear and cabined by understandable principles. Pragmatic concerns can only go so far. Just as modern developments direct that elections officials be allowed room to implement election laws, the language of and history behind the Election Clauses suggest that a republican ideal be adhered to, at least as far as possible.

While I confess that more work—both historical and logical—needs to be done in this area, it would seem that a sound compromise is to require an affirmative and unmistakable legislative delegation of regulatory authority to executive and administrative agencies. Unless the Framers'

republican compromise is to become a dead letter, modern leniency with delegations must be avoided.[173] Vague, "intelligible" principles will not suffice.[174] Rather, clear, specific requests to assist with federal elections should be required. This requirement would be akin to the Eleventh Amendment's waiver rule, which demands precise, explicit waivers before states can be sued in federal court.[175] The Framers, after all, were not familiar with what has become the modern administrative state. The ideal behind the Election Clauses of Article I and II was republicanism. The presumption, then, should be against delegation. Rebuttal would be allowed, but it requires clear proof.

Because the Framers were familiar with the role of state courts, in contrast, a presumption should run in favor of legislative delegation of interpretive powers in that direction. The Framers knew that state courts interpreted statutes and employed common law principles. They would not have been surprised by a judicial interpretation of legislatively adopted election rules. For this reason, a presumption in favor of delegation should run in favor of judicial review. Justice Stevens' sentiments in *Bush v. Gore* are surely correct. In the absence of a clear legislative statement to the contrary, state courts ought to be expected to interpret state election laws.

Assuming a proper delegation of power—either to courts, executive agents, or the people—the harder problem involves the scope of the delegated authority. What can the agent do? With courts, the answer seems simple; courts are free to interpret the legislative will. Courts can and must engage in a measure of rulemaking. Given modern advancements in the realm of Administrative Law, moreover, one must also concede that some measure of rulemaking has to be tolerated at the executive and/or administrative level. Like it or not, those who interpret and implement law more often than not make law as well.

Still, this does not mean that courts and agents have blank checks to do what they want. Instead, non-legislative rulemaking can be tolerated only so long as it fits neatly within the legislature's prescribed model. Agents should not be allowed to supplement the legislature's plan, nor should they be authorized to contradict it. Their role must be limited to

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173 *E.g., Whitman v. American Trucking Ass'n,* 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.…[W]e repeatedly have said that when Congress confers decision-making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'").

174 *Id.*

175 *E.g., Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 149-50 (1981) (per curiam) (finding insufficient evidence of express waiver despite state law providing that the defendant was a "body corporate with the capacity to sue and be sued").

filling in blanks and mending seams.

Of course, therein is the devil. Distinguishing what is permissible ("filling in the blanks") from what is not ("rewriting") is no simple matter. Generations of scholars have struggled with this fine line. One solution, which seems to be the majority approach today, is for courts to simply defer to agents.[176] At least since the famous "switch in time that saved the nine" in the spring of 1937, federal courts have retreated from judicially enforceable constitutional limits on delegations of legislative power.[177]

This general retreat notwithstanding, courts have continued to question agency action under the guise of statutory construction. For example, although it is clear that Congress can delegate power to agents, federal courts have not always concluded that it specifically has.[178] Alternatively, even the Supreme Court has recently concluded that federal agencies have not lived up to the terms of their delegated mandates.[179] Thus, federal courts today continue to invalidate federal agency rules and actions, the demise of the non-delegation doctrine and rise of deference notwithstanding.

Measuring state agency action against legislatively adopted standards would thus not be completely foreign to the federal courts.[180] It is not unheard of or unworkable. Deference, moreover, is not required. A middle ground is possible.

Along these lines, and in order to best implement the Election Clauses' republican ideal, state legislatures that choose to delegate rulemaking power should be expected to announce clear legislative objectives. Agents, in turn, must be expected to follow this legislative direction. For this to happen, legislative statements must go beyond mere "intelligible principles," and accompanying administrative action must be more than arguably correct. A measure of scrutiny akin to the "intermediate" analysis (employed by the Court under Article IV's privileges and immunities clause, for example) might be employed to insure that both obligations are fulfilled. Administrative rulemaking would

176 *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

177 *See* K. Davis, *Administrative Law Treatise* § 2.01 (1958) ("In absence of palpable abuse or true congressional abdication, the non-delegation doctrine to which the Supreme Court has in the past often paid lip service is without practical force.").

178 *E.g., Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Attorney General was not delegated power to regulate the medical profession's prescription of drugs to hasten death).

179 *E.g., Massachusetts v. Environmental Protection Agency,* 549 U.S. 497 (2007) (holding that the EPA did not properly implement the Clean Air Act).

180 Federal courts perform a similar task under 42 U.S.C. § 1983 when they attempt to identify policymakers who can bind municipal governments. *E.g., McMillian v. Monroe County*, 520 U.S. 781 (1997) (using local law to determine that an Alabama sheriff was a final authority for the state and not a county).

not have to be absolutely necessary (as is true under strict scrutiny), but would still need to be substantially related to the legislature's goal. What that goal is, whether the administrative agent properly interpreted it, and whether the agent's approach serves it, would be subject to searching (though not fatal) judicial scrutiny.

Of course, this analysis must rely heavily on state law. Federal courts will be asked to look to state legislative action to decide whether a clear delegation has occurred, and then to decide the scope of the requested administrative assistance. Courts (quite often federal courts) will be pressed to interpret state administrative action and measure it against legislative objectives and directions. But this kind of analysis is not uncommon in constitutional parlance. Federal courts often conduct this kind of means-ends analysis—both under substantive limitations and structural guarantees. Nor is it uncommon to lean heavily on state law to answer federal questions.[181]

In sum, the job can be performed by federal courts using conventional constitutional techniques. It will not be quick and easy. Federal courts will be called to intervene. But neither must it result in a complete federalization of local administrative law in the context of federal elections. At best, it will result in legislative clarity. At worst, it should cause agents to exercise greater care.

VII. CONCLUSIONS

Applying these principles to the problems described in California, Florida, Ohio, Mississippi and Louisiana should produces the following results: as Justice Stevens suspected, California's open-primary initiative cannot constitutionally be applied to federal elections. The initiative used in California was not in the nature of a veto, and there was no indication that California's legislature (as opposed to the state constitution) had delegated this authority to the people. Even if it had, it is not obvious that the measure substantially advanced any legislatively adopted objective. It would therefore likely have tripped over intermediate scrutiny.

Florida's constitution could not constrain the legislature's regulation of presidential elections. The Court in *Bush v. Palm Beach County* was thus correct to question the Florida Supreme Court's reliance on Florida's

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[181] The Supreme Court's procedural due process cases come immediately to mind, *e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972) (holding that one must have a "legitimate claim to entitlement" under state law to have due process challenge), as do civil rights cases under 42 U.S.C. § 1983 employing the so-called "final authority" analysis. *E.g., City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (holding that to determine whether local agent is a policymaker federal courts must interpret state law).

constitution. However, the Florida Supreme Court's interpretation of the legislatively adopted election scheme—which was again presented to the Supreme Court in *Bush v. Gore*—presents a closer question. Because the Florida Supreme Court's equitable remedy requiring that all "undervotes" throughout the state be recounted strayed far from the more limited county-specific remedy envisioned by Florida's statutes, it would appear to fail the intermediate level of scrutiny proposed here. However, the Florida Supreme Court's evidentiary standard—which focused on the intent of the voter—would not seem as problematic under Article II. The interpretation, after all, would seem to naturally and substantially advance the legislature's plan; at least it is far from obvious why it would not.

Ohio's administratively adopted plan was properly invalidated in *Brunner* for the simple reason that the legislature did not delegate to the secretary of state the authority to regulate federal elections. And even if it had, the secretary's rules did not fill in gaps or interpret legislation; they replaced legislation that was ruled invalid under the First Amendment. These administrative rules could thus not be claimed to substantially advance any legislative end. They would fail intermediate scrutiny.

Louisiana's secretary of state's emergency deadline in *Dardenne* should fail analysis under Article II for similar reasons. The legislature did not delegate authority to the secretary to regulate federal elections. It delegated emergency rulemaking power to the governor. The secretary would not appear capable of crossing the delegation threshold. He simply lacked power to regulate federal elections.

Mississippi's 5:00 PM deadline likewise fails for lack of clear legislative delegation. Had Mississippi's legislature delegated authority, on the other hand, the case would have presented a closer question. Still, it would appear that the executive deadline would fail constitutional analysis. Because Mississippi's legislature had specifically announced terminal 5:00 PM deadlines in a dozen election statutes, but not its presidential qualification statute, a strong argument can be made that the legislature's plan was to not include a 5:00 PM deadline for presidential tickets. And even if these counter-examples did not exist, it is not clear that a 5:00 PM terminus to a qualifying period prescribed in terms of a substantial number of days substantially advances the legislature's objective.