

## 7 | Strategy for Enacting the National Popular Vote Compact

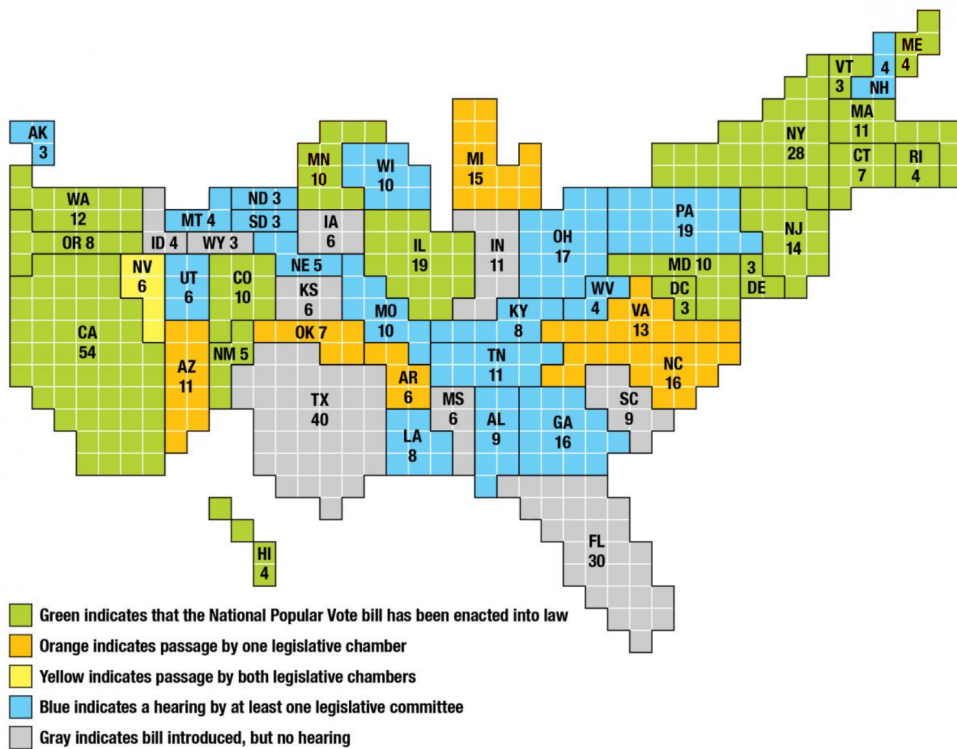
The National Popular Vote Compact must be enacted by states possessing a majority of electoral votes (i.e., 270 out of 538) in order to take effect. This chapter discusses:

- the current list of states that have enacted the Compact into law (section 7.1),
- the role of state legislatures in enacting the Compact (section 7.2),
- the possible role of the citizen-initiative process (section 7.3), and
- the role of Congress (section 7.4).

### 7.1. CURRENT STATUS OF THE NATIONAL POPULAR VOTE COMPACT

As of July 2024, the Compact has been enacted into law by 18 jurisdictions together possessing 209 electoral votes—61 votes away from 270. It has been enacted in:

- six small jurisdictions:
  - Delaware—3 electoral votes
  - District of Columbia—3
  - Hawaii—4
  - Maine—4
  - Rhode Island—4
  - Vermont—3
- nine medium-sized states:
  - Colorado—10
  - Connecticut—7
  - Maryland—10
  - Massachusetts—11
  - Minnesota—10
  - New Jersey—14
  - New Mexico—5
  - Oregon—8
  - Washington—12
- three big states:
  - California—54
  - Illinois—19
  - New York—28



**Figure 7.1** Status of the National Popular Vote Compact as of July 2024.

The National Popular Vote Compact has been approved by a total of 43 legislative chambers in 25 jurisdictions. In addition to the 35 legislative chambers of the 18 jurisdictions listed above, the bill has been approved by the following eight legislative chambers in seven states:

- Arizona House—11
- Arkansas House—6
- Michigan House—15
- Nevada Assembly and Senate<sup>1</sup>—6
- North Carolina Senate—16
- Oklahoma Senate—7
- Virginia House—13

A more detailed history of the National Popular Vote Compact is available online.<sup>2</sup>

Figure 7.1 shows the status of the Compact in the various states as of July 2024.

<sup>1</sup> In 2023, both houses of the Nevada legislature approved a state constitutional amendment enacting the National Popular Vote Compact. See additional discussion of Nevada in section 7.2.

<sup>2</sup> See <https://www.nationalpopularvote.com/news-history>

## 7.2. THE ROLE OF STATE LEGISLATURES

A state legislature typically enacts an interstate compact in the same way that it enacts any other state statute.

The law-making process at the state level generally entails adoption of a proposed legislative bill by a majority vote of each house of the state legislature. In addition, all state Governors currently have veto power over bills (or at least most bills<sup>3</sup>) passed by their legislatures. Legislative bills are presented to the Governor for approval or disapproval.<sup>4</sup>

If a Governor vetoes a bill, the legislation may nonetheless become law if the legislature overrides the veto in the manner specified by the state's constitution.

Overriding a gubernatorial veto typically requires a two-thirds super-majority in each house; however, a three-fifths majority is sufficient in seven states, namely Delaware, Illinois, Maryland, Nebraska (which has a one-house legislature), North Carolina, Ohio, and Rhode Island.

A veto may be overridden by a majority in six states, namely Alabama, Arkansas, Indiana, Kentucky, Tennessee, and West Virginia.

The procedure in the District of Columbia is somewhat different. Prior to 1973, Congress typically approved interstate compacts on behalf of the District. In 1973, Congress passed the District of Columbia Home Rule Act. Under the 1973 Act, the Council of the District of Columbia has the power to approve interstate compacts. In the District's legislative process, the Mayor has veto power, and the Council has power to override a veto. Then, all legislation enacted by the District is subject to potential veto by Congress during a 30-day review period.

An interstate compact may also be adopted by a state by means of a constitutional amendment. In 2023, the Nevada state legislature approved the National Popular Vote Compact as an amendment to the state constitution.<sup>5</sup> If the proposed amendment is approved for a second time by the 2025–2026 legislature, the proposed amendment would be submitted to Nevada voters at the November 2026 election. Because amending the state constitution is a time-consuming multi-step process, the proposed amendment in Nevada contains a provision empowering the state legislature to withdraw from the Compact by ordinary statute—that is, by the same procedure as if the state had originally enacted the Compact by statute. The proposed amendment in Nevada provides:

“The State of Nevada may withdraw from the National Popular Vote Compact **by statute**, and may rejoin by subsequent statute.” [Emphasis added]

## 7.3. THE ROLE OF THE CITIZEN-INITIATIVE PROCESS

In certain jurisdictions, state statutes or state constitutional amendments may be enacted directly by the voters by means of the citizen-initiative process.

<sup>3</sup> In some states, there are specific limitations on the Governor's veto power. For example, the North Carolina Governor cannot veto a redistricting bill.

<sup>4</sup> Council of State Governments. 2005. *The Book of the States*. Lexington, KY: The Council of State Governments. Volume 37. Pages 161–162.

<sup>5</sup> The history of Assembly Joint Resolution 6 of 2023 may be found at <https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10288/Overview>

Table 7.1 The 25 jurisdictions with the citizen-initiative process

State	Statutory initiatives	Constitutional initiatives	Status of National Popular Vote Compact as of July 2024
Alaska	Yes		
Arizona	Yes	Yes	
Arkansas	Yes	Yes	
California	Yes	Yes	Enacted
Colorado	Yes	Yes	Enacted
District of Columbia	Yes		Enacted
Florida		Yes	
Idaho	Yes	Very limited	
Illinois	Advisory only	Very limited	Enacted
Maine	Yes		Enacted
Massachusetts	Yes	Yes	Enacted
Michigan	Yes	Yes	
Missouri	Yes	Yes	
Montana	Yes	Yes	
Nebraska	Yes	Yes	
Nevada	Yes	Yes	
North Dakota	Yes	Yes	
Ohio	Yes	Yes	
Oklahoma	Yes	Yes	
Oregon	Yes	Yes	Enacted
South Dakota	Yes	Yes	
Utah	Yes		
Washington	Yes		Enacted
Wyoming	Yes		
<b>Total</b>	<b>24</b>	<b>18</b>	<b>8</b>

In the citizen-initiative process, if a specified number of voters sign a petition, the proposed statute or constitutional amendment will be submitted to the voters for their approval or disapproval.

Polls conducted by numerous polling organizations over a number of years—using a variety of different wordings of questions—have reported high levels of support for a national popular vote (section 9.22).

This fact suggests that the citizen-initiative process can, and should, be used to enact the National Popular Vote Compact in certain states.

7.3.1. STATES WITH THE CITIZEN-INITIATIVE PROCESS

The voters in 23 states and the District of Columbia have the power to enact statutes through the citizen-initiative process.

In 18 states, the voters also have the power to enact state constitutional amendments through the citizen-initiative process. These states include Florida—a state that does not have the statutory initiative process.

Thus, a total of 25 jurisdictions permit either statutory or constitutional initiatives, as shown in table 7.1.<sup>6</sup>

The National Popular Vote Compact has been enacted in eight of these 25 jurisdictions as of July 2024, as shown in the last column of the table. Thus, there are 17 jurisdictions where the Compact could potentially be enacted using the citizen-initiative process.

One of the co-authors of this book (Joseph F. Zimmerman) wrote *The Initiative: Citizen Law-Making*—a book that provides details on the constitutional and statutory provisions governing the initiative processes in the various states.<sup>7</sup>

In addition, a vast amount of information about the citizen-initiative process is available from the Ballot Initiative Strategy Center.<sup>8</sup>

### 7.3.2. History of the initiative process

The origin of the citizen-initiative process is generally attributed to various Swiss cantons in the early 19<sup>th</sup> century.<sup>9</sup>

In 1898, the state constitution of South Dakota was amended to permit the citizen-initiative process.

Oregon adopted the process in 1902. Then, in 1904, Oregon voters became the first in the United States to use the citizen-initiative process to enact new state laws. Those laws created a direct primary and a local option for liquor.<sup>10</sup>

The initiative process spread rapidly to additional states as part of the Progressive movement in the early 20<sup>th</sup> century.

In 1908, Maine adopted the initiative and referendum processes.

In 1911, California voters adopted the initiative process in the belief that it would reduce the dominance of the state legislature by the railroads and other corporations and that it would reduce the power of political machines.

By 1918, 19 states had adopted the citizen-initiative process. All were west of the Mississippi River, except for Maine, Massachusetts, and Ohio.

The initiative process was included in Alaska's original constitution at the time of that state's admission to the Union in 1959.<sup>11</sup>

### 7.3.3. The protest-referendum process

In many of the states with the citizen-initiative process, the voters have reserved to themselves an additional power called the “protest-referendum” (or “veto-referendum”) process.

<sup>6</sup> Mississippi had a (rarely used) initiative process for constitutional amendments until the Mississippi Supreme Court declared the process inoperative in 2021. As of May 2024, attempts to restore the initiative process in Mississippi have not been successful. Pender, Geoff. 2023. Senate kills Mississippi ballot initiative without a vote. *Mississippi Today*. March 23, 2023. <https://mississippitoday.org/2023/03/23/mississippi-ballot-initiative-dies-again-without-vote/>

<sup>7</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger. Pages 24–25.

<sup>8</sup> The web site of the Ballot Initiative Strategy Center is <https://ballot.org>.

<sup>9</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

<sup>10</sup> Eaton, Allen J. 1912. *The Oregon System: The Story of Direct Legislation in Oregon*. Chicago, IL: A.C. McClurg & Co.

<sup>11</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

This process enables voters to sign a petition to temporarily suspend a law enacted by the legislature and subsequently vote on whether to retain the law in a statewide referendum.

The protest-referendum process must be invoked in a limited period of time immediately after the enactment of the statute. After the expiration of that period, the citizen-initiative process (if it exists in that particular state) could potentially be used to enact a law repealing the statute.

The protest-referendum process is described in the book *The Referendum: The People Decide Public Policy*<sup>12</sup> by Professor Joseph F. Zimmerman (who is also co-author of this book).

The Michigan Constitution (Article II, section 9) provides a good description of both the citizen-initiative process and the protest-referendum process:

“The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for Governor at the last preceding general election at which a Governor was elected shall be required.

“No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

“Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.

“If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

“Any law submitted to the people by either initiative or referendum petition and

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<sup>12</sup> Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the Governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.”<sup>13</sup>

The Arizona Constitution provides:

“The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.”<sup>14</sup>

The Ohio Constitution provides:

“The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives, but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.”<sup>15</sup>

#### **7.3.4. Interstate compacts and the citizen-initiative and protest-referendum processes**

An interstate compact is both a state law and a legally binding contract among the states involved (chapter 5).

There is no provision of any state constitution that specifically singles out interstate compacts as being ineligible for enactment by the voters by means of the citizen-initiative process or immune from repeal using the protest-referendum process.

Nonetheless, there are numerous state-specific limitations as to subject matter eligible for the citizen-initiative and protest-referendum processes.<sup>16,17</sup>

In general, the subject-matter restraints on the protest-referendum process are more

<sup>13</sup> Michigan Constitution. Article II, section 9.

<sup>14</sup> Arizona Constitution. Article I, section 1.

<sup>15</sup> Ohio Constitution. Article II, section 1.

<sup>16</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

<sup>17</sup> The limitations in Illinois are extremely severe. The statutory initiative process in Illinois is advisory only, and the state's constitutional initiative process is limited to matters relating to legislative procedure. Thus,

severe than those applying to the initiative process.<sup>18</sup> For example, in many states, the protest-referendum process cannot be applied to appropriations and other measures involving the support of governmental operations, emergency measures, and the judiciary.

Having said that, both the citizen-initiative and protest-referendum processes have been used in connection with interstate compacts.

In 1988, an initiative petition forced a statewide vote on the question of repealing a law providing for Nebraska's participation in the Central Interstate Low-Level Radioactive Waste Compact. The citizen-initiative process was used because the law involved had been enacted several years earlier by the legislature. In the statewide vote on Proposition 402, voters rejected the proposition to repeal the compact.

In South Dakota in 1984, there was a statewide vote on whether to require the approval of the voters on the state's participation in any nuclear-waste-disposal compact. The measure passed 182,952 to 112,161. In 1985, the South Dakota Supreme Court upheld the referral of the Dakota Interstate Low-Level Radioactive Waste Management Compact to voters.<sup>19</sup>

In addition, legislatures have occasionally directly referred enactment of an interstate compact to their voters. For example, the Maine legislature referred the question of enactment of the Texas Low-Level Radioactive Waste Disposal Compact to its voters in 1993. The question on the ballot was:

“Do you approve of the interstate compact to be made with Texas, Maine and Vermont for the disposal of the State's low-level radioactive waste at a proposed facility in the State of Texas?”

The proposition received 170,411 “yes” votes and 63,672 “no” votes.

In 2019, the Colorado legislature passed the National Popular Vote Compact, and Governor Jared Polis signed the legislation.<sup>20</sup> Shortly thereafter, the Protect Colorado's Vote organization<sup>21</sup> circulated a protest-referendum petition seeking repeal of the Compact. The Colorado Secretary of State certified the validity of the petition in August 2019—thereby temporarily suspending the state's approval of the Compact until a statewide referendum could be held on the issue.<sup>22</sup>

In the Colorado campaign in 2020, the Compact was defended by the Yes on National Popular Vote organization,<sup>23</sup> Coloradans for National Popular Vote, and Conservatives for Yes on National Popular Vote.

In the statewide vote on Proposition 113 in November 2020, Colorado voters supported

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it would not be possible to enact an interstate compact using the initiative process in Illinois. As it happens, the National Popular Vote Compact has been enacted into law by the legislature and Governor in Illinois.

<sup>18</sup> Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

<sup>19</sup> *Wyatt v. Kundert*. 375 N.W.2d 186 (1985).

<sup>20</sup> Colorado Senate Bill 42 of 2019. <https://leg.colorado.gov/bills/sb19-042>

<sup>21</sup> <https://www.protectcoloradosvote.org/>

<sup>22</sup> Davies, Emily. 2019. Colorado approved a national popular vote law. Now it might be repealed. August 2, 2019. *Washington Post*. [https://www.washingtonpost.com/politics/colorado-approved-a-national-popular-vote-law-now-it-might-be-repealed/2019/08/02/a305b1de-b468-11e9-8e94-71a35969e4d8\\_story.html](https://www.washingtonpost.com/politics/colorado-approved-a-national-popular-vote-law-now-it-might-be-repealed/2019/08/02/a305b1de-b468-11e9-8e94-71a35969e4d8_story.html)

<sup>23</sup> <https://www.YesOnNationalPopularVote.com>



the decision of the legislature and Governor to enact the National Popular Vote Compact.<sup>24</sup> Ballotpedia<sup>25</sup> and the National Popular Vote web site<sup>26</sup> provide historical information about the campaign.

### 7.3.5. May the National Popular Vote Compact be enacted using the citizen-initiative process?

The adoption of the citizen-initiative and protest-referendum processes in the early 20<sup>th</sup> century has raised the question as to whether a state's voters may exercise these processes in connection with functions that the federal Constitution assigns to state legislatures.

The federal functions to be performed by state legislatures include:

- enactment of state laws governing the conduct of congressional elections—including redistricting—under Article I of the Constitution;
- enactment of state laws expressing a state's choice of the method of its appointing presidential electors under Article II of the Constitution (e.g., the National Popular Vote Compact);
- election of U.S. Senators by the state legislature before the 17<sup>th</sup> Amendment (ratified in 1913) providing for direct popular election of Senators;
- enactment of state laws regarding the filling of vacancies in U.S. Senate seats after ratification of the 17<sup>th</sup> Amendment; and
- ratification of federal constitutional amendments, calling state conventions to ratify federal constitutional amendments, and calling a federal constitutional convention.

Article II, section 1, clause 2 of the U.S. Constitution is particularly relevant to the National Popular Vote Compact. It provides:

“Each State shall appoint, in such Manner as the **Legislature** thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ....” [Emphasis added]

The specific question relevant to the National Popular Vote Compact is whether it may be enacted using the citizen-initiative process (or repealed using the protest-referendum process).

An answer to this question requires an examination of the way that the word “legislature” is used in the U.S. Constitution.

In the century before the 2015 case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, most constitutional scholars would have unhesitatingly opined that the word “legislature” in Article II does not refer to merely the two chambers of the state legislature. Instead, prevailing opinion was that the lawmaking process also includes:

<sup>24</sup> The official election returns for Proposition 113 are at <https://results.enr.clarityelections.com/CO/105975/web.264614/#/detail/1126>

<sup>25</sup> Ballotpedia. Colorado Proposition 113, National Popular Vote Interstate Compact Referendum (2020). [https://ballotpedia.org/Colorado\\_Proposition\\_113,\\_National\\_Popular\\_Vote\\_Interstate\\_Compact\\_Referendum\\_\(2020\)](https://ballotpedia.org/Colorado_Proposition_113,_National_Popular_Vote_Interstate_Compact_Referendum_(2020))

<sup>26</sup> See the Colorado page at the National Popular Vote web site at <https://www.nationalpopularvote.com/state/co>

- the state’s Governor (an official who is manifestly not a member of the legislature), and
- in states that have the citizen-initiative and protest-referendum processes, the state’s voters, who, like the Governor, are manifestly not members of the legislature.

Indeed, the Supreme Court’s 5–4 ruling in the *Arizona* case in 2015 reached the conclusion that the state’s voters could use the citizen-initiative process to create a commission to redistrict the state.

However, the dissenting opinions (notably that of Chief Justice John Roberts) in the *Arizona* decision were exceptionally vigorous.

After President Trump made three appointments to the Supreme Court between 2017 and 2020, many constitutional scholars predicted that the Court was poised to reverse its 2015 decision in *Arizona*.

Moreover, during the same period, a minority of constitutional lawyers were vigorously advancing the so-called “independent state legislature” theory in connection with state laws relating to both congressional elections (under Article I of the Constitution) and presidential elections (under Article II).

Under this theory, when a state legislature enacts laws relating to congressional and presidential elections, it is operating exclusively under authority of the U.S. Constitution. Thus, the state legislature is outside the constraints of its own state constitution (which might, among many things, authorize use of the citizen-initiative process to enact state laws in lieu of the legislature).<sup>27,28</sup>

Under one particularly expansive variation of the theory, the “legislature” that has the power to enact election laws under Article I and Article II consists *only* of the chambers of the state legislature. That is, under this expansive variation of the theory, the legislative process would *not* include:

- presenting a bill relating to congressional or presidential elections to the state’s Governor; or
- allowing the state’s voters to enact legislation relating to congressional or presidential elections using the citizen-initiative process (or to repeal such laws using the protest-referendum process).

In short, under this variation of the theory, state Governors would have no voice in the legislation involving congressional or presidential elections, and voters would not be able to use the citizen-initiative process or the protest-referendum process in connection with such legislation.

In 2022, a redistricting case from North Carolina (*Moore v. Harper*) presented the U.S. Supreme Court with the opportunity to embrace some or all of the elements of the independent state legislature theory.

<sup>27</sup> Gellman, Barton. 2022. Trump’s next coup has already begun. *The Atlantic*. January 2022. <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/>

<sup>28</sup> Amar, Vikram D. and Amar, Akhil Reed. Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish. University of Illinois College of Law Legal Studies Research Paper No. 21-02. February 24, 2022. *Supreme Court Review*. Available at SSRN: <https://ssrn.com/abstract=3731755>

Because the theory potentially impacted numerous aspects of election law, the case generated an enormous amount of debate in legal circles.<sup>29</sup>

A reversal of the 2015 *Arizona* ruling concerning the use of the meaning of the word “legislature” in Article I could very well have indicated that the citizen-initiative could not be used to enact state legislation under Article II (such as the National Popular Vote Compact).

However, in its decision in *Moore v. Harper* in 2023, the Supreme Court reaffirmed its 2015 ruling in the *Arizona* case as well as its earlier rulings in *Hildebrant* in 1916 and *Smiley* in 1932 (both of which are discussed later in this section).

“This Court recently reinforced the teachings of *Hildebrant* and *Smiley* in *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U. S. 787, a case concerning the constitutionality of an Arizona ballot initiative to amend the State Constitution and to vest redistricting authority in an independent commission. Significantly for present purposes, the Court embraced the core principle espoused in *Hildebrant* and *Smiley*: Whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court dismissed the argument that the Elections Clause divests state constitutions of the power to enforce checks against the exercise of legislative power.

“The basic principle of these cases—reflected in *Smiley*’s unanimous command that a state legislature may not ‘create congressional districts independently of’ requirements imposed ‘by the state constitution with respect to the enactment of laws,’ 285 U. S., at 373—commands continued respect.”<sup>30</sup>

The discussion below traces the line of earlier cases in which the Supreme Court has upheld the ability of the voters to exercise power granted to state legislatures by Article I and Article II of the U.S. Constitution.

The word “legislature” appears in 15 places in the U.S. Constitution—13 of which relate to the powers of state legislatures.<sup>31</sup> As will become clear later in this section, the word “legislature” is used with two distinct meanings in the U.S. Constitution, namely:

- **the state’s two legislative chambers**—that is, the state house of representatives and the state senate agreeing on a common action—either by sitting together in a joint convention or adopting a concurrent resolution while sitting separately;<sup>32</sup> or

<sup>29</sup> See, for example, the numerous *amicus* briefs for *Moore v. Harper* at <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1271.html>

<sup>30</sup> *Moore v. Harper*. 2023. 600 U.S. 1.

<sup>31</sup> Two of the 15 occurrences of the word “legislature” in the U.S. Constitution are unrelated to the powers of state legislatures and will therefore not be discussed further in this chapter. The first such provision is the requirement in Article I, section 2, clause 1 that voters for U.S. Representatives have “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” The second is the requirement in Article VI, clause 2 that “Members of the several State Legislatures” take an oath or affirmation to support the U.S. Constitution.

<sup>32</sup> For simplicity, we refer to the “two houses” of a state legislature throughout this discussion, even though Nebraska has a unicameral state legislature.

- **the state’s law-making process**—that is, the entire process of enacting a state law, including the Governor and perhaps the citizen-initiative and protest-referendum processes.

These 13 occurrences of the word “legislature” appear in the following 11 provisions of the U.S. Constitution:

- electing United States Senators in the state legislature (prior to ratification in 1913 of the 17<sup>th</sup> Amendment providing for popular election of Senators);
- filling a U.S. Senate vacancy (prior to the 17<sup>th</sup> Amendment);
- ratifying a proposed federal constitutional amendment;
- making an application to Congress for a federal constitutional convention;
- choosing the manner of electing U.S. Representatives and U.S. Senators;
- choosing the manner of appointing presidential electors;
- choosing the manner of conducting a popular election to fill a U.S. Senate vacancy (under the 17<sup>th</sup> Amendment);
- empowering the state’s Governor to fill a U.S. Senate vacancy temporarily until the voters fill the vacancy in a popular election (under the 17<sup>th</sup> Amendment);
- consenting to the purchase of enclaves by the federal government for “forts, magazines, arsenals, dock-yards, and other needful buildings”;
- consenting to the formation of new states from territory of existing state(s); and
- requesting federal assistance to quell domestic violence.

Table 7.2 displays these 11 provisions of the U.S. Constitution referring to the powers of the state “legislature.”

**Table 7.2 Provisions of the U.S. Constitution referring to powers of the state “legislature”**

	Power	Provision of the U.S. Constitution
1	<b>Electing U.S. Senators</b> (prior to the 17 <sup>th</sup> Amendment)	“The Senate of the United States shall be composed of two Senators from each State, <b>chosen by the Legislature thereof</b> , for six Years; and each Senator shall have one Vote.” <sup>a</sup> [Emphasis added]
2	<b>Filling a U.S. Senate vacancy</b> (prior to the 17 <sup>th</sup> Amendment)	“If Vacancies happen by Resignation, or otherwise, during the Recess of the <b>Legislature</b> of any State, the Executive thereof may make temporary Appointments until the next Meeting of the <b>Legislature, which shall then fill such Vacancies.</b> ” <sup>b</sup> [Emphasis added]
3	<b>Ratifying a proposed federal constitutional amendment</b>	“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, <b>when ratified by the Legislatures</b> of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress ... ” <sup>c</sup> [Emphasis added]
4	<b>Making an application to Congress for a federal constitutional convention</b>	“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, <b>on the Application of the Legislatures</b> of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress ... ” <sup>d</sup> [Emphasis added]

(Continued)

Table 7.2 (Continued)

	Power	Provision of the U.S. Constitution
5	<b>Choosing the manner of electing U.S. Representatives and Senators</b>	“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be <b>prescribed in each State by the Legislature thereof</b> ; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” <sup>e</sup> [Emphasis added]
6	<b>Choosing the manner of appointing presidential electors</b>	“Each State shall appoint, in such Manner <b>as the Legislature thereof may direct</b> , a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ....” <sup>f</sup> [Emphasis added]
7	<b>Choosing the manner of conducting a popular election to fill a U.S. Senate vacancy</b> (under the 17 <sup>th</sup> Amendment)	“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election <b>as the legislature may direct.</b> ” <sup>g</sup> [Emphasis added]
8	<b>Empowering the Governor to fill a U.S. Senate vacancy temporarily until a popular election is held</b> (under the 17 <sup>th</sup> Amendment)	“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That <b>the legislature of any State may empower</b> the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.” <sup>h</sup> [Emphasis added]
9	<b>Consenting to the purchase of enclaves by the federal government</b>	“To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the <b>Consent of the Legislature</b> of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” <sup>i</sup> [Emphasis added]
10	<b>Consenting to the formation of new states</b> from territory of existing state(s)	“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the <b>Consent of the Legislatures</b> of the States concerned as well as of the Congress.” <sup>j</sup> [Emphasis added]
11	<b>Requesting federal military assistance</b> to quell domestic violence	“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on <b>Application of the Legislature</b> , or of the Executive (when the <b>Legislature</b> cannot be convened) against domestic Violence.” <sup>k</sup> [Emphasis added]

a U.S. Constitution. Article I, section 3, clause 1. Superseded by the 17th Amendment.

b U.S. Constitution. Article I, section 3, clause 2. Superseded by the 17th Amendment.

c U.S. Constitution. Article V.

d U.S. Constitution. Article V.

e U.S. Constitution. Article I, section 4, clause 1.

f U.S. Constitution. Article II, section 1, clause 2.

g U.S. Constitution. 17th Amendment, section 2.

h U.S. Constitution. 17th Amendment, section 2.

i U.S. Constitution. Article I, section 9, clause 17.

j U.S. Constitution. Article IV, section 3, clause 1.

k U.S. Constitution. Article IV, section 4.

In the next 11 subsections of this chapter, we discuss the meaning of the 13 occurrences of the word “legislature” in these 11 provisions of the U.S. Constitution.

As will be seen, history, practice, and law indicate that the word “legislature” in the U.S. Constitution means “the state’s two legislative chambers” when the legislature’s action consists of a decision that can be expressed in one or two words—that is, the name of the person being elected to a full-term or to fill a vacancy in the U.S. Senate (prior to ratification of the 17<sup>th</sup> Amendment), a “yes” response to the yes-or-no question of ratifying a proposed constitutional amendment, or a decision to apply to Congress for a federal constitutional convention.

In contrast, history, practice, and law indicate that the word “legislature” in the U.S. Constitution means “the state’s law-making process” when detailed legislation is required.

### **Electing U.S. Senators**

Under the original Constitution, each state legislature elected the state’s two U.S. Senators. Two methods were commonly used by the states. In some states, the two houses of the state legislature met in a joint convention in which each State Representative and each State Senator cast one vote in the election for the state’s U.S. Senator. In other states, the state house of representatives and the state senate voted separately on a concurrent resolution expressing their choice for the state’s U.S. Senator.<sup>33</sup> Regardless of which method was used, the state’s Governor was *not* part of the constitutional process of electing U.S. Senators. Neither the decision of a joint convention of the two houses nor the concurrent resolution agreed to by both houses of the legislature was presented to the Governor for approval or disapproval. In other words, the word “legislature” in the U.S. Constitution, in connection with the election of U.S. Senators (the first entry in table 7.2), refers to the state’s two legislative chambers—not to the state’s usual process for making laws.

### **Filling a U.S. Senate vacancy**

Similarly, under the original Constitution, a vacancy in the U.S. Senate was filled by action of the state’s two legislative chambers (either voting in a joint convention or acting separately by concurrent resolution). That is, the word “legislature” in the U.S. Constitution, in connection with the filling of U.S. Senate vacancies (the second entry in table 7.2), refers to the state’s two legislative chambers.

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<sup>33</sup> Separate voting for U.S. Senators by the two houses of the state legislature, of course, created the possibility of a deadlock between the two houses. Thus, it became common for U.S. Senate seats to remain vacant for prolonged periods. Article I, section 4, clause 1 of the U.S. Constitution provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” In 1866, Congress exercised its power under this constitutional provision to change the “manner” by which state legislatures conducted their Senate elections and to specify the “time” of such elections. Congress required the two houses of each state legislature to meet in a joint convention on a specified day and to meet every day thereafter until a Senator was selected (14 Stat. 243).

## Ratifying a proposed federal constitutional amendment

The meaning of the word “legislature” in connection with the ratification of amendments to the federal Constitution (the third entry in table 7.2) was decided by the U.S. Supreme Court in *Hawke v. Smith* in 1920.<sup>34</sup> Article V of the U.S. Constitution provides that proposed amendments

“shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the **Legislatures** of three fourths of the several States ....” [Emphasis added]

Before deciding the specific issue in the *Hawke* case in 1920, the U.S. Supreme Court reviewed its 1798 decision in *Hollingsworth et al. v. Virginia*.<sup>35</sup> The *Hollingsworth* case explored the two distinct meanings of the word “Congress” in the U.S. Constitution (the analog of the issue concerning the two meanings of the word “legislature”).

The Constitution frequently uses the word “Congress” to refer to the national government’s law-making process—that is, the process by which the legislative bills are passed by the two houses of Congress and presented to the President for approval or disapproval. The word “Congress” appears with this meaning in numerous places in the Constitution, including:

“The **Congress** shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States ....”<sup>36</sup> [Emphasis added]

The word “Congress” also appears in Article V:

“The **Congress**, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution ....” [Emphasis added]

The *Hollingsworth* case addressed the question of whether the word “Congress” in the U.S. Constitution meant:

- **the national government’s legislative chambers**—that is, the U.S. House of Representatives and U.S. Senate sitting separately and agreeing to a concurrent resolution, or
- **the national government’s law-making process**, including the presentment of the proposed action to the President.

In 1798, the U.S. Supreme Court ruled that when the Congress proposes an amendment to the U.S. Constitution, the resolution of ratification need not be submitted to the President for approval or disapproval. Referring to the 1798 *Hollingsworth* case, the Court noted in the 1920 *Hawke* case:

“At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over

<sup>34</sup> *Hawke v. Smith*. 253 U.S. 221. 1920.

<sup>35</sup> *Hollingsworth et al. v. Virginia*. 3 Dall. 378. 1798.

<sup>36</sup> U.S. Constitution. Article I, section 8, clause 1.



the adoption of the Eleventh Amendment. *Hollingsworth et al. v. Virginia*, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1, section 7, of the Constitution. The Attorney General answered that **the case of amendments is a substantive act, unconnected with the ordinary business of legislation**, and not within the policy or terms of the Constitution investing the President with a qualified negative [veto] on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said:

‘There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution.’

“The court by a unanimous judgment held that the amendment was constitutionally adopted.”<sup>37</sup> [Emphasis added]

In other words, the 1798 *Hollingsworth* case concluded that a federal constitutional amendment was *not* the “ordinary business of legislation.”

The U.S. Supreme Court then addressed the specific issue in the 1920 *Hawke* case, namely the constitutionality of a 1918 amendment to the Ohio Constitution. This state constitutional amendment extended the protest-referendum process to resolutions of ratification by the Ohio legislature of proposed federal constitutional amendments. Specifically, the 1918 amendment to the Ohio Constitution provided:

“The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.”

The *Hawke* case arose as a result of the Ohio Legislature’s ratification of the 18<sup>th</sup> Amendment prohibiting the manufacture, sale, and transportation of intoxicating liquors for beverage purposes. On January 7, 1919, the Ohio Legislature passed a concurrent resolution<sup>38</sup> ratifying the Amendment.<sup>39</sup> Ohio’s ratification was crucial because the U.S. Secretary of State was in possession of resolutions of ratification from 35 other states, and 36 ratifications were sufficient, at the time, to make a pending amendment part of the U.S. Constitution. A protest-referendum petition was quickly circulated in Ohio. Supporters of the 18<sup>th</sup> Amendment challenged the petition’s validity in state court. The Ohio Supreme Court decided that the legislature’s ratification of the 18<sup>th</sup> Amendment should be temporar-

<sup>37</sup> *Hawke v. Smith*. 253 U.S. 221 at 229–230. 1920.

<sup>38</sup> A concurrent resolution is a type of resolution that is passed by both houses of the legislature but not submitted to the Governor for approval or disapproval.

<sup>39</sup> The resolution of ratification for the 18<sup>th</sup> Amendment was adopted by the Ohio Legislature in accordance with the long-standing practice in Ohio (and other states) of not submitting the legislature’s resolution to the state’s Governor for approval or disapproval.



ily suspended and submitted to the state’s voters for approval or disapproval in a statewide referendum. The U.S. Supreme Court, however, decided otherwise:

“The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition 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. 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.**”<sup>40</sup> [Emphasis added]

In short, in connection with ratification of amendments to the U.S. Constitution (the third entry in table 7.2), the word “legislature” in the U.S. Constitution refers to the state’s two legislative chambers. Ratification is:

- “unconnected with the ordinary business of legislation”<sup>41</sup> and
- “not an act of legislation.”<sup>42</sup>

### **Making an application to Congress for a federal constitutional convention**

The word “legislature” appears in the U.S. Constitution in connection with one of the two ways by which amendments to the Constitution may be proposed to the states. Article V provides:

“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the **Application of the Legislatures** of two thirds of the several States, shall call a Convention for proposing Amendments ....” [Emphasis added]

State legislatures sometimes call on Congress to convene a federal Constitutional Convention. For example, prior to congressional passage of the 17<sup>th</sup> Amendment, 26 states had petitioned Congress for a federal Constitutional Convention to consider the specific question of the popular election of U.S. Senators. In addition, two additional states had, during the period immediately prior to congressional action on the 17<sup>th</sup> Amendment, issued requests for a federal Constitutional Convention without mentioning the topic to be considered by the Convention. Similarly, by the time Congress acted on the 21<sup>st</sup> Amendment, almost two-thirds of the states had petitioned Congress for a federal Constitutional Convention to repeal the 18<sup>th</sup> Amendment.

According to Orfield’s *The Amending of the Federal Constitution*, when state legislatures apply to Congress for a federal Constitutional Convention, the long-standing practice of the states has been that the action of the legislature is not presented to the state’s Gov-

<sup>40</sup> *Hawke v. Smith*. 253 U.S. 221 at 229–230. 1920.

<sup>41</sup> *Ibid.* at 230.

<sup>42</sup> *Ibid.*

error for approval or disapproval.<sup>43</sup> Instead, the two houses of the state legislature pass a concurrent resolution. Thus, in connection with applications to Congress for a federal Constitutional Convention (the fourth entry in table 7.2), historical practice indicates that the word “legislature” in the U.S. Constitution refers to the state’s two legislative chambers.

### Choosing the manner of electing U.S. Representatives and Senators

As demonstrated in the previous four sections, judicial precedent and long-standing practice by the states indicate that the word “legislature” in the U.S. Constitution refers, in connection with the first, second, third, and fourth entries in table 7.2, to the state’s two legislative chambers—not to the Governor or the citizen-initiative or protest-referendum processes.

In many other parts of the U.S. Constitution, however, the word “legislature” has a different meaning—namely, the state’s law-making process. In these parts of the Constitution, “legislature” includes the state’s Governor. Moreover, in these parts of the U.S. Constitution, “legislature” may also include the state’s voters—who, like the Governor, are plainly not members of the two chambers of the state legislature.

An example of this second meaning of the word “legislature” is found in Article I, section 4, clause 1 of the U.S. Constitution concerning the manner of holding elections for U.S. Representatives and Senators (the fifth entry in table 7.2).

“The Times, Places and **Manner** of holding Elections for Senators and Representatives, shall be prescribed in each State by the **Legislature** thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.” [Emphasis added] [Spelling per original]

The U.S. Supreme Court addressed the meaning of “legislature” in Article I, section 4, clause 1 in *Smiley v. Holm* in 1932.<sup>44</sup> The issue in *Smiley* was whether the Minnesota Governor could veto a law passed by the legislature redrawing the state’s congressional districts after the 1930 census. In other words, the question in *Smiley* was whether the word “legislature” refers to the state’s two legislative chambers or the state’s law-making process, which, in Minnesota in 1932, included the Governor.

The question of whether the word “legislature” includes a state’s Governor depends, in large part, on the answer to the following question:

“When a state exercises authority pursuant to powers granted to it by the U.S. Constitution in connection with deciding on the manner of electing its U.S. Representatives,

- (1) does it derive the power to act solely from the U.S. Constitution, or
- (2) does it enact the legislation in accordance with the procedures specified in the state’s constitution?”

The 1932 *Smiley* case involving the meaning of the word “legislature” in the U.S. Con-

<sup>43</sup> Orfield, Lester Bernhardt. 1942. *The Amending of the Federal Constitution*. Ann Arbor: The University of Michigan Press.

<sup>44</sup> *Smiley v. Holm*. 285 U.S. 355. 1932.

stitution went to the U.S. Supreme Court over a decade after various cases arising from the adoption of the initiative and referendum processes in the early years of the 20<sup>th</sup> century. These earlier cases included the 1920 *Hawke* case (discussed above) and the 1916 case of *State of Ohio ex rel. Davis v. Hildebrant* (discussed below). *Smiley* thus provided the Court with the opportunity to put all of these related cases into perspective. The U.S. Supreme Court wrote in *Smiley* in 1932:

**“[W]henever the term ‘legislature’ is used in the Constitution, it is necessary to consider the nature of the particular action in view.”**<sup>45</sup> [Emphasis added]

Applying this test, the Court found that the term “legislature” in Article I, section 4, clause 1 referred to “making laws”<sup>46</sup> and therefore included the Governor.

**“[I]t 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. We find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.”**<sup>47</sup> [Emphasis added]

Thus, the word “legislature” in the U.S. Constitution, in connection with the state’s deciding on the “manner of holding Elections” for U.S. Representatives” (the fifth entry in table 7.2), refers to the state’s process of making laws—not just to the two chambers of the state legislature.

In 1916, the U.S. Supreme Court addressed the specific question of whether the word “legislature” in Article I, section 4, clause 1 of the U.S. Constitution included the voters acting through the processes of direct democracy. The Supreme Court described the origins of *State of Ohio ex rel. Davis v. Hildebrant* as follows:

**“By an amendment to the Constitution of Ohio, adopted September 3d, 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.”**<sup>48</sup> [Emphasis added]

The decision continued:

**“In May, 1915, the general assembly of Ohio passed an act redistricting the state for the purpose of congressional elections, by which act twenty-two congressional districts were created, in some respects differing from the previously**

<sup>45</sup> *Ibid.* at 366.

<sup>46</sup> *Ibid.* at 365.

<sup>47</sup> *Ibid.* at 368.

<sup>48</sup> *State of Ohio ex rel. Davis v. Hildebrant*. 241 U.S. 565 at 566. 1916.

established districts, and this act, after approval by the Governor, was filed in the office of the secretary of state. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved.

“Thereupon, in the supreme court of the state, the suit before us was begun against state election officers for the purpose of procuring a mandamus, directing them to disregard the vote of the people on the referendum, disapproving the law, and to proceed to discharge their duties as such officers in the next congressional election, upon the assumption that the action by way of referendum was void, and that the law which was disapproved was subsisting and valid.”<sup>49</sup>

Summarizing the issue, the Court wrote:

**“The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the state,** and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed, it was in substance charged that both from the point of view of the state Constitution and laws and from that of the Constitution of the United States, especially [clause] 4 of article 1, providing that

‘the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators;’

and also from that of the provisions of the controlling act of Congress of August 8, 1911 (chap. 5, 37 Stat. at L. 13, Comp. Stat. 1913, 15), apportioning representation among the states, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. **The court below adversely disposed of these contentions, and held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary,** and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.”<sup>50</sup> [Emphasis added]

The U.S. Supreme Court then upheld the Ohio Supreme Court and rejected the argument that the word “legislature” in Article I, section 4, clause 1 of the U.S. Constitution excluded the referendum process. The popular vote rejecting Ohio’s redistricting statute was allowed to stand.

<sup>49</sup> *Ibid.* at 566–567.

<sup>50</sup> *Ibid.* at 568.

Additionally, the Court noted:

“Congress recognize[d] the referendum as part of the legislative authority of a state.”<sup>51</sup>

In 1920, the U.S. Supreme Court distinguished its decision in *Hawke* from its decision in *State of Ohio ex rel. Davis v. Hildebrant*:

“But it is said [the Court’s view in *Hawke*] runs counter to the decision of this court in *Davis v. Hildebrant* (241 U.S. 565) 36 S. Ct. 708. But that case is inapposite. It dealt with article 1 section 4, of the Constitution, which provides that the times, places, and manners of holding elections for Senators and Representatives in each state shall be determined by the respective Legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. **Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.**”<sup>52</sup> [Emphasis added]

Relying on *Smiley v. Holm*<sup>53</sup> and *State of Ohio ex rel. Davis v. Hildebrant*,<sup>54</sup> the Colorado Supreme Court wrote in *Colorado, ex rel. Salazar v. Davidson* in 2003:

“[T]he United States Supreme Court has interpreted the word ‘legislature’ in Article I to broadly encompass any means permitted by state law [including] citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state.”<sup>55,56</sup>

Chief Justice Rehnquist, joined by Justices Thomas and Scalia, echoed this view in a dissenting opinion when the U.S. Supreme Court denied review of the *Colorado, ex rel. Salazar v. Davidson* decision. Rehnquist stated that the Court had

<sup>51</sup> *Ibid.* at 569.

<sup>52</sup> *Hawke v. Smith*. 253 U.S. 221 at 230–231. 1920.

<sup>53</sup> *Smiley v. Holm*. 285 U.S. 355. 1932.

<sup>54</sup> *State of Ohio ex rel. Davis v. Hildebrant*. 241 U.S. 565. 1916.

<sup>55</sup> *Colorado, ex rel. Salazar v. Davidson*. 79 P.3d 1221, 1232 (Colorado 2003).

<sup>56</sup> In *Cook v. Gralike*, 531 U.S. 510, 526 n.20 (2001), the Court declined to consider whether the Elections Clause of Article I, section 4, which is a grant of power to “each State by the Legislature thereof,” could be invoked concerning a statute adopted by referendum. The Court reaffirmed, however, the notion in *Smiley* that “[w]herever the term ‘legislature’ is used in the Constitution, it is necessary to consider the nature of the particular action in view.”

“explained that the focus of our inquiry was **not on the ‘body’ but the function performed** [and that] the function referred to by Article I, §4, was **the lawmaking process**, which is defined by state law.”<sup>57</sup> [Emphasis added]

The distinction between “the lawmaking process” and the two chambers of the state legislature is not new. In fact, this distinction has been made since the earliest days of the U.S. Constitution.

When the U.S. Constitution took effect in 1788, the Governors of only two states had veto power over state laws.<sup>58,59</sup>

The provisions of the Massachusetts Constitution of 1780 (which was in effect at the time when the U.S. Constitution took effect) were substantially the same as the procedures for gubernatorial approval, veto, and legislative override found in most state constitutions today (and substantially the same as the procedures for presidential veto in the U.S. constitution).

**“No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revisal;** and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated, who shall enter the objections sent down by the Governor, at large, on their records, and proceed to reconsider the said bill or resolve; but if, after such reconsideration, two-thirds of the said senate or house of representatives shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of law.”<sup>60</sup> [Emphasis added]

On November 20, 1788, both chambers of the Massachusetts legislature approved a bill specifying the manner for electing U.S. representatives. The bill was presented to Governor John Hancock; he approved it, and the bill became law.<sup>61</sup>

The New York Constitution of 1777 (which was in effect at the time when the U.S. Constitution took effect) also had a veto provision. It required that all bills passed by the legislature be submitted for approval or veto to a Council of Revision composed of the Governor, the Chancellor, and the judges of the state supreme court.

<sup>57</sup> *Colorado General Assembly v. Salazar*, 124 S. Ct. 2228 at 2230. 2004.

<sup>58</sup> Kole, Edward A. 1999. *The First 13 Constitutions of the First American States*. Haverford, PA: Infinity Publishing.

<sup>59</sup> Kole, Edward A. 1999. *The True Intent of the First American Constitutions of 1776–1791*. Haverford, PA: Infinity Publishing.

<sup>60</sup> Massachusetts Constitution of 1780. Chapter I, Section I, Article II.

<sup>61</sup> Smith, Hayward H. 2001. *Symposium, Law of Presidential Elections: Issues in the Wake of Florida 2000*. History of the Article II Independent state legislature doctrine. 29 *Florida State University Law Review* 731–785 at 760. Issue 2.

On January 23, 1789, the New York legislature completed its approval of legislation specifying the manner for electing U.S. representatives.<sup>62</sup>

On January 24, the New York Senate:

“Ordered that Mr. Duane and Mr. Humfrey deliver the bill to the Honorable the Council of Revision.”<sup>63</sup>

The bill was presented to the Council, which approved it on January 27, saying:

“It does not appear improper to the Council that the said bill should become a Law of this State.”<sup>64</sup>

Article I, section 4, clause 1 of the U.S. Constitution covers the manner of electing U.S. Senators as well as the manner of electing U.S. Representatives:

“The Times, Places and **Manner** of holding Elections for **Senators** and Representatives, shall be prescribed in each State by the **Legislature** thereof ....”  
[Emphasis added]

The two meanings of the word “legislature” in the U.S. Constitution are dramatically illustrated by the actions of the first New York legislature that met under the U.S. Constitution (section 2.2). The state’s Governor was not part of the constitutional process of electing U.S. Senators under the original Constitution. The two chambers of the state legislature elected the state’s U.S. Senators. The Governor of New York was, however, part of the law-making process that decided the *manner* of electing U.S. Senators. For example, in 1789, both houses of the New York legislature passed a bill providing for the manner of electing U.S. Senators. This bill was presented to the Council composed of the Governor, the Chancellor, and judges of the state supreme court. The Council vetoed the bill, and it did not become law.<sup>65</sup> In short, when a state chose the “manner” of electing its U.S. Senators, the word “legislature” in the U.S. Constitution meant “the lawmaking process” (which included the Governor and Council); however, when the state actually elected its U.S. Senators, the same word “legislature” meant only the two legislative chambers (which did not include the Governor or the Council).

Congressional districting is arguably the most important aspect of the “manner” of electing U.S. Representatives.

In recent years, the voters have used the protest-referendum process not only to review congressional districting plans enacted by state legislatures (leading to the 1916 case of *State of Ohio ex rel. Davis v. Hildebrant*), but also to entirely exclude the state legislature from the process of congressional districting.

For example, in 2000, Arizona voters used the citizen-initiative process to adopt a

<sup>62</sup> DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 343.

<sup>63</sup> *Ibid.* Page 344.

<sup>64</sup> *Ibid.* Page 346.

<sup>65</sup> DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 3.



state constitutional amendment (called “Proposition 106”) establishing the Arizona Independent Redistricting Commission to draw the state’s congressional and state legislative districts. The petition proposing the state constitutional amendment described the proposal as follows:

“This citizen-sponsored Arizona Constitutional amendment will create a new ‘citizens’ independent redistricting commission’ to draw new legislative and congressional district boundaries after each U.S. Census. **This amendment takes the redistricting power away from the Arizona Legislature** and puts it in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not “gerrymandered” for any party’s or incumbent’s advantage.”<sup>66</sup> [Emphasis added]

In 2008, California voters established a similar nonpartisan commission using the citizen-initiative process (Proposition 11).

These actions by Arizona and California voters are noteworthy for two reasons.

First, the establishment of a commission was accomplished by a citizen-initiative petition—not the “legislature.”

Second, both commissions were established by an amendment to the state constitution, as distinguished from a statutory enactment of “legislation.”<sup>67</sup>

In other words, neither the “legislature” nor “legislation” was involved in the decision to exclude the state legislature.

The Arizona Independent Redistricting Commission created the congressional districts that were used throughout the decade following the 2000 census. These districts were generally viewed as favorable to Republicans.

However, Arizona Republicans vigorously objected to the districts created by the commission after the 2010 census. In the period since the 2010 census, the Republicans have controlled both the legislature and Governor’s office. During the dispute, the Republicans removed the chair of the commission; however, the Arizona Supreme Court restored her to the position. The districts created by the commission took effect for the 2012 elections.

Then, in June 2012, a lawsuit (authorized by both houses of the legislature) was filed in the U.S. District Court in Arizona challenging the constitutionality of the Arizona Independent Redistricting Commission under Article I, section 4, clause 1 of the U.S. Constitution.

The complaint in *Arizona State Legislature v. Arizona Independent Redistricting Commission et al.* stated:

“Prop. 106 removes entirely from the Legislature the authority to prescribe legislative and congressional district lines and reassigns that authority wholly to the IRC—a new entity created by Prop. 106.

“Prop. 106 also prescribes the process by which the IRC members are appointed and the process and procedures by which the IRC is to establish legislative and congressional district lines.

<sup>66</sup> July 6, 2000, application to Arizona Secretary of State by the “Fair Districts, Fair Elections” organization.

<sup>67</sup> See the discussion of Arkansas’ implementation of the 17<sup>th</sup> Amendment in section 8.3.7.



**“Prop. 106 eliminates entirely the Legislature’s prescriptive role in congressional redistricting....”<sup>68</sup> [Emphasis added]**

In June 2015, the U.S. Supreme Court held that Article I of the U.S. Constitution permits a state’s voters to create (without involvement of the legislature) an independent commission for congressional redistricting (without involvement of the legislature).<sup>69</sup>

In summary, present-day practice, practice at the time of ratification of the U.S. Constitution, and existing court decisions consistently support the interpretation that the word “legislature” in Article I, section 4, clause 1 of the U.S. Constitution (the fifth entry in table 7.2) does not refer to the two chambers of the state legislature but instead refers to the “lawmaking process” that includes:

- the state’s Governor, an official who is manifestly not a member of the two chambers of the state legislature and
- in states that have the citizen-initiative process and protest-referendum processes, the state’s voters, who, like the Governor, are manifestly not members of the two chambers of the state legislature.

### **Choosing the manner of appointing presidential electors**

The word “legislature” appears in Article II of the U.S. Constitution (the sixth entry in table 7.2).

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ....”<sup>70</sup> [Emphasis added]

In *U.S. Term Limits v. Thornton*, the U.S. Supreme Court in 1995 noted the parallelism between the use of the word “legislature” in Article I, section 4, clause 1 (relating to the “manner” of electing U.S. Representatives) and the word “legislature” in Article II. The Court wrote:

“the provisions governing elections reveal the Framers’ understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that **the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States**, namely that

‘[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof.’  
[Art I., §4, cl. 4.]

<sup>68</sup> Complaint in *Arizona State Legislature v. Arizona Independent Redistricting Commission et al.* Page 5.

<sup>69</sup> *Arizona State Legislature v. Arizona Independent Redistricting Commission*. 2015. 576 U.S. 787.

<sup>70</sup> U.S. Constitution. Article II, section 1, clause 2.

**“This duty parallels the duty under Article II that**

‘Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.’ Art II., §1, cl. 2.

“These Clauses are express delegations of power to the States to act with respect to federal elections.”<sup>71</sup> [Emphasis added]

The parallelism noted by the Court supports the power of the people to act legislatively through the citizen-initiative process concerning the manner of electing presidential electors.

The question of whether the word “legislature” includes the state’s initiative and referendum processes depends, in large part, on the answer to the following question:

“When a state exercises authority pursuant to powers granted to it by the U.S. Constitution in connection with deciding on the manner of choosing its presidential electors,

- (1) does it derive the power to act solely from the U.S. Constitution, or
- (2) does it enact the legislation in accordance with the procedures specified in the state’s constitution?”

The leading U.S. Supreme Court case interpreting Article II, section 1, clause 2 of the U.S. Constitution is *McPherson v. Blacker* in 1892.<sup>72</sup> In that case, the Court rejected a challenge to Michigan legislation providing for selection of presidential electors by district, as distinguished from the statewide winner-take-all method that Michigan had been using prior to 1892 and that had become the national norm. In that case, the Court analyzed the meaning of the word “legislature” as used in Article II and noted that the interpretation of this word was governed by the fundamental law of the state. The U.S. Supreme Court wrote:

“The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, **except as limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, **unless by the fundamental law power is elsewhere reposed**. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of **the legislative power under state constitutions as they exist**.”<sup>73</sup> [Emphasis added]

The possibility that a state’s legislative power might be “reposed” in a place other than the state legislature is noteworthy, given that the case was decided when the idea of the

<sup>71</sup> *U.S. Term Limits v. Thornton*. 514 U.S. 779 at 805. 1995.

<sup>72</sup> *McPherson v. Blacker*. 146 U.S. 1. 1892.

<sup>73</sup> *Ibid.* at 27.

citizen-initiative process was an active topic of public debate (just before South Dakota became the first state to adopt it in 1898).

Given that the citizen-initiative process is generally considered to be a co-equal grant of authority to that given to the state's legislature, the treatment of the process as a legislative power is consistent with the fundamental law of states that have it.

There are two cases that have specifically involved the question of whether the word "legislature" in Article II of the U.S. Constitution includes the initiative and referendum processes.<sup>74</sup>

The first case arose as a result of a 1919 law entitled "An act granting to women the right to vote for presidential electors." This law was passed by the two houses of the Maine legislature and presented to the state's Governor, who signed the law. Under the protest-referendum provisions of the Maine Constitution, if a petition protesting a just-enacted law is filed with the signatures of at least 10,000 voters, the new law is temporarily suspended and referred to the voters for their approval or disapproval in a statewide referendum. A petition was circulated and duly filed with the Governor's office concerning this statute. Before proceeding with the referendum, the Governor raised the question of whether the referendum provision of the Maine Constitution applied to legislation involving the manner of appointing the state's presidential electors. Specifically, he propounded the following question to the Justices of the Maine Supreme Judicial Court:

"Is the effect of the act of the Legislature of Maine of 1919, entitled 'An act granting to women the right to vote for presidential electors,' approved by the Governor on March 28, 1919, suspended by valid written petitions of not less than 10,000 electors, addressed to the Governor and filed in the office of the secretary of state within 90 days after the recess of the Legislature, requesting that it be referred to the people, and should the act be referred to the people as provided in article 4 of the Constitution of Maine, as amended by Amendment 31, adopted September 14, 1908?"

On August 28, 1919, the Maine Supreme Judicial Court unanimously answered this question in the affirmative. Relying extensively on the 1892 decision of the U.S. Supreme Court in *McPherson v. Blacker*,<sup>75</sup> the Maine Supreme Judicial Court wrote:

"The language of section 1, subd. 2, is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states.

<sup>74</sup> Court cases specifically interpreting the word "legislature" in Article II in relation to the citizen-initiative or protest-referendum process are necessarily rare for several reasons. First, the citizen-initiative and protest-referendum processes are only slightly more than 100 years old. Second, the two processes are available in fewer than half of the states. Third, only a handful of the laws that a state enacts in a typical year involve the conduct of elections. Fourth, few new state laws involve the manner of conducting congressional and senatorial elections, and even fewer relate to presidential elections. Fifth, the vast majority of new state laws each year are enacted without the use of either process.

<sup>75</sup> *McPherson v. Blacker*. 146 U.S. 1. 1892. The *Blacker* case is also discussed in section 9.1.1, section 4.3.3, and later in this section.

‘Each state shall appoint in such manner as the Legislature thereof may direct’

are the significant words of the section, and their plain meaning is that **each state is thereby clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the federal government**, except, of course, in case of attempted discrimination as to race, color, or previous condition of servitude under the fifteenth amendment. The clause,

‘in such manner as the Legislature thereof may direct,’

means, simply that **the state shall give expression to its will, as it must, of necessity, through its law-making body, the Legislature**. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen.

**“But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law. The Legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed.** Nor was it designated by the federal Constitution as a mere agency or representative of the people to perform a certain act, as it was under article 5 in ratifying a federal amendment, a point more fully discussed in the answer to the question concerning the federal prohibitory amendment. 107 Atl. 673. **It is simply the ordinary instrumentality of the state, the legislative branch of the government, the law-making power, to put into words the will of the state in connection with the choice of presidential electors. The distinction between the function and power of the Legislature in the case under consideration and its function and power as a particular body designated by the federal Constitution to ratify or reject a federal amendment is sharp and clear and must be borne in mind.**

“It follows, therefore, that under the provisions of the federal Constitution the state by its legislative direction may establish such a method of choosing its presidential electors as it may see fit, and may change that method from time to time as it may deem advisable; but **the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed** and can be valid and effective only when enacted in compliance therewith.”<sup>76</sup>  
[Emphasis added]

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<sup>76</sup> *In re Opinion of the Justices*. 107 A. 705. 1919. The entire text of this is available in Appendix Q of the 4<sup>th</sup> edition of this book at <https://www.every-vote-equal.com/4th-edition>

The Court continued:

“It is clear that this act, extending this privilege to women, constitutes a change in the method of electing presidential electors....

“this state during the century of its existence prior to 1919, had by appropriate legislative act or resolve directed that only male citizens were qualified to vote for presidential electors. By the act of 1919 it has attempted to change that direction, by extending the privilege of suffrage, so far as presidential electors are concerned, to women. Had this act been passed prior to the adoption of the initiative and referendum amendment in 1908, it would have become effective, so far as legal enactment is concerned, without being referred to the people; but now under Amendment 31 such reference must be had, if the necessary steps therefor are taken.”

**“This is the public statute of a law-making body, and is as fully within the control of the referendum amendment as is any other of the 239 public acts passed at the last session of the Legislature, excepting, of course, emergency acts. It is shielded from the jurisdiction of that referendum neither by the state nor by the federal Constitution.** In short, the state, through its Legislature, has taken merely the first step toward effecting a change in the appointment of presidential electors; but, because of the petitions filed, it must await the second step which is the vote of the people. The legislative attempt in this case cannot be fully effective until

‘thirty days after the Governor shall have announced by public proclamation that the same has been ratified by a majority of the electors voting thereon at a general or special election.’”<sup>77</sup> [Emphasis added]

When the voters of Maine voted on the suspended law, it was passed by a vote of 88,080 to 30,462.<sup>78</sup>

The second case involving an interpretation of the word “legislature” in Article II of the U.S. Constitution came just prior to the November 2, 2004, presidential election.<sup>79</sup> *Napolitano v. Davidson* involved a federal court challenge to an initiative petition proposing an amendment to the Colorado Constitution to adopt the whole-number proportional method for choosing the state’s presidential electors (section 4.2). In that case, a Colorado voter asked that the Colorado Secretary of State be enjoined from holding the election on

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<sup>77</sup> *Id.*

<sup>78</sup> There was a flurry of activity concerning women’s suffrage at the time. The Maine legislature adopted its contested law on women’s suffrage in presidential elections on March 28, 1919. Congress proposed the women’s suffrage amendment to the U.S. Constitution on June 4, 1919, and sent it to the states for ratification. The Maine Supreme Judicial Court announced its decision on August 28, 1919. The Maine Legislature ratified the proposed federal constitutional amendment on November 5, 1919. Tennessee’s ratification on August 18, 1920, brought the 19<sup>th</sup> Amendment to the U.S. Constitution into effect.

<sup>79</sup> Johnson, Kirk. 2004. Coloradans to Consider Splitting Electoral College Votes. *New York Times*. September 19, 2004. <https://www.nytimes.com/2004/09/19/politics/campaign/coloradans-to-consider-splitting-electoral-college-votes.html>

the proposed amendment. The plaintiff alleged that Amendment 36 violated Article II of the U.S. Constitution in that the voters were attempting to unconstitutionally preempt the role of the “legislature” in connection with the manner of appointing presidential electors.

The Colorado Attorney General defended the Secretary of State. Two representatives of those who had signed initiative petitions to place Amendment 36 on the ballot (the “proponents”) were granted the right to intervene in the litigation. Additionally, one Democratic and one Republican candidate for presidential elector in the November 2004 election attempted to intervene.<sup>80</sup>

The Colorado Attorney General unqualifiedly defended the substantive provisions of Amendment 36. In response to the claim that the exercise of the initiative power to allocate presidential electors infringed upon Article II, the Attorney General stated that, when the people of Colorado use the citizen-initiative process, they act as the “legislature.” Specifically, the State of Colorado took the position that its voters were fully empowered to act, pursuant to Article II, to allocate presidential electors.

“Article II, §1 authorizes each state to act in a lawmaking capacity to select the manner in which it appoints its presidential electors .... For example, the law-making authority conferred by Article II, §1 encompasses the people’s power of referendum when such power is provided by the state constitution. *Cf. Hildebrant*, 241 U.S. at 569. It follows that **the lawmaking authority conferred by Article II, §1 also encompasses the people’s power of initiative where the people are empowered by the state constitution to legislate via initiative.**”

**“The Proposal (to proportionally allocate presidential electors based on the state’s popular vote) is an initiative by the people of Colorado as authorized by the Colorado Constitution. As such, it is an exercise of legislative power for the purpose of appointing presidential electors. The Proposal, therefore, is authorized by Article II, §1.”**<sup>81</sup> [Emphasis added]

By the time the matter was fully briefed for the court, early voting had commenced in Colorado. Most absentee ballots had been sent to voters. A little more than one week remained until Election Day. On October 26, 2004, Judge Lewis Babcock heard the motions for preliminary injunction, filed by the plaintiff and the elector-intervenors, as well as the motions to dismiss filed by the Colorado Attorney General and the petition’s proponents. Judge Babcock denied the former and granted the latter, clearing the way for a vote by the people on Amendment 36 on November 2, 2004.

From the bench, Judge Babcock noted that the matter was not ripe for adjudication, as an actual controversy could be said to exist only if the election were held and a majority of voters were to approve the proposed change in the method of allocating Colorado’s presidential electors. Until that time, any opinion would only be advisory in nature.

<sup>80</sup> The Elector-Intervenors were permitted to brief each of their legal arguments. After addressing the substance of their arguments, however, Judge Babcock ruled from the bench that their attempted intervention was not authorized, as they lacked standing to participate in the litigation.

<sup>81</sup> The Secretary of State’s Combined Motion to Dismiss and Response to Motion for Preliminary Injunction at 21–22, filed in *Napolitano v. Davidson*, Civil Action No. 04–B–2114, D.Colo. (2004).

Judge Babcock also noted that the issues involved in this case should be resolved in the first instance by the Colorado state courts and, therefore, that it was proper for the federal courts to abstain from intervening in this matter. Indeed, the Colorado challenge to the initiative petition on Amendment 36 was unusual in that it started in federal court. Most challenges to initiative and referendum petitions start in state courts.

In his oral ruling, Judge Babcock noted that the elector-intervenors had argued that Amendment 36 was “patently unconstitutional.” The judge expressly stated that this was not the case, but he added that because he did not have to reach the merits of the case, his ruling should not be taken as a judicial imprimatur concerning the constitutionality of Amendment 36.

In order to obtain a preliminary injunction, one generally must establish (among other things) that there is a substantial likelihood of prevailing on the merits when the matter goes to trial. This standard generally applies when one seeks to enjoin an election or any part of the election process.<sup>82</sup> The federal district court, in evaluating the motions for preliminary injunction, did not find that either the plaintiff or the elector-intervenors had a substantial likelihood of success on the merits with regard to their argument that Amendment 36 violated Article II.

On November 2, 2004, Amendment 36 was rejected by the voters (section 4.2), so the legal issues raised by the pre-election lawsuit were not subsequently addressed in court. Nonetheless, the power of the voters to use the initiative process to change the manner of appointing presidential electors in Colorado was not disturbed by the judiciary.

Long-standing historical practice by the states is consistent with the 1920 decision by the Maine Supreme Judicial Court and the outcome of the 2004 litigation in Colorado concerning the meaning of the word “legislature” in Article II of the U.S. Constitution.

The gubernatorial veto existed in only two states at the time when the U.S. Constitution first took effect in 1788.

In Massachusetts, the Governor of Massachusetts had veto power over legislation. In New York, the Council of Revision (composed of the Governor, the Chancellor, and various judges) had veto power over legislation.<sup>83,84</sup> In both states, a veto could be overridden by a two-thirds vote of both houses of the legislature.

On November 20, 1788, both chambers of the Massachusetts legislature completed the process of approving a bill specifying the manner for appointing the state’s presidential electors. This bill was presented to Governor John Hancock—an official who was manifestly not part of the two chambers of the state legislature. Governor Hancock approved the bill, and it became law.<sup>85</sup>

<sup>82</sup> *Libertarian Party v. Buckley*, 938 F.Supp. 687, 690 (D. Colo. 1997). See also *Chandler v. Miller*, 520 U.S. 305, 311. 1997.

<sup>83</sup> Kule, Edward A. 1999. *The First 13 Constitutions of the First American States*. Haverford, PA: Infinity Publishing.

<sup>84</sup> Kule, Edward A. 1999. *The True Intent of the First American Constitutions of 1776–1791*. Haverford, PA: Infinity Publishing.

<sup>85</sup> Smith, Hayward H. 2001. *Symposium, Law of Presidential Elections: Issues in the Wake of Florida 2000*, History of the Article II Independent state legislature doctrine, 29 *Florida State University Law Review* 731 at 760.



In New York, the legislature began consideration of legislation for choosing U.S. Representatives, U.S. Senators, and presidential electors on December 13, 1788.

On January 23, 1789, both houses of the New York legislature agreed to a bill providing the manner of electing U.S. Representatives (including the districts to be used).<sup>86</sup>

On January 24, the New York Senate:

“Ordered that Mr. Duane and Mr. Humfrey deliver the bill to the Honorable the Council of Revision.”<sup>87</sup>

The bill was presented to the Council, which approved it on January 27, and it became law.<sup>88</sup>

On January 27, the Council approved the bill, saying:

“It does not appear improper to the Council that the said bill should become a Law of this State.”<sup>89</sup>

The Governor then signed a copy of the Council’s proceedings, and that signed document was delivered to the legislature. Elections for U.S. Representatives were held on March 3, 1789, in accordance with this law.

The U.S. Constitution specified (at the time) that U.S. Senators would be elected by the state legislature.

In many states, a controversy arose as to whether U.S. Senators would be chosen in a joint convention attended by all of the members of both chambers of the legislature or by a concurrent resolution voted on by each chamber separately.

Use of a joint convention would typically reduce the voting power of the members of the smaller chamber (i.e., the state Senate). More importantly, when political control is divided between the chambers, a joint convention would enable whichever party controlled its chamber by the larger margin to totally dominate the choice of U.S. Senator. Typically, the party controlling the larger chamber (i.e., the Assembly in the case of New York) would control its chamber by the larger margin. Indeed, that was the case in New York in 1789, when the Anti-Federalists controlled the Assembly, and the Federalists controlled the state Senate.

Conversely, use of a concurrent resolution gives both chambers a veto or leverage over the choice of Senator when political control is divided between the chambers. In practice, it may simply prevent the election of anyone.

The legislature passed a bill entitled “An act prescribing the manner of holding elections for Senators to represent this State in the Senate of the United States” providing for use of a concurrent resolution.

This bill was presented to the Council of Revision. The Council vetoed the bill on July 5, 1789, saying:

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<sup>86</sup> DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 343. See pages 361–365 for the text of the law.

<sup>87</sup> *Ibid.* Page 344.

<sup>88</sup> *Ibid.* Page 346.

<sup>89</sup> *Ibid.* Page 346.



“Because this bill, when two Senators are to be chosen, enacts that in case of the disagreement of the two houses in the nomination, each house shall, out of the nomination of the other, choose one, and that such person shall be the Senator to represent this State; and thus, by compelling each house to choose one of two persons, neither of whom meet with their approbation, establishes a choice of Senators by the separate act of each branch of the Legislature, in direct opposition to the Constitution of the United States, which, in the third section of the first article, declares that they shall be chosen by the legislature.”<sup>90</sup>

Under the New York Constitution of 1777, a two-thirds vote of both houses of the legislature would have been necessary to override the Council’s veto.<sup>91</sup>

The Anti-Federalist Assembly refused to override the veto. As a result, the bill did not become law, and no U.S. Senators were selected by New York in the 1789 session of the legislature. That is, the state went unrepresented in the U.S. Senate.<sup>92</sup>

The political divisions in New York also prevented New York from appointing presidential electors in the nation’s first presidential election.

In 1789, the legislature debated a bill entitled “An act for regulating the manner of appointing electors who are to elect the President, and Vice-President of the United States of America.”<sup>93</sup> This legislation specifying the manner of appointing presidential electors was similar to the vetoed bill concerning U.S. Senators. However, the two chambers of the New York legislature did not reach an agreement on the manner of appointing presidential electors in time for the first presidential election in 1789. Consequently, New York did not appoint any presidential electors in the 1789 presidential election.

As the nation’s second presidential election (1792) approached, a bill specifying a method for appointing presidential electors passed the legislature. The legislature’s bill was presented to the Council on April 12, 1792. The Council approved the bill, and New York appointed presidential electors in the 1792 presidential election.

This legislation called for presidential electors to be elected by the two houses of the state legislature—without involvement of the Governor (or the Council). The Council approved this legislation, and New York participated in the 1792 presidential election.<sup>94</sup> In other words, a legislative bill that empowered the two houses of the legislature to choose

<sup>90</sup> Street, Alfred B. 1859. *The Council of Revision of the State of New York and its Vetoes*. Albany, NY: William Gould Publisher. Pages 290–291. [https://books.google.com/books?id=53w4AAAAIAAJ&pg=PA199&source=gbs\\_toc\\_r&cad=3#v=onepage&q&f=false](https://books.google.com/books?id=53w4AAAAIAAJ&pg=PA199&source=gbs_toc_r&cad=3#v=onepage&q&f=false)

<sup>91</sup> Under the 1821 Constitution of New York, the Council was abolished, and its veto power was transferred to the Governor alone (subject to possible override by a two-thirds vote of both houses of the legislature).

<sup>92</sup> On January 14, 1793, the Council also vetoed “An act for prescribing the times, places and manner of holding elections for Senators to represent this State in the Senate of the Congress of the United States of America. Street, Alfred B. 1859. *The Council of Revision of the State of New York and its Vetoes*. Albany, NY: William Gould Publisher. Page 418. [https://books.google.com/books?id=53w4AAAAIAAJ&pg=PA199&source=gbs\\_toc\\_r&cad=3#v=onepage&q&f=false](https://books.google.com/books?id=53w4AAAAIAAJ&pg=PA199&source=gbs_toc_r&cad=3#v=onepage&q&f=false)

<sup>93</sup> DenBoer, Gordon, Brown, Lucy Trumbull, and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 3. Pages 217–435.

<sup>94</sup> An Act for appointing electors in this state for the election of a president and vice president of the United States of America. Passed April 12, 1792. *Laws of New York*. Pages 378–379.

presidential electors, *without the involvement of the Governor (or the Council)*, was nonetheless presented to the Governor (and Council) for approval or veto.

Thus, actual practice in the two states that had the gubernatorial veto at the time when the U.S. Constitution first took effect was that the word “legislature” in Article II meant the state’s lawmaking process—not just the two chambers of the state legislature—in connection with the state’s decision on the manner of appointing presidential electors.

Present-day practice by the states has remained consistent with practice from the time when the U.S. Constitution first took effect.

Table 7.3 provides a citation to each state’s current law specifying the manner of appointing presidential electors.<sup>95</sup> The law concerning the method of appointing presidential electors was not enacted merely by action of the two chambers of the state legislature but instead, was presented to the state’s Governor for approval or disapproval, except for West Virginia. In West Virginia, the method of election is contained in the state constitution.<sup>96</sup>

None of the state laws in table 8.2 was enacted by means of the citizen-initiative process; however, there have been numerous initiatives and referenda over the years on provisions of state election laws involving the manner of electing presidential electors.

On February 23, 1917, Maine voted on a “Proposed Constitutional Amendment Granting Suffrage to Women upon Equal Terms with Men.” The proposition received 20,604 “yes” votes and 38,838 “no” votes.

In 1919, the Maine Supreme Judicial Court upheld the constitutionality of holding a protest-referendum on a state statute entitled “An act granting to women the right to vote for presidential electors.”<sup>97</sup> The voters supported women’s suffrage in the 1919 vote.

In the late 1950s and early 1960s, there was considerable controversy in Michigan (and other states) concerning the coattail effect of votes cast for President on races for lower offices. In particular, Republican county and township officeholders in Michigan sought to eliminate the voter’s option to vote for all nominees of one party by casting a single so-called *straight-party* vote. When the Republicans ended 14 years of Democratic control of the Governor’s office in 1962, the new Republican Governor and the Republican legislature enacted a statute requiring that voters cast a separate vote for President and a separate vote for each other office on the ballot (the so-called “Massachusetts ballot”).<sup>98</sup> A protest-referendum petition was circulated and filed, thereby suspending the statute. The voters rejected the statute in the November 1964 election. Thus, presidential electors remained tethered in Michigan to the party’s candidates for other offices (if the voter so desired to cast a straight-party ballot).

Similarly, in 1972, an initiative petition was filed in Maine proposing to change the form of the ballot from party columns to individual offices (the Massachusetts ballot). This proposition passed by a vote of 110,867 to 64,506.

<sup>95</sup> That is, the statewide winner-take-all rule in 48 states and the District of Columbia and the congressional district system in Maine and Nebraska.

<sup>96</sup> Article VII, section 3 (ratified November 4, 1902) specifies that, in all elections, the candidate with “the highest number of votes for either of said offices, shall be declared duly elected thereto.”

<sup>97</sup> *In re Opinion of the Justices*. 107 Atl. 705. 1919.

<sup>98</sup> Michigan Public Act 240 of 1964.

**Table 7.3 Current state laws for appointing presidential electors**

<b>State</b>	<b>Section</b>
Alabama	Ala. Code § 17-19-4, Ala. Code § 17-19-5, Ala. Code § 17-19-6
Alaska	AK ST § 15.15.450
Arizona	A.R.S. § 16-650
Arkansas	Ar. Code §7-8-304
California	Cal. Elec. Code § 15505
Colorado	C.R.S. § 1-11-106
Connecticut	C.G.S. § 9-315
Delaware	15 Del. C. § 5703, 15 Del. C. § 5711
D.C.	D.C. Code § 1-1001.10
Florida	F.S.A. § 9.103.011
Georgia	Ga. Code Ann., § 21-2-499
Hawaii	H.R.S. § 2-14-24
Idaho	ID ST § 34-1215
Illinois	10 ILCS 5/21-2, 10 ILCS 5/21-3
Indiana	IC 3-12-5-7
Iowa	I.C.A. § 50.45
Kansas	KS ST § 25-702
Kentucky	KRS § 118.425
Louisiana	LSA-R.S. 18:1261
Maine	21-A M.R.S. § 723, 21-A M.R.S. § 802
Maryland	MD Code § 11-601
Massachusetts	M.G.L.A. 54 § 118
Michigan	M.C.L.A. 168.42
Minnesota	M.S.A. § 208.05
Mississippi	Miss. Code Ann. § 23-15-605
Missouri	V.A.M.S. 128.070
Montana	Mt. St. §13-25-103, Mt. St. §13-1-103
Nebraska	NE ST § 32-710, NE ST § 32-1040
Nevada	N.R.S. 293.395
New Hampshire	N.H. Rev. Stat. § 659:81
New Jersey	§19:3-26
New Mexico	N. M. S. A. 1978, § 1-15-14
New York	§ 12-102
North Carolina	N.C.G.S.A. § 163-210
North Dakota	ND ST 16.1-14-01
Ohio	R.C. § 3505.33
Oklahoma	26 Okl. St. Ann. § 7-136, 26 Okl. St. Ann. § 10-103
Oregon	O.R.S. § 254.065
Pennsylvania	25 P.S. § 3166
Rhode Island	§ 17-4-10
South Carolina	Code 1976 § 7-19-70
South Dakota	SDCL. § 12-20-35
Tennessee	T. C. A. § 2-8-110
Texas	§ 192.005
Utah	Utah Code 20A-4-304, Utah Code 20A-13-302
Vermont	VT ST T. 17 § 2731, VT ST T. 17 § 2592
Virginia	§ 24.2-675, § 24.2-673
Washington	Rev. Code Wash. (ARCW) § 29A.56.320 <sup>a</sup>
West Virginia	Article VII, section 3 of West Virginia Constitution
Wisconsin	W.S.A. 5.01
Wyoming	WY ST § 22-17-117, WY ST § 22-19-103

<sup>a</sup> Article III, section 4 of the Washington State Constitution specifies that, in all elections, the candidate "having the highest number of votes shall be declared duly elected."

In 1976, an Oklahoma court wrote the following in *McClendon v. Slater* about state legislation concerning the manner of appointing presidential electors:

“It is fundamental that each state and its Legislature, under a Republican form of government possess all power to protect and promote the peace, welfare and safety of its citizens. The only restraints placed thereon are those withdrawn by the United States Constitution and the state’s fundamental law. Art. V, ss 1 and 2 express that these reservations or **withdrawals in the people under the Constitution of the State of Oklahoma are two in nature and as explicitly set out in Art. V, s 2 to be the ‘initiative’ and the ‘referendum’ processes.** For our purpose, **no other withdrawal or restraint is placed upon the broad fundamental powers of this state’s Legislature** by Art. V of the State Constitution.”<sup>99</sup> [Emphasis added]

More recently, voters have considered initiatives for instant run-off voting for presidential electors and other offices in Alaska in 2002, requirements for voter identification in Arizona in 2004, and voting by convicted felons in Massachusetts in 2000.

In *Commonwealth ex rel. Dummit v. O’Connell*, the Kentucky Court of Appeals wrote the following in 1944 in connection with a state law permitting soldiers to vote by absentee ballot for U.S. Representatives, U.S. Senators, and presidential electors:

“[T]he legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment, even though that enactment be one which the Legislature is authorized by the Federal Constitution to make.”<sup>100</sup>

It is important to note that the decision of the U.S. Supreme Court in *Bush v. Gore* in 2000 did nothing to change the meaning of the word “legislature” in Article II of the U.S. Constitution. In that case, the Court settled the dispute over Florida’s 2000 presidential vote by halting the manual recount of ballots that the Florida Supreme Court had ordered.

Referring to the 1892 case of *McPherson v. Blacker*,<sup>101</sup> the U.S. Supreme Court wrote in *Bush v. Gore* in 2000:

“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. **This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature’s power to select the manner for appointing electors is plenary;** it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28–33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential

<sup>99</sup> *McClendon v. Slater*. 554 P.2d 774, 776 (Ok. 1976).

<sup>100</sup> *Commonwealth ex rel. Dummit v. O’Connell*. 181 S.W.2d 691, 694 (Ky. Ct. App. 1944).

<sup>101</sup> *McPherson v. Blacker*. 146 U.S. 1. 1892.

electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *Id.*, at 35.”<sup>102</sup> [Emphasis added]

The U.S. Supreme Court did not change the prevailing definition of the word “legislature” in *Bush v. Gore* but instead identified the source (i.e., *McPherson v. Blacker*) of the undisputed statement that the “legislature” is indeed supreme in matters of choosing the manner of appointing a state’s presidential electors. The issues in *Bush v. Gore* did not concern the way that Florida’s election code was originally enacted (e.g., whether the election code was presented to the Governor for approval or disapproval or whether the voters had perhaps enacted the election code through the citizen-initiative process). Indeed, the Florida election code at issue in *Bush v. Gore* was not enacted by the legislature alone but instead, was enacted by the ordinary lawmaking process involving presentation of the bill to the Governor for approval or disapproval (as shown in table 7.3).

Rather, *Bush v. Gore* was concerned with the breadth of authority of the Florida Supreme Court to establish a recount process *not found in Florida’s pre-existing legislation* after the voters had cast their votes on November 7, 2000. The U.S. Supreme Court specifically identified two issues to be decided in *Bush v. Gore*:

- (1) “whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. §5, ...”<sup>103</sup> and
- (2) “whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.”<sup>104</sup>

In reaching its decision in *Bush v. Gore*, the Court referred to the Safe Harbor provision (3 U.S.C. §5).

“If any State shall have provided, **by laws enacted prior to the day fixed for the appointment of the electors**, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascer-

<sup>102</sup> *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

<sup>103</sup> *Bush v. Gore*. 531 U.S. 98 at 103. 2000. Section 5 of the Electoral Count Act of 1887 (which was in effect in 2000) may be found in appendix B of the 4<sup>th</sup> edition of this book at <https://www.every-vote-equal.com/4th-edition>. The corresponding provision of the Electoral Count Reform Act of 2022 may be found in Appendix B of this book.

<sup>104</sup> *Bush v. Gore*. 531 U.S. 98 at 103. 2000.

tainment of the electors appointed by such State is concerned.”<sup>105</sup> [Emphasis added]

On December 12, 2000, the Court ruled that insufficient time remained to conduct a constitutional recount before the Electoral College meeting scheduled for December 18, 2000. Accordingly, Bush’s 537-vote plurality that had already been certified under terms of the Florida election code was allowed to stand.<sup>106</sup>

In *Bush v. Gore*, the Supreme Court did not address the issue of whether the Florida voters could substitute themselves for the legislature, through the citizen-initiative process or the protest-referendum process, concerning the manner of choosing presidential electors in Florida. In fact, the 1892 case (*McPherson v. Blacker*) cited by the Court in *Bush v. Gore* specifically mentioned the possibility that a state’s legislative power might be “reposed” in a place other than the state legislature.

**“The legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed.”**<sup>107</sup> [Emphasis added]

The citizen-initiative process—representing the authority of the citizens of a state to make their own laws—is consistent with the two exceptions contained in *McPherson v. Blacker*, namely that the legislature’s power is supreme “except as limited by the constitution of the state” and except when “power is elsewhere reposed” “by the [state’s] fundamental law.” Initiatives are limitations on the power of the legislature, because they enable the voters to displace the legislature by enacting laws of their own design. The initiative process is established by the state’s fundamental law (i.e., constitution). Indeed, initiatives are the obvious alternative place where the state’s legislative power might be “elsewhere reposed.”

The citizen-initiative process has consistently been viewed as a limitation on the state legislature. For example, in 1964, the U.S. Supreme Court in *Lucas v. Forty-Fourth General Assembly*<sup>108</sup> approved the use of the initiative to “obtain relief against alleged malapportionment” of state legislative seats. In 1975, *Chapman v. Meier*<sup>109</sup> concerned the adoption of an initiative substituting the will of the voters for the legislature’s unwillingness to act. As a reservation of legislative power by the voters, the initiative process is necessarily an element of the fundamental law. In *Eastlake v. Forest City Enterprises, Inc.*, the U.S. Supreme Court wrote in 1976:

“Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See e.g., *The Federalist*, No. 39 (J. Madison). **In establishing legislative bodies, the peo-**

<sup>105</sup> Title 3, chapter 1, section 5 of the United States Code.

<sup>106</sup> *Bush v. Gore*, 531 U.S. 98 at 110. 2000.

<sup>107</sup> *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

<sup>108</sup> *Lucas v. Forty-Fourth General Assembly*. 377 U.S. 713 at 732–733. 1964.

<sup>109</sup> *Chapman v. Meier*. 420 U.S. 1 at 21. 1975.

**ple can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”<sup>110,111</sup> [Emphasis added]**

In commenting on *Bush v. Gore* in *Breaking the Deadlock*, Judge Richard Posner wrote:

“[I]t is important that the approach be understood, and not rejected out of hand as meaning, for example, that the Governor of a state cannot veto a proposed law on the appointment of the state’s Presidential electors or that the state’s supreme court cannot invalidate an election law as unconstitutional. **Article II does not regulate the process by which state legislation is enacted and validated**, any more than it precludes interpretation. **But once the law governing appointment of the state’s presidential electors is duly enacted**, upheld, and interpreted, (so far as interpretation is necessary to fill gaps and dispel ambiguities), the legislature has spoken and **the other branches of the state government must back off ....**”<sup>112</sup> [Emphasis added]

*Bush v. Gore* was not about “the process by which state legislation is enacted” but the extent to which the Florida Supreme Court should “back off.”

In summary, present-day practice by the states, actual practice by the states at the time that the U.S. Constitution took effect, legal commentary, and court decisions are consistent in supporting the view that the word “legislature” in Article II, section 1, clause 2 of the U.S. Constitution (the sixth entry in table 7.2) means the state’s law-making process which includes the state’s Governor and the voters in states that have the citizen-initiative and protest-referendum processes.

As Kirby stated in 1962:

“It is safe to assume that state legislatures are limited by constitutional provisions for veto, referendum, and initiative in prescribing the manner of choosing presidential electors.”<sup>113</sup>

There is an analog, at the federal level, to the settled practice of presenting state laws concerning the appointment of presidential electors to the Governor.

As previously mentioned, Article II, section 1, clause 2 of the U.S. Constitution provides:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors ....” [Emphasis added]

The 23<sup>rd</sup> Amendment (ratified in 1961) contains the wording “as the Congress may direct.” The Amendment provides:

<sup>110</sup> *Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668 at 672. 1976.

<sup>111</sup> *Cf. James v. Valtierra*, 401 U.S. 137, 141 (1971) “[p]rovisions for referendums demonstrate devotion to democracy.”

<sup>112</sup> Posner, Richard A. 2001. *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*. Princeton, NJ: Princeton University Press. Page 111.

<sup>113</sup> Kirby, J. 1962. Limitations on the powers of the state legislatures over presidential elections. 27 *Law and Contemporary Problems* 495 at 504.



“The District constituting the seat of government of the United States shall appoint in such manner **as the Congress may direct**: A number of electors of President and Vice President....” [Emphasis added].

In implementing the 23<sup>rd</sup> Amendment, the congressional legislation establishing the winner-take-all rule for the District of Columbia was presented to the President for his approval or disapproval.

### Choosing the manner of conducting a popular election to fill a U.S. Senate vacancy

The 17<sup>th</sup> Amendment (providing for popular election of U.S. Senators) was ratified in 1913—in the midst of the period (1898–1918) when 19 states were adopting the initiative and referendum processes.<sup>114,115</sup> The 17<sup>th</sup> Amendment provides:

“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election **as the legislature may direct**.” [Emphasis added]

The phrase “as the legislature may direct” in the 17<sup>th</sup> Amendment parallels the wording of Article II of the U.S. Constitution concerning presidential electors:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ....”<sup>116</sup> [Emphasis added]

Moreover, the phrase “as the legislature may direct” in the 17<sup>th</sup> Amendment and Article II parallels the wording of Article I, section 4, clause 1 of the U.S. Constitution concerning the “manner” of holding elections for U.S. Representatives and Senators:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be **prescribed in each State by the Legislature thereof**; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.” [Emphasis added]

The practice of the states in enacting laws to implement the 17<sup>th</sup> Amendment is shown in table 7.4. This table provides a citation to each state’s law that specifies the manner of holding the popular election to fill a vacancy in the U.S. Senate under the 17<sup>th</sup> Amendment. The table also shows the section that specifies each state’s law that specifies whether the Governor is empowered to make temporary appointments to the U.S. Senate prior to the vacancy-filling election. As can be seen, in no state was enactment of the implementing legislation for the 17<sup>th</sup> Amendment accomplished merely by action of the two chambers of

<sup>114</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

<sup>115</sup> Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

<sup>116</sup> U.S. Constitution. Article II, section 1, clause 2.



the legislature. Instead, the actual practice of all states has been to treat the word “legislature” in the 17<sup>th</sup> Amendment to mean the “lawmaking process.” The “lawmaking process” concerning the 17<sup>th</sup> Amendment has involved legislative bills that have been presented to the state’s Governor for approval or disapproval and the use of the citizen-initiative process (in the cases of Arkansas in 1938 and Alaska in 2004).

Arkansas’ implementation of the 17<sup>th</sup> Amendment is noteworthy for two reasons.

First, Arkansas’ current implementation of the 17<sup>th</sup> Amendment was put on the ballot (on November 8, 1938) as a result of a citizen-initiative petition—not by the legislature.

Second, Arkansas’ implementation of the 17<sup>th</sup> Amendment was in the form of an amendment to the state constitution as distinguished from a statutory enactment.

In other words, neither the “legislature” nor “legislation” was involved in implementing the 17<sup>th</sup> Amendment in Arkansas.<sup>117</sup>

The November 2004 elections provided two additional examples of the interpretation given to the word “legislature” by the states in connection with the 17<sup>th</sup> Amendment.

When U.S. Senator John Kerry was running for President in 2004, the Democratic-controlled legislature in Massachusetts passed a bill changing the procedure for filling U.S. Senate vacancies in Massachusetts. Under the pre-existing Massachusetts law, the Governor had the power to appoint a temporary replacement, who would serve until the next general election. In other words, if Democrat Kerry had won the presidency in November 2004, then the Republican Governor of Massachusetts would have been able to appoint a Republican to serve in the then-closely-divided U.S. Senate until November 2006 (almost two full years). Under the bill that the legislature passed, the Senate seat would remain vacant until a special election could be held (between 145 and 160 days after the creation of the vacancy). That is, a special Senate election would have been held in Massachusetts in the spring of 2005 if Kerry had been elected President. The legislative bill was presented to Governor Mitt Romney for his approval or disapproval. Thus, the constitutional phrase “as the Legislature thereof may direct” was interpreted to mean the law-making process. Predictably, the Republican Governor vetoed the bill passed by the Democratic legislature. As it happened, the legislature overrode the Governor’s veto, and the bill became law.

The election of U.S. Senator Frank Murkowski as Governor of Alaska in 2002 created a vacancy in the U.S. Senate. Murkowski appointed his daughter Lisa to serve the last two years of his Senate term, thereby focusing public attention on the operation of the 17<sup>th</sup> Amendment in Alaska. An initiative petition was circulated and filed to require that, in the future, a vacancy in the U.S. Senate would remain vacant until a special election could be called. The Alaska Constitution enables the legislature to keep an initiative proposition off the ballot if the legislature responds to the petition by enacting a “substantially” similar law. The legislature’s bill resembled the proposal in the petition in that it required a special election to fill a Senate vacancy; however, the legislature’s bill differed from the petition in that it authorized the Governor to appoint a temporary Senator prior to the popular election. The legislature’s bill was presented to the Governor for his approval or disapproval, and he signed it. The petition’s sponsors protested that the legislature’s alternative

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<sup>117</sup> See the discussion of the Arizona Independent Redistricting Commission created in the November 2000 election and a similar commission created in California in the 2008 election in section 8.3.5.

**Table 7.4 Practice by the states concerning the meaning of the word “legislature” in connection with state laws specifying the implementation of the 17th Amendment**

State	Sections	Was the legislature's bill presented to the state's Governor?
Alabama	Ala. Code § 36-9-7	Yes
	Ala. Code § 36-9-8	Yes
Alaska	AK ST § 15.40.140	No—citizen-initiative process
	AK ST § 15.40.145	
Arizona	A.R.S. § 16-222	Yes
Arkansas	Const. Am. 29, § 1	No—citizen-initiative process
California	Cal. Elec. Code § 10720	Yes
Colorado	C.R.S.A. § 1-12-201	Yes
Connecticut	C.G.S.A. § 9-211	Yes
Delaware	DE ST TI 15 § 7321	Yes
Florida	F.S.A. § 100.161	Yes
Georgia	Ga. Code Ann., § 21-2-542	Yes
Hawaii	HI ST § 17-1	Yes
Idaho	ID ST § 59-910	Yes
Illinois	10 ILCS 5/25-8	Yes
Indiana	IC 3-13-3-1	Yes
Iowa	I.C.A. § 69.8	Yes
Kansas	KS ST § 25-318	Yes
Kentucky	KRS § 63.200	Yes
Louisiana	LSA-R.S. 18:1278	Yes
Maine	21-A M.R.S.A. § 391	Yes
Maryland	MD Code, Election Law, § 8-602	Yes
Massachusetts	M.G.L.A. 54 § 140	Yes
Michigan	M.C.L.A. 168.105	Yes
Minnesota	M.S.A. § 204D.28	Yes
Mississippi	Miss. Code Ann. § 23-15-855	Yes
Missouri	V.A.M.S. 105.040	Yes
Montana	Mt. St. 13-25-202	Yes
Nebraska	NE ST § 32-565	Yes
Nevada	N.R.S. 304.030	Yes
New Hampshire	N.H. Rev. Stat. § 661:5	Yes
New Jersey	§19:3-26	Yes
New Mexico	N. M. S. A. 1978, § 1-15-14	Yes
New York	McKinney's Consolidated Laws of	Yes
	New York, Chapter 47, Article 3	
North Carolina	N.C.G.S.A. § 163-12	Yes
North Dakota	ND ST 16.1-13-08	Yes
Ohio	R.C. § 3521.02	Yes
Oklahoma	26 Okl. St. Ann. § 12-101	Yes
Oregon	O.R.S. § 188.120	Yes
Pennsylvania	25 P.S. § 2776	Yes
Rhode Island	§ 17-4-9	Yes
South Carolina	Code 1976 § 7-19-20	Yes
South Dakota	SDCL. § 12-11-4	Yes
	SDCL. § 12-11-5	Yes
Tennessee	T. C. A. § 2-16-101	Yes

(Continued)

Table 7.4 (Continued)

State	Sections	Was the legislature's bill presented to the state's Governor?
Texas	§ 204.001	Yes
	§ 204.002	Yes
	§ 204.003	Yes
	§ 204.004	Yes
Utah	§ 20A-1-502	Yes
Vermont	VT ST T. 17 § 2621	Yes
	VT ST T. 17 § 2622	Yes
Virginia	§ 24.2-207	Yes
Washington	RCW 29A.28.030	Yes
	RCW 29A.28.041	Yes
West Virginia	W. Va. Code, § 3-10-3	Yes
Wisconsin	W.S.A. 17.18	Yes
	W.S.A. 8.50	Yes
Wyoming	WY ST § 22-18-111	Yes

approach was not substantially the same as the initiative proposition, because it gave the Governor's appointee the advantage of incumbency in the special election.

On August 20, 2004, the Alaska Supreme Court decided that the legislature's alternative was not substantially the same as the proposition in the initiative petition.<sup>118</sup> At the same time, the Court refused to consider a pre-election challenge to the use of the citizen-initiative process to change the manner of filling a vacancy in the U.S. Senate on the grounds that the U.S. Constitution required the "legislature" to make the decision. The Alaska Supreme Court allowed the voters to vote on the proposition in the petition in the November 2004 election. The voters then enacted the proposition in the petition (Ballot Measure 4) in the November 2004 election by a margin of 165,017 to 131,821.<sup>119</sup>

The phrase "as the Legislature thereof may direct" in the 17<sup>th</sup> Amendment (the seventh entry in table 7.2) has been interpreted as the state's entire law-making process—not action by the state's legislature two chambers.

### Empowering the Governor to temporarily fill a U.S. Senate vacancy until a popular election is held

The word "legislature" also appears in the 17<sup>th</sup> Amendment in connection with temporary appointments to the U.S. Senate.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That **the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election** as the legislature may direct." [Emphasis added]

<sup>118</sup> *State of Alaska et al. v. Trust the People Initiative Committee*. Supreme Court Order No. S-11288.

<sup>119</sup> In the same election, the voters elected Lisa Murkowski to a full six-year term in the Senate by a margin of 149,446 to 139,878.

As shown in table 7.4, the word “legislature” in the 17<sup>th</sup> Amendment (the eighth entry in table 7.2) has meant the state’s entire law-making process—not action by the two chambers of a state’s legislature.

### Consenting to the federal purchase of enclaves

The U.S. Constitution empowers Congress to exercise exclusive

“Authority over all Places purchased by the **Consent of the Legislature** of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”<sup>120</sup> [Emphasis added]

Prior to ratification of the U.S. Constitution, the states had been paying for the operation and maintenance of 13 lighthouses. Moreover, in 1789, several additional lighthouses were under construction. When the first Congress met in 1789, it offered to fund the operation and maintenance of all the lighthouses; however, Congress insisted that the sites become federal enclaves. Accordingly, Congress passed the Lighthouse Act on August 7, 1789, offering permanent funding for lighthouses on the condition that the state “legislatures” consented to the creation of the federal enclaves by August 15, 1790.<sup>121</sup> The Constitution required consent from the state “legislatures” and thus set the stage for a contemporary interpretation of the word “legislature” in the Enclaves Clause of the U.S. Constitution. The question was whether the word “legislature” referred to the two chambers of the state legislature or “the lawmaking process.”

At the time when the U.S. Constitution took effect, the gubernatorial veto existed in Massachusetts and New York.<sup>122</sup> Both chambers of the legislatures of Massachusetts and New York approved legislation consenting to the cession of their lighthouses. These legislative bills were then presented, respectively, to the Governor of Massachusetts (an official who was manifestly not part of the state legislature) and the New York Council of Revision (a body composed of the Governor and other officials who were manifestly not part of the state legislature). The Massachusetts legislation became law on June 10, 1790,<sup>123</sup> and the New York legislation became law on February 3, 1790.<sup>124</sup> Cession legislation was similarly enacted in New York in connection with the construction of a new lighthouse at Montauk in 1792—with the legislative bill again being presented to the Governor and the Council.<sup>125</sup>

Thus, practice by the states in connection with the ninth entry in table 7.2 has interpreted the word “legislature” to mean the state’s law-making process in connection with the consent by a state to the acquisition of enclaves by the federal government (the ninth entry in table 7.2).

<sup>120</sup> U.S. Constitution. Article I, section 9, clause 17.

<sup>121</sup> Grace, Adam S. 2005. *Federal-State “Negotiations” over Federal Enclaves in the Early Republic: Finding Solutions to Constitutional Problems at the Birth of the Lighthouse System*. Berkeley, CA: Berkeley Electronic Press. Working Paper 509. <http://law.bepress.com/expresso/eps/509>. Pages 1–11.

<sup>122</sup> Kole, Edward A. 1999. *The First 13 Constitutions of the First American States*. Haverford, PA: Infinity Publishing.

<sup>123</sup> Ch. 4, 1790 Massachusetts Laws 77.

<sup>124</sup> New York, Ch. 3, February 3, 1790.

<sup>125</sup> New York, Ch. 4, December 18, 1792.

### Consenting to the formation of new states from territory of existing states

The U.S. Constitution provides:

“No new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the **Consent of the Legislatures** of the States concerned as well as of the Congress.”<sup>126</sup> [Emphasis added]

The authors of this book believe that this usage of the word “legislature” refers to the state’s law-making process in connection with the consent of a state to the formation of a new state from its territory (the 10th entry in table 7.2).

### Requesting federal military assistance to quell domestic violence

The U.S. Constitution provides:

“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on **Application of the Legislature**, or of the Executive (when the **Legislature** cannot be convened) against domestic Violence.”<sup>127</sup> [Emphasis added]

This provision of the U.S. Constitution (the Guarantee Clause) specifically creates a contrast between the state’s “executive” and “legislature.”

The Guarantee Clause has only been rarely invoked. On April 4, 1842, Rhode Island Governor Samuel Ward King requested that President John Tyler provide federal military aid to quell a potential insurrection, known as the Dorr Rebellion, in which an alternative government for Rhode Island was attempting to gain recognition and legitimacy. The Governor’s request was not accompanied by a simultaneous request from the state legislature. President Tyler took no action in response to the Governor’s unilateral request.<sup>128</sup>

Then, in 1844, the Freeholders’ legislature of Rhode Island passed a resolution requesting that President Tyler provide federal military aid to quell the Dorrites. President Tyler took no action in response to the legislature’s resolution.<sup>129</sup>

The Guarantee Clause of the U.S. Constitution distinguishes the state’s “legislature” from the state’s Governor. These two requests concerning the Dorr Rebellion in Rhode Island suggest that the word “legislature” in Article IV, section 4 of the U.S. Constitution (the 11<sup>th</sup> entry in table 7.2) was interpreted, in Rhode Island in the 1840s, to mean the two chambers of the state legislature.

<sup>126</sup> U.S. Constitution. Article IV, section 3, clause 1.

<sup>127</sup> U.S. Constitution. Article IV, section 4.

<sup>128</sup> Wiecek, William M. 1972. *The Guarantee Clause of the U.S. Constitution*. Ithaca, NY: Cornell University Press. Page 105.

<sup>129</sup> Gettleman, Marvin E. 1973. *The Dorr Rebellion: A Study in American Radicalism 1833–1849*. New York, NY: Random House. Page 105.

### 7.3.6. Pre-election versus post-election challenges

The use of the citizen-initiative process to enact the National Popular Vote Compact can be challenged either before or after the statewide vote on the statute proposed by a petition.

Both state and federal courts have been reluctant, as a general principle, to intervene in the citizen-initiative process prior to enactment of a proposition by the voters.

In “Pre-Election Judicial Review of Initiatives and Referendums,” James Gordon and David Magleby wrote:

“Most courts will not entertain a challenge to a measure’s substantive validity before the election. A minority of courts, however, are willing to conduct such review. Arguably, pre-election review of a measure’s substantive validity involves issuing an advisory opinion, violates ripeness requirements and the policy of avoiding unnecessary constitutional questions, and is an unwarranted judicial intrusion into a legislative process.”<sup>130</sup>

The numerous practical difficulties with pre-election judicial challenges to ballot propositions partly explain judicial reluctance to such challenges. As Supreme Court Justice William O. Douglas wrote in his concurring opinion in *Ely v. Klahr* in 1971:

“We are plagued with election cases coming here on the eve of election, with the remaining time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented.”<sup>131</sup>

The practical difficulties associated with pre-election challenges have been compounded in recent years by the increasing use of absentee (mail-in) voting and early voting (where walk-in polling places are operated at designated locations, such as government buildings, for several weeks prior to Election Day).

The general reluctance of courts to prevent a vote on ballot measures proposed by the citizen-initiative process is illustrated by the efforts in the early 1990s to enact state constitutional amendments imposing term limits on members of the U.S. House of Representatives and U.S. Senate. Many questioned whether the proposed state constitutional amendments were consistent with the specific federal constitutional provisions establishing qualifications for these federal offices.

Despite pre-election legal challenges to the initiative petitions in some states, in no instance did the courts prevent a vote by the people on the grounds that congressional term limits violated the U.S. Constitution.

It was only after these propositions had been enacted by the voters in a number of states that the courts examined the constitutionality of the ballot propositions. In 1995, the U.S. Supreme Court held that term limits on members of the U.S. House of Representatives and U.S. Senate could not be imposed at the state level.<sup>132</sup>

<sup>130</sup> Gordon, James D., and Magleby, David B. 1989. Pre-election judicial review of initiatives and referendums. 64 *Notre Dame Law Review* 298–320 at 303.

<sup>131</sup> *Ely v. Klahr*. 403 U.S. 103 at 120–121. 1971.

<sup>132</sup> *U.S. Term Limits v. Thornton*. 514 U.S. 779. 1995.

The California Supreme Court refused, on July 26, 2005, to remove an initiative proposition from the ballot in California's November 8, 2005, statewide election:

"The stay issued by the Court of Appeal as part of its July 22, 2005, decision, restraining the Secretary of State from taking any steps, pending the finality of the Court of Appeal's decision, to place Proposition 80 in the ballot pamphlet or on the ballot of the special election to be held on November 8, 2005, is vacated. As the Court of Appeal recognized, California authorities establish that

'it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity.' (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.)

"Because, unlike the Court of Appeal, at this point we cannot say that it is clear that article XII, section 5, of the California Constitution precludes the enactment of Proposition 80 as an initiative measure, we conclude that the validity of Proposition 80 need not and should not be determined prior to the November 8, 2005 election. Accordingly, the Secretary of State and other public officials are directed to proceed with all the required steps to place Proposition 80 in the ballot pamphlet and on the ballot of the special election to be held on November 8, 2005. After that election, we shall determine whether to retain jurisdiction in this matter and resolve the issues raised in the petition."<sup>133</sup>

### **State constitutional restraints on repeal of laws enacted by the citizen-initiative process**

In 11 states, there are state constitutional limitations concerning the repeal or amendment of a statute originally enacted by the voters by means of the citizen-initiative process, as shown in table 7.5.<sup>134</sup>

In seven of the 11 states in the table, the constraint on the legislature runs for a specific period of time.

In four of the 11 states, the constraint is permanent—that is, the voters must be consulted in a subsequent referendum about any proposed repeal or amendment.

<sup>133</sup> *Independent Energy Producers Association et al., Petitioners, v. Bruce McPherson, as Secretary of State, etc., Respondent; Robert Finkelstein et al., Real Parties in Interest*. Case number S135819. July 26, 2005.

<sup>134</sup> The full constitutional provisions may be found in appendix R of the 4<sup>th</sup> edition of this book at <https://www.every-vote-equal.com/4th-edition>



**Table 7.5 State constitutional limitations on the repeal or amendment of statutes enacted by the voters**

State	Limitations
Alaska	No repeal within two years; amendment by majority vote anytime
Arizona	Three-quarters vote to amend; amending legislation must “further the purpose” of the measure
Arkansas	Two-thirds vote to amend or repeal
California	No amendment or repeal of an initiative statute by the legislature unless the initiative specifically permits it
Michigan	Three-quarters vote to amend or repeal
Nebraska	Two-thirds vote to amend or repeal
Nevada	No amendment or repeal within three years of enactment
North Dakota	Two-thirds vote to amend or repeal within seven years of effective date
Oregon	Two-thirds vote to amend or repeal within two years of enactment
Washington	Two-thirds vote to amend or repeal within two years of enactment
Wyoming	No repeal within two years of effective date; amendment by majority vote any time

## 7.4. THE ROLE OF CONGRESS

Congress typically does not consider an interstate compact until it has been enacted by the requisite combination of states.

Congress has the option of explicitly consenting to a compact (section 5.19). It also may implicitly consent to one. As the U.S. Supreme Court wrote in *Virginia v. Tennessee*:

“Consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them.”<sup>135</sup>

Legislation conferring congressional consent on an interstate compact requires a majority vote of both houses of Congress and presentation of the bill to the President. The President can veto such legislation.<sup>136</sup> If the President vetoes the bill, Congress can override the veto by a two-thirds vote of both houses.

Many interstate compacts do not require congressional consent in order to take effect. The question of whether the National Popular Vote Compact requires congressional consent in order to take effect is discussed in detail in section 9.23.3.

<sup>135</sup> *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

<sup>136</sup> An example of a presidential veto of an interstate compact occurred in 1942 involving Colorado, Kansas, and Nebraska. President Franklin D. Roosevelt vetoed a bill granting congressional consent to the Republican River Compact. See Republican River Basin—Veto Message from the President of the United States. *Congressional Record*. Volume 88. Pages 3285–3286. April 2, 1942. <https://www.govinfo.gov/content/pkg/GPO-CRECB-1942-pt3/pdf/GPO-CRECB-1942-pt3-7-1.pdf>