REVISITING SECTION 2 AND THE ELECTORS CLAUSE: ON THE RIGHT OF THE PEOPLE TO CHOOSE PRESIDENTIAL ELECTORS

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ABSTRACT

Recent scholarship argues that Section 2 of the Fourteenth Amendment protects the people's right to elect presidential electors. This Article offers fresh perspectives both on Section 2 scholarship and on the underlying history of the Electors Clause. It begins with a review of modern interpretations of the Fourteenth Amendment. It then summarizes the author's recent research into the text and structure of the Electors Clause and its ratification. It also offers new perspectives on consequential debates over the constitutionality of legislative election that began in 1800 and ended in 1826. When Section 2 was drafted in June 1866, the popular election of presidential electors was universal, challenged only by South Carolina's formerly renegade but recently repudiated and abandoned practice. Section 2 created or reaffirmed the rights of the people and protected against backsliding. Our subsequent history—including a second ratification of the words of the Electors Clause in 1961—confirms the people's right to elect the President.

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INTRODUCTION

For most of its existence, Section 2 of the Fourteenth Amendment—never enforced and rarely cited or analyzed—has been of little consequence.[1] Yet, occasionally Section 2 enters into modern discussions about the meaning and application of the Fourteenth Amendment in presidential elections. Its influence in that context has been significant, even if not fully appreciated. Part I reviews this discussion, from 1960 to the present.

Part II of this Article probes more deeply into the question of whether the Fourteenth Amendment is built upon a preexisting right established in the Electors Clause. Part II reports results of recent research about constitutional text and structure,[2] ratification,[3] the election of 1800,[4] and framer Rufus King's role in the debates in Congress (1816–1824) and in New York (1823–1824).[5] Part II adds to the already substantial evidence that the "plenary power" dictum in *McPherson v. Blacker*[6] is profoundly at odds with the history of the drafting and ratification of the Constitution and with serious and consequential debates over the meaning of Article II.

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1. David B. Froomkin & Eric Eisner, *The Second Coming of the Second Section: The Fourteenth Amendment and Presidential Elections*, 56 ARIZ. ST. L.J. 127, 130–31 (2024) [hereinafter *Second Coming*] (noting "scholars have largely ignored Section 2" and citing representative articles).
2. *See infra* Sections II.B (text), II.C (structure).
3. *See infra* Section II.D.
4. *See infra* Section II.E.
5. *See infra* Section II.F.
6. 146 U.S. 1, 35 (1892) ("From this review . . . it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to state legislatures in the matter of the appointment of electors.").

I. MODERN INTERPRETATIONS OF SECTION 2 OF THE FOURTEENTH AMENDMENT

The 1960s witnessed the fundamental transformation of the understanding of the Fourteenth Amendment, and both Section 2 and the Electors Clause played a role from the beginning. As Section I.A recounts, in the summer of 1960, Reverend Martin Luther King, Jr. led marches on the national conventions of both major political parties and demanded, among other things, enforcement of Section 2.[7] At the same time, Congress approved and forwarded the Twenty-Third Amendment to the states.[8] This amendment uses terms from the original Electors Clause[9] to extend what was characterized as the fundamental right to vote in presidential elections to the citizens of the District of Columbia.

Section I.B explores a 1964–1965 colloquy between Professor William Van Alstyne and Justice Harlan about the relationship between Sections 1 and 2 of the Fourteenth Amendment. At issue was the contemporary understanding, which the Supreme Court was then articulating, that the right to vote is fundamental and is enforceable through Sections 1 and 5 of the Fourteenth Amendment. Professor Van Alstyne refuted Justice Harlan's historical argument that voting rights are addressed solely by Section 2—i.e., that Section 1 simply does not apply to voting rights.[10] Professor Van Alstyne concluded that Section 2 is not preclusive; rather, it creates a right to vote in six categories of elections, which include elections for presidential electors.[11] This exchange essentially ended the argument that Section 2 is a limitation on the right to vote or a barrier to effective enforcement.

The understanding that the right to vote is fundamental was upended some three and a half decades later with the Supreme Court's stunning pronouncement (in dicta) in *Bush v. Gore*[12] that the people have no constitutional right to vote in presidential elections.[13] Section I.C presents arguments from a 2001 *Bush v. Gore* colloquium.[14] Professor Peter M. Shane led the way in explicating the conflict between Section 2 and *Bush*.[15]

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7. *See infra* Section I.A.

8. U.S. CONST. amend. XXIII, § 1 ("The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct: A number of electors of President and Vice President . . . .").

9. *Compare id.* (including the language, "shall appoint in such manner as the [legislative authority] may direct: a number of electors"), *with* U.S. CONST. art. II, § 1, cl. 2 (including the language, "shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors").

10. William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 80 (1965).

11. *Cf.* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 187–89 (2012) [hereinafter UNWRITTEN CONSTITUTION] (exploring the relationship between sections 1 and 2 and concluding that the Fourteenth Amendment empowers Courts to remedy violations of the right to vote specified in Section 2).

12. 531 U.S. 98 (2000).

13. *Id.* at 104.

14. *See infra* Section I.C.

15. Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 535 (2001).

Shane concluded that Section 2 creates a right to vote for presidential electors that is judicially enforceable.[16] Shane's view was challenged at the time by another scholar.[17]

Questions about Section 2 and presidential elections receded for another two decades, but the controversy erupted following the 2020 election.[18] Section I.D reviews a number of recent articles that expand on Van Alstyne and Shane's point that Section 2 affirms the right to vote, and that it does so in presidential elections. These articles[19] examine a broader swath of materials and events during Reconstruction. One line of inquiry considers the entire history of the Electors Clause, arguing that one facet of the Supreme Court's conclusion in *McPherson*[20]—that history demonstrates that state legislatures had been "conceded" "plenary power" over presidential elections—is simply dicta and is demonstrably wrong.[21]

A. The Opening of the Modern Era: Martin Luther King, Jr., Section 2, and the Right to Vote in Presidential Elections (1960–1961)

The decade of the 1960s, which birthed a new understanding of the Fourteenth Amendment, opened with a presidential election. Civil rights writ large was a significant issue, and the parties competed as champions of the cause. During that summer, Reverend Martin Luther King, Jr. and A. Philip Randolph organized a March on the Conventions Movement, which King led.[22] Among ten demands in the movement's "Joint Platform Proposals,"[23] Number 6 called for the Democratic Party and convention to

16. *Id.* at 539.

17. Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 588 (2001).

18. *See infra* Section I.D.

19. Mark Bohnhorst, Reed Hundt, Kate E. Morrow, & Aviam Soifer, *Presidential Election Reform: A Current National Imperative*, 26 LEWIS & CLARK L. REV. 437 (2022) [hereinafter *National Imperative*]; Mark Bohnhorst, Michael W. Fitzgerald, & Aviam Soifer, *Gaping Gaps in the History of the Independent State Legislature Doctrine:* McPherson v. Blacker*, Usurpation, and the Right of the People to Choose Their President*, 49 MITCHELL HAMLINE L. REV. 257, 258–59 (2023) [hereinafter *Gaping Gaps*]; *Second Coming*, *supra* note 1, at 127; Charlie Martel, *Power for the People: Recognizing the Constitutional Right to Vote for President*, 45 CARDOZO L. REV. 1788, 1788 (2024) [hereinafter *Power for the People*]; Michael W. Fitzgerald & Mark Bohnhorst, *Reconstruction, Racial Terror, and the Electoral College*, 14 J. CIV. WAR ERA 31, 33–34, 44 (2024); *see also* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J. L. & PUB. POL'Y 310, 335 (2024) (showing that Congress made late changes in Section 3, as it did in Section 2, to prevent states from defeating the application of Section 3 in presidential elections by having their legislatures elect).

20. McPherson v. Blacker, 146 U.S. 1, 10 (1892) (referring to legislative elections; it is true that legislatures had been conceded plenary power over popular elections).

21. *National Imperative*, *supra* note 19, at 453 nn.43–44, 456 n.60; *Gaping Gaps*, *supra* note 19, *passim* (showing that the Court's historical review and conclusion, insofar as they imply a power for legislatures rather than the people to choose electors, misconstrued or ignored critical events, including the Constitutional Convention, Ratification, the most consequential debates about the constitutionality of legislative election, and Reconstruction); *see infra* Part II (revisiting the history and sharpening the critique).

22. Maurice Isserman, *The Protestors of 1960 Helped Change the World*, L.A. TIMES (Aug. 13, 2000), https://www.latimes.com/archives/la-xpm-2000-aug-13-op-3555-story.html.

23. L.B. Thompson, Joint Platform Proposals to the 1960 Democratic Party Platform Committee (July 7, 1960) (transcript available at Martin Luther King, Jr. Research and Education Institute,

"repudiate and condemn the segregationists, white supremacists, racists and Dixiecrats in your ranks," including specifically Senator Eastland of Mississippi, where Black citizens were "disfranchised in violation of the 13th, 14th, and 15th Amendments."[24] Demand number 7 called for the convention "go on record to uphold the second section of the 14th Amendment to the U.S. Constitution, which calls for the reduction of representation of states in accordance with their disfranchisement of qualified voters."[25] At the same time, the nation faced the question of whether to extend the right to vote in presidential elections to citizens of the District of Columbia, pursuant to Congress' approval of the Twenty-Third Amendment and referral to the states.[26]

The 1960 Democratic Party Platform contained strong civil rights planks.[27] The platform affirmed that "[t]he right to vote is the first principle of self-government" and specifically endorsed ratification of the Twenty-Third Amendment: "We urge the legislatures of the 50 states to ratify the 23rd Amendment, passed by the Democratic Congress, to give District citizens the right to participate in Presidential elections."[28]

The Republican Party Platform of 1960 also contained a strong civil rights section.[29] The party was proud of its record: "[m]ore progress has been made during the past eight years than in the preceding 80 years."[30] It hailed "significant and effective civil rights legislation" enacted in 1957 and 1960 based on recommendations from the Eisenhower administration—recommendations which, pointedly, "the Democratic-controlled Congress watered . . . down."[31] The platform pledged "vigorous enforcement of the civil rights laws to guarantee the right to vote to all citizens in all areas of the country."[32] The platform did not mention the Twenty-third Amendment, but party support for ratification—as evidenced in the debates in Congress, discussed below—is clear.

The importance of the ratification of the Twenty-Third Amendment cannot be overstated. This was literally and effectively a second ratification of the terms of the 1787 Electors Clause itself.[33] The amendment uses

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Stanford University); *see also* Interview by Lee Nichols at Republican National Convention with Martin Luther King, Jr. (July 25, 1960) (stating King led marches of about 5,000 individuals to each convention).

24. L.B. Thompson, Joint Platform Proposals to the 1960 Democratic Party Platform Committee (July 7, 1960) (transcript available at Martin Luther King, Jr. Research and Education Institute, Stanford University).

25. *Id.*

26. *See infra* notes 34–56 and accompanying text.

27. *1960 Democratic Party Platform*, AM. PRESIDENCY PROJECT (July 11, 1960), https://www.presidency.ucsb.edu/documents/1960-democratic-party-platform.

28. *Id.*

29. *Republican Party Platform of 1960*, AM. PRESIDENCY PROJECT (July 25, 1960), https://www.presidency.ucsb.edu/documents/republican-party-platform-1960.

30. *Id.*

31. *Id.*

32. *Id.*

33. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

the very words of the Electors Clause: "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* . . . ."[34] As the debates discussed below show, Congress understood both that the right to vote is fundamental and that the terms of the amendment, which were first ratified in 1788, confer a right to vote for presidential electors.

It was clear to the people's representatives in Congress that a constitutional amendment was needed, for voting rights were being denied. The Twenty-Third Amendment was drafted by the House Judiciary Committee and reported on May 31, 1960.[35] The purpose was: "to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States."[36] The Report noted, the "amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections."[37]

The amendment was debated in the House on June 14, 1960, and in the Senate on June 16, 1960.[38] In both chambers, the debates evidenced a bipartisan understanding that the amendment established a right to vote in presidential elections. House Judiciary Committee Chair Emanuel Celler, a Democrat from New York, considered it "a great privilege" to sponsor the amendment, "which will give the people of the District of Columbia the right to vote in Federal elections."[39] At the conclusion of remarks on the broad sweep of history, Representative Celler said, "[b]y the end of the Civil War, practically universal, manhood suffrage had been established for all whites."[40] With the removal of "the disqualification of sex" through the Nineteenth Amendment and with the current Congress' "[g]reat efforts" to secure voting rights under the Fifteenth Amendment, "There can be . . . no logic, no justification, no indifference to the disenfranchisement of the residents of the District of Columbia."[41]

For the Republicans, Representative William Moore McCulloch of Ohio managed much of the debate. He began his remarks saying: "Mr. Chairman, we have an opportunity today to do our part in conferring a fundamental American right—the right to vote for presidential and vice presidential electors—upon the citizens who reside in and have their legal

34. U.S. CONST. amend. XXIII, § 1 (emphasis added).
35. 106 CONG. REC. 11493 (1960).
36. H.R. REP. NO. 1698, at 2275 (1960).
37. *Id*. at 2276.
38. 106 CONG. REC. 12551 (1960); 106 CONG. REC. 12850 (1960).
39. 106 CONG. REC. 12555 (1960).
40. *See* U.S. CONST. amend. XIV, § 2; 106 CONG. REC. 12557 (1960).
41. 106 CONG. REC. 12557 (1960).

domicile in the District of Columbia." Representatives from both parties reiterated the point.[42]

The Senate debate confirmed the strong Republican Party support for the right of District citizens to vote for presidential electors. Majority Leader Lyndon Johnson laid the House resolution before the Senate, moved that the Senate concur, and then yielded to Republican Senator Francis Case from South Dakota, who managed the floor debate.[43] Senator Case began by recalling President Dwight Eisenhower's long-standing support for "getting the right to vote for the people of the District of Columbia."[44] Eisenhower "thought there was something basically wrong" with either taxing people or drafting peoples' sons for military duty if you "did not give them the right to vote."[45] Senator Case related that a trio of Republican Senators—Case, Keating, and Beal—testified before the House Judiciary Committee, "urging action upon this particular proposition to provide suffrage for the voters of the District of Columbia in the election of President and Vice President."[46] Senator Javits said: "I know that all of us will throw our weight, in our respective States, behind the ratification of the amendment by the State legislatures."[47]

Democratic Senator Jennings Randolph of West Virginia, who began his service in Congress in the House of Representatives in 1933, said that "this is not a partisan issue in any sense."[48] "It is not inappropriate to state here again that the platforms of both major parties have spoken out again and again affirmatively for this desirable ideal."[49] The Senate approved the joint resolution by voice vote.[50]

In the House, a sole Republican, Representative George Meader of Michigan, expressed misgivings. In the June 14, 1960 debate, Meader said "I approached this proposal with resistance, and probably with the least enthusiasm of any member of the subcommittee and of the full Judiciary

42. *Id*. at 12558–68 (quoting the following individuals: Rep. Multer (D), "[G]iving the right to vote"; Rep. Curtin (R), "[G]roup of our citizens . . . still being denied this fundamental right"; Rep. Baldwin (R), "[T]axpayers . . . should have the right to participate"; Rep. Lindsay (R), "[P]ermit the residents of the District . . . to vote"; Rep. Henderson (R), "[P]ermit the people of the District . . . to vote for President and Vice President"; Rep. Bow (R), had himself "offered an amendment to accomplish this same purpose"; Rep. Foley (D), "[T]ruly historic legislation"; and Rep. Toll (D), "[F]or the fourth time . . . this great 86th Congress[] is recognizing the universal right of suffrage").

43. *Id.* at 12850–51.

44. *Id*. at 12851.

45. *Id.*

46. *Id.* at 12851–52.

47. *Id*. at 12852.

48. *Id.*

49. *Id.*

50. *Id.* at 12857–58 (noting that Senators Olin Johnston (D-S.C.) and James Eastland (D-Miss.) asked that the record reflect they voted against the resolution, with no similar request noted for any Republican).

Committee."[51] Meader framed his resistance as a matter of principle.[52] He laid out a number of "aspects" that members should consider.[53]

Important for present purposes, Meader said that he recommended a change in phraseology from the Senate version, which did not track the Electors Clause precisely:[54]

> I might say . . . that I suggested the language as it appears in the resolution before you because it follows precisely the language of the Constitution, article II, section 1, providing for the electors for President and Vice President . . . . I want to call your attention to the fact that the phrase I have quoted does not require popular election of electors for President and Vice President; the legislature is given complete authority in article II, section 1, to determine how presidential electors are to be selected.[55]

The "mean[ing]" of what he had just said, according to Meader, was simply that Congress would need to pass enabling legislation.[56] The reason Meader gave for the change in language—"it follows precisely the language of the Constitution"[57]—was innocuous enough.

The implication, however, that the Electors Clause, as understood in 1960, did not require popular election, and that the language of the Twenty-Third Amendment likewise might not require popular election, was another matter. Representative Byron Rogers, a Democrat from Colorado, sought clarification twice.[58] Meader responded to Rogers's first question with a question.[59] He responded to the second question by stating he did not intend to interpret the Constitution and did not know whether

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51. *Id.* at 12559.

52. *Id.* (citing regard for the framers and the infrequency of amendments).

53. *Id.* at 12559–61 (showing the "aspects" Meader mentioned were these: (i), the amendment "does not do anything" for 2,300,000 citizens of Puerto Rico or the citizens of the Panama Canal Zone, Samoa, the Virgin Islands or Guam; (ii) for citizens of the District of Columbia, it granted only a "partial franchise" because it provided no representation in Congress and no right to vote even for any local unit of government; (iii) "[T]his desirable objective; namely, granting the franchise to District residents" might be accomplished without "tampering with the Constitution" by "retroced[ing]" most of the District to Maryland; (iv) the measure required that Congress pass implementing legislation, and "I do not know whether we have accomplished very much" if such legislation "is referred to the District Committee, which some have accused of being unfriendly to the residents of the District of Columbia"; and (v) "a great proportion" of the residents of the District "actually exercise their franchise back home in States from which they come.").

54. *Id.* at 12560.

55. *Id.*

56. *Id.* ("What does that mean? . . . [E]nabling legislation will be introduced . . . .").

57. *Id.*

58. *Id.* ("Does the gentleman think that Congress could itself elect the electors without referring it to the people? . . . . I understand the gentleman's argument is that the State legislatures may now, if they so desire, provide the method of selection of the electors without referring it to a vote of the people; is that correct?").

59. *Id.*

any state legislature had ever provided for the selection of electors by any method other than direct election of the people.[60] That ended the colloquy.

The relevant question is not what was meant by this colloquy, in which an ideological outlier seemed to suggest that the language of the Twenty-Third Amendment might not confer a right to vote, while declining to say so directly. The relevant question is what the nation understood the amendment meant during the ratification process. The nation ratified the language of the amendment as presented and understood by its proponents; it did not "ratify" the colloquy.

The Twenty-Third Amendment was ratified in approximately nine months—near record time.[61] The process played out during the presidential election campaign of 1960. Both presidential campaigns and then-President Eisenhower supported ratification; there was no organized opposition.[62]

Yet ratification was not unanimous. Rather, "because of the large numbers of blacks living in the District the franchise issue had racial overtones."[63] A swath of Deep South states, from Florida to Virginia to Texas, took no action on the Twenty-Third amendment.[64]

Given the racial overtones of the issue and the competition between the parties over the issue of civil rights, as well as President Eisenhower's support for the measure, it is inconceivable that Republicans suggested during ratification that Congress, rather than the people, might have the right to vote for presidential electors. Given the Democratic Party Platform planks,[65] it is equally inconceivable that mainstream Democrats—Senator Eastland and fellow southern segregationist "Dixiecrats" excepted—suggested the language would permit Congress, not the people, to choose electors.[66] Thus, it is reasonable to suppose that it was universally understood then—as it is universally understood today—that the Twenty-Third Amendment establishes a right to vote in presidential elections. It does so by incorporating the exact language of the Electors Clause.

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60. *Id.* ("I am simply reading the exact language of the Constitution. I do not intend to make any interpretation of it other than what the language imparts. I do not know whether the legislature of any State has ever provided for the selection of presidential electors or for the appointment, to use the constitutional phrase, of presidential electors in any other fashion than by a direct vote of the people.").

61. ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 130 (1978).

62. *Id.*

63. *Id.* at 127.

64. *Id.* at 130.

65. *See supra* Section I.A (expressly supporting ratification as conferring a "right to vote," which is "the first principle of self-government").

66. *See supra* Section I.A. Review of the debates in the states that ratified the Twenty-third Amendment is beyond the scope of this Article.

B. A Consequential Debate: Section 2, a Penalty, Not an Exclusive Remedy (1964–1965).

The mid-1960s witnessed a debate over the meaning of Section 2 of the Fourteenth Amendment.[67] Dissenting from many of the Supreme Court decisions that established the modern jurisprudence of voting rights, Justice Harlan argued that Section 2 was preclusive—i.e., that Section 1, on which the Supreme Court's landmark voting rights decisions relied, did not apply to the right to vote.[68] Justice Harlan maintained that his view represented the consensus understanding of the thirty-ninth Congress.[69] Somewhat remarkably, the majority opinions in these cases simply ignored Justice Harlan's elaborate historical arguments.[70]

Thus, it fell to Professor William W. Van Alstyne to answer Justice Harlan. Observing there was already "a surfeit of Fourteenth Amendment histories," Van Alstyne noted that the issues, controversies, and selected materials in those reviews were different.[71] He undertook to "rake the history" once again, as does this Article.[72]

Van Alstyne started with the following passage from Representative John Bingham's explanation of the Fourteenth Amendment—which he characterized as perhaps the strongest evidence in favor of Justice Harlan's general argument.[73] Yet this passage is also one of the strongest statements against applying Justice Harlan's interpretation to a wholesale deprivation of the right to vote for electors:

> The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States. The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a cause supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people.[74]

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67. *See* Van Alstyne, *supra* note 10, at 85 (entering into, and effectively ending, the debate).

68. *Id.* at 33–34 (citing multiple cases in which Justice Harlan dissented, principally Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting)).

69. *Id.* at 42–43 (summarizing Harlan's evidence, stating, "It will be seen, however, that there are certain mistakes and serious exaggerations in this reading of the congressional history . . . .").

70. *See* Carrington v. Rash, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting) ("If that history does not prove what I think it does, we are at least entitled to be told why.").

71. Van Alstyne, *supra* note 10, at 36–37.

72. *Id.* at 37 (stating that "[a] matter affecting the integrity of judicial review ought not to be resolved by inference from historical reviews in which this subject was of but incidental concern."). Likewise, here, a matter affecting the fundamental rightof the people to vote for their president. should not be resolved on inferences from historical reviews in which the subject was of incidental concern. *See e.g.*, McPherson v. Blacker, 146 U.S. 1, 28 (1892).

73. Van Alstyne, *supra* note 10, at 41.

74. *Id.* (emphasis added); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (stating that a blanket deprivation of a voting right conferred directly by the Constitution might violate Section 1).

Representative Bingham was "the author of the first section in the Reconstruction Committee and its leading proponent."[75] In at least one circumstance, he thought that Section 2 did not foreclose a direct cause of action under Section 1 to challenge a wholesale deprivation of a constitutional right to vote.[76]

Bingham acknowledged that theretofore the federal elective franchise had been "exclusively under the control of the States."[77] It was, however, "the philosophy of every measure of reconstruction now pending before the House" that no "State lately in insurrection can exercise either that power or any other until it is restored to its constitutional relation to the Union . . . nor that after being restored they can exercise that power contrary to the express conditions prescribed by Congress for their restoration."[78] Bingham reiterated that a central point of Section 1 was to create power in Congress to remedy unconstitutional state actions, including violations of the privileges and immunities of United States citizens that were already embodied in the Constitution.[79]

Van Alstyne explained that early in the session, Representative Bingham (and others)[80] rejected the view that creating a penalty under what would become Section 2 would preclude other remedies:

> Mr. BINGHAM . . . . There is a further guarantee in the Constitution, of a republican form of government to every State, which I take to mean that the majority of the free male citizens in every State shall have the political power. I submit to my friend that this proviso is

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75. Van Alstyne, *supra* note 10, at 41 (quoting Justice Harlan in Reynolds v. Sims, 377 U.S. 533, 598 (1964) (Harlan, J., dissenting)).

76. *Id*. at 41, 63 (noting that Justice Harlan agreed and that this is one of several permissible readings of Senator Bingham's "puzzling statement").

77. CONG. GLOBE, *supra* note 74, at 2542.

78. *Id.*

79. *Id.* (referring to "many instances of State injustice and oppression . . . of flagrant violations of the guaranteed privileges of citizens" for which "the national Government furnished and could furnish by law no remedy." Following reference to impositions of cruel and unusual punishment, Bingham offered the example of a South Carolina ordinance adopted during the nullification crisis of 1833 that authorized both (i) the administration of oaths that required allegiance to South Carolina and to no other power and (ii) punishment for violation of such oaths. "[A]s able a body of men . . . as was ever convened in Washington" devised a remedy to protect officers who were responsible for administration of national revenue laws, but those men could find no basis in the Constitution to protect U.S. citizens in general from potential punishment for violation of the South Carolina oath. Three of the great men were identified by last name only: Webster, Clay and Benton. The last is Thomas Hart Benton, who for some thirty years had been a proponent of the view that legislative election of electors was a usurpation of the rights of the people in violation of the language of the Constitution and the intent of the Framers. *Gaping Gaps*, *supra* note 19, at 279–81, 286; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 182–83 (1998) (documenting Bingham's view, expressed in 1859, six times in a key speech on February 28, 1866, and in 1871, that the guarantees of the Bill of Rights are privileges and immunities of citizens of the United States, as contradistinguished from citizens of the several states). Moreover—although Van Alstyne did not make this point—Bingham considered the right to vote for presidential electors to be a privilege and immunity of citizens of the United States. Akhil Reed Amar, *The Privileges or Immunities Clause: America's Lost Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/704#the-privileges-or-immunities-clause-americas-lost-clause-by-akhil-reed-amar (last visited Apr. 7, 2025).

80. Van Alstyne, *supra* note 10, at 49–59 (debates in the House).

> nothing but a penalty for a violation on the part of the people of any State of the political right of franchise guaranteed by the Constitution to their free male fellow-citizens of full age.
>
> Mr. BROMWELL. I ask the gentleman whether the pending amendment . . . does not, by forcible implication . . . admit that a majority may disfranchise a minority?
>
> Mr. BINGHAM. As I have before stated . . . there has not been such a construction, in my opinion, of a law which imposes only a penalty, for centuries, if ever, in any country where the common law obtains.[81]

At the Fourteenth Amendment's framing, there was no common understanding of whether Section 2 was preclusive.[82] On March 9, 1866, Senator Fessenden, the chair of the Joint Committee on Reconstruction for the Senate, acknowledged that opinions differed on whether Congress could legislate regarding suffrage under the Guarantee Clause.[83] He insisted, however, that whatever one's view, Section 2 was merely a penalty and did not take away any power Congress might possess, through the Guarantee Clause or otherwise.[84] The point was made twice more on March 9th.[85]

On May 23, 1866, Senator Jacob M. Howard introduced the combined Fourteenth Amendment.[86] He began by stating that the meaning of "privileges and immunities" would be a "curious question" to answer and lead to a "barren discussion."[87] Indeed, he noted that the United States Supreme Court itself had recently declined to offer a general definition, indicating the issue could be considered case-by-case.[88] Despite this observation, Senator Howard quoted a lengthy definition from the case of *Corfield v. Coryell*,[89] which stated that the phrase meant rights that "are in their nature, fundamental."[90] After listing many, the court said, "to which may be added the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised."[91] The *Corfield* court did not consider the question of fundamental rights of citizens of the United States qua United States, and none of the fundamental rights of the Bill of Rights is included in its list.[92] Having just quoted authority that the elective franchise is a fundamental right, Senator Howard said the right to

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81. *Id.* at 52–53.
82. *See id.* at 59–60.
83. *Id.* at 59.
84. *Id.*
85. *Id.* at 59–60.
86. CONG. GLOBE, *supra* note 74, at 2764.
87. *Id.* at 2765.
88. *Id.*
89. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (Assoc. Justice Bushrod Washington, as circuit judge; holding a New Jersey statute that limited the right to dredge for oysters to citizens of New Jersey did not violate the privileges and immunities of citizens of other states, secured by Article IV, sec. 2).
90. *Id.* at 551–52.
91. CONG. GLOBE, *supra* note 74, at 2765.
92. *Id.*

vote is *not* fundamental and is not among the privileges or immunities covered by Section 1 of the Fourteenth Amendment.[93] Moreover, according to Van Alstyne, the position that Section 2 precludes all other sources of authority over suffrage conflicts with the stated views of three other senators and at least nine members of the House.[94]

These inconclusive debates preceded the fundamental re-crafting of Section 2 that occurred in the Senate on June 7 and 8, 1866.[95] The proposal considered on May 23 referred to the "elective franchise."[96] On June 7th and 8th, the Senate discussed clarifying the scope of Section 2 by changing "elective franchise" to "any election held under the Constitution and laws of the United States, or of any State."[97] After debate, it was evident that this was overly broad and unclear;[98] and on June 8th, Senator George H. Williams of Oregon offered an amendment that named the specific offices subject to the Section 2 penalty.[99] The first of these is "the right to vote at any election for the choice of electors for President and Vice President."[100] Senator Williams said the change "specif[ied] particularly the officers for which these people must be allowed to vote in order to be counted."[101]

In the course of sixteen days, the proposed scope of Section 2 changed from "elective franchise"—which was generally considered to be under the control of states—to elections provided for in state and federal constitutions—which also suggested state law control—to elections named in the United States Constitution itself, without reference to rights previously established in federal or state constitutions.[102] From his careful review of the historical record, Van Alstyne concluded that Section 2 is not the exclusive method for protecting voting rights under the Fourteenth Amendment, and that "the right to vote protected by § 2 included the right to vote for all . . . specified groups of offices."[103]

Van Alstyne's answer to Justice Harlan essentially ended the debate about whether Section 2 precludes the use of Section 1 to protect voting rights.[104] Van Alstyne's focus was on reapportionment, not on the relationship between Section 2 and presidential elections, which he did not mention. Questions about the latter relationship arose thirty-five years later in

93. *Id.* at 2766 ("The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.").

94. Van Alstyne, *supra* note 10, at 68.

95. *Id.* at 67.

96. *Id.* at 82–84.

97. *Id.* at 83–85.

98. CONG. GLOBE, *supra* note 74, at 3011 (Sen. Henderson remarking that Section 2 could be evaded if a state elected through its legislature, as South Carolina had done).

99. *National Imperative*, *supra* note 19, at 451 n.37.

100. *Id.*

101. CONG. GLOBE, *supra* note 74, at 3029.

102. *See* Van Alstyne, *supra* note 10, at 71, 84.

103. *Id.* at 82–84.

104. *Cf.* UNWRITTEN CONSTITUTION, *supra* note 11, at 187–89 (considering interplay between Sections 1 and 2 and concluding that courts have Section 5 power to enforce voting rights).

Bush, when the Supreme Court announced, to the astonishment of the nation, that there is no right to vote in presidential elections.

C. Bush v. Gore *and Its Immediate Aftermath (2000–2001)*

The scholarly revulsion to *Bush* was widespread, though not universal. For present purposes, two articles published in the *Florida State Law Review*'s 2001 colloquium about the Bush–Gore election are particularly important. Professor Shane was the first scholar to examine whether the plenary power notion is incompatible with Section 2 and whether legislative intervention to deprive the people of the right to choose electors is subject to judicial challenge.[105] Pamela S. Karlan, on the other hand, questioned whether Section 2 creates a right to vote for presidential electors.[106]

Shane identified three reasons the Fourteenth Amendment either creates in itself (or supports, in conjunction with other sources) the right of the people to choose presidential electors.[107] First, the legislative history of Section 2 demonstrates that it was intended to create (or affirm the existence of) this right.[108] On June 7, 1866, Senator Henderson pointed out that, "unless you alter the Constitution on the subject," states could evade Section 2 (as proposed on June 7th) by having their legislatures choose presidential electors.[109] The very next day, Senator Williams, after conferring with the appropriate "committee"[110] and other friends of the Fourteenth Amendment, proposed to change the language to specify that Section 2 applies to elections of presidential electors (and other listed offices).[111] As noted, Williams said the people "must be allowed to vote" for each of the listed offices.[112] Shane reasoned that the plain language of Section 2, the explanation given at the time it was incorporated into the Fourteenth Amendment, and the imperative of preventing the easy evasion of "making black suffrage the price of reempowering the Southern states," mean that "one need not look further than Section 2 for a constitutional guarantee that individual citizens of the several states shall be entitled to participate in the selection of presidential electors."[113]

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105. Shane, *supra* note 15, at 539 ("Even more fundamentally, [the *Bush v. Gore* dictum denying the right to vote for president] is wrong because the Fourteenth Amendment, persuasively read, does guarantee individual citizens the right to vote for presidential electors.").

106. Karlan, *supra* note 17, at 588, 591.

107. Shane, *supra* note 15, at 539–40, 543–47.

108. *Id.*

109. *See* CONG. GLOBE, *supra* note 74, at 3011 (showing that Sen. Henderson referred specifically to South Carolina). Prof. Shane's quotation elides this reference.

110. This might have been the full Committee on Reconstruction; it might have been the caucus of its Republican members.

111. CONG. GLOBE, *supra* note 74, at 3029.

112. *Id.*

113. Shane, *supra* note 15, at 543 (purpose), 545 ("[O]ne need not look further than Section 2 . . . ."). For a recent examination of the political purposes of the Fourteenth Amendment, see MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 1–3 (2023).

Shane's second point was "[t]he near-complete consistency of post-Fourteenth Amendment state practice with this reading."[114] This point takes on added force from recent United States Supreme Court cases that look to "our whole experience as a Nation" in resolving constitutional questions, particularly with regard to the Electors and Elections clauses.[115]

Shane's third point was that the right to vote in presidential elections may be a "privilege" of national citizenship under Section 1.[116] He pointed out:

> During floor discussion immediately prior to the House adoption of the Fourteenth Amendment, Representative Bingham stated, without contradiction: "The franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States *as is the elective franchise for choosing Representatives in Congress or presidential electors. They are both provided for and guaranteed in your Constitution.*[117]

Earlier in the day, Representative Rogers of New Jersey—also a member of the Reconstruction Committee, but a Democrat who opposed radical reconstruction—appeared to agree that both federal office-holding and voting are privileges:

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege . . . . The right to be a judge or President of the United States is a privilege.[118]

One cannot dismiss this comment as mere Democratic Party oppositional rhetoric. It is common sense. Consider the privileges and immunities of a citizen of State A. These include, not only the enjoyment of *non-political* privileges or immunities of State B when citizen A is subject to the jurisdiction of State B (which are secured in Article IV of the Constitution),[119] but also the *political* privileges and immunities of State A itself. Section 1's protection of the privileges or immunities of *citizens of the United States itself* is broader than Article IV. Of fundamental import, it includes the federal Bill of Rights, selectively incorporated.[120] If Article II, properly interpreted, provides for "the people" collectively to have the right to vote for presidential electors, that collective right should also be enforceable

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114. Shane, *supra* note 15, at 545.

115. Chiafalo v. Washington, 591 U.S. 578, 592–93 (2020) ("[W]hole experience as a Nation . . . ."); NLRB v. Noel Canning, 573 U.S. 513, 515 (2014); Moore v. Harper, 600 U.S. 1, 32 (2023) (stating history is "particularly pertinent" in Electors and Elections Clause cases).

116. Shane, *supra* note 15, at 546–47.

117. *Id.* at 547 (emphasis added).

118. CONG. GLOBE, *supra* note 74, at 2538.

119. *Compare* U.S. CONST., art. IV, § 2, cl. 1 ("*The Citizens of each State* shall be entitled to all Privileges and Immunities of Citizens in the several States."), *with* U.S. CONST. amend. XIV, § 1 ("No state shall . . . abridge the privileges or immunities of *citizens of the United States*; . . . .") (emphasis added).

120. AMAR, *supra* note 79, at 250.

through Section 1. Putting sections 1 and 2 together, a right previously regulated by the states alone was now also regulated by Section 2—it applied, almost universally, to adult males of all races.

Furthermore, on our issue of presidential elections, the Democratic Party had a long and proud history of maintaining that voting in presidential elections is a right conferred by the Constitution itself. This intellectual tradition reached back to the Constitutional Convention, the ratification, and (post-ratification) to James Madison, Rufus King (not a Democrat, but a principled ally), Thomas Hart Benton, and Andrew Jackson—and it survived in 1866 through President Andrew Johnson.[121]

The Section 1 argument confronts the historical point that the advocates of the Fourteenth Amendment said repeatedly, during drafting and ratification, that Section 1 applies to *civil* rights and privileges, not to *political* rights.[122] Yet, there is a categorical difference between the right to vote in an election, and the right to have an election in which to vote. Political elites believed in 1866 that the nation was not yet ready to compel states to give Black men the right to vote outright, so the reformers made clear the amendment did not specifically enfranchise them.[123] Rather, reformers did the next best thing—they created a standard of universal suffrage, applicable to all regardless of race, and they imposed a draconian penalty in the hope that states would "voluntarily" embrace Black suffrage.[124] The "political" issue of the day to which reformers responded was whether a discrete group within the body of "the people" could be excluded from participation in elective processes of all types, and the political solution was to benefit that discrete group indirectly by effectively extending suffrage to all.[125] In contrast, the structural issue concerns a particular election, the people as a whole, and the fundamental nature of our government: to wit, in a representative democracy do "the people" collectively have the right to a popular election? Aside from the comments late in the day on June 7 and June 8 in the Senate, in the debates in Congress, and during ratification, no one addressed the question of whether the people must be allowed to vote in presidential elections. This is perhaps not surprising, since by 1866–1868, popular election of electors was universal.[126]

Professor Karlan briefly offered three critiques of Shane's Section 2 analysis.[127] The first and only substantial point was this: Section 2 applies to several categories of offices, two of which are state judges and

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121. *Infra* Part II; *Gaping Gaps*, *supra* note 19, at 262–88.

122. AMAR, *supra* note 79, at 216–17. *But see supra* Section I.B (discussing Van Alstyne's argument that the point is overstated).

123. *See* Van Alstyne, *supra* note 10, at 71–73.

124. *See id.*

125. *See id.*

126. AMAR, *supra* note 79, at 197–206 (making the case that silence during ratification as to whether Section 1 incorporates the federal Bill of Rights is no argument against incorporation).

127. Karlan, *supra* note 17, at 589–93. The critiques did not address the Section 1 issue, discussed in the text.

governors.[128] Yet many states appoint, rather than elect, state judges, and a few allow their legislatures to choose the governor if no candidate receives a majority of the popular vote.[129] Karlan argued that Section 2 may apply only to elections separately provided for under state or federal law, reasoning that "it would be absurd to conclude that Section 2 was intended to strip states with appointed judiciaries or legislatively selected governors of all their representation in Congress and all but two of their electoral votes."[130] However, as Shane persuasively argues, it does not follow that all listed offices must be treated the same; in particular, there may be a fundamental difference between state-created offices and federal offices.[131] This is particularly so if the right to vote for the President predates the Fourteenth Amendment. Shane's argument—that his interpretation is required to prevent circumvention of the intent of Section 2, which was directed at the political alignment of the nation (and clearly not at judicial offices)—is similarly compelling.[132]

D. Threats to Representative Democracy and the Peaceful Transfer of Power (2020–Present)

The 2020 election witnessed unprecedented threats to representative democracy, including calls to ignore the results of popular elections and refer the appointment of electors to state legislatures.[133] A question has arisen whether anything can be done to prevent legislative usurpation of the rights of the people to elect—if, for example, a state government acts preemptively and cancels a pending election.[134] Four recent law review articles reviewed here build on and extend Shane's thinking about Section 2; all conclude that Shane was right and that the Fourteenth Amendment, properly understood, may furnish an effective remedy.[135]

The first article, written by Mark Bohnhorst, Reed Hundt, Kate E. Morrow and Aviam Soifer in 2022,[136] tracks and concurs with Shane's

128. *Id.* at 590.

129. *Judicial Election Methods by State*, BALLOTOPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state (last visited Apr. 10, 2025); *Governor (State Executive Office)*, BALLOTOPEDIA, https://ballotpedia.org/Governor_(state_executive_office) (last visited Apr. 10, 2025).

130. Karlan, *supra* note 17, at 589–93; *see also id.* at 590–91 (stating the danger of state evasion of the purpose of Section 2 "is relatively remote"). Yet, that danger manifested in Florida and Alabama immediately after the Fourteenth Amendment was ratified. Michael W. Fitzgerald & Mark Bohnhorst, *Reconstruction, Racial Terror, and the Electoral College*, 14 J. CIVIL WAR ERA 31, 32 (2024); *see also* Karlan, *supra* note 17, at 591–92 (stating "there is little reason to think that creating an affirmative right to vote . . . adds anything very significant to the operation of Section 2"). Yet, the availability of injunctive relief to prevent wholesale violations of Section 2 during the ten-year periods between reapportionments would be significant.

131. Shane, *supra* note 15, at 543.

132. *Id.* at 543–44; GRABER, *supra* note 113, at 54.

133. *Gaping Gaps*, *supra* note 19, at 258 (stating the idea helped animate the attack on the Capitol on January 6, 2021).

134. LAWRENCE LESSIG & MATTHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION 119 (Yale Univ. Press 2024).

135. *Id.* at 157 n.4 (stating that *Gaping Gaps* may make the best argument that legal recourse exists to block legislative usurpation).

136. *National Imperative*, *supra* note 19.

reading of the legislative history of Section 2 and his conclusion that Section 2 itself creates a judicially enforceable right to vote for presidential electors.[137] The authors add the point that South Carolina was cited at the critical juncture when the "right to vote" in presidential elections was added to Section 2, and they add context concerning South Carolina and other southern states.[138] Indeed, in September 1865, well before the Fourteenth Amendment was proposed, South Carolina's provisional governor—hand-picked by President Johnson—repudiated legislative choice of electors as a "gross error" and "usurpation" of the rights of the people, and South Carolina's all-white constitutional convention resolved that the people elect the electors.[139] At that point, a national consensus existed.[140] Perhaps Congress was not aware of recent developments in South Carolina, when it took care to prevent circumvention of Section 2. Even if it was aware, Congress may have assessed that, unless it changed the Constitution, nothing would prevent the national consensus from unraveling.

The authors also discuss events from 1868 concerning both ratification and the immediate post-ratification understanding. First, completing the story of South Carolina's two constitutional conventions, in early 1868, while ratification was pending, a majority-Black constitutional convention discussed the effect of Section 2 and adopted a constitutional provision requiring popular election of electors.[141] This is certainly consistent with an understanding that Section 2 applies to presidential elections.

Later in 1868, Florida and Alabama attempted to cancel the popular election of electors in the face of a Ku Klux Klan campaign of terror.[142] Both the Democratic and Republican press assailed this scheme (enacted in Florida, vetoed in Alabama).[143] Republican papers criticized the steps as unprincipled and unwise.[144] The Democratic press condemned them in harshest terms as unconstitutional,[145] often explaining that Section 2 applied.[146] Following this widespread condemnation, states did not try to cancel popular elections again[147]—despite the continuing and worsening campaign of racial political violence.

Relevant to the Section 1 question of whether the original Constitution provides for popular election of electors, the authors note the harsh criticism of state legislatures at the Founding.[148] They also mention

137. *Id.* at 455–56.
138. *Id.* at 453–54.
139. *Id.* at 453 n.44.
140. *See id.* at 453–54.
141. *Id.*
142. *Id.* at 454.
143. *Id.*
144. *Id.* at 454 n.49.
145. *Id.* at 454.
146. *Id.*
147. *See Gaping Gaps*, *supra* note 19, at 299.
148. *National Imperative*, *supra* note 19, at 456 n.60.

debates in 1800 and 1824–1826 that condemned legislative election as unconstitutional.[149]

The second recent article, by Bohnhorst, Fitzgerald, and Soifer,[150] is a frontal attack on the historical review that underlies *McPherson*'s "plenary power" dictum. The authors set out to show that *McPherson v. Blacker*'s "plenary power" dictum, as applied to the question of legislative election, is based on a fundamentally flawed historical narrative.[151]

Picking up where the first article leaves off, the authors identify important history that *McPherson* left out or got wrong. They argue that *McPherson* completely misconstrued the Constitutional Convention and point out the court did not even mention Madison's notes.[152] Likewise, *McPherson* did not even mention ratification, during which proponents of the Constitution repeatedly said that the people are to elect, while opponents either explicitly agreed or raised no objections on that score.[153]

The authors detail significant objections to legislative election that surfaced in Massachusetts and New York in the first presidential election.[154] Turning to the first genuinely contested election in 1800, the authors cite leading scholars who have written that the constitutionality of legislative election was a prominent issue—with the meaning of "State" a central point of dispute.[155] Yet, *McPherson* asserted, falsely, that no question about the constitutionality of legislative election had been raised.[156]

The authors recount significant debates in Congress from 1824–1826[157]—which *McPherson* ignored. Early in 1824, Senator Thomas Hart Benton of Missouri denounced legislative election as a usurpation of the rights of the people and suggested that Congress might consider not counting electoral votes from usurping states.[158] Benton made common cause with Andrew Jackson, and each pursued the cause of presidential electoral reform to the end of his time in politics—in Benton's case, to the early 1850s, overlapping with Andrew Johnson, who carried the cause forward to 1868.[159] Benton's address referenced issues that were hotly debated in New York in 1823 and 1824.[160] The article also discusses a unanimous 1826 report from a special, nine-member Senate Committee (hand-picked by Vice President Calhoun, with Benton Chair and Van Buren a member)

149. *Id.* at 456 n.60, 459–60 n.71.
150. *Gaping Gaps*, *supra* note 19.
151. *Id.* at 258–59.
152. *Id.* at 262–70.
153. *Id.* at 270–71.
154. *Id.* at 272–75.
155. *Id.* at 275–76.
156. *Id.* at 278.
157. *Id.* at 279.
158. *Id.* at 279–80.
159. *Id.* at 285–86.
160. *Id.* at 280–81 (writing that the New York State election was a "political bloodbath" for anyone blocking the right to vote, and Benton's speech was "influential").

that characterized legislative election as the work of "mere usurper[s]."[161] It also discusses some of the arguments from one and a half months of debates in the House in 1826, where again the meaning of "state" was contested.[162] Again, this was all missing from *McPherson*'s rendition of history.

With respect to the Civil War era, and drawing from a more extensive manuscript-in-process authored by Fitzgerald and Bohnhorst, the authors revisit the nation's rejection (1) of the 1868 proposals in Alabama and Florida to reinstate legislative election, discussed above,[163] and (2) of a proposed "Sixteenth Amendment."[164] The amendment, which the Senate approved in February 1869 as a companion to the Fifteenth Amendment, would guarantee popular election of electors and empower Congress to override state rules and establish a uniform system.[165] Opining on whether the amendment undercut the argument that Section 2 confers an enforceable right to vote in presidential elections (if it creates a right, why was the amendment necessary?), Professor Shane previously noted that conferring power on Congress to establish a nation-wide system, such as election by the people in districts, could furnish an independent reason for the amendment.[166] Shane was right. The lead author of the 1869 resolution for an amendment, Democratic Senator Charles Buckalew of Pennsylvania, was the nation's foremost advocate of proportional representation; Buckalew was building his legacy.[167] Buckalew emphasized the importance of the power his proposed amendment would grant Congress, which might establish a district system, as had been advocated for decades.[168] The Senate debates do not discuss Section 2 specifically, and the reactions in the press do not mention it.[169] It is clear, however, that Senators were concerned that the events of August 1868 in Florida and Alabama might be repeated.[170] A constitutional amendment that removed any ambiguity over the rights of the people, and that held out the prospect of solving the winner-take-all problem that had been debated since 1800, would obviously be in the public interest. "Copperhead" Democrat Charles Buckalew thought no one would object; "Radical" Republican Senator Oliver P. Morton said the need for the amendment was so obvious it would be "submitted and adopted hereafter."[171]

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161. *Id.* at 281–82; S. JOURNAL, 19th Cong., 1st Sess. 45–46 (1825) (listing Benton and Van Buren as members).

162. *Gaping Gaps*, *supra* note 19, at 282–83.

163. *Id.* at 289–92 (based on manuscript-in-process).

164. *Id.* at 293–95 (based on manuscript-in-process).

165. *See* Fitzgerald & Bohnhorst, *supra* note 19, at 31, 42–43 (publishing former manuscript-in-process).

166. Shane, *supra* note 15, at 547–48 n.51.

167. Fitzgerald & Bohnhorst, *supra* note 19, at 42–43.

168. *Id.*

169. *Id.* at 42–48 (discussing Senate debates and reactions in the press).

170. *Id.* at 43, 45.

171. *Id.* at 43, 44, 48.

The remaining two articles, published in 2024, also conclude that Section 2 establishes the right of the people to vote for presidential electors. In an article published in May, David B. Froomkin and Eric Eisner argue that the powerful penalties established under Section 2 create a de facto constitutional guarantee of a popular election.[172] Their article examines several aspects of Pamela Karlan's contention that Section 2 might not apply if a state chooses electors by its legislature rather than by popular election.[173] The authors' simplest, and most conclusive, argument is that a choice by the legislature is actually a type of "election" under the Constitution.[174] Thus, a state cannot evade Section 2 (which applies to "any election for the choice of electors") by having its legislature conduct the election.[175]

Reviewing a range of evidence from the Civil War era to frame their understanding of Section 2, Froomkin and Eisner conclude that the evidence is mixed.[176] As one example, on the question of whether the original Constitution confers a right to popular election, they cite February 1865 Senate hearings, in which moderate Indiana Republican Henry Smith Lane (anticipating Baldwin's 1866 statement) said, "The right of the people of a State to vote for President is a constitutional right."[177] At the same time, the *power* of a state to elect through its legislature was unquestioned, as reflected in an 1864 opinion of the New Hampshire Supreme Court.[178] Among other post-ratification material, Froomkin and Eisner discuss reactions in the press to Florida's 1868 decision to have its legislature choose the state's electors. They report a diversity of views on the constitutionality of legislative election and the meaning of Section 2.[179] Given the indeterminacy of the contemporaneous historical record, the authors conclude that Section 2 should be read as it is written and that, by its clear terms, it applies to any election of electors, whether by the people or the legislature.[180]

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172. *Second Coming*, *supra* note 1, at 132–34.

173. *Id.* at 156–72.

174. *Id.* at 158.

175. *Id.* at 158–160, 159 n.164, 169 ("The evidence that 'election' in Section 2 encompasses both popular and legislative elections is overwhelming.").

176. *Id.* at 172–83.

177. *Id.* at 176; CONG. GLOBE, 38th Cong., 2d Sess. 561 (1865) (debating the counting of purported electoral votes from Louisiana).

178. *Second Coming*, *supra* note 1, at 173 n.237 (citing *In re* Opinion of the Justices, 45 N.H. 595, 599–600 (N.H. 1864)) (stating the appointment of electors is the action of the State in its sovereign capacity and stating, "No appeal to the people by popular election in any form is required by the Constitution; excepting only time, the whole question as to the manner in which the State shall appoint the electors is left wholly to the discretion of the State legislature"). The court did not consider the point that "the people" are the state sovereign.

179. *Id.* at 179–81.

180. *Id.* at 148, 182–83 (arguing that Section 2 is "self-executing" and that the Supreme Court's recent decision that Section 3 is not self-executing is inapposite); *see also* Trump v. Anderson, 601 U.S. 100, 121–22 (2024) (Sotomayor, J., concurring) (holding Section 3 is not self-executing and that there is no implementing legislation). The authors are right that Sections 2 and 3 are fundamentally different; one applies to state actors and one to private individuals. *Second Coming*, *supra* note 1, at

In the fourth article, published in October, Professor Charlie Martel offers more proofs[181] that Section 2 creates a right to vote in presidential elections. At one level, Martel's argument, much like Froomkin and Eisner's, is straightforward originalism/textualism, flavored with a dose of legislative history.[182] Martel relates the recent thinking of several scholars—William Baude, Michael Stokes Paulsen, Franita Tolson, Akhil Reed Amar, Luis Fuentes-Rohwer, and Guy-Uriel Charles.[183] He recounts the legislative history of Section 2, focusing on the last two days of debate, when the words "right to vote [*for specific offices*]" replaced the term "elective franchise" and the somewhat more concrete "right to vote [*as established in existing state and national constitutions*]."[184] "The "right to vote" as adopted is not tethered to any existing constitutions. It is defined by the office for which the right to vote exists, and by the plain language of Section 2, the Fourteenth Amendment creates a right to vote in presidential elections.[185]

Martel buttresses the case with the lessons of history; specifically, of four subsequent constitutional amendments that extended or protected the "right to vote" and two centuries of practice.[186] Martel also notes that in *Chiafalo v. Washington*,[187] the Court seems to have distanced itself from *Bush*, which it did not cite and whose reasoning it did not adopt.[188]

Recent scholarship on a related topic—Section 3—bolsters the Section 2 legislative history case. In an article published in May 2024,[189] prominent Fourteenth Amendment scholar Kurt Lash offers historical perspectives on various aspects of the controversy over Section 3 of the Fourteenth Amendment. Lash demonstrates that Section 3 was changed late in the legislative process to prevent states from easily evading it in presidential elections.[190] An earlier version, which would have disqualified disloyal

148. Furthermore, Congress has legislated with respect to Section 2. *See, e.g.*, 42 U.S.C. § 1983 (establishing causes of action against persons acting under color of state law); 2 U.S.C. § 6 (requiring reduction of representation for violation of right to vote); 3 U.S.C. § 5(d) (creating federal court venue and expedited procedures for litigation of disputes relating to electors); 2 U.S.C § 2(a) (clarifying "no State [is] to receive less than one Member [in the House]").

181. *Power for the People*, *supra* note 19, at 1811.

182. *See generally id.* at 1801–15 (including Section II.A.1 of the article, which shows "The Fourteenth Amendment Added a Right to Vote to the Constitution—Including the Right to Vote for President").

183. *Id. passim*.

184. *Id.* at 1808–09.

185. *Id.* at 1813–14.

186. *See generally id.* at 1815–23 (discussing four constitutional amendments). To be added to those is the Twenty-Third Amendment, discussed at the beginning of this article, and the nation's re-ratification of the very terms of the Electors Clause with the public understanding that those terms create an individual right to vote for presidential electors. *See supra* Section I.A.

187. 591 U.S. 578, 597 (2020) (holding states may require electors to vote for the presidential ticket to which they are pledged).

188. *Power for the People*, *supra* note 19, at 1846.

189. Lash, *supra* note 19.

190. *Id.* at 353–54.

voters rather than *officeholders*, was severely criticized.[191] Representative John Longyear said a provision that disqualified *voters* "would also be so easily evaded by appointing electors of President and Vice President through their Legislatures, as South Carolina has always done."[192] Representative Bingham said it was "useless."[193] Senator Howard made much the same point.[194] In the Senate, on May 29, 1866, the former Section 3 was stricken and replaced with the version later adopted, which applies to the right to hold offices, rather than the right to vote, and this solved the problem.[195] The Senate proposed to change Section 3 to prevent easy evasion in presidential elections some ten days before it did the same thing for Section 2.[196]

Martel's article is every bit as much a frontal assault on the Supreme Court's pernicious dicta in *McPherson* as is the Bohnhorst, Fitzgerald, and Soifer article.[197] Where the latter article exposes deep flaws in *McPherson's* historical review, the former places *McPherson* squarely in the mainstream of the Court's shameful racist and misogynist jurisprudence of the latter decades of the nineteenth century.[198] Even if the *McPherson* language were something more than dicta, it offers no reasoning, and no underlying value judgment, that a twenty-first century scholar or jurist is bound to respect. *McPherson*'s double assertion, not only that "power" had been conceded but also that there is no "right" to vote in presidential elections, is untethered from the constitutional text and from the nation's history.[199]

As Martel observes, however, the shared modern interpretation reviewed here is not shared by all: "[I]t is fair to say that this thesis is contrary to established Supreme Court precedent and even the conclusions of some well-respected scholars squarely in the voting rights camp."[200] But this concedes too much. Dicta do not establish "precedent." The Supreme Court's statements in both *McPherson* and *Bush*, insofar as they relate to the power of state legislatures to choose electors, are purest dicta. That even Martel would refer to this as "established . . . precedent" suggests

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191. *Id.* at 341 n.125 (noting criticism in Congress as well as in the press, namely that proponents exhibited the "grossest ignorance of constitutional law" for not realizing that states could avoid the disqualification by not holding a popular election for presidential electors).

192. CONG. GLOBE, *supra* note 74, at 2537.

193. *Id.* at 2543.

194. *Id.* at 2764–66.

195. Lash, *supra* note 19, at 352–54.

196. *Id.* at 354–56 (May 29); Shane, *supra* notes 15, at 539–42 (June 7–8).

197. *Power for the People*, *supra* note 19, at 1847 (observing that "a hyper-technical read of Article II that disenfranchises citizens is constitutionally ridiculous").

198. *Id.* at 1830–32.

199. McPherson v. Blacker, 146 U.S. 1, 10, 12 (1892) ("There is no color for the contention that under the amendments every male inhabitant of the state, being a citizen of the United States, has from the time of his majority a right to vote for presidential electors."). This value judgment entered the public domain just as southern states were re-writing their constitutions to effectively disenfranchise their Black citizens—an abomination that would last for 70 years.

200. *Power for the People*, *supra* note 19, at 1800 (citing opposing viewpoints of several scholars).

how insidiously pervasive the dicta have become. One might take Martel to mean the dicta have been broadly treated *as if* they are "established precedent," when they are not; and that, unfortunately, is the case.[201]

In sum, strong arguments underlie a modern interpretation that the Fourteenth Amendment—on its face and when read against 157 years of post-ratification history—creates a right to vote for presidential electors. Looking to the "entire" history of the nation—back to the Founding, as *Chiafalo* and other recent decisions suggest—strengthens the case, particularly as to Section 1. A deeper examination of important aspects of that history is in order.

Part II of this Article revisits that early history, using the "constitutional liquidation" framework proposed in 2019 by originalist scholar William Baude as a guide. The text and how the text was understood during ratification are foundational to this framework, and Part II pursues these questions with renewed vigor. Where text is indeterminate, the liquidation framework holds that substantive debates about the meaning of the language and whether or how those debates were resolved are decisive. "Mere action," taken without engagement with substantive issues, does not count. Part II delves into the substantive and consequential debates of 1800 (in New York and Virginia) and of 1823–1824 (in New York). It also highlights the role of founder and framer Rufus King from 1816 to 1824, both in the Senate and in New York. It offers new evidence and insights about the role that the debate over the constitutionality of legislative election played in transforming the constitutional order into one in which "the people," almost everywhere, chose their President.

II. RECENT RESEARCH: THE FOUNDING THROUGH 1826[202]

A. Constitutional Liquidation Framework

In a 2019 *Stanford Law Review* article, originalist scholar William Baude laid the intellectual and historical foundations for what he terms Madisonian constitutional liquidation.[203] Baude's description is not entirely unique, and some scholars suggest liquidation may simply be one variation of "historical gloss."[204] The Supreme Court has applied similar

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201. *Id.* For a very recent illustration of the view that the Fourteenth Amendment does not establish a right to vote for presidential electors, see JOHN R. KOZA, BARRY FADEM, MARK GRUESKIN, MICHAEL S. MANDELL, ROBERT RICHIE, & JOSEPH F. ZIMMERMAN, EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 663–65 (5th ed. 2024) [hereinafter EVERY VOTE EQUAL] (making arguments based on Section 2's reference to state judicial elections and on select elements of the "historical context").

202. Part II is an abridged version of a work-in-process paper posted on SSRN: Mark Bohnhorst, Revisiting the Electors Clause: On the Original Right of the People to Choose Presidential Electors (Mar. 26, 2025) (unpublished manuscript) [hereinafter *Revisiting the Electors Clause*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5195052.

203. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 67 (2019).

204. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 39–41 (2020) (noting originalist scholars—a "small number"—who have written about Madisonian liquidation and discussing "historical gloss").

concepts, though perhaps not as formal doctrine.[205] Others have explored how Baude's framework applies to issues under the Electors and Elections clauses.[206] Finding the framework an exceptionally good fit for our topic, this Article also uses Baude's framework as a guide.

Baude identified three core components of Madison's thinking about how history and practical application relate to constitutional interpretation. There must be (1) an indeterminate text; (2) a settled application arrived through prolonged, conscious consideration of the constitutional question; and (3) acquiescence by constituted authorities and, ideally, by the public.[207] If all these conditions are met, then the interpretation or practice becomes "liquidate[d]"—as in clarified or settled—and is considered to be part of the Constitution itself.[208]

The first question is whether the meaning of the text is indeterminate. For Madison, the state ratifying conventions were central to the meaning of the constitutional text. During ratification, the people consented to the Constitution as they understood it—not to the bare words proposed to the state conventions by the Constitutional Convention.[209]

Under Baude's framework, when the text is indeterminate, a practice must clear a high bar to be considered a settled application. A practice is "settled" only after "'uniform sanction of successive legislative bodies, through a period of years and under the varied ascendancy of parties." A practice had to happen repeatedly and constantly—to be neither a "one-off" nor a constantly contested question."[210] Moreover, it is not enough that a practice be a matter "of sheer political will."[211] It has to be deliberate and the "subject of solemn discussion."[212] Practices deserve "little respect" when they are "without full examination and deliberation."[213] Acquiescence occurs when, in effect, "the losers . . . g[i]ve up." The element of public sanction embodies the principles of popular sovereignty that animated the Constitution in the first place.[214]

It is unresolved whether the theory applies only to questions of governmental powers or whether it also applies to questions of rights. As

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205. NLRB v. Noel Canning, 573 U.S. 513, 525 (2014). For Justice Breyer's discussion of how *Noel Canning* illustrates a pragmatic approach to constitutional interpretation, see STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM 197–208 (2024). Justice Breyer's reference to "Madison's view" does not necessarily mean incorporation of Baude's formulation of that approach.

206. Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J. L. & PUB. POL'Y 135, 158–163 (2023) (describing *Chiafalo* as an application of constitutional liquidation); Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. & POL'Y REV. 53, 59 (2020).

207. Baude, *supra* note 203, at 13–20.

208. *Id.* at 12–13.

209. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 340–41 (1997).

210. Baude, *supra* note 203, at 16–17.

211. *Id.* at 17.

212. *Id.*

213. *Id.* at 18.

214. *Id.* at 18–19.

Baude noted, in *McCulloch v. Maryland*,[215] Chief Justice Marshall suggested resort to historical practice might not control in cases of bold usurpations of liberty.[216] Baude also argued that although the considered views of the founders are always entitled to some weight, originally settled practices are not categorically privileged and permanent.[217]

Michael Weingartner recently discussed the application of the liquidation framework to the Elections and Electors Clauses,[218] specifically whether the understanding that state legislatures are subject to state constitutions when they establish federal elections rules had become a "settled" or "liquidated" feature of American elections.[219] More broadly, Weingartner pointed to the then-recently decided Article II faithless electors litigation, in which the Supreme Court appeared to employ Madisonian liquidation theory.[220] Writing before the Court's decision in *Chiafalo*, Rebecca Green anticipated the Court might apply Madison's theory.[221] Only a few years earlier, the Court stated that it had "continually confirmed" Madison's approach.[222] In *Moore v. Harper*,[223] decided the year following Weingartner's article, the Court declared that historical practice is "particularly pertinent" in Elections and Electors cases.[224]

As the remainder of Section II demonstrates, the fit between the nation's historical grappling with the meaning of the Electors Clause and William Baude's theory of constitutional liquidation could not be tighter. On close examination, the text is ambiguous. During ratification, however, participants and commentators from both sides said over and again, without direct contradiction, that the people are to elect the electors. Yet, the precise question of whether state legislatures could elect was not addressed.

Treating the meaning of the Electors Clause as unresolved, one turns to substantive debates—mere action does not prove the meaning of contested terms. The debates in New York in 1800 and 1823–1824 appear to

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215. 17 U.S. 316 (1819).

216. Baude, *supra* note 203, at 24–25. Marshall was an active participant in the Virginia ratifying convention, where all speakers agreed the Electors Clause provides for popular election. In 1816 his Federalist colleague Rufus King said in Congress that legislative election was a pernicious violation of the rights of the people. Marshall's statement in *McCulloch* is consistent with the view that even if the exercise of a *power* is longstanding and wide-spread, when *liberty* is at issue the mere exercise of power does not extinguish the rights of the people or fix (i.e., "liquidate") the meaning of the Constitution.

217. *Id.* at 61–62 (acknowledging that care must be taken with regard to post-ratification statements of founders).

218. Weingartner, *supra* note 206, at 138.

219. *Id.* at 138–39.

220. *Id.* at 153.

221. *Id.* at 158–159; Chiafalo v. Washington, 591 U.S. 578, 592–93 (2020); Green, *supra* note 206, at 54.

222. NLRB v. Noel Canning, 573 U.S. 513, 525 (2014). For Justice Breyer's discussion of how *Noel Canning* illustrates a pragmatic approach to constitutional interpretation, see BREYER, *supra* note 205, at 197–208. Justice Breyer's reference to "Madison's view" does not necessarily mean incorporation of Baude's views about the details of that approach.

223. 600 U.S. 1 (2023).

224. *Id.* at 32.

satisfy Baude's criteria. The debates were truly substantive; as late as 1824, they were informed by one of the drafters and ratifiers of the Electors Clause. The verdict of "the people" was unambiguous; it was political suicide to infringe their sovereign rights. By 1826, one of the most prominent "losers" in the debates in New York, Martin Van Buren, had "given up," joining a unanimous Senate Report that declared legislative election a "mere usurpation."[225] There was a consensus spanning the nation's most fundamental divide, in which both defenders of slavery and the most prominent opponents of the extension of slavery joined. Except for severely malapportioned South Carolina, which might be considered a "one off," the practical application of the Constitution became aligned with the rights of the people.

B. Constitutional Text

Modern discussions of the Electors Clause typically accept *McPherson*'s "plenary power" dictum at face value and do not spend much time with the text. But the text is important, as evidenced by the debates of 1800, 1823, and 1824. Those debates centered on three interrelated terms: "State," "Legislature," and "the People." The first two are in the Electors Clause; "the People" is in the Preamble, Article I, and the Ninth and Tenth Amendments.

The Electors Clause provides that "[e]ach *State* shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress . . . ."[226]

In Founding Era dictionaries, "state" has multiple meanings, including "the public[],"the "body of a nation," and the "civil power."[227] In 1800, James Madison explained that "state" has many meanings, one of which is "the people" in their capacity as sovereigns. "The people," he wrote, in their "highest sovereign capacity," ordained and established the Constitution.[228] Following the Civil War, the Supreme Court recognized that "state" has multiple common meanings. The Court concluded: "[I]n all these senses the primary conception is that of a people or community. The people . . . constitute the state."[229] Citing this Reconstruction Era precedent, *McPherson* itself says "state" has many meanings, including a political community and the people.[230]

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225. *Gaping Gaps*, *supra* note 19, at 296.

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

227. *See* NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 291 (1806) (listing "State" as "a condition, grandeur, pomp, a kingdom or republic, civil power, body of a nation"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1776) (listing "State" as "5. Mode of government . . . . 6. The community; the publick; the commonwealth . . . . 8. Civil power . . . . 9. A republic; a government not monarchical").

228. *Gaping Gaps*, *supra* note 19, at 277.

229. Texas v. White, 74 U.S. 700, 720 (1869), *overruled by*, Morgan v. United States, 113 U.S. 476 (1885).

230. *Gaping Gaps*, *supra* note 19, at 305.

"Legislature," on the other hand, commonly meant the "government" of the state—not the sovereign, which was understood to be the people.[231] Justice Story wrote: "A State, and the legislature of a State, are quite different political beings."[232]

As noted, "the people" is one definition of "state." Four relevant constitutional provisions use the term. It is "We the People" who ordained and established the Constitution.[233] "[T]he People" of the several states choose the members of the House of Representatives.[234] The Ninth and Tenth Amendments embody solicitude for the rights and powers of "the people."[235]

The sovereignty of the people is at the core of the constitutional design. One leading historian of the early Republic stated that the nation's understanding of politics and of itself was so profoundly transformed between 1776 and 1787 that even the meaning of words changed—including, specifically, the meaning of "the people."[236] The continental Enlightenment idea that sovereignty must always reside in one supreme government authority was overturned by the principle of popular sovereignty—viz., the people hold all sovereignty and can delegate portions of it to different levels of government, retaining all that is not delegated.[237]

The meaning and application of these terms frame all the later debates. In the first presidential election in Massachusetts, some believed that "state shall appoint" means the "people" shall appoint, because it is fundamental that the "people" elect in a democratic republic.[238] It was recalled that, during ratification, a constitutional amendment had been proposed that might clarify that ambiguities are to be resolved in favor of the reserved powers of "the people."[239] The Ninth and Tenth Amendments appear to do just that.[240]

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231. Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, 64 BOS. COLL. L. REV. 637, 655–57 (2023). In *Federalist No. 59*, Alexander Hamilton referred to state legislatures, in election of Senators, as representing "State governments" or "the States, in their political capacities." THE FEDERALIST NO. 59 (Alexander Hamilton). In Webster's terms, legislatures are the "civil power," not the "body of the nation."

232. JOSEPH STORY, *Book III, The House of Representatives*, *in* COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570, § 627 (1833).

233. *See* U.S. CONST pmbl.

234. *Id.* at art. I, § 2, cl. 1.

235. *Id.* at amend. IX, amend. X.

236. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 524, 606–07 (1969) (writing "old words had assumed new meanings" and "the people" no longer meant in the United States what it had meant in Europe).

237. *Id.* at 530–31 (stating that Wilson's understanding that sovereignty lies with the people, who can divide it as they wish, was the basis of all Federalist thinking). The Supreme Court recently invoked this principle of popular sovereignty—of "the trust of a Nation that here, We the People rule." Chiafalo v. Washington, 591 U.S. 578, 597 (2020).

238. *Gaping Gaps*, *supra* note 19, at 272–73.

239. *Id.*

240. U.S. CONST. amend IX, amend. X. Under the Ninth Amendment, it would seem the "enumeration" of the right of the people to elect members of the House of Representatives "shall not be

The arguments framed in 1800, 1823, 1824 and 1826 all begin with the premise that the people are sovereign and retain all power that has not been delegated. Some also raise interesting textual problems.[241] If "State" means the people or the sovereign, and "Legislature" means the government, then textual problems disappear.[242]

A fourth term, "thereof," supports the conclusion that "state" does not mean a state's legislature. Founding Era dictionaries explain that "thereof" refers to a thing that is subject to a controlling source or is a part of something larger.[243] The Constitution uniformly employs the phrase "Legislature thereof" in connection with federal elections and solely in that context.[244] On the topic of elections, the Constitution consistently treats state legislatures as only a part of, and subject to the control of, their respective states.

Two linked terms, "direct" and "manner," also indicate that legislatures are not authorized to select presidential electors. As for "direct," in the first North Carolina ratifying convention, future Supreme Court Justice James Iredell said it would be awkward for a legislature to say it had "direct[ed]" itself to elect the electors.[245] In 1824, Senator Thomas Hart Benton said "direct" never means to direct oneself and that no one skilled in the use of the English language would use the term in that sense.[246] As used in the Constitution and during the Constitutional Convention, the term "manner" had a limited scope. "Manner" was used in an early version of the Committee of Detail's August 6 draft of the Constitution.[247] It referred to establishing an election code for a popular election, not to deciding between legislative and popular elections.[248] This meaning of "manner" is preserved in the Constitution. To prescribe the "manner" of

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construed to deny or disparage" the "retained" right of the people to elect presidential electors. The Tenth Amendment reserves "to the States respectively, or to the people," powers not delegated to the United States nor prohibited to the states. What reserved "power" do "the people" possess under the national government, if not the power to elect?

241. *See, e.g.*, *Revisiting the Electors Clause*, *supra* note 202, app. at 52 (making the point that the Electors Clause refers to "representatives to which the State may be entitled in Congress," arguing the legislature is not "entitled" to representatives, "the People" are).

242. U.S. CONST. art II, § 2, cl. 1. (substituting terms, the clause reads: "Each [Sovereign] shall appoint, in such manner as the [Government] thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the [Sovereign] may be entitled in the Congress.").

243. *Gaping Gaps*, *supra* note 19, at 269 n.60, 313 nn.359–61.

244. *See* U.S. CONST. art. I, § 4, cl. 1.

245. *See Gaping Gaps*, *supra* note 19, at 284 ("His comment was a rare mention in the ratification debate record of the possibility that state legislatures, rather than the people, might elect—and it was made after eleven states ratified.").

246. 41 ANNALS OF CONG. 172 (1824) ("There is not a book in the English language which uses the word in this sense; not one, from the little primer, that comes to us in company with the birchen rod, up to the ponderous folio of Johnson. No man acquainted with the power of language would so use it . . . .").

247. *Two Versions of the Preamble to the Constitution, 1787*, GILDER LEHRMAN INST., https://www.gilderlehrman.org/history-resources/spotlight-primary-source/two-versions-preamble-constitution-1787 (last visited Apr. 8, 2025).

248. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153 (1911) [hereinafter FARRAND RECORDS II].

conducting elections under Article I, Section 4 means to create an elections code for a type of election, popular or legislative, specified elsewhere in the Constitution.[249]

Another set of three interrelated terms—"appoint," "ch[oo]se," and "elect[]"[250]—bears mention. In the debates of 1823 and 1824, an essay apparently authored by Henry Wheaton[251] concluded that the three terms can be used interchangeably.[252] "Elect[]" and "ch[oo]se" are synonyms, and they are used interchangeably in Article I.[253] "Appoint" is not a synonym of either. "Appoint" generally applies to offices, but it encompasses both "nam[ing]" and "commission[ing]" officers.[254] "Naming" implies the act or process of choosing whom to commission. Indeed, a cognate of choose, "chusing," is used in the fourth clause of Article II, Section 1[255]; and "appoint" and "chus[e]" appear to be used interchangeably in Article II.[256] Given that presidential electors are constitutional "officers," obligated to perform certain duties specified in the Constitution, it is reasonable to read "appoint" in the Electors Clause to encompass "choosing" or "electing"—electors, as well as commissioning them.

The Electors Clause uses terms that are also found in Article V of the Articles of Confederation:

> For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct.[257]

The language is passive ("delegates shall be . . . appointed," not "___ shall appoint delegates"). Unlike the Electors Clause, Article V does not specify who is to choose/appoint; rather, it seems to presuppose the existence of a process for choosing delegates, specifying that it must be annual.[258] Like the Electors Clause, Article V assigns the legislature a duty to "direct" the "manner" of appointment.[259]

At the time Article V was proposed, extant state constitutions already specified how the delegates would be chosen, which may explain Article V's failure to address the question.[260] Further, changing the locus of authority for determining how a state's representatives are chosen from the

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249. *See* U.S. CONST. art. I, § 4, cl. 1.
250. *Id.* at art. II, § 1, cl. 2 ("appoint"); *id.* at art. II, § 1, cl. 4 ("chusing"); *id.* at art. I, §§ 2–4 ("[C]huse," "choose," and "election" are used interchangeably).
251. Wheaton served as the third Reporter of the Decisions of the United States Supreme Court from 1816 to 1827.
252. *Revisiting the Electors Clause*, *supra* note 202, app. at 52–53.
253. U.S. CONST. art. I, §§ 2–4.
254. WEBSTER, *supra* note 227, at 15 ("Appoint . . . name and commission to an office").
255. U.S. CONST. art. II, § 1, cl. 4.
256. *Id.*
257. ARTICLES OF CONFEDERATION of 1777, art. V, § 1.
258. *Id.*
259. *Id.*
260. *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine,* 29 FLA. ST. U. L. REV. 731, 755 n.157 (2001) (collecting citations of constitutional provisions).

state's constitution to its legislature would intrude significantly on state sovereignty. In contrast, requiring a level of formality in commissioning a state's officers would not impinge on state sovereignty and would be consistent with normal practice.[261] It appears, then, that "manner" has the same meaning in Article V that it has in Article I, Section 4: it refers to how an election will be conducted and particularly how the results will be documented, not to who will elect. Because the formal "appointment" is memorialized by discrete officials, probably including the keeper of the state seal—not by the legislature as a corporate body—the term "direct" fits. A legislature is not "directing" itself under Article V of the Articles of Confederation; it is directing functionaries to do their jobs. This interpretation is fully consistent with the stated purpose of article V, which was to provide a convenience to the Constitutional Congress, not to impinge on state sovereignty.[262]

There is no direct evidence that the members of the committee that drafted the Electors Clause borrowed terms from Article V of the Articles of Confederation for the purpose of authorizing state legislatures to choose electors, and there is considerable evidence to the contrary. Notably, the author of Article V, committee member John Dickinson, explained in 1802 correspondence that he persuaded the committee to adopt a system of electors chosen by the people.[263] In the Virginia ratifying convention, committee member James Madison said the electors are to be elected by the people, and in 1823 and 1824 he wrote in private correspondence that the intent of the Electors Clause was popular election in districts.[264] From 1816 to 1824 committee member Rufus King advocated on the floor of the Senate, in committee, and in private correspondence that the Constitution contemplates and "demands" popular election of electors.[265] Indeed, committee member Pierce Butler from South Carolina—who on July 25, 1787, was the last person at the Convention to express a personal preference for legislative election of electors—wrote a correspondent in May 1788 that the Constitution provides for "more of a popular Government—the whole is Elective," and that the President "is responsible to [h]is [c]onstituents."[266]

As noted, in the debates to come, arguments over the interpretation of the terms of the Electors Clause played a prominent role. The meanings of "state," "direct," "manner," "appoint," "legislature," and "the people" were discussed repeatedly. The core textual arguments on behalf of "the people" were these: (i) "state" means "the people;" (ii) the "legislature" is

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261. *See generally* JOURNAL, ACTS AND PROCEEDINGS, OF THE CONVENTION 17–58 (Thomas B. Wait ed., 1819) (reproducing delegate credentials spanning forty-one pages, evidencing standard practice and importance at the founding of formal proof of appointment).

262. ARTICLES OF CONFEDERATION of 1777, *supra* note 257.

263. *Gaping Gaps*, *supra* note 19, at 268 n.50 (citing Dickinson's correspondence).

264. *Id.* at 279 n.114 (citing Madison's correspondence).

265. *Infra* Section II.F.

266. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301–02 (Max Farrand ed., 1911) [hereinafter FARRAND RECORDS III].

not the same thing as the "state;" (iii) if the framers meant to allow the legislatures to appoint, they would have stated said so expressly, as in art. I., sec. 3 (senators "chosen by the legislature thereof"); (iv) "manner" refers merely to how an election is conducted and not to what body (the people or the legislature) may elect; (v) "direct" proves the legislature may not "direct itself" to elect; and (vi) ambiguities are to be resolved in favor of "the people" (with reference either to the Ninth and Tenth Amendments or to the principles of popular sovereignty that those amendments embody). Textual arguments on behalf of "the legislature(s) thereof" were these: (i) "state" can mean "legislature;" (ii) the text does not prohibit legislatures from electing; (iii) the absence of language such as "*The people of* each State shall appoint . . ." shows the Constitution does not mandate popular election, in contrast to art. I, sec. 2, cl. 1 (requiring that "the people" elect members of the House of Representatives); and (iv) some of the language of the Electors Clause is drawn from Article V of the Articles of Confederation, under which state legislatures commonly chose delegates to the Continental Congress.

At the end of the day, the text alone is ambiguous.[267]

C. Constitutional Structure: Single-Purpose Bodies

Constitutional meaning also may be ascertained from constitutional structures, and when there are parallel structures, the treatment accorded to one is some evidence that a similar treatment is intended for the other. A "weak" version of this interpretive tool is based on inference alone—it is implicit that similar structures will be accorded similar treatment. A "strong" version is based on direct evidence of the intent of the drafters.[268] The Constitution provides both.

The Constitution employs the unique structural element of single purpose bodies to carry out two critically important functions. One single-purpose body—the ratifying conventions—brought the national government into being.[269] The second—the electoral college—brought the executive branch into being and renews it every four years.[270] There is no question that the framers intended and directed that members of ratifying conventions be elected by the people of each state, under such terms as the

267. *Gaping Gaps*, *supra* note 19, at 271.

268. Admittedly, looking for evidence of intent in the records of the Constitutional Convention may not be consistent with doctrinaire originalism, and such evidence was not available to the founders. But the evidence is available to us and considering "our whole history" as a nation seems to require that it be considered. Indeed, Abraham Lincoln considered Madison's notes to be definitive proof that the Dred Scott decision was based on a historical fabrication. *See* SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 253–54 (2018) (showing Abraham Lincoln's reliance, in the Cooper Union Address, on Madison's notes of the Constitutional Convention). We, too, should be able to consider Madison's notes to evaluate whether the "plenary power" dictum is simply wrong.

269. *See Gaping Gaps*, *supra* note 19, at 267.

270. *September 6, 1787: The Electoral College Completed*, NAT'L PARK SERV., https://home.nps.gov/articles/000/constitutionalconvention-september6.htm (last visited Apr. 9, 2025).

state legislatures directed. The fact that the Electors Clause also utilizes single purpose bodies suggests that these bodies, too, should be chosen by the people. Moreover, if "State" means "the People," the terms of the Electors Clause are an exact fit. In each case, "the people" elect the members of the special purpose bodies; in each, the legislatures provide the rules for the election, including voter qualifications.

The debates in the Constitutional Convention provide direct support for the inference. On successive days, July 23–24, the Convention rejected any direct role for state legislatures either in ratifying the Constitution or in choosing the president through electors.[271] On July 24th, the Convention also rejected Elbridge Gerry's suggestion that state legislatures themselves vote for president, with each state having as many votes as its members in Congress: "The *noes* were so predominant that the [votes] were not counted."[272]

On July 25th, proponents of legislative involvement tried one last time. Oliver Ellsworth proposed that after a presidential term of seven years (to which the president would have been elected by the national legislature) the president could be reelected by electors chosen by the state legislatures.[273] At this point James Madison said that his opposition to any involvement of state legislatures in choosing the president was grounded in one overriding consideration—the propensity of state legislatures to support "pernicious" measures.[274] Two days earlier, delegates voiced similarly critical assessments of state legislatures in the course of deciding that the Constitution would be ratified by conventions of delegates chosen by the people, not by state legislatures.[275] Following Madison's speech, the Convention again rejected the idea that state legislatures participate directly, or even at one remove, in choosing the President.[276] Madison's July 25 summary of the options that remained under consideration did not include any mention of state legislatures.[277]

On July 24th and July 25th, the Convention struggled with how to reconcile election by the national legislature—to which it reverted on July 24—with protection from cabal, corruption, and foreign influence. The discussion appears to have been inspired by an important historical precedent involving single-purpose bodies: the "famous Ballot of Venice."[278]

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271. *Gaping Gaps*, *supra* note 19, at 266–67.

272. FARRAND RECORDS II, *supra* note 248, at 101. The rejection was not recorded in the Journal. *Id.* at 97–99.

273. *Id.* at 108–09.

274. *Id.* at 110 ("The Legislatures of the States had betrayed a strong propensity to a variety of pernicious measures.").

275. *Id.* at 88–89.

276. *Id.* at 111.

277. *Id.* at 110–11.

278. The "famous Ballot of Venice" was featured in one of the "letters" that comprised John Adams' book. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES 58, 62 (1787) [hereinafter DEFENCE]. According to Gordon Wood, the book

As of 1787, for over 500 years Venice had used single purpose bodies of electors to choose its chief executive, the doge.[279] The discussion illustrates the dangers the delegates feared from using preexisting bodies and the possibility that a single purpose body might be the solution.

On July 24, more or less out of the blue, Pennsylvania delegate James Wilson suggested using an element of chance—a central feature of the Ballot of Venice—in selecting the president:

> Mr. Wilson. As the great difficulty seems to spring from the mode of election, he [would] suggest a mode which had not been mentioned. It was that the Executive be elected for 6 years by a small number, not more than 15 of the Natl Legislature, to be drawn from it, not by ballot, but by lot and who should retire immediately and make the election (without separating). By this mode intrigue would be avoided in the first instance, and the dependence would be diminished. This was not he said a digested idea and might be liable to strong objections.[280]

A scrap of paper in the files of the Journal of the Convention contained more detail. Assuming the legislature had 90 members, "then put in 90 balls—of which as many as the proposed number of electors shall be gilded—those who draw these balls to be the Electors."[281] The electors are "to proceed immediately to the choice of the Executive and not to separate until it be made."[282] The use of gilded balls, the obligation to proceed immediately to the task, and the obligation not to separate until the task is completed are prominent features of the Ballot of Venice.[283]

Another speaker, Gouverneur Morris from Pennsylvania, delivered a long speech that assailed election by the national legislature and ended

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represented "the finest fruit of the American Enlightenment." WOOD, *supra* note 236, at 568. Volume I was published in London in January 1787, became available in the United States in April, was republished in the United States in May, and was serialized weekly in Philadelphia during the Constitutional Convention. Mary Sarah Bilder, *The Soul of a Free Government: The Influence of John Adams's* A Defence *on the Constitutional Convention*, 1 J. AM. CONST. HIST. 1, 14–16. (2023). Thus, it is virtually certain the delegates were familiar with Adams's discussion of Venice. As Pierce Butler wrote in May 1788: "We had before us all the Ancient and modern Constitutions . . . ." FARRAND RECORDS III, *supra* note 266, at 301. As Adams put it: "The republic of Venice has existed longer than those of Rome or Sparta, or any other that is known in history." DEFENCE, *supra* note 278, at 58. The Ballot of Venice employed a series of four two-step dances. Bodies of electors (each initially determined by lot and immediately sequestered in a separate room) expanded their membership by super-majority voting and then had the membership again reduced by lot. A final group of 41 electors elected the doge, with a super-majority of 25 required. Throughout the process, electors could vote for as many candidates as they wished. For a contemporary description, see Marji Lines, *Approval Voting and Strategy Analysis: A Venetian Example*, 20 THEORY & DECISION 155 (1986).

279. Miranda Mowbray & Dieter Gollmann, *Electing the Doge of Venice: Analysis of a 13th Century Protocol*, IEEE COMPUT. SCI., July 2007, at 295, 295 ("The 1268 protocol for the election of the Doge of Venice was used with only minor changes for over five centuries, until the fall of the Venetian Republic in 1797.").

280. FARRAND RECORDS II, *supra* note 248, at 103.

281. *Id.* at 99.

282. *Id.*

283. *Id.*

with a favorable comment about Wilson's extraordinary proposal. The speech began and ended thus:

> Mr. Govr. Morris. Of all possible modes of appointment that by the Legislature is the worst . . . . It is [the] most difficult of all rightly to balance the Executive. Make him too weak: The Legislature will usurp his powers: Make him too strong.: He will usurp on the Legislature . . . . He was not prepared to decide on Mr. Wilson's mode of election just hinted by him. He thought it deserved consideration. It would be better that chance [should] decide than intrigue.[284]

On July 25, echoing points James Madison had made earlier in the day,[285] South Carolina delegate Pierce Butler expressed two oft-mentioned concerns: "The two great evils to be avoided are cabal at home, & influence from abroad. It will be difficult to avoid either if the Election be made by the Natl Legislature."[286] Gouverneur Morris agreed: "He considered an election by the people as the best, by the Legislature as the worst, mode. Putting both these aside, he could not but favor the idea of Mr. Wilson, of introducing a mixture of lot. It will diminish, if not destroy both cabal & dependence."[287]

Wilson and Morris were leading proponents of popular election, and the "undigested" "hint" of election by legislators chosen by lot appears to be a rhetorical device that highlighted the problems with legislative choice, rather than a genuine proposition. It is clear, however, that delegates were searching for some system that might succeed in avoiding cabal and intrigue. Venice, with its system of electing by temporary electoral bodies chosen by a combination of chance and consensus voting, and of isolating electors from outside influence while they deliberated, was somewhat protected from faction and intrigue.[288]

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284. *Id.* at 103, 105.

285. *Id.* at 109 (criticizing election by the national legislature, stating: "The Ministers of foreign powers would have and make use of, the opportunity to mix their intrigues & influence with the Election" which "will be an object of great moment with the great rival powers of Europe . . . . No pains, nor perhaps expence, will be spared, to gain from the Legislature an appointment favorable to their wishes.").

286. *Id.* at 112.

287. *Id.* at 113.

288. Some modern scholars have not recognized the influence of Adams' book. Bilder, *supra* note 278, at 3, 5 (noting that one scholar's statement that there is no explicit reference to *Defence* is complicated by an explicit reference in Yates' notes of the Convention). Among those may be Shlomo Slonim, who wrote that "not once" did the Convention consider the procedures used in Venice; yet there are evident references to Venice noted in text, and the Electoral College shares at least two elements with the Venetian system (single purpose bodies, multiple voting). Shlomo Slonim, *The Electoral College at Philadelphia*, 73 J. AM. HIST. 35, 57 (1986) ("[T]here is no evidence that the convention was inspired in the matter by classical or medieval precedents. Not once did the delegates advert to the procedures that prevailed in ancient Rome or Greece or in republican Venice."). The import of Adams' writing and the republican principles Adams illustrated in the course of his review of ancient and modern republics was affirmed by Brearley Committee members Rufus King and Pierce Butler. *Revisiting the Electors Clause*, *supra* note 202, at 20 ("[T]he first volume of Mr. Adams' defence of the American constitutions . . . has been read and approved by the sensible and candid part of the community" [which assuredly included the members of the Constitutional Convention]); FARRAND RECORDS III, *supra* note 266, at 301 ("We had before us all the Ancient and modern Constitutions.").

The very next topic taken up in the Convention brainstorm was consensus voting—also a feature of the Ballot of Venice.[289] On July 25th, three delegates, Hugh Williamson from North Carolina, Gouverneur Morris and James Madison, discussed using an unusual system—allowing each voter to cast multiple (two or three) votes—in a popular election of the President.[290]

The Convention next took up presidential elections on August 24th.[291] A proposal for election by electors chosen by the people lost by only one vote.[292] Still dissatisfied with the proposal for election by the national legislature, on August 31 the Convention referred the question to a committee of eleven members chaired by David Brearley of New Jersey (Brearly Committee).[293] On August 31th, Williamson, Morris and Madison were chosen to serve on the committee.[294] On September 4, the committee proposed that the President be elected by single purpose bodies of electors, and that these electors use the vote system that had been discussed on July 25th.[295] Both of these elements mirror the Ballot of Venice.[296]

On September 4th, Morris explained the Brearly Committee's reasoning. The benefits of the proposed temporary, single-purpose bodies included the protection against intrigue and faction, the fact that "[m]any were anxious even for an immediate choice by the people," and the "indispensable necessity" of making the president independent of the legislature.[297] Having the electors vote simultaneously and at great distance from one another would avoid the great evil of cabal and render corruption impossible.[298] Conspicuously absent from Morris's explanation was any mention of state legislatures. They had not been mentioned since July 25, and they would not be mentioned during the several days of discussion that followed. Allowing preexisting bodies—state legislatures—to control the membership of these temporary, single-purpose bodies would have undermined the whole idea and reintroduced the dangers of legislative dysfunction that had been noted and rejected on July 23th, July 24th and July 25th.[299] Madison had the last word at the Constitutional Convention; on

289. *Revisiting the Electors Clause*, *supra* note 202, at 11.

290. FARRAND RECORDS II, *supra* note 248, at 113–14 (Williamson: "[E]ach man should vote for 3 candidates"; Morris: "[A]mendment that each man should vote for two persons one of whom at least should not be of his own State"; Madison: "[S]omething valuable might be made" of these suggestions).

291. *Id.* at 396–407.

292. *Id.* at 404.

293. *Gaping Gaps*, *supra* note 19, at 268.

294. FARRAND RECORDS II, *supra* note 248, at 473.

295. *Id.* at 493–94.

296. U.S. CONST. art. II, § 1, cl. 3 ("The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.").

297. FARRAND RECORDS II, *supra* note 248, at 500.

298. *Id.*

299. *See generally id.* at 84–115.

September 12, 1787, he said: "[The president] is now to be elected by the people and for four years."[300]

In the debates to come, the "temporary, single purpose body" argument was a mainstay of those who advocated for the rights of "the people." Advocates of the "legislature(s) thereof" did not offer an effective response to this argument. Yet, Madison's record of the debates of the Constitutional Convention discussed here was not published until 1840, and the underlying ambiguity of the constitutional text could not be resolved from these materials. Rather, as Madison insisted, one looks to ratification to clarify the meaning of ambiguous text.

D. Public Understanding During Ratification

The public record is reasonably clear: with relatively little ambiguity and almost no contradiction, the public understanding during ratification was that the people are to choose the presidential electors.[301] This high-level view is easily drawn from the *Federalist Papers*, number 68, in which Alexander Hamilton stated that the people are to choose the electors and that a leading Anti-Federalist tract agreed.[302] Yet *Federalist No. 68* was published relatively late in the ratification process, whereas the Anti-Federalist tract was published early—in November, when only a few of the *Federalist Papers* had been published.[303] This raises the question of what the Anti-Federalists had in mind when they approved of the system for electing the president.

To best understand ratification, one needs to look at the process as a whole, including any anomalies.[304] The inquiry[305] summarized here is grounded in the monumental, thirty-four volume Documentary History of the Ratification of the Constitution,[306] Pauline Maier's extensive narrative

300. *Id.* at 586–87.

301. *Id.* An essay published on August 19, 1823, during the debates in New York made the same point. *Revisiting the Electors Clause*, *supra* note 202, app. at 51–52 ("In those days the idea of the legislature's taking upon itself to choose the electors was not invented—no mention is made of it in the writings or debates of that period.").

302. THE FEDERALIST NO. 68, at 411–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating "most plausible" opponent "admit[s] that the election of the President is pretty well guarded" and stating "the sense of the people should operate in the choice" and that "[t]his end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at that particular conjuncture").

303. *The Federalist No. 1, [27 October 1787]*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-04-02-0152 (last visited Apr. 11, 2025) (stating *Federalist No. 1* was published on October 27, 1787).

304. Anomalies include ambiguities or possible inconsistencies in Federalist messaging and two non-public notes of Anti-Federalists indicating they may have stated in public meetings (of which there is no independent record) that state legislatures would choose electors.

305. This section briefly summarizes a full report of research into ratification, in *Revisiting the Electors Clause*, *supra* note 202, at 12–31.

306. *See generally The Documentary History of the Ratification of the Constitution Online Edition*, UNIV. OF VA. PRESS, https://rotunda.upress.virginia.edu/founders/RNCN.html (last visited Apr. 9, 2025).

of ratification,[307] and Tadahisa Kuroda's chapter on ratification,[308] which may make the best case that the Federalists were sometimes inconsistent and that some Anti-Federalists directly said that state legislatures may choose electors.[309]

On September 26, 1787, the first major defense of the Constitution stated unambiguously and plainly that the people are to elect the electors. The essay, written by Tench Coxe and first published in Philadelphia, was reprinted in twenty-nine papers (in all but four states), one of which circulated nationally.[310] Coxe wrote the essay for the common man. Madison informed Coxe it had been printed in western Virginia, as Coxe had suggested, and "had a very valuable effect."[311]

Ten days later, on October 6, 1787, James Wilson delivered a major address in defense of the Constitution.[312] Wilson sought to answer the early, and central, Anti-Federalist argument that the Constitution "would reduce the power of the states and then destroy them altogether."[313] The Electors Clause (among other provisions) proved this was false. Wilson said the electors would be "nominated in such manner as the legislature of each state may direct; so that if there is no legislature, there can be no Electors, and consequently the office of President cannot be supplied."[314] The speech was reprinted even more broadly than Coxe's opening defense; it became "a fundamental text for the ratification debates."[315]

As Kuroda recognized, throughout ratification, the Federalists said over and again that the people are to elect the electors.[316] The subsequent

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307. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 93–94 (2010).

308. TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 155–161 (1994).

309. *Revisiting the Electors Clause*, *supra* note 202, at 22; *see also* ALAN E. JOHNSON, THE ELECTORAL COLLEGE: FAILURES OF ORIGINAL INTENT AND A PROPOSED CONSTITUTIONAL AMENDMENT FOR DIRECT POPULAR VOTE 48–83 (2018).

310. 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 592 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler eds., 1981) [hereinafter DHRC 13].

311. *Revisiting the Electors Clause*, *supra* note 202, at 15; *see also* FARRAND RECORDS III, *supra* note 266, at 302 (echoing Coxe's essay in listing a dozen points of contrast between the British King and the President, stating "the whole is elective . . . . [the president] is responsible to His Constituents").

312. *Revisiting the Electors Clause*, *supra* note 202, at 17.

313. MAIER, *supra* note 307, at 80.

314. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 170 (Merrill Jensen ed., 1976) [hereinafter DHRC 2].

315. DHRC 13, *supra* note 310, at 593 (demonstrating that Wilson's speech was reprinted in 38 newspapers in all but one state, including one paper with national circulation); MAIER, *supra* note 307, at 81.

316. KURODA, *supra* note 308, at 23. Indeed, during ratification, delegates from the two deep south states that voted against the electoral college were clear that the people are to elect the electors: (1) General Charles Cotesworth Pinckney of South Carolina said, "[H]e is to be elected by the people, through the medium of electors chosen particularly for that purpose," 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 148 (John P. Kaminski et al. eds., 2016); and (2) William Richardson Davie of North Carolina said, "How is he [the President] created? By electors appointed by the people under the direction of the legislatures—by a union of the interest of the people and the state governments." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 58 (Jonathan Elliot ed., 2d ed. 1836).

"inconsistencies" that he cited appear to involve imprecise wording of Wilson's "fundamental text." For example, "Noah Webster wrote that electors would be chosen under the 'inspection' of the legislatures."[317] "James Wilson said at the Pennsylvania convention that 'with the approbation' of the legislatures[,] the people would elect."[318] "In the Massachusetts convention, Samuel Stillman said the president and the senators would be chosen by 'the interposition' of the legislatures."[319] While such terms may be ambiguous in the abstract, when read in light of Coxe's widely-distributed, baseline explanation and Wilson's even more widely-distributed "fundamental text," they do not contradict the Federalists' oft-repeated insistence that the people are to elect the electors.

A paragraph in *Federalist No. 45* is a commonly cited example of an ambiguous rendering of Wilson's core point that the Constitution respects and relies upon state legislatures for its very existence. There, Madison wrote that the president cannot be elected without the "intervention" of state legislatures, but he added—rather confusingly—that the legislatures "must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it."[320] What does that mean? It apparently does not mean electors will be chosen in the way senators are elected, which Madison said was "absolutely and exclusively" by legislatures.[321] Madison's concluding remarks shed some light. Legislators are "that class of men" who have an "influence" in all elections: "Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men whose influence over the people obtains for themselves an election into the State legislatures."[322] The "great share" in appointment of electors encompasses both the express power to create the election rules and the inherent influence legislators have in any election. Moreover, state legislators themselves could be electors; in that role they could, possibly, "of themselves determine" who would be elected President.[323]

Federalist No. 68 resolved any ambiguities about what "Publius" meant in No. 45. Madison revisited this topic at the Virginia ratifying convention, where he dropped the confusing terminology. He stated (i) that the people are to choose the electors, (ii) that state legislatures would have "influence" both in elections of the House and in elections of electors, and (iii) that the Senate is elected directly by the legislatures.[324]

Kuroda's final, and central, evidence about inconsistencies in Federalist messaging is a colloquy from the North Carolina ratifying

317. *Revisiting the Electors Clause*, *supra* note 202, at 13.
318. *Id.*
319. *Id.*
320. THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).
321. *Id.*
322. *Id.*
323. *Id.*
324. *Revisiting the Electors Clause*, *supra* note 202, at 24.

convention.[325] Kuroda appears not to have realized that this was a performance of a straw man argument, in which Federalists both raised and refuted potential objections.[326]

For their part, the Anti-Federalists never disagreed publicly with the Federalists' initial and core explanation that the people elect the electors. The Virginia ratifying convention was the most complete recorded debate about presidential elections. Careful review of the record confirms that the Anti-Federalist speakers understood and agreed that the electors are to be chosen by the people. Leading figures from the Constitutional Convention—Federalists Madison and Randolph, and Anti-Federalist Mason—all concurred on this.[327] The Anti-Federalists, however, including James Monroe,[328] strenuously opposed the contingent election in the House.[329]

As for other states, evidence of Anti-Federalist dissent is scant indeed. Kuroda highlights a speech by an Anti-Federalist at a Connecticut town meeting. There is no public record or report of the meeting, however, and there were three versions of the Anti-Federalists' private notes, making it impossible to know what he actually said.[330]

Alan E. Johnson cites an objection found in notes that Anti-Federalist Samuel Chase[331] prepared for the Maryland ratifying convention, where he delivered a speech that extended over two days.[332] The objection was that the election of electors by the people was "pretended" and that the legislatures were to decide "*who are to be* electors."[333] There is no record of the convention debate, in which the Federalists did not participate, and it is impossible to know whether Chase actually made this argument. Uncertainty is heightened by the fact that the objection is one item in a 54-page list of objections, which was not published and was discovered almost a century after the list was written.[334] Furthermore, Chase's Anti-Federalist colleague, Luther Martin, who unlike Chase had attended the Constitutional Convention, apparently disagreed with Chase on this

325. The North Carolina convention, which failed to ratify, took place after eleven states had ratified. It had no influence on ratification. KURODA, *supra* note 308, at 22–23, 31.

326. *Revisiting the Electors Clause*, *supra* note 202, at 30.

327. *Id.* at 24–26.

328. *See* James Monroe, *Some Observations on the Constitution*, *in* 2 THE PAPERS OF JAMES MONROE 408, 420 (Daniel Preston & Marlena C. DeLong eds., 2006) (twenty-four page essay prepared for the Virginia convention, but not distributed due to poor quality of printing; demonstrating Monroe's commitment to principles of popular sovereignty, the view that the president must be elected by the people, and understanding that electors are to be elected by the people). *Id.* at 427 n.1 (stating Monroe later sent the essay to his friends, George Washington and Thomas Jefferson).

329. *Revisiting the Electors Clause*, *supra* note 202, at 24–26.

330. *Id.* at 14, 17 n.145 and accompanying text.

331. Chase was a future Justice of the United States Supreme Court; he was not a delegate to the Constitutional Convention. JOHNSON, *supra* note 309, at 56.

332. *Id.*

333. 12 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 639 (John P. Kaminski et al. eds., 2015) [hereinafter DHRC 12].

334. *Id.* at 631–44.

point.[335] Beyond all that, the objection is conspicuously absent from a lengthy list of objections and proposed amendments that Anti-Federalists published shortly after the convention ended. [336] In contrast, Chase's two objections about congressional elections were on the list and were among the Anti-Federalists' highest priorities.[337] Thus, whether Chase made his objection to presidential elections in his convention speech is unknown. Even if he did, it appears he agreed to withdraw it, perhaps after consulting with Luther Martin. In any event, the objection is not part of the public record.[338]

In sum, as Alexander Hamilton explained in *Federalist No. 68*, the people are to elect the electors—and all were agreed on that point. Federalists also explained repeatedly that the temporary, single purpose structure of the Electors Clause had been adopted to protect the election as far as possible from cabal, corruption, and foreign influence.

In the debates to come, ratification loomed large, with advocates of "the people" repeatedly invoking the Federalist Papers and the Virginia ratifying convention. August 1823 is particularly instructive, not least because of the roles of President James Monroe's sons-in-law. One reminded his readers that the *Federalist* said the people are to elect the electors.[339] The other was associated with the author of an intellectually rigorous essay that discussed both the *Federalist Papers* and the Virginia ratifying convention at length.[340] The essay's conclusions are accurate and telling:

> In those days the idea of the legislature's taking upon itself to choose the electors was not invented—no mention is made of it in the writings or debates of that period, nor was it suggested in the Virginia convention, that there was danger of the legislature of a state doing any more than to point out the manner of election . . . . [I]f it had been believed or imagined that the legislatures of the states would ever take the appointment of electors from the people at large, the constitution would

335. At the Constitutional Convention, it was Martin who first proposed, on July 17, that the president be elected by electors chosen by the state legislatures. FARRAND RECORDS II, *supra* note 248, at 22, 24 (defeated 2:8). Martin left the Convention on September 4, before the Electors Clause was unveiled and discussed; and he later reported to the Maryland legislature—which required that delegates report back to it—that he could not address those provisions. 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 94 (John P. Kaminski et al. eds., 2015) ("[B]efore this point was finally adjusted I had left the Convention."). Martin then published twelve essays, titled "Genuine Information," that elaborated on his report to the legislature. In "Genuine Information IX," Martin again acknowledged that he had not been present during the discussion of the Electors Clause. He did report, however, that advocates of popular election had pressed their case repeatedly and had failed, by his recollection, three times, "but within the last fortnight of their session, they obtained the alteration in the manner it now stands . . . ." Luther Martin, *Genuine Information IX*, MD. GAZETTE, Jan. 29, 1788 ("Every part of the system . . . was introduced and agreed upon after I left Philadelphia.").

336. *Revisiting the Electors Clause*, *supra* note 202, at 22.

337. *Id.*

338. *Id.* at 22–23. This is a pity. Had the objection been included, it seems almost certain that a clarifying amendment would have been demanded in the Virginia or New York ratifying conventions.

339. *Id.* at 41–42.

340. *Id.* at 42–43.

> not have been adopted in Virginia, nor do we believe it would in any other state.[341]

For an originalist, the overwhelming evidence from ratification should be conclusive on the question of whether the people have a *right* to choose electors. At a minimum, an originalist should acknowledge that a history that excludes ratification altogether—as *McPherson*—is highly suspect.

Yet, whether state governments nonetheless had a *power* not to honor that right might be considered a separate matter. Ratification did not address that possibility, and from the beginning, many state governments did exercise such a power. Treating the issue as open, rather than decided by ratification, one turns to the substantive constitutional debates that followed.

E. The First Full-Throated Debate (1800)

Under the constitutional liquidation framework, mere action—taken without consideration of the substantive constitutional issues—does not establish the meaning of the Constitution. This principle applies to the first three presidential elections, in the first two of which election of George Washington was a foregone conclusion, and in the third of which his absence was not clear until very late in the election cycle (the third election, in September 1796).[342] Except in the first election, there appears to have been little or no engagement with the substantive issues.[343]

The constitutionality of legislative election was a major issue in the election of 1800,[344] playing out in the elections for the state legislatures. Alexander Keyssar identified the constitutional issue as one of "two axes" on which the debate over how to choose the president unfolded.[345] According to Tadahisa Kuroda, "No issue was more important in New York's legislative election than the method of selecting presidential electors."[346] The opening act in the drama was Virginia's decision to change from popular election in districts to the winner-take-all, general ticket, admittedly for partisan advantage.[347] Yet, Virginia's principled stand against

341. *Id.* app. at 56–57.
342. KURODA, *supra* note 308, at 68.
343. *Gaping Gaps*, *supra* note 19, at 272–75 (discussing debates in Massachusetts and New York in 1788–1789).
344. *Id.* at 275–77.
345. ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 35 (2020). The other axis was selection state-wide versus by districts.
346. KURODA, *supra* note 308, at 83.
347. EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 62–63 (2007).

legislative election and Governor James Monroe's role, both discussed here, have been entirely overlooked.[348]

The switch to the general ticket was unexpectedly controversial. Because the "avowed object" was "to give Virginia *fair play*," however, Madison thought it would become popular "with proper explanations."[349] The Federalists widely distributed a broadside attacking the bill,[350] which heightened the need for a proper explanation.

In March 1800 the Republicans countered with a major campaign document of their own, a "*Vindication*" of the general ticket bill.[351] *Vindication* was a candid and comprehensive explanation of the change in the mode of popular election. *Vindication* analyzed all the options, including election by the legislature. This option, it explained, was subject to two serious constitutional objections:

> The first is, that the constitution having declared, "that each *state* should [sic, "shall"] appoint electors in such manner as the legislature thereof might [sic, "may"] direct," seems to have given to the legislature, not the actual power of appointment, but only the power of prescribing the manner in which the appointment shall be made . . . . Between these two things, the power of appointing electors, and the power of directing how they shall be appointed, there appears to be a substantial difference, which ought not to be disregarded by a legislature, the members of which have taken an oath to support the constitution of the United States. The force of this objection is irresistible, if the constitution, in the recited clause, means by the word "state," the people in each state in their highest sovereign capacity. (See the report of the select committee, p. 6).[352]

The "report of the select committee" refers to the Virginia legislature's January 1800 defense of the Virginia Resolutions of 1798 that, among other things, assailed the Alien and Sedition Acts and characterized the national government as a "compact" among the states.[353] The January 1800 defense, written by James Madison, clarified that "state" can have

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348. There is some suggestion in the literature that Pinckney's appeals to Madison in 1799 to implement legislative election included the idea of using the general ticket. *Id.* at 62. This is not correct and overlooks the two separate axes of debate identified by Alexander Keyssar. Pinckney's letters did not recommend or even mention popular election, and no credit (or blame) for Virginia's actions should be attributed to him. Indeed, the *Vindication* said Pinckney's favored system of legislative election is probably unconstitutional and that the Virginia legislature did not even consider it. *See infra* notes 351–56 and accompanying text.

349. *From James Madison to Thomas Jefferson, 18 January 1800*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-17-02-0208 (last visited June 24, 2025).

350. LARSON, *supra* note 347, at 64.

351. A VINDICATION OF THE GENERAL TICKET LAW, PASSED BY THE LEGISLATURE OF VIRGINIA, ON THE 18TH DAY OF JANUARY, 1800 (Samuel Pleasants, Jr. prtg. 1800) [hereinafter VINDICATION]; *see* LARSON, *supra* note 347, at 62–64, 109–110 (discussing political context); EVERY VOTE EQUAL, *supra* note 201, app. at 1158–62 (reproducing a Shenandoah County reprint of only part I of the pamphlet. The parenthetical reference to the "report of the select committee" is missing from the county reprint).

352. VINDICATION, *supra* note 351, at 4–5.

353. *Gaping Gaps*, *supra* note 19, at 276–77.

several meanings and that "state" in the context of ratification means the sovereign, i.e., the "people, in their highest sovereign capacity," as Madison had explained in the Virginia ratifying convention.[354] If this is the meaning of "state" in the Electors Clause, then legislative election is plainly unconstitutional—just as *Vindication* concluded.

The second objection was grounded in democratic republican principles:

> The other objection is founded on a principle in political science, which is not perhaps sufficiently regarded in the structure of the general government.[] The principle is, that in all cases whatever, those who are to act for the people, in other words their servants and agents, ought to be chosen by the people themselves, unless the power of choosing cannot be conveniently and properly exercised. Now the constitution of the United States certainly not having excluded the people from the appointment of electors, and the power of appointment being one, which they can as experience proves, conveniently and properly exercise, the right of electing electors ought to remain unimpaired in their hands. If they exercise it, the majority will prevail, and the minority, unless destitute of principle, which cannot be supposed, will feel disposed to acquiesce; but if the legislature exercise it, they may appoint a set of electors, not one of whom would stand a chance to be chosen if the election depended on the people. It is said that in the state of New York, at the last presidential election, all the electors chosen by the legislature were not approved by a majority of the people.[355]

According to *Vindication*, the Virginia legislature did not even consider the legislative option:

> It is believed that reasons, something like these [i.e., the objections as to constitutionality], were deemed sufficient even to prevent a proposition in the general assembly of this commonwealth, for a legislative appointment.[356]

Correspondence between James Monroe and Thomas Jefferson confirms their commitment to the principle of popular election, even as they evaluated how best to advance the principle in practice. On January 4, 1800, Monroe, the newly elected governor of Virginia, wrote Jefferson that he had commenced his administration "in a tone of moderation, yet of decision as to principle."[357] The Speaker of the House of Delegates had congratulated Monroe and attributed the victory to Monroe's "inflexible republican principles"—principles Monroe articulated at the Virginia

354. *Id.*
355. VINDICATION, *supra* note 351, at 5.
356. *Id.*
357. *To Thomas Jefferson from James Monroe, 4 January 1800*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-31-02-0247 (last visited June 24, 2025).

ratifying convention and in his twenty-four page, unpublished essay.[358] In reply, Monroe had referred to "the free elective system of government which happily exists among us" and expressed delight "to find my exertions in support of that cause approved."[359] Monroe wrote to Jefferson that he considered it beneath him and "perhaps at present impolitick" to attack Adams directly, "[y]et the publick mind ought not to be suffered to lose any portion of its republican tone by taking a position short of what it will bear[,]" and he sought Jefferson's advice on the matter.[360] Jefferson replied on January 12.[361] He wrote that he had discussed the political situation in New York with Aaron Burr and had information from New Jersey as well.[362] In both states, Republicans were confident of success in the upcoming legislative elections.[363] Under the circumstances they insisted on legislative election of electors and were unwilling to consider election by the people, either in districts or by a general ticket.[364] Jefferson wrote that "perhaps it will be thought I ought in delicacy to be silent on this subject."[365] Jefferson also affirmed his "desire to see this government brought back to it's [sic] republican principles."[366]

Vindication met both Monroe's and Jefferson's requirements. Because it was published anonymously,[367] Jefferson could remain silent on an issue that divided his party. The tone was candid and moderate. Yet there was no compromise of Republican principles—it declared that legislative election was subject to serious constitutional objections. The *Vindication* also addressed Monroe's wish that "the publick mind" ought not lose "its republican tone."[368] *Vindication* observed pointedly that state legislators take an oath to support the Constitution.[369] Implicitly, the issue of constitutionality could be raised in the upcoming state elections. Indeed, simultaneous with the publication of *Vindication*, it was raised, and with a vengeance.

In New York, the constitutionality of legislative election was the dominant issue in the March and April 1800 election campaign for the state legislature. Advocacy may have begun as early as March 9th in a tract

358. *Revisiting the Electors Clause*, *supra* note 202, at 25, 33 (stating president "ought to depend on the people" for election and "continuance in office" and expressing concern that the contingent election would prevent this); *see* Monroe, *supra* note 328.

359. *To Thomas Jefferson from James Monroe, 4 January 1800*, *supra* note 357.

360. *Id.*

361. *From Thomas Jefferson to James Monroe, 12 January 1800*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-31-02-0256 (last visited June 24, 2025).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. The author was "Franklin." It is thought to have been authored by George Hay, who was a confidant of James Monroe (and future son-in-law) and who wrote another major Republican tract in response to the Alien and Sedition Acts, the classic defense of free speech, "An Essay on the Liberty of the Press," dated January 1799.

368. *To Thomas Jefferson from James Monroe, 4 January 1800*, *supra* note 357 and accompanying text.

369. VINDICATION, *supra* note 351, at 5.

from "A Republican Farmer."[370] The tract's "earnest[] entreat" was to "establish[] a majority of republican members in [the] Legislatures" in order to replace President Adams.[371] The author "solemnly recommend[ed]" the Virginia resolution of 1798 "on the sedition law," and more generally "[t]he opinions and resolutions of so important a state [Virginia]."[372] Taking up *Vindication*'s second point, "Republican Farmer" maintained that, consistent with "the nature of Elective Governments" the Constitution gives "the election of a President exclusively to the People."[373]

The most important debate of 1800 took place three days later, on March 12th in the New York House of Assembly,[374] where a bill to replace legislative election with election by the people in districts was considered. Echoing points made in *Vindication*, Republican legislators condemned the legislative system as unconstitutional. State Representative Adam Comstock "gave voice to key Republican principles"[375]: "The elective franchise being the vital principle" of representative government, and "all power originat[ing] in and emanat[ing] from the people—what they do not delegate is reserved to themselves."[376] The people "justly contend" that the right to elect belongs to them alone and that it is guaranteed by the Electors Clause.[377] He argued that the alternative contention that "state" means "legislature" makes no sense: "[I]n other words, the legislature shall appoint in such manner as the legislature of the legislature may direct . . . . Is not this construction of the text a palpable absurdity? Can any thing [sic] be more ridiculous?"[378] Further, if there is doubt, "ought we not in every doubtful case always . . . decide in favour of the people. We surely cannot properly exercise powers that are not expressly delegated to us by the people, who are the sovereign fountain of all power."[379]

The Federalists did not dispute that "state" has multiple meanings. "I grant you, said [John V. Henry][380] that the term state frequently means the people—admit that it does . . . ."[381] Henry argued "state" also means the "body politick," which he claimed includes both the legislature and the people.[382] If the Constitution had meant to give the choice solely to the legislature, it would have done so, as with the Senate, Henry said; and if it meant to give the choice solely to the people, it would have done so, as

370. This is the date of a note urging newspapers to publish *A Republican Farmer*. The note was published along with the tract on April 23, 1800. *A Republican Farmer*, REPUBLICAN WATCH-TOWER, Apr. 23, 1800.
371. *Id.*
372. *Id.*
373. *Id.*
374. The debate was reported the following month in AM. CITIZEN, Apr. 4, 1800.
375. KURODA, *supra* note 308, at 75.
376. *Legislature of New-York, House of Assembly, Wednesday, March 12*, AM. CITIZEN, Apr. 5, 1800.
377. *Id.*
378. *Id.*
379. *Id.*
380. KURODA, *supra* note 308, at 76 (identifying John V. Henry as an Albany Federalist).
381. *Legislature of New-York, House of Assembly, Wednesday, March 12*, *supra* note 376.
382. *Id.*

with the House of Representatives.[383] The Constitution gave the legislature the power to choose between these modes, Henry said.[384] Comstock, implicitly invoking Madison's point that "state" means "the people" for purposes of ratification, replied:

> I contend . . . that the people of the U. States framed the constitution, and that all powers not delegated by it are absolutely reserved to them. "That each state shall appoint, in such manner as the legislature thereof shall direct," means most certainly two distinct bodies, the people and the legislature.[385]

A Republican colleague said that this dispute is easily resolved if one looks beyond the words of the Electors Clause itself: "[H]e thought there could not remain a doubt on this question, if gentlemen would only attend to the constitution *and its amendments* all power not delegated certainly remains in the people."[386] The debate in 1800 was about both the words of the Electors Clause and fundamental republican principles, which are embodied in the Preamble and in the Ninth and Tenth Amendments.[387]

The debate was also about the dignity of "the people." On March 12th, Federalist speakers made a profound strategic error when they literally "disparaged" the right of the people to elect by disparaging the people.[388] For example, Henry said election by the people does not have the "purity" of election by legislators, who have more information and "more expanded minds."[389] According to Henry, "[p]opular elections are bad, because the electors get misinformed by wicked and designing men."[390] A colleague added: "The people are not so capable of choosing, as the legislature. What do they know about the general government, or about foreign affairs? Nothing."[391] Comstock retorted:

> [H]e felt surprised that the gentleman would presume to say that the people were ignorant and that their representatives knew better than themselves what was calculated to promote their welfare. Is it not as probable . . . that the people can make as proper a choice of electors, as they can in choosing legislators. Wherever we find this doctrine prevail, the people considered as nothing more than the mere *Swinish Multitude*, they have been enslaved.[392]

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383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.* (emphasis added).
387. *Cf.* AMAR, *supra* note 79, at 119–33 (showing that at the founding the core meaning of "the people" in the Ninth and Tenth Amendments was political, that the amendments referred to the collective political rights and powers of the people as sovereign).
388. *Legislature of New-York, House of Assembly, Wednesday, March 12*, *supra* note 376.
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*

The March 12th debate became the centerpiece of New York's spring 1800 legislative elections.[393] On March 19th, *American Citizen* published a short piece from "The Swinish Multitude," playing on Comstock's rhetorical jabs.[394] The paper also promised to publish a "sketch" of the "considerable debate" in the assembly and promised to report the yeas and nays.[395] On April 4th, the "sketch" first appeared on the streets as a broadside, which was reprinted in *American Citizen* on April 19.[396] Addressed to "the Electors of the State of New York," it affirmed that all power derives from the people, whom those who hold delegated power should venerate.[397] The broadside repeated, and then condemned, the "execrable sentiments" that Federalists had "openly avowed this session" during the March 12 debate over a bill that aimed "to restore to the people the elective franchise for President and Vice-President, improperly usurped." It included the list of yeas and nays.[398]

On April 4 *American Citizen* reported that "a public list of the patriotism of [the] Representatives in the Assembly of this state" was now available.[399] It editorialized as follows:

> [The editors] beg leave to enquire, whether the good federalists who represent this city, were unwilling to entrust the constituents to exercise a right which the people of Virginia and other States have been authorized to do, by the acts of their Legislatures. Do they conceive the people unfit to nominate the men who are to elect the first and second magistrates of the Union. Or do they suppose that they possess more wisdom and penetration than those who have chosen them with authority.[400]

And so the Republican onslaught continued.[401] On April 5th, *American Citizen* reprinted the March 12th debate.[402] On April 9th, the paper printed *Columbus—No. III*, which assailed the Federalists for "[d]enying this sacred right and libeling the faculties of their fellow citizens."[403] On April 12th, the *Republican Watch Tower* printed *Columbus—No. III* and indicated the national breadth of the debate: "The discussions that have obtained on this subject, not only in this but in other states, prove that there

393. *To the Electors of the State of New-York*, AM. CITIZEN, Apr. 19, 1800.
394. *The Swinish Multitude*, AM. CITIZEN, Mar. 19, 1800.
395. *Id.*
396. *To the Electors of the State of New-York*, *supra* note 393.
397. *Id.* ("That all just and legitimate government is derived from the people, and intended solely for their benefit, is a truth consecrated by reason, by the principles of our revolution, and by the nature of our constitutions. It beho[o]ves then the possessor of delegated authority to venerate the people from whom he derives his political existence . . . .").
398. *Id.*
399. Editorial, AM. CITIZEN, Apr. 4, 1800.
400. *Id.*
401. *See also A Republican Farmer*, REPUBLICAN WATCH-TOWER, Apr. 23, 1800.
402. *Important Debate*, AM. CITIZEN, Apr. 5, 1800.
403. *Columbus–No. III*, AM. CITIZEN, Apr. 9, 1800.

is a difference of conception concerning the true intent and meaning of the federal constitution . . . ."[404]

From April 29, 1800, through May 1, 1800, thanks to a sweep of New York City seats engineered by Aaron Burr, the Federalists went down to defeat statewide.[405] The majority of the new legislature—which would elect the presidential electors in joint session in November—was now Republican. Adams lost twelve electoral votes to Jefferson and Burr.[406] All other things being equal, the legislative election in New York decided the 1800 presidential election against Adams.[407]

While it is impossible to determine the precise impact of a given issue on any election, in 1800 the right of the people to elect was the leading issue in New York. It is clear that the constitutionality of legislative election was hotly disputed, in other states[408] as well as in New York. Yet *McPherson* said there was no such issue in the election of 1800, and the issue is sometimes overlooked by scholars and others.[409]

The election of 1800 was an opening salvo, not a consensus resolution of the issue in the way that the constitutional liquidation framework would require. For several years, controversy subsided. In 1802, Republicans gained control of most state legislatures and became confident that they would win the presidency no matter what system was used.[410] In 1804, there was a move toward popular election; and the switch from legislative to popular election in three of them "burnished the Republicans' credentials as advocates of popular government."[411] Beyond that, Republicans were generally content to allow the status quo to continue;[412] and with the outcome of most elections a foregone conclusion, there was little change from election to election.[413]

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404. *Columbus–No. III*, REPUBLICAN WATCH-TOWER, Apr. 12, 1800.

405. KURODA, *supra* note 308, at 84.

406. *Id.*

407. *See, e.g.*, 3 LIFE AND CORRESPONDENCE OF RUFUS KING 232 (Charles King ed., 1896) ("It is concluded that the 12 electors of New York will all vote for Mr. Jefferson, as president, and this will probably be decisive in his favour . . . .").

408. *Gaping Gaps*, *supra* note 19, at 275 n.95.

409. *Id.* at 272 (quoting *McPherson* that "[n]o question was raised"); Jack N. Rakove, *The Political Presidency: Discovery and Invention*, *in* THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC 30, 30–58 (James Horn, Jan Ellen Lewis, Peter S. Onuf, eds., 2002); *id.* at 49 (stating there is no reason to look beyond the four corners of the "unambiguous[]" Electors Clause); *id.* at 51–52 (crediting success in New York to the "great political entrepreneur, Aaron Burr," not discussing the issues debated in the election); *id.* at 53 (stating "no principled basis from which to ask whether the proper theory of the Constitution might favor one mode of election over another"); EVERY VOTE EQUAL, *supra* note 201, at 181–90 (devoting nine pages to the 1800 election but not mentioning that the constitutionality of legislative election was a central issue).

410. KEYSSAR, *supra* note 345, at 45.

411. *Id.* at 32 (Table I.I) (showing legislative election in ten of sixteen states in 1800 and in six of seventeen states in 1804); *id.* at 51–52 (stating changes in Pennsylvania, New Jersey and New Hampshire "burnished the Republicans' credentials").

412. *Id.* at 51.

413. *Id.* at 32, 51. One notable exception was Massachusetts, which changed its system every year from 1796 to 1824.

One important exception to the relative stasis was the election of 1812, in which both North Carolina and New Jersey switched from popular election to legislative election.[414] This prompted outrage, particularly in North Carolina, and ignited a movement for federal constitutional reform that continued unabated through 1826.[415]

F. Founder, Framer, and Senator Rufus King: Approaching Consensus (1816–1826)

In *Moore*, the Supreme Court gave no weight to Justice Story's interpretation of Article I, Section 4 (which refers to "prescribing" the "manner" of holding elections for Congress), noting that Justice Story was not a member of the founding generation.[416] In contrast, Rufus King—who, beginning in 1816, played an active role in the debates—was very much a member of that generation: he fought in the Revolution (1778); he was an influential member of the Continental Congress (1784–-1787); he served on the committees that created the Electoral College and produced the final draft of the Constitution (1787); and he led the ratification effort in Massachusetts (1788).[417] King's opinion—amply supported by the historical record and the opinions of his contemporaries—deserves serious consideration.[418] Beginning some thirty years after the founding, King helped guide the nation to a consensus understanding that the Constitution requires popular election of presidential electors.

Elected as one of New York's first senators in 1789 and reelected in 1795, King returned to the Senate in May 1813 as a member of the thirteenth Congress.[419] Early in 1813 in the expiring twelfth Congress, the Senate resolved by more than the required two-thirds margin to amend the Constitution to require election of electors by the people in districts.[420] From introduction to approval, the process in the Senate took less than one month.[421] This set the stage for more than a decade of efforts at reform. In the Senate, resolutions to amend the Constitution to require popular election in districts were also approved by greater than two-thirds of the votes in 1819, 1820, and 1822.[422]

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414. *Id.* at 66; *Gaping Gaps*, *supra* note 19, at 277 n.108.

415. *Gaping Gaps*, *supra* note 19, at 277 n.108.

416. Moore v. Harper, No. 21–1271, slip op. at 26 (U.S. 2022) (citation omitted) ("Story's comment . . . reflects the views of a jurist who, although 'a brilliant and accomplished man, . . . was not a member of the Founding generation.'").

417. *Revisiting the Electors Clause*, *supra* note 202, app. at 49.

418. *Id. Gaping Gaps* overlooks Rufus King's role in the Senate and does not delve into the elections in New York from 1823–1824, in which King also played a role. This Article seeks to fill those gaps.

419. *Id.*

420. 25 ANNALS OF CONG. 89–91 (1813); KEYSSAR, *supra* note 345, at 66–67.

421. KEYSSAR, *supra* note 345, at 80.

422. *Id.* (adding that a resolution failed by only two votes in 1818 and procedural votes indicated strong support in 1816 as well).

When the Senate took up the question in 1816, King engaged fully in the debate, adding to the side of reform the authority of a member of the Constitutional Convention who had been instrumental in ratification:[423]

> The opinion had been that all undue agency or influence was entirely guarded against; that the men selected by the people from their own body would give their votes in such a manner as that no opportunity would be afforded for a combination, to change the freedom and popular character which naturally belonged to the electoral bodies. Such had been the idea of the nation at the time of the adoption of the Constitution . . . . The election of a President of the United States is no longer that process which the Constitution contemplated. In conformity with the original view of the authors of that instrument, I would restore, as thoroughly as possible, the freedom of election to the people: I would make the mode of election uniform through the country, by throwing the whole nation into as many districts as there are Electors, and let the people of each district choose one Elector . . . . It was with the people the Constitution meant to place the election of the Chief Magistrate, that being the source least liable to be corrupt. But if, under the name of the liberty of the people, said Mr. K., we put this power into other hands, with different interests, we place it in a situation in which the rights of the people are violated.[424]

In later years King served on Senate committees that proposed constitutional amendments.[425] In 1822, Senator Thomas Hart Benton of Missouri joined King in committee, and Benton and King made common cause.[426] Benton became known as a champion of electoral college reform thanks to an early-1824 oration in which he condemned legislative election as unconstitutional and suggested electoral votes from usurping states might not be counted.[427] Much of Benton's oration echoed constitutional arguments that had dominated the elections in New York over the preceding eight months, in which King also had a role.

The election of 1824 brought new forces into play. There were several viable candidates from within Jefferson's Republican Party, which made it likely that no one would win a majority of electoral votes.[428] This

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423. *Revisiting the Electors Clause*, *supra* note 202, app. at 49–50. At the time, no one other than surviving Constitutional Convention delegates knew the leading role that King played at the Convention.

424. 29 ANNALS OF CONG. 216 (1816). King also voiced support for an amendment that called for election of the President by a national popular vote, reiterating his sharp critique of the then-current system. *Id.* at 223 ("He was persuaded that the course of things under the present mode of choosing a President was in its nature pernicious, and that it had a tendency to prevent the object intended by the Constitution, of a pure elective magistracy.").

425. *E.g.*, 31 ANNALS OF CONG. 242 (1818); 33 ANNALS OF CONG. 207 (1819).

426. The senators' profound differences on the issue of extending slavery to Missouri did not affect this alliance. Benton sought out King as a mentor; King reciprocated with valuable advice and many courtesies. In fatherly fashion, King cautioned Benton about excessively strident rhetoric. From Benton's telling, they held one another in high esteem. 1 THOMAS HART BENTON, THIRTY YEARS' VIEW: OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 57–58 (1853) (remarks on King's retirement).

427. *Gaping Gaps*, *supra* note 19, at 278–82, 285–86.

428. KEYSSAR, *supra* note 345, at 85–86.

posed the obvious danger that the election would be decided by a grossly undemocratic contingent election in the House of Representatives. In New York, Senator Martin Van Buren, King's colleague in the Senate, led the then-ascendant arm of the Republican party.[429] For Van Buren, maintaining party discipline was sacrosanct; and for his arm of the party, the solution was clear: follow the party's established practice, nominate a candidate through a congressional caucus, and (in New York) have the legislature choose electors committed to the nominee. For King, on the other hand, election by caucus and state legislature was pernicious. It was not what he and his fellow framers and fellow ratifiers had intended in 1787 and 1788. It violated the rights of the people.

In private notes, King memorialized his and Van Buren's early thinking about the upcoming election.[430] Van Buren favored Georgian William H. Crawford but wished to delay publicizing the preference.[431] King disagreed; he thought "the public should be roused agt. longer submission to a Southern Master."[432] On March 4th, the two discussed John Calhoun's candidacy. Van Buren thought Calhoun was "actively employed in measures to obtain the office."[433] Van Buren was correct. A number of Calhoun's prominent supporters started a newspaper, the *New York Patriot*, that began publication on May 28, 1823.[434] A Prospectus had been "circulated at the Seat of Government of this State, previous to the caucus Meeting of the Republican Members of the Legislature, on the 22d of April."[435]

That month, Rufus King joined the fight—the last crusade of his political career. In an April 20th letter to his son John A. King,[436] a New York state senator, King explained his intended role, his central argument, and his proposed strategy. King planned to be a silent supporter: "[A]s the part that I take in public affairs has less activity than formerly, and except in cases that affect my friends, is free from zeal, I think myself entitled to

429. *Id.* at 93.
430. 6 THE LIFE AND CORRESPONDENCE OF RUFUS KING 507–11 (Charles R. King ed., 1900).
431. *Id.* at 509.
432. *Id.* at 507.
433. *Id.* at 511.
434. Thomas Robson Hay, *John C. Calhoun and the Presidential Campaign of 1824 Some Unpublished Calhoun Letters*, 40 AM. HIST. REV. 82, 85 n.6, 90 n.18 (1934). Supporters included Samuel L. Gouverneur, a son-in-law of President James Monroe, and Henry Wheaton, the third Reporter of Decisions of the United States Supreme Court.
435. Editorial, N.Y. PATRIOT, May 31, 1823. The Prospectus did not endorse a particular candidate. Editorial, N.Y. PATRIOT, May 28, 1823 ("We think the present a proper time to urge the support of measures instead of men."). It abjured references to geography and "any attempt to introduce the odious and impolitic distinction of slave and non-slave holding States." *Id.* (on file with the Library of Congress, Serials Div.).
436. ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 385–86 (1968) (citing an "April 10" letter—possibly there were two letters; stating presidential electoral reform was King's "final political crusade." John King's career in law and politics extended to 1857, when he was elected the first Republican Party governor of New York, and 1860, when he was elected an Elector for Abraham Lincoln).

pass unnoticed in the conflict, in which younger men will engage . . . ."[437] King expressed concern about being the subject personal attacks, particularly from Mordecai Noah, publisher of the *National Advocate*, which supported Van Buren.[438] He noted that Noah previously had attacked the *New York American,* of which his son Charles was editor.[439]

The core argument mirrored Rufus King's 1816 speech in the Senate. Legislative bodies will be "associated by the means that Candidates may employ," and "the expectation of a virtuous election of a President (which has certainly been anticipated) must prove visionary," leading instead to "corruptions and ruinous consequences."[440] "We must choose the electors by the people or the public liberties will be lost . . . . [The people] cannot be bribed, they are safe agt. corruption: it may not be so if the Legislators choose the elects."[441]

King suggested that his son John seek leave to introduce a bill in the current legislature that "the *electors of this State be chosen by the people*."[442] The strategy—first followed in 1800—was obvious: "[I]t will be popular . . . . you are sure to attract the public attention; and [should] it fail, it may be said that it did so, because the leaders [would] not trust the people."[443]

Although it does not appear that John King acted on his father's suggestion, in broad outline the strategy succeeded. The *New York Patriot* played a leading role, as King's "young friend, Henry Wheaton" contributed "trenchant propaganda for the popular choice of electors."[444] The summer was marked by frequent attacks on the *Patriot* and the *American* by the *Argus* and the *Advocate*.[445] Occasionally the issue of slavery—which had sharply divided the *American* from the *Argus* and the *National*

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437. 6 LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 430, at 518–19 (expressing a concern about personal attacks from Mordecai Noah, publisher of the *National Advocate*, which supported Van Buren).

438. *Id.* at 519.

439. *Id.* at 518. Charles King edited the *American* until 1844. He was president of Columbia College from 1849 to 1864. The *National Advocate* and *Albany Argus* had supported the South in the Missouri controversy, in which Rufus King, supported by the *American*, was a leading advocate of restricting the spread of slavery to new states. GLOVER MOORE, THE MISSOURI CONTROVERSY 1819-1821, at 190–91 (1953) ("*American* . . . was published by members of the King, Verplanck and Hamilton families."); *id.* at 19192 (*National Advocate* and Albany *Argus*); *id.* at 73 ("King was regarded popularly as the leader of the North.").

440. 6 LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 430, at 519.

441. *Id.* at 520.

442. *Id.*

443. *Id.*

444. ERNST, *supra* note 436, at 385 (stating Wheaton had been with King two years earlier at the New York constitutional convention).

445. *E.g.*, ALB. ARGUS, Aug. 15, 1823 (stating the *American* stood "pre-eminent" among papers and the "most vociferous to discard the political compass"); ALB. ARGUS, Sept. 2, 1823 (stating the *American* was undermining the old Republican party); NAT'L ADVOC., Aug. 20, 1823 (stating the *New York Patriot* "is the most stupid and dull Journal ever published").

Advocate during the debate over admission of Missouri—was raised,[446] but it did not blunt the growing consensus. The *Patriot*, which took the same line as the *American*, was founded by supporters of John Calhoun and abjured any effort to introduce the "odious and impolitic" issue of slavery.[447]

On June 19, 1823, the *Patriot*[448] editorialized that the intent of the Framers was clear. The editors pronounced the current system repugnant to the *spirit* of the constitution because it made selection of the chief executive the work of intrigue, corruption, and political juggling.[449] On June 21st, the *Patriot* distinguished itself from the *National Advocate*, which it associated with those who wanted to keep appointment of electors under the control of "the Cabal," not the people.[450] On June 27th, responding to a charge from the *National Advocate* that the proposal for popular election was a weak and wicked scheme, the *Patriot* asked whether restoring powers that had been usurped was such a scheme and predicted the question would be decided in the upcoming election.[451]

On July 3rd, the *Patriot* reiterated its stance that the Constitution requires popular election. Accusing the *National Advocate* of avoiding the question by raising generalized concerns over "innovation," the *Patriot* stated that "the object is *not to innovate*, but to restore matters to their ancient constitutional foundation . . . . to the true interpretation of the constitution."[452] Allowing the legislature to choose completely defeated the purpose of precluding a corrupt concert among electors.[453] On July 14th, the *Patriot* explained its construction of the Electors Clause: "By the word 'State,' we mean either the People of the State, or the powers delegated by the People, which form the different departments of the government.—The Legislative department, *separately*, is not the State . . . ."[454] The

446. NAT'L ADVOC., Aug. 18, 1823 (calling the *American* a family newspaper and complaining about the King family's repetition regarding the "cant about slavery"); NAT'L ADVOC., Aug. 20, 1823 ("Messrs. Kings . . . harass, perplex, and taunt [southerners] with these never ending, and selfish charges of being slave drivers.").

447. Hay, *supra* note 434, at 85 n.6 (founded by supporters of Calhoun); N.Y. PATRIOT, May 28, *supra* note 435 ("odious and impolitic").

448. N.Y. PATRIOT, June 19, 1823.

449. *Id.*

450. N.Y. PATRIOT, June 21, 1823.

451. N.Y. PATRIOT, June 27, 1823 ("Is a scheme to give back to the People a power which belongs to them, by the National Constitution, and which has been usurped by the Legislature (or if you will, *inadvertently* assumed by them)—is this a *weak and wicked scheme*? . . . . [W]e should not be surprized if it were made an indispensable qualification, in the candidates for the next Legislature, throughout the State, that they should express their willingness to give back to the People the choice of Electors by general ticket.").

452. N.Y. PATRIOT, July 3, 1823.

453. *Id.* (rebutting other arguments: the framers' wisdom in using one intermediate body did not imply there could be more than one; the argument for legislative discretion meant the legislature might assign the choice to the governor or the judiciary).

454. N.Y. PATRIOT, July 14, 1823 (stating the Legislature is "to *direct the manner of appointment* only").

power of appointment "is deposited in the whole State, composing its whole power," not in a single branch of government.[455]

In August 1823, three essay-length publications elaborated on the issues. In Washington, the *National Intelligencer* published a long address "To the People of the United States" from "Phocion," who was President Monroe's son-in-law, George Hay, author of the March 1800 *Vindication* of Virginia's adoption of the general ticket.[456] Hay focused on the near-certainty that the 1824 election would be decided in the House of Representatives and the necessity for and elements of a constitutional amendment to assure that the people would elect in almost all cases. Hay did not discuss at any length whether the Constitution already provided that the people rather than the legislatures were to elect, but he did touch on the topic. In a footnote, Hay cited the *Federalist* ("the election had been confided, not to any pre-established body, but to men chosen by the people for the special purpose"); in the text, he repeated a point made in *Vindication*: "[T]he Legislature . . . it would seem . . . were authorized by the Constitution, not to appoint electors, but rather to prescribe the manner in which the state should appoint them."[457]

In New York, advocates of popular election published a twelve-page pamphlet in six parts. The pamphlet was published in the *Cabinet* and republished in full in the *Patriot*.[458] Part number 4 restated the argument that

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455. *Id.*

456. DAILY NAT'L INTELLIGENCER, Aug. 7, 1823; DAILY NAT'L INTELLIGENCER, Aug. 8, 1823; DAILY NAT'L INTELLIGENCER, Aug. 9, 1823. Phocion stated that "[f]rom 1798 to the present day" he had been engaged in discussion and publication about constitutional questions, and when "the district system was abolished, to make way for the general ticket system, I conscientiously vindicated the measure."

457. DAILY NAT'L INTELLIGENCER, Aug. 7, 1823 n.1 (quoting portions of Federalist No. 68); DAILY NAT'L INTELLIGENCER, Aug. 9, 1823. On August 11 and 12, Hay wrote to each of the living ex-presidents, attaching copies of the three articles from the *National Intelligencer*. Madison responded on August 23, 1823. He wrote that election of electors by the people in districts was "mostly, if not exclusively in view" at the Constitutional Convention and said that a constitutional amendment requiring district elections and changing the contingent election in the House "is justly called for." *Letter to James Madison from George Hay, 11 August 1823*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/04-03-02-0105 (last visited June 27, 2025); *Letter from James Madison to George Hay, 23 August 1823*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/04-03-02-0109# (last visited June 27, 2025). Hay also wrote to Thomas Jefferson and John Adams. *Letter to Thomas Jefferson from George Hay, 11 August 1823*, NAT'L ARCHIVES, https://founders.archives.gov/?q=Recipient%3A%22Jefferson%2C%20Thomas%22&s=1211311113&r=1497 (last visited June 27, 2025); *Letter to John Adams from George Hay, 12 August 1823*, NAT'L ARCHIVE, https://founders.archives.gov/?q=Author%3A%22Hay%2C%20George%22%20Recipient%3A%22Adams%2C%20John%22&s=1111311111&r=1 (last visited June 27, 2025). Jefferson responded and condemned the contingent election in the House of Representatives. *Letter from Thomas Jefferson to George Hay, 17 August 1823*, NAT'L ARCHIVES, https://founders.archives.gov/?q=%20Author%3A%22Jefferson%2C%20Thomas%22%20Recipient%3A%22Hay%2C%20George%22&s=1211311113&r=1 ("[T]he most dangerous blot in our constitution."). Adams apparently did not respond.

458. N.Y. PATRIOT, Aug. 27, 1823; N.Y. PATRIOT, Aug. 28, 1823; N.Y. PATRIOT, Aug. 29, 1823. By August 1823, the *Cabinet* had taken up the cause of popular election. *See infra* note 461. With the exception of the August 19, 1823, issue, however, it appears all issues of the *Cabinet* from mid-June 1823 to January 20, 1824, may be lost to history.

state means the people.[459] Part number 3 addressed why New York had submitted for so long to "so flagrant an usurpation and to so palpable an evil."[460]

The third essay was published in the surviving, August 19 issue of the *Cabinet*.[461] The essay reads more like a Supreme Court brief—or opinion—than a polemical tract.[462] It begins with a reflection on the true meaning of the people's sovereignty.[463] It proceeds to a close reading of the text, including "state," "legislature," "appoint," "elect" and "choose." The textual analysis of Article II is more sophisticated than anything else in the debates from 1800 to 1826. The essay cites the language of the then-current apportionment statute, the uses of "appoint" in the Virginia ratifying convention and in the convention that formed the New York constitution of 1777, and the fact that Article II, Section 1 itself uses both "appoint" and "chosen" interchangeably.[464] In short, "appoint" means "elect" or "choose," and "State" does not mean "legislature."[465]

The essay then turns to "direct." "[P]lain common sense, as well as technical and legal knowledge," the author argued, show that whenever the "manner of doing [an act] is to be regulated by one individual, or certain individuals," the individual or individuals "is said and are as much *prohibited* from doing the act itself . . . as if they were forbidden in the most solemn form of words."[466]

The essay next "examine[s] the reasons and motive of the people in framing and adopting this clause of the constitution."[467] It discusses the *Federalist*—"[t]he fullest and most complete commentary, and the clearest explanation and statement of the object and effect" of the Constitution's provisions—quoting it in five paragraphs.[468] To begin, "[n]othing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue and corruption."[469] Over and again, the *Federalist* said this objective was achieved not by depending on any preexisting body

459. N.Y. PATRIOT, Aug. 28, 1823.

460. *Id.*

461. *Electors for President, From the* New-York Patriot, THE SCHENECTADY CABINET, Aug. 19, 1823. The essay is said to be from the *New York Patriot*; yet a review by the Serials Division of the Library of Congress of all the numbers of that publication from its inception to August 19 indicates the essay was not previously published there (personal communications with staff from the Library of Congress, Serials Division). The essay appears to have been overlooked by scholars, which is understandable, given that it appeared in the only surviving issue of the *Cabinet* for a 7-month period from June 1823 to January 1824. The essay is set out in full in *Revisiting the Electors Clause*, *supra* note 202, app. at 51.

462. *Revisiting the Electors Clause*, *supra* note 202, app. at 51–57. It is reasonable to assume that Rufus King's friend, Henry Wheaton, who had been the Reporter of Decision of the United States Supreme Court since 1817, was, at a minimum, a co-author.

463. *Id.* app. at 51.

464. *Id.* app. at 51–52.

465. *Id.*

466. *Id.* app. at 53 (illustrating with examples from incorporation of a bank, appointment of non-commissioned officers in a militia, and distribution of the proceeds of an estate).

467. *Id.* app. at 54.

468. *Id.*

469. *Id.*

of men, who could be tampered with, but by relying instead "in the *first instance*" on "*an immediate act of the people of America*, to be exerted in the choice of persons for the *temporary* and *sole* purpose of making the appointment."[470]

The essay ends with ratification.[471] The focus is Virginia—the only convention where the mode of election was objected to—but, as the essay explains, that objection had to do with the contingent election in the House of Representatives, not election by the people in the first instance.[472] Monroe, Mason, Randolph, and Madison all made clear that the people are to elect in the first instance. To repeat, the essay correctly summed up ratification: "In those days the idea of the legislature's taking upon itself to choose the electors was not invented."[473] And it closed by observing that if it had been "believed or imagined" that the legislatures might "take the appointment of electors from the people," the constitution would not have been ratified.[474] This from a publication associated with a son-in-law of James Monroe, a prominent figure in the Virginia ratification debates, and with a friend of the leader of ratification in Massachusetts.[475]

Throughout the summer of 1823, there was no direct evidence linking King to the advocates. On September 29, 1823, King broke his apparent radio silence.[476] A letter to his son Charles outlined a new argument based on constitutional text and history.[477] None of that summer's articles and essays mentioned that the Convention had first agreed to legislative election of electors and then rejected it. The August 19th essay referred only to an "immediate" rejection and did not discuss the terms approved on July 19, 1787, only to be rejected several days later.[478] In the September 29 letter, King explained how the terms used on July 19th, when compared to the terms of the Constitution, could strengthen the textual argument.[479]

Over the fall, the movement for popular election of electors "swelled to enormous proportions" and cut across party lines.[480] Many Republican candidates for the state legislature broke party discipline, promised to

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470. *Id.* app. at 54–55.
471. *Id.* app. at 55–57.
472. *Id.*
473. *Id.* app. at 56.
474. *Id.* app. at 57.
475. *Id.*
476. 6 LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 430, at 532–34.
477. *Id.*
478. *Id.*
479. *Id.* King's point was that when the Convention meant to authorize state legislatures to elect—either to choose senators or to appoint electors—it said so clearly: "by the Legislature thereof" and "by the Legislatures of the States." The Electors Clause is obviously different, and comparing the language adds another layer to the argument. A variation on King's point is this. Start from the premise that when the Convention meant to grant state legislatures a power to elect it did so explicitly. If the framers actually meant to give a choice between popular and legislative election, they easily could have done so, for example: The people or the legislature of each state shall appoint, in such manner etc. As the August 19 essay concluded, such a provision would not have been ratified.
480. ROBERT V. REMINI, MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY 41–42 (Colum. Univ. Press 1959).

support repeal of the old electoral law, "and were thus elected."[481] In December, after returning to Washington, Rufus King sent "a stream of letters" to Henry Wheaton and a similar if not larger number to his son Charles.[482] A New Year's Day letter to Charles declared that the Constitution "demand[s]" election by the people.[483] Letters to Wheaton recommended that he "push actively for popular choice of electors by promoting town and county meetings."[484]

Governor Yates' January address to the state legislature ducked the issue, recommending that the question of popular election of electors be postponed to another day.[485] Wheaton and James Tallmadge[486] were elected to the state assembly and played prominent roles in the ensuing debates.[487] Wheaton was appointed to a nine-member committee (chosen and chaired by allies of Martin Van Buren).[488] After some maneuvering, the committee approved a resolution that the assembly support popular election of electors by a general ticket, but an amendment required that electors win a majority of votes state-wide.[489] A later amendment specified that, in the absence of a state-wide majority, electors would be chosen by plurality vote in each district.[490] During the debates Tallmadge delivered an "animated and eloquent speech" which "pourtrayed [sic] in brilliant colours" how succeeding legislatures had "usurp[ed] to themselves" the interests and rights of the people "in choosing electors."[491] The speech included his recollection of the controversies of 1799–1800, when he was

481. *Id.*

482. ERNST, *supra* note 436, at 386; 6 LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 430, at 538–45.

483. 6 LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 430, at 544–45.

484. ERNST, *supra* note 436, at 386.

485. In September, the *New York Patriot* published letters from "Gates" to "Yates" pointedly asking the Governor how he interpreted the Electors Clause and urged that his address take a "bold, manly and independent tone in favour of reform." N.Y. PATRIOT, Sept. 17, 1823; N.Y. PATRIOT, Sept. 18, 1823 (what is governor's interpretation); N.Y. PATRIOT, Sept. 22, 1823 (Electors Clause requires popular election).

486. Tallmadge, like King, had been a leader in the crusade to prevent the spread of slavery into Missouri. MOORE, *supra* note 439, at 33–64.

487. See SCHENECTADY CABINET, Jan. 20, 27, Feb. 3, 10, 1824, for summary reports of legislative proceedings; Editorial, N.Y. AM., Jan. 12, 1824 (editorializing about expected obstruction of Eastman's bill).

488. SCHENECTADY CABINET, Jan. 20, *supra* 487 (showing committee membership; stating design of those whom the "junto" [Van Buren's faction] appointed leaders and managers was to throw impediments in the way of passage of Wheaton's bill).

489. *Id.* (reporting Wheaton's assessment that the amendment's requirement of majority winners would probably defeat the bill because there would not be time for a run-off and the electoral votes of New York could be "entirely lost").

490. With multiple candidates contending, it seemed unlikely that there would be majority winners. The fallback district system was a poison pill, intended to justify votes against the bill (in the Senate) on the basis that a district system would dilute the power of the State. N.Y. AM., Jan. 16, 1824 (reporting first amendment to require majority vote); N.Y. AM., Feb. 3, 5, & 7, 1824 (outlining debates over the majority vote amendment; compromise agreed to); N.Y. AM., Feb. 9, 1824 (reporting vote, 104-4); N.Y. AM., Feb. 5, 1824 (reporting Wheaton's February 2 speech, stating that in 1800, "[t]he people arose in their majesty, and hurled from power those who had attempted to usurp their rights").

491. SCHENECTADY CABINET, Feb. 3, 1824 (describing speech).

secretary to George Clinton and "first learned to write handbills."[492] When Tallmadge concluded, there was a "universal burst of applause from the gallery and lobby, which were crowded to overflowing."[493]

The debate over the amendment requiring election by majority vote was intense.[494] Ultimately the compromise was accepted. Wheaton reasoned that it achieved the primary objective of repealing the 1792 law that provided for legislative election.[495] The assembly passed the amended bill in early February by an overwhelming margin.[496]

The state senate did not act on the bill until early March. In the meantime, as King recommended, numerous town and county meetings passed resolutions in support of popular election.[497]

Despite the apparently overwhelming support for popular election, the Senate—only eight of whose members had stood for election in 1823—voted 17–14 in opposition.[498] For the seventeen senators who voted no, this was political suicide: "[M]ost of these political Spartans ended their legislative careers with that vote; the hatred generated among the people was extraordinarily intense."[499]

The arguments marshaled in support of the "no" votes—in a Senate report and in the debate on the report—included the clearest defense of the constitutionality of legislative election.[500] The Senate report framed the issue as whether the Constitution restricts the legislatures from choosing any of the methods that had been used over the years; stated differently, the question was whether "the people *alone*" have the right to choose, such that legislative choice "is a dangerous usurpation of authority."[501] The Report made the following points: (i) under no fair construction of the Electors Clause can popular election of electors be considered mandatory; (ii) at the founding, "states" were free, sovereign and independent and

492. SCHENECTADY CABINET, Mar. 2, 1824 (reprinting speech). *See Revisiting the Electors Clause*, *supra* note 202, app. at 58–59 (reprinting portions of March 2 reprint).

493. SCHENECTADY CABINET, Feb. 3, 1824.

494. N.Y. AM., Feb. 3, 5, & 7, 1824 (identifying debates over the majority vote amendment; compromise agreed to); N.Y. AM., Feb. 9, 1824 (reporting vote, 104-4).

495. N.Y. AM., Feb. 9, 1824.

496. SCHENECTADY CABINET, Feb. 10, 1824 (reporting the vote stood 110 to 5); N.Y. AM., Feb. 9, 1824 (demonstrating that Wheaton justified voting for the bill—even with its poison pill—on the basis that it achieved the central purpose of repealing the law for legislative election).

497. SCHENECTADY CABINET, Mar. 9, 16, 1824 (reporting five county or town meetings).

498. N.Y. AM., Feb. 9, 1824.

499. Michael Wallace, *Changing Concepts of Party in the United States: New York, 1815-1828*, 74 AM. HIST. REV. 453, 465 (1968); ERNST, *supra* note 436, at 386 (noting "popular fury" over Senate's refusal to agree to popular election); KEYSSAR, *supra* note 345, at 93–97 ("The Melee in New York"); Lisa Thomason, Jacksonian Democracy and the Electoral College: Politics and Reform in the Method of Selecting Presidential Electors, 1824–1833, at 59 (May 2001) (Ph.D. dissertation, University of North Texas) (on file with the University of North Texas Library).

500. *New-York American* reprinted the Senate report on March 3, 1824, and editorialized that "such, and no more, is the intellectual scope of the Report . . . nothing more is meant than that as the Legislature of New-York have the power of choosing electors, they ought not to scruple to make use of it." N.Y. AM., Mar. 3, 1824. The *American* reported the debate and votes on March 11, 12, 13, 15, 16 and 19, 1824.

501. N.Y. AM., Mar. 3, 1824.

performed most of their acts through their legislatures; (iii) delegates to the Continental Congress were chosen by state legislatures, and the authority to appoint is consistent with the language of Section V of the Articles; and (iv) if the framers meant to limit the choice to the people, they would have used language similar to Article I, Section 2.[502] In addition to arguments based on text and the founding era, the Report cited practice—the use of legislative election from the first election to the present, and its continued use in other states (seven according to the Report).[503] The Report did not mention ratification, the temporary single-purpose body argument, or arguments about the meaning of specific terms.

On March 8, Senator Burt tied the current controversy to the debates of 1800. He recalled that his long and arduous efforts to restore the rights of the people had begun in 1798–1799, in league with Adam Comstock, the venerable patriot of Saratoga.[504] As a legislator, Burt had participated in the debates of 1800, and he repeated key points made then and ever since: that the Constitution assigned only the "manner" of choosing electors to the legislatures and that *Federalist No. 68* stated clearly that the people are to elect.[505]

On March 9, Senator Sudam responded. He claimed that "p. 90" of the proceedings of the Constitutional Convention, together with an explanation of Luther Martin "at the bar of the Maryland Legislature," showed that the constitution contemplated the states would act in their sovereign capacity and that the people should not choose the electors.[506] Sudam was dead wrong on both counts. Page 90 of the Journal was for June 1, 1787, and on that day no resolution regarding selection of the president was presented.[507] On June 2, James Wilson's proposal that the President be elected by electors chosen by the people was made, but it was not voted on.[508] Rather, the Convention approved Edmund Randolph's original proposal that the national legislature (not the states) choose the President.[509] June 2 was only the first in a series of efforts to bring the election as close as possible to the people. Sudam got Luther Martin backward. Martin wrote that the advocates of popular election proposed many times that the people elect and that, ultimately, it was they who drafted the Electors Clause.[510]

As noted, *American* editorialized that, at bottom, the argument against popular election amounted to one point—since the constitution did not expressly prohibit legislatures from exercising the power to appoint electors, nothing prevented them from doing so; and if they wished to do

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502. *Id.*
503. *Id.*
504. N.Y. AM., Mar. 15, 1824; *see supra* Section II.E (recounting Comstock's central role in the March 8, 1800, legislative debate).
505. N.Y. AM., Mar. 15, 1824.
506. *Id.*
507. JOURNAL, ACTS AND PROCEEDINGS, OF THE CONVENTION, *supra* note 261, at 90.
508. *Id.* at 92.
509. *Id.*
510. *See* sources cited *supra* note 335.

so, they would.[511] It was simply a question of power.[512] If the people disapproved, however, those legislators would not have that power much longer; and as it happened, they were soon gone.

In the meantime, in the United States Senate, in late January and early February 1824, Senator Benton delivered an oration that excoriated legislative election and concluded with the hypothetical suggestion that Congress consider not counting electoral votes from usurping states.[513] Benton incorporated arguments made that summer in New York, added King's point that after first approving legislative election, the Constitutional Convention had specifically rejected it, and assailed election by pre-existing bodies and by legislators elected up to four years prior to a presidential election.[514]

The events in New York influenced King's last appearance on the stage of electoral college reform in the Senate. Some six weeks after Benton's oration, amid furor in New York over the electoral bill, the Senate took up the question of what to do next. Though King had supported and helped lead the forces of reform for eight years, in March 1824 he moved that the Senate table the matter.[515] Preliminarily, he said that the time was not right, but he devoted the bulk of his speech to assailing congressional nominating caucuses.[516] Senator John Holmes of Maine took exception, but he began his remarks with high praise for King, appreciating his experience and wisdom, commenting on the "cordiality and zeal" that marked King's advocacy for the bill in committee.[517]

The March hearing also considered the question of power. Senator Mahlon Dickerson of New Jersey, who had led the reform effort in the Senate since 1818, praised Benton's oration for demonstrating "in the strongest point of view" the evils of the present system and need for change.[518] Senator Dickerson concluded, however, that "[i]t [was] too late to oppose the exercise of this power," which he characterized as "permanent."[519]

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511. *See* sources cited *supra* note 500.

512. *See* sources cited *supra* note 500.

513. *Gaping Gaps*, *supra* note 19, at 279–80 (discussing Benton's speech).

514. 41 ANNALS OF CONG. 170–78 (1824) (denunciation of legislative election); *id.* at 177–78 (questioning counting electoral votes cast in violation of the Constitution).

515. 41 ANNALS OF CONG. 355 (1824).

516. *Id.* at 355–62; KEYSSAR, *supra* note 345, at 92–93 (stating King's attack on the caucus derailed debate and shattered decorum); *cf.* ERNST, *supra* note 436, at 386–88 (viewing the motion to postpone as "Rufus King at his best" and the demise of the caucus system as a victory in King's final crusade).

517. 41 ANNALS OF CONG. 370–71 (1824) ("I had the honor to be, with the gentleman from New York, [King] on the committee to whom these amendments to the Constitution were referred . . . . Full well I knew and appreciated his experience and wisdom. As he was one of those who framed that instrument, and knew the views and motives of his associates, I adopted him, in some measure, as my Mentor. The amendment which has been the subject of his animadversion, was agreed on in committee, with great unanimity; and by none with more cordiality and zeal than by that gentleman.").

518. *Id.* at 366.

519. *Id.* at 367.

> However incorrect the construction of the Constitution may have been, *and was*, when this power was first assumed, it has been acquiesced in for more than thirty years. To reject the electoral votes thus given, at this time, would be to dissolve the Union.[520]

The final question under Baude's constitutional liquidation framework is whether the nation arrived at a consensus understanding of the Electors Clause. By the time Rufus King resigned from public service in March 1826,[521] the House was nearing the end of one and a half months of debate in which few defended legislative election. A unanimous, nine member select Senate Committee, chosen by Vice President John Calhoun (whose supporters founded the *Patriot*) had said that under our system of government the people are sovereign, that they have the right to choose their representatives, and that with legislative election legislators become "mere usurper[s]."[522] Martin Van Buren, whose supporters maintained in 1823 and 1824 that legislative election was perfectly constitutional, was a member of the committee.[523] The most prominent "loser" in the debates appears to have given up, to have switched sides. The understanding bridged the fundamental chasm of American politics—slavery. Ardent advocates of both sides agreed the people must elect.[524] True, South Carolina persisted with legislative election until the Civil War,[525] but that might be considered a "one-off."

At the same time, the nation had acquiesced in legislative election for decades. No one took up Senator Benton's suggestion that electoral votes might not be counted, and one of the leading proponents of change conceded the "power" was permanent, absent a change in the Constitution.[526] Justice Story said much the same thing in 1833.[527]

Perhaps the Gordian knot can be sliced by recognizing there were two types of consensus—one about rights, and one about power. This is well justified by the history. That there could be two different consensus understandings accords with Justice Marshall's distinction between established governmental practices in general and great principles of liberty. It is consistent with recent Supreme Court decisions pointing to the importance of considering our entire history as a nation. It may even explain *McPherson*—which said only that plenary "power" had been conceded.

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520. *Id.* at 366–67 (emphasis added) ("The gentleman from Missouri [Benton] says, that the power exercised by the Legislatures of the States, to appoint Electors, is a usurpation . . . . Call this power by what name you please, it is now a permanent power; only to be reached by an amendment to the Constitution.").

521. At the time of King's death in 1827, only two states still used legislative election. After 1828, it was only one. KEYSSAR, *supra* note 345, at 115–16.

522. *Gaping Gaps*, *supra* note 19, at 281–82 (discussing S. REP. NO. 19-22 (1826)).

523. *Id.* at 282 n.136 (noting Van Buren motion to expand membership to nine senators).

524. *See supra* notes 446–47 and accompanying text.

525. *Gaping Gaps*, *supra* note 19, at 284 n.153.

526. *See* 41 ANNALS OF CONG. (1824), *supra* note 517, at 366–67.

527. *Gaping Gaps*, *supra* note 19, at 284–85.

The existence of two consensuses also frames relevant questions for understanding the Fourteenth Amendment. How did the Amendment intrude on the "power" of states over presidential elections? Profoundly, I would suggest, by confronting states that might exercise the power with political suicide. If the "right" of the people to elect was intended from the beginning, clearly articulated during ratification, and reaffirmed in consequential debates, should that right be as enforceable under Sections 1 and 5, along with many other rights of United States citizens? Resoundingly yes, I would answer.

CONCLUSION

Our entire history as a nation teaches that the people have the *right* to elect presidential electors. Choosing electors is a sovereign act, and the people are the sovereign. This was understood at the founding; it was repeated often in the debates that began in 1800.

In late July 1787, four times in three days, the Constitutional Convention rejected involving state legislatures in the sovereign acts of ratification and of choosing the chief executive. The idea was never mentioned again. The idea that legislatures might elect was not "invented" during ratification. The terms of the Electors Clause have been ratified twice, in 1788 and again in 1961. The public understanding each time was that those words mean the people have the right to choose presidential electors. For an originalist, that should end the matter.

Our entire history also teaches that state legislatures originally had an unchecked *power* to choose electors themselves and deny the people their rights. When the manner of choosing the President truly mattered, this conflict between the rights of the people and the power of the legislatures generated intense debate. In 1800, the voters resolved the debate against those who denied the people their rights, and that resolution may have decided a presidential election. The people had both rights and the sovereign power to elect those who honored those rights. In 1823 and 1824 in New York, the people exerted their power once again, in an election informed by the Journal of the Convention, an election guided in part by the knowledge and wisdom of one of the Framers of the Constitution. For thirty years, except in South Carolina, the sovereign power of the people secured their sovereign rights.

The Fourteenth Amendment was drafted specifically to deter states from exercising the power that South Carolina had assumed. Section 2 created a political penalty if a state were so bold as to presume to deny that right. Sections 1 and 5 also created a remedy for violations of the privileges of national citizenship, which in our history, properly understood, includes the right to vote for presidential electors. Our entire history subsequent to Reconstruction teaches this fundamental lesson: The people elect.

One modern understanding of the Fourteenth Amendment is this: Sections 1, 2 and 5 marked the end of the previously unchecked power of state governments to deprive the people of their sovereign rights.