

AN END RUN AROUND A REPRESENTATIVE DEMOCRACY? THE UNCONSTITUTIONALITY OF A BALLOT INITIATIVE TO ALTER THE METHOD OF DISTRIBUTING ELECTORS

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INTRODUCTION

The 2000 presidential election was one of the most closely contested races in recent memory. Despite winning a plurality of the popular vote, Al Gore was not named the forty-third President because he failed to receive a majority of electoral votes.¹ It is widely known that the President of the United States is elected by members of the Electoral College, who are chosen by popular vote in each state.²

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¹ See David Stout, *The 43rd President: The Final Tally*, N.Y. TIMES, Dec. 30, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=9906E6DD143BF933A05751C1A9669C8B63>.

² Most states use a winner-take-all system, where the candidate with a plurality of the statewide vote is awarded all of the state's electors. Two states—Maine and Nebraska—award electors through a congressional district-based system. Under this system, the winner of a plurality of the statewide vote is awarded two electors, and the winner of a plurality in each Congressional district is awarded that district's elector. John Harwood, *Challenge to Electoral College in Colorado Could Have Big Impact*, WALL ST. J., Sept. 13, 2004, at A1.

The text of Article II, Section 1 of the Constitution³ sheds some light on the method states can use to change the method of choosing these electors: “Each State shall appoint, in such *Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁴ The Constitution thus assigns the task of selecting the method of distributing presidential electors to the state legislatures.

In the wake of the 2000 election and the recent attempts on a state level to alter this distribution system, scholars have increasingly analyzed the Distribution Clause, chiefly addressing the topic of the independent legislature doctrine.⁵ However, there have been only a few articles on the question of whether a ballot initiative qualifies as an act of the “legislature” under Article II.⁶

This Comment attempts to add to that scholarship, arguing that the use of a ballot initiative⁷ is an unconstitutional means by which to alter the me-

³ For the purposes of this Comment, Article II, Section 1 shall be known as the Distribution Clause.

⁴ U.S. CONST. art. II, § 1, cl. 2 (emphasis added). For example, California has fifty-five electors, based on their two senators and fifty-three members of the House of Representatives. See TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 23 (2005).

⁵ This Comment does not address whether Article II grants the state legislature plenary power, thereby allowing it to act independently of the other branches of state government—for example, free from an executive veto power. Under those circumstances, there is not a complete removal of the legislature from the process, whereas a ballot initiative completely bypasses the legislature. For articles on the independent state legislature doctrine and other issues regarding Article II, see Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495 (1962); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1 (2000); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

⁶ See, e.g., Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L. Q. 631 (2008); Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”*: *Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599 (2008); David S. Wagner, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575 (2006) (arguing that a ballot initiative is a constitutional method of altering the distribution of electors); Michael McLaughlin, Comment, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943 (2008).

⁷ Ballot initiatives are distinct from another form of popular participation, a referendum. While both a referendum and a ballot initiative are put to a popular vote, a referendum is proposed by the legislature, and a ballot initiative is proposed by the people. Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 533 (2004). This Comment only evaluates the constitutionality of a ballot initiative. The constitutionality of a referendum is a slightly more difficult question because there a legislature is voluntarily abdicating its power to the people on the specific issue of the method of distributing electors. With a ballot initiative, the legislature itself is not ceding its power to the people to vote on the issue.

thod of selecting electors. To alter the method of selecting electors,⁸ the state legislature must act. The argument proceeds in three parts. Part I provides background on the current attempts by states to alter the method of elector selection, focusing on recent proposals in Colorado and California. Part II examines Article II of the Constitution from a textual and historical perspective, arguing that the Constitution does not permit the use of ballot initiatives to alter the distribution of electors because it removes the discretion of a key political body—the state legislature. This Part analyzes the original meaning of “legislature” by looking to the text of Article II, the Constitutional Convention and ratification debates, relevant historical practices, and prior court decisions. Building upon this discussion, Part III presents an alternative proposal to solicit the input of citizenry regarding the distribution of electors—a nonbinding advisory ballot initiative.

I. BACKGROUND

In the wake of the historic 2000 election, commentators have sought alternatives to the Electoral College and to the winner-take-all distribution system used by most states.⁹ The first proposal for change occurred in Colorado, where George W. Bush received 51% of the vote in the 2000 election. Despite this close popular vote, Bush received all nine of Colorado’s electoral votes due to the state’s winner-take-all system.¹⁰ In response, the Colorado Senate, controlled by Democrats, passed a bill that changed the distribution of Colorado’s electors to the congressional-district system used in Maine and Nebraska.¹¹ However, the measure failed in the Republican-controlled house.¹² Had the change that was proposed after the

⁸ An example of an alteration that could occur is a state changing the distribution of electors from a winner-take-all popular election to one based on popular votes within congressional districts. See Harwood, *supra* note 2 (describing how a congressional-district-based system works). The state legislature could also assign itself the task of selecting electors, eliminating the need for a popular election completely.

⁹ Because any federal constitutional amendment on these issues is unlikely, see Matthew J. Festa, Comment, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2129 n.225 (2001), commentators have proposed state-based legislation that alters the method of distributing electors. Under one proposal, each state would award its electors to the winner of the popular vote. Only eleven states would need to adopt this rule to reach the 270 votes required for a majority in the Electoral College, which would create an election via national popular vote, rather than by the Electoral College. See ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 165–66 (2006). For alternative proposals to the winner-take-all system, see generally ROSS, *supra* note 4; WALLACE S. SAYRE & JUDITH H. PARRIS, *VOTING FOR PRESIDENT: THE ELECTORAL COLLEGE AND THE AMERICAN POLITICAL SYSTEM* (1970).

¹⁰ CNN.com, Election 2004—U.S. President, <http://www.cnn.com/ELECTION/2004/pages/results/president>.

¹¹ Harwood, *supra* note 2. See *supra* note 2 for a description of Maine and Nebraska’s congressional district based system.

¹² Harwood, *supra* note 2.

election been in place after the election, it could have affected the outcome, as Gore would have received one of Colorado's nine electoral votes.¹³

Despite this initial setback, the attempts at electoral change in Colorado did not end. A movement called "Make Your Vote Count" collected the signatures necessary to place a ballot initiative, known as Amendment 36, on the 2004 ballot. This initiative proposed changing Colorado's elector-distribution system to a proportional method—distributing electors by the candidate's percentage of the popular vote.¹⁴ However, Amendment 36 did not pass—only 35% voted yes.¹⁵ If it had passed and been applied to the 2004 election, Bush would have received five electors and John Kerry the remaining four.¹⁶ Instead, Bush carried the state with 52% of the vote, receiving all nine electoral votes.¹⁷

Recently, the drive for electoral reform has extended into California, a state where the winner-take-all system has traditionally helped Democrats. Under California's current system, recent Democratic candidates have won a plurality of the vote and therefore all of its fifty-plus electoral votes.¹⁸ Republicans began a petition drive to certify the "Presidential Election Reform Act" as a ballot initiative for the 2008 election.¹⁹ The Act would change the distribution of California's electors from a winner-take-all system to a congressional district-based system, similar to those in Maine and Nebraska.²⁰ Had a district-based system been in place during the 2000 election, George Bush would have won nineteen of California's electoral votes and Al Gore thirty-five, instead of all fifty-four electoral votes going to

¹³ See David Leip, Atlas of U.S. Presidential Elections, <http://www.uselectionatlas.org> (last visited Jan. 16, 2009) (showing electoral maps and data for the 2000 election in each Congressional district).

¹⁴ Harwood, *supra* note 2.

¹⁵ See CNN.com, Election 2004—Ballot Measures, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures> (last visited Mar. 24, 2009); DONETTA DAVIDSON, COLO. SEC'Y OF STATE, OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2003 COORDINATED, 2004 PRIMARY, 2004 GENERAL 138–39 (2004), <http://www.elections.colorado.gov/www/default/Prior%20Years%20Election%20Information/2004/Abstract%202003%202004%20082305%20Late%20PM-5.pdf>.

¹⁶ See BENNETT, *supra* note 9, at 212 n.18 (describing the mathematical method of the distribution of electoral votes under the proposed proportional system in Colorado).

¹⁷ CNN.com, Election 2004—U.S. President, <http://www.cnn.com/ELECTION/2004/pages/results/states/CO/P/00/index.html> (last visited Jan. 16, 2009).

¹⁸ CAL. SEC'Y OF STATE, ELECTING THE PRESIDENT (2004), http://www.sos.ca.gov/elections/sov/2004_general/sov_pref14_15_electing_pres.pdf.

¹⁹ McLaughlin, *supra* note 6, at 2988–3000 (concluding that a ballot initiative is constitutional on functional and pragmatic grounds); see also Bob Herbert, *In 2008, Bush v. Gore Redux?*, N.Y. TIMES, Sept. 22, 2007, at A15; Jamin Raskin, *Deformed Reform: The Cure for the Electoral College That Is Worse Than What Ails Us*, SLATE, Aug. 24, 2007, <http://www.slate.com/id/2172700/>.

²⁰ Herbert, *supra* note 19; see also *supra* note 2 for an explanation of a congressional district-based distribution system.

Gore.²¹ In 2004, Bush would have won twenty-two electors and Kerry only thirty-three.²² Thus, under this proposed system it seems likely that at least twenty electoral votes would be awarded to a Republican candidate in future elections.²³ The California petition drive is not yet complete—it remains unclear whether this initiative will be voted on, let alone pass.²⁴

Some commentators believe the California ballot initiative is a purely partisan play by Republicans to gain additional electoral votes, noting that Republicans are not proposing a similar initiative in Texas, a large state with a clear Republican majority.²⁵ If this initiative were to pass in California and in no other state, it would alter the balance of power among the parties and might fundamentally change the outcomes of future presidential elections.

As shown by the failure to alter the electoral system in Colorado, it is unlikely that state legislatures will vote to shift the distribution of electors to the opposing political party.²⁶ There is little political incentive for the legislature of a state to change the winner-take-all system that favors its party's candidate or for a governor to sign such a change into law. In order to pass such legislation, both houses of the legislature and the governorship would need to be controlled by the party that lost previous presidential elections or expected to lose upcoming elections in that state.

Therefore, reformers have rightly determined that electoral reform is more likely to be successful via a ballot initiative.²⁷ State constitutions con-

²¹ Vikram David Amar, *The So-Called Presidential Election Reform Act: A Clear Abuse of California's Initiative Process*, FINDLAW.COM, Aug. 17, 2007, <http://writ.news.findlaw.com/amar/20070817.html>.

²² *Id.*

²³ Herbert, *supra* note 19. See also Hasen, *supra* note 6, for a similar hypothetical scenario in the 2008 election and additional discussion about the California proposal.

²⁴ Herbert, *supra* note 19.

²⁵ Amar, *supra* note 21; see also Leip, *supra* note 13 (noting that Texas has voted for the Republican candidate in the past seven elections); Dan Morain, *California Democrats Promote Measure on Popular Vote*, L.A. TIMES, Aug. 22, 2007, at A11 (noting that in response to the Republican proposal in California, Democrats are proposing that California allocate all of its electors to the winner of the national popular vote, instead of either the current winner-take-all system or the proposed district-based system).

²⁶ See Harwood, *supra* note 2 (noting that the Republican-controlled Senate blocked a change in the distribution of electors); see also Robert W. Bennett, *Selecting the President: A Bad Idea Out There in California*, 102 NW. U. L. REV. COLLOQUY 82, 83 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/26/> (noting that a Democratic-controlled legislature is unlikely to pass a proposal that would shift electors away from the Democratic candidate, and vice versa).

²⁷ A group known as "National Popular Vote" began a movement calling for a proposal similar to the one proposed by Professor Bennett, *supra* note 9. See National Popular Vote, <http://www.nationalpopularvote.com> (last visited Jan. 16, 2009). Maryland and New Jersey have passed this proposal, along with the legislatures of Illinois, California, and Hawaii, and one branch of the legislatures of Arkansas, Colorado, and North Carolina. Tom Hester, Jr., *Governor Signs Popular N.J. Vote Measure*, ASSOCIATED PRESS, Jan. 14, 2008, available at http://www.newsvine.com/_news/2008/01/13/1225002-governor-signs-popular-nj-vote-measure.

trol the requirements of ballot initiatives.²⁸ For example, to place an initiative on the ballot in Colorado one must collect signatures of registered voters equal to at least 5% of the total vote for the office of Secretary of State in the previous election.²⁹

This Comment argues that the use of a ballot initiative to change the method of selecting electors violates Article II, Section 1 of the U.S. Constitution, which states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”³⁰ Part II examines the text of the Constitution, as well as the Constitutional Convention, ratification debates, and historical factors, all of which provide strong evidence that a ballot initiative is unconstitutional.

II. THE CONSTITUTIONAL CASE AGAINST THE USE OF BALLOT INITIATIVES AS A MECHANISM FOR ALTERING THE DISTRIBUTION OF ELECTORS

This Comment uses multiple modalities of constitutional interpretation to argue that a ballot initiative is unconstitutional. Its goal is to present the argument from multiple points of view, without preferencing one modality over another. Regardless of the method chosen, the conclusion is the same—this use of a ballot initiative is unconstitutional.

Section A argues that the Framers actively and knowledgeably used the word “Legislature” in the Distribution Clause to grant the power to determine the method of selecting electors to the state legislature. First, the Framers understood the word “Legislature” to indicate a representative body. Second, they would have used other phrases if a popular vote was desired. The use of the term “legislature,” therefore, assigns the task of determining the method of choosing electors to a state’s representative.

Section B draws support from the debates at the Constitutional Convention and the subsequent ratification debates to support the argument in section A and to show the Framers’ intent. At the Constitutional Convention, the Framers evaluated various methods for choosing the President before settling on the use of electors. The Framers then assigned the task of selecting the method of choosing electors to the legislature of each state,

²⁸ Not all states have provisions for ballot initiatives. In these states, ballot initiatives are not an option. There are currently twenty-four states with an initiative process—either constitutionally or legislatively mandated. See National Conference of State Legislatures, Initiative, Referendum and Recall, <http://www.ncsl.org/programs/legismgt/elect/initiat.htm> (last visited Jan. 16, 2009).

²⁹ COLO. CONST. art. V, § 1, cl. 2; see also CAL. CONST. art. II, § 8, cl. (a)–(b) (“(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them; (b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to five percent in the case of a statute, and eight percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.”).

³⁰ U.S. CONST. art. II, § 1, cl. 2.

with the belief that each state's representative body would make this choice. The ratification debates illustrate the Framers' understanding that the state legislature must be involved in this process. The original meaning of the word "legislature" and the Framers' intent support the conclusion that using ballot initiatives to alter the method of selecting electors is unconstitutional.

Section C explores the historical practice of selecting electors. Although the constitutionality of an action does not depend on its prior use, a lack of history supporting the practice may indicate that it is unconstitutional.³¹ Strikingly, at no point in the past 200 years has a state legislature been completely removed from the process of selecting the method of distributing electors. The unwavering historical practice of the inclusion of the legislature in the decisionmaking process provides strong evidence that the legislature is a constitutionally necessary actor when a state alters its method of choosing electors.

Section D evaluates another instance of the term "legislature" in the Constitution, comparing the Distribution Clause to Article I, Section 2, which governed the selection of senators prior to the Seventeenth Amendment. The use of the word "legislature" in Article I, Section 2 can help us determine its meaning in the Distribution Clause. Similar to section C, this section assesses the history of the selection of senators prior to the Seventeenth Amendment, which indicates that almost all state legislatures had autonomous control over the selection of senators. It concludes that, just as the Seventeenth Amendment was required to change the process by which senators were selected, a constitutional amendment would be necessary to remove the power to choose the method of selecting presidential electors from the state legislature.

Section E evaluates court decisions interpreting the word "legislature" in the Constitution. In all but one case, the Court has held that the use of the term "legislature" in the Constitution means the legislature must act, to the exclusion of a ballot initiative.

A. The Text of Article II

The Framers specifically chose the word "legislature" in the Distribution Clause³² to grant the state legislature the power to choose the method of selecting electors. First, the Framers defined a legislature as a representa-

³¹ See e.g., Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005) (arguing that the historical practice of not citing foreign law is evidence that it is an unacceptable source for constitutional interpretation); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005) (arguing that a strong theory of precedent and reliance on historical practice is necessary in constitutional interpretation to ensure the positive result of judicial restraint).

³² "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ." U.S. CONST. art. II, § 1, cl. 2.

tive body. Second, other terms would have been used if popular vote was desired. The ordinary meaning of “legislature” and the discernable intent of the Framers should govern the clause’s interpretation.

First, the Constitution distinguishes between the “state” and the “legislature” in Article II, Section 1. Although it grants the “state” the ability to appoint electors, it grants the “legislature” the power to choose the manner in which the electors are distributed.³³ At the time of the drafting of the Constitution, the Framers, and likely the populace as a whole, knew the meaning of the word “legislature”:

[It] was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. . . . There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.³⁴

Thus, if the Framers wanted to delegate the determination of the method of distribution to the people themselves, they would have used the appropriate language, as they did in other sections of the Constitution. For example, as Article I, Section 2 demonstrates, the Framers saw fit to have the “people of the several States” elect the members of the House of Representatives.³⁵ If the Framers wanted the people, rather than state legislatures, to select the method of choosing electors (e.g., through a ballot initiative), they could have used the language “the people of several states.” However, this is not the language used. Instead, the Constitution confers power to select the method of choosing electors to a particular branch of government—the state “legislature.”³⁶ Although other branches of government potentially can be involved, a state cannot use an initiative to remove the legislature from the decision-making process because the Constitution grants this specific power to the legislature, rather than to the people.³⁷

³³ *But see* Amar, *supra* note 6, at 632 (arguing that the “state,” not the “legislature,” is the textually empowered body to appoint—and thereby determine the method of selecting—presidential electors).

³⁴ *Hawke v. Smith*, 253 U.S. 221, 226 (1920) (emphasis added).

³⁵ U.S. CONST. art. I, § 2, cl. 1.

³⁶ *See* *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). It is possible that a state might choose not to have a legislature. However, that currently is not the case, and the possibility is highly unlikely. We should “cross that bridge when we come to it; as of now every state has a legislature.” RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 154 (2001).

³⁷ *See* *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring) (arguing that a state constitution cannot remove this power from the legislature and grant it to the judiciary). This Comment argues that the legislature cannot be removed from the process via ballot initiative. However, it does not argue what the role of the legislature in the selection process must be under Article II.

The text of the Constitution also distinguishes the “legislature” from “legislative power.” Article I, Section 1 grants all federal “legislative power” to Congress, while Article I, Section II grants the state “legislature” the power to select senators.³⁸ This evinces awareness among the Framers of a distinction between a body—“legislature”—and the power it has—“legislative power.” Some state constitutions also contain this distinction; they grant the “legislative power” to the people.³⁹ If the Framers had intended for ballot initiatives to fulfill the requirements of Article II, they could have referred to the “legislative power” of the states. Instead, they chose to refer to the “legislature.” This provides evidence that, in this context, the word “legislature” means the legislative body.

The word “legislature” has been defined alternatively only once by the Court.⁴⁰ Article I, Section 4 directs the state “legislature” to establish the time, place, and manner of congressional elections. In this context, the word “legislature” has been held to include “legislative authority.”⁴¹ However, the state’s power outlined in Article I, Section 4 is subject to congressional regulation. Congress has used this power to pass legislation specifically authorizing the use of a ballot initiative, which was upheld by the Supreme Court.⁴² Without this congressional authorization, the word “legislature” would not have been redefined to include the use of a ballot initiative. In contrast, the Distribution Clause does not contain any provision for congressional oversight like that in Article I, Section 4. Congress cannot simply pass a law to alter a state’s method of choosing electors, as it can do to modify a state’s time, place, and manner of holding congressional elections.

Both the differences in congressional oversight over state power and Congress’ grant of power under Article I, Section 4 permitting the use of ballot initiatives distinguish the uses of “legislature” in these two clauses.. Additionally, because the conditions that led to the Court’s inclusion of ballot initiatives as part of the “legislature” under Article I, Section 4 are not present in the Distribution Clause, the word “legislature” under the Distribution Clause should be confined to the state’s legislative body.

³⁸ U.S. CONST. art. I, §§ 1–2; *see also id.* art I, § 1 (the people eligible to vote for members of the House of Representatives are the same as those who fulfill the “qualifications requisite [to vote for] the most numerous branch of the state *legislature*.” (emphasis added)).

³⁹ *See e.g.*, COLO. CONST. art. V, § 1, cl. 2 (“The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.”)

⁴⁰ *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 568–69 (1916); *see infra* Part III.E. for a discussion of *Davis*.

⁴¹ U.S. CONST. art. I, § 4

⁴² *Davis*, 241 U.S. at 568–69.

The ordinary meaning of the word “legislature” in Article II, Section 1 was the state’s legislative body. Circumventing the legislative body through the use of a ballot is therefore unconstitutional. Historical accounts of the Constitutional Convention and ratification debates provide further evidence regarding the original meaning of the term “legislature.”

B. The Constitutional Convention and the Ratification Debates

Both the Constitutional Convention and the Ratification debates demonstrate that the Framers conceived the method of selecting electors as confined to the state legislature. Although ballot initiatives did not exist at the time of the ratification of the Constitution, the logical corollary of the Framers’ model is that ballot initiatives are unconstitutional.⁴³

During the Constitutional Convention, the Framers evinced intent to define the word “legislature” in Article II as the state legislature. The Framers considered various methods of electing the President, including direct popular vote and selection by the national legislature. During their discussions, the Framers also proposed different methods of selecting electors, if used, including appointment by the state legislature,⁴⁴ and the popular vote.⁴⁵ Unable to agree upon the best method, they delegated this decision to the state legislatures, and created what is now known as the Electoral College. During the ratification debates, many delegates discussed the important function state legislatures would play in the election of the President. On June 1, 1787, the Convention first addressed the mode of electing the President.⁴⁶ James Wilson of Pennsylvania proposed “[indirect] appointment by the people,” with the goal of making the executive and legislature “as independent as possible of each other.”⁴⁷ He proposed that “[s]tates be divided into districts,” and that citizens choose “Electors,” who in turn would elect the “Executive.”⁴⁸ John Dickinson of Delaware was displeased with these methods because he opposed abolishing the power of the state governments.⁴⁹ He proposed adding a clause allowing removal of the executive “on the request of the majority” of the state legislature.⁵⁰ Both proposals were rejected.⁵¹ Roger Sherman of Connecticut proposed direct

⁴³ See McLaughlin, *supra* note 6, at 2957–61, for alternative grounds to support this conclusion, namely the Framers’ preference for representative lawmaking.

⁴⁴ See *infra* note 74.

⁴⁵ See *infra* note 80.

⁴⁶ Remember that during this time, there was no discussion of an Electoral College. The Committee of Eleven created the Electoral College.

⁴⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69 (Max Farrand ed., 1966) [hereinafter FARRAND]. Thank you to Matthew J. Festa, whose article I mirrored parts of for this section on the Constitutional Convention. See Festa, *supra* note 9, at 2110–23.

⁴⁸ 1 FARRAND, *supra* note 47, at 80.

⁴⁹ *Id.* at 78, 85.

⁵⁰ *Id.* at 85.

⁵¹ *Id.* at 78.

“appointment by the [Congress].”⁵² The delegates discussed a term limit and compromised on seven years.⁵³ This proposal, appointment by Congress to a seven-year term, was passed eight to two.⁵⁴

Because Congress was going to select the President, the delegates needed to decide how votes would be allocated. On June 15, William Patterson presented the “New Jersey Plan,” which called for Congress to select a “Federal Executive” by votes allocated equally among states.⁵⁵ Under James Madison’s competing “Virginia Plan,” a “National Executive” would be chosen by a “National Legislature,” where the states’ votes would be apportioned according to their size.⁵⁶ In response, several delegates expressed concern about the selection of the executive by the legislature.⁵⁷ They believed the independence of the executive would be weakened by its reliance on the legislature, arguing that the selection would be based on “the work of intrigue, of cabal, and of faction.”⁵⁸

In subsequent debates, three major questions about the presidency arose: the mode of election, the eligibility for reelection, and the term length.⁵⁹ Some Framers believed reelection through Congress would lead the executive to succumb to the will of the legislature and therefore argued for a single, longer term.⁶⁰ Others preferred shorter terms with the possibility of reelection.⁶¹ Although James Wilson and Alexander Hamilton of New York proposed that electors chosen by the people in electoral districts select the President,⁶² it was clear that the generally preferred method was for Congress to choose the President.⁶³ However, since the future distribution of power in Congress was uncertain, the decision of executive election was tabled until the makeup of Congress was determined.⁶⁴

On July 16, 1787, the Framers reached the Great Compromise and settled the separate question of congressional representation: The upper house (the Senate) would have equal representation for each state, while the lower house (the House of Representatives) would have representation based on population.⁶⁵ Importantly, this compromise balanced the interest of the

⁵² *Id.* at 68.

⁵³ *Id.* at 68–69.

⁵⁴ *Id.* at 81.

⁵⁵ *Id.* at 244.

⁵⁶ 2 *id.* at 109–11.

⁵⁷ *Id.*

⁵⁸ *Id.* at 29.

⁵⁹ Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 44 (1986).

⁶⁰ 1 FARRAND, *supra* note 47, at 68–88.

⁶¹ *Id.* at 68.

⁶² *Id.* at 292.

⁶³ *Id.* at 285–92.

⁶⁴ *Id.* at 244.

⁶⁵ 2 *id.* at 15.

small states and the large states. Small states would have equality in the Senate, and large states would exert greater influence in the House.⁶⁶ The Great Compromise influenced the remainder of the Constitutional Convention, including the creation of the Electoral College.⁶⁷

The next day, delegates resumed discussion of executive election.⁶⁸ They began with the previously agreed-upon method of appointment by the legislature.⁶⁹ Some delegates, such as Governor Morris of New York, desired a popular election.⁷⁰ Roger Sherman of Connecticut believed that the people would not be adequately informed and would simply vote for a man from their own state.⁷¹ Along with the mode of election, the delegates continued to wrestle with the issues of presidential reelection and term length.⁷² They were unable to come to an agreement based on the appointment by the legislature. Support for popular election gained momentum.⁷³

On July 19, 1787, with the delegates unable to agree on the use of popular election, Oliver Ellsworth of Connecticut proposed a compromise between appointment by the legislature and direct popular election. He proposed that the executive should be chosen by “electors appointed by the Legislatures of the States,” with the largest states receiving three electors and the smallest receiving one.⁷⁴ The delegates approved of this method with a six-year term limit and eligibility for reelection.⁷⁵

However, this agreement did not last. By July 24, delegates’ concerns about the inconvenience and expense of bringing together electors from every state just to elect the executive led them to discard this method, at least for the moment.⁷⁶ Appointment by the national legislature was once again the preferred method.⁷⁷ The next day, James Madison voiced his concerns, noting that “there are objections against every mode that has been, or perhaps can be proposed.”⁷⁸ He concluded that appointment by the national legislature and election by state legislatures or executives were all undesir-

⁶⁶ *Id.*

⁶⁷ CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 185–87 (1966).

⁶⁸ 2 FARRAND, *supra* note 47, at 401.

⁶⁹ *Id.*

⁷⁰ *Id.* at 29.

⁷¹ *Id.*

⁷² *Id.* at 57.

⁷³ *Id.* at 52–54.

⁷⁴ *Id.* at 57. Unlike the current Constitution, this proposal explicitly assigned the task of selecting electors to the legislature—answering the question of *who* chooses electors. In the adopted wording of the Constitution, the task of appointing electors is not explicitly assigned to any institution. The decision of *who* chooses the electors is left to the state legislature, as this Comment argues.

⁷⁵ *Id.*

⁷⁶ *Id.* at 95.

⁷⁷ *Id.* at 95–109.

⁷⁸ *Id.* at 109.

able.⁷⁹ He said, “the option before us then lay between an appointment by electors chosen by the people and immediate appointment by the people,”⁸⁰ concluding that “the former mode [is] free from many objections . . . and preferable to . . . appointment by the national legislature.”⁸¹

Despite Madison’s objections and other proposals, the delegates tentatively agreed on election by the national legislature,⁸² with a single seven-year term and no possibility of reelection.⁸³ The proposal was sent to the Committee of Detail for drafting, which created the language, “The President of the United States of America . . . shall be elected by ballot by the Legislature . . . [and] shall hold his office during the term of seven years; but shall not be elected a second time.”⁸⁴ The language, however, did not address whether the legislature should act concurrently or by joint ballot.⁸⁵

On August 24, 1787, after days of argument and over great objection by the small states, a resolution was passed requiring a joint ballot.⁸⁶ However, once again, this agreement was only temporary. Governor Morris again objected to the selection by Congress.⁸⁷ Other proposals were also made.⁸⁸

The delegates abandoned the current language, including use of a joint ballot, and postponed the entire matter.⁸⁹ This might have been a result of various small states threatening to withdraw from the agreement that revenue bills originate in the House of Representatives, which the largest states deemed imperative.⁹⁰ The matter was referred to the Committee on Unfinished Parts, which was composed of one member from each state.⁹¹

⁷⁹ *Id.* at 95–110.

⁸⁰ *Id.* at 110.

⁸¹ *Id.* at 112. Other proposals were made as well. Hugh Williamson of North Carolina proposed election by the people, where each voter would name three candidates, two of whom would be from states other than the voter’s, which would have decreased the dominance of the largest states. *Id.* at 116. Dickinson proposed that each state legislature nominate one candidate, with Congress to select from those candidates. *Id.* at 115–18. Ellsworth proposed that the legislature appoint the executive for the first term, with reelection to be determined by electors appointed by the states. *Id.*

⁸² *Id.* at 115–18.

⁸³ *Id.* at 128.

⁸⁴ *Id.* at 185.

⁸⁵ A joint ballot would require members of both houses to cast their votes together. Election via joint ballot would give more power to the lower house and hence to the largest states.

⁸⁶ 2 FARRAND, *supra* note 47, at 403–04.

⁸⁷ *Id.*

⁸⁸ *Id.* at 410–20.

⁸⁹ *Id.* at 425.

⁹⁰ *Id.* That day, David Brearly of New Jersey stated that “the argument that the small States should not put their hands into the pockets of the large ones did not apply” in the case of selecting the President. *Id.* at 402. Essentially, he argued that selecting a President was of equal concern to all the states and the Senate should have more control than simply a joint ballot. Forrest McDonald argues that this statement was a “bit of backstage maneuvering,” and that New Jersey, Delaware, and Maryland strategically withdrew support for the clause that required spending bills to originate in the House in order to trade this

On September 4, 1787, the Committee proposed a plan wherein electors would elect the President for a term of four years (with no mention of term limits).⁹² The Committee proposed that “[e]ach State shall appoint in such a manner as its legislature may direct, a number of electors equal to [its representation in Congress].”⁹³

Over the next three days, the delegates debated this proposal.⁹⁴ Governor Morris defended it, noting that it made the legislature and executive independent, reduced the likelihood of intrigue and faction, allowed for reelection, and allowed states to choose selection of electors by the people.⁹⁵ After multiple failed attempts to alter this plan, it passed.⁹⁶ The debate over the method of electing the executive was finally complete, and the language was inserted into the Constitution. Interestingly enough, there was no discussion of the fact that the plan left the method of choosing electors to the states—specifically, as this Comment argues, to the state legislatures.

Although the history of the Constitutional Convention is not completely clear, there is strong evidence that the delegates would not approve of an interpretation of “legislature” to include the use of a ballot initiative to determine the method of selecting electors. If the Framers wanted the people to be directly involved in the process, they would have used different language instead of specifying the “legislature.” Additionally, the Framers rejected numerous proposals that specified the method of choosing electors. Elbridge Gerry of Massachusetts proposed state governors select the electors.⁹⁷ James Wilson of Pennsylvania wanted electors to be chosen by Congress.⁹⁸ Multiple delegates favored popular election to select electors. Alexander Hamilton of New York desired citizens to vote in their Congressional districts to choose electors.⁹⁹ Rufus King and William Patterson, both of New York, favored electors chosen directly by the people.¹⁰⁰ James Madison also discussed the possibility of electors chosen by the people.¹⁰¹

However, their calls for the Constitution to specify the method of choosing electors, including direct election of electors, were rejected. The

support for other states supporting the Electoral College. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 228 (1985).

⁹¹ 2 FARRAND, *supra* note 47, at 425; *see also* CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 621 n.1 (1928) (noting that the reason for the committee’s success was that it was composed of “almost the ablest men for each state”).

⁹² 2 FARRAND, *supra* note 47, at 497.

⁹³ *Id.*

⁹⁴ *Id.* at 497–98.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 57.

⁹⁸ *Id.* at 105.

⁹⁹ 1 *id.* at 292.

¹⁰⁰ 2 *id.* at 55–56.

¹⁰¹ *Id.* at 110–12.

delegates chose to vest the state legislatures with the discretion to select the appropriate method of choosing electors. If the Framers desired the citizenry to choose the method of selecting electors, they would have assigned them the task. One commentator notes, “It must have seemed natural in the eighteenth century to think of governmental powers as somehow naturally associated with specific institutional departments. Who else would hold legislative power but the legislature itself?”¹⁰² This provides strong evidence that the Framers would have disapproved of a ballot initiative to determine the method of selecting electors.

The delegates’ comments during the ratification debates further demonstrate their belief that the Article II, Section I reference to the “Legislature” did not include the use of a ballot initiative.¹⁰³ James Wilson of Pennsylvania was the first to speak about this issue. Arguing that state legislatures should still have a role in selecting the President, he stated:

For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. The president is to be chosen by electors, 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. . . . From this view, then it is evidently absurd to suppose, that the annihilation of the separate [state and federal] governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.¹⁰⁴

Despite counterarguments by Antifederalists, Wilson was vindicated when Pennsylvania ratified the Constitution.

James Madison also stressed the power of the states under the Constitution to the people of Virginia:

¹⁰² John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *LAW & CONTEMP. PROBS.* 41, 47 (2002). *But see* Larry D. Kramer, *The Supreme Court in Politics*, in *THE UNFINISHED ELECTION OF 2000*, at 105, 122 (Jack N. Rakove ed., 2001) (arguing that the lack of evidence that the Framers intended to “elevat[e] the acts of a state legislature above the authority of a state constitution” means this contention “is wildly implausible”). This Comment contends that Kramer misconstrues the argument: the responsibility to select the method of choosing electors is assigned to the state legislatures by the *federal* Constitution, which is an authority superior to that of state constitutions.

¹⁰³ Although these comments may not indicate the thoughts of every member of the Constitutional Convention, they indicate that some members believed that the word “Legislature” in Article II precluded the use of a ballot initiative. This evidence is better than no evidence at all.

¹⁰⁴ 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 342 (John P. Kaminski & Gaspare J. Saladino eds., 1981). Jasper Yates, a fellow Pennsylvanian, reaffirmed Wilson’s ideas, arguing that state “legislatures likewise are to prescribe the manner for the appointment of electors who are to elect the President. Thus, Sir, is the connection between the states in their separate and aggregate capacity preserved, and the existence of the Federal government made necessarily dependent” on the states. *PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788*, at 296 (John Bach McMaster & Frederick D. Stone eds., 1888).

In the American Constitution the general authority will be derived entirely from the subordinate authorities. The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacity. The former will be accountable to their constituents at moderate, the latter at short periods. The President also derives his appointment from the States, and is periodically accountable to them. This dependence of the General, on the local authorities, seems effectually to guard the latter against any dangerous encroachments of the former . . .¹⁰⁵

Madison continued in *The Federalist No. 45*, arguing that:

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it.¹⁰⁶

Although the rationale for the delegates' decision to assign the task of selecting the method of choosing electors to the state legislatures is unclear, the delegates had a clear understanding of the meaning of the word "legislature" and rejected other bodies from exercising this role.¹⁰⁷ The ratification debates provide additional evidence that at least some of the delegates regarded state legislatures as a necessary component of the electoral system. Allowing the use of ballot initiatives removes this necessary component, and as such, is an unconstitutional method of altering the method of distributing electors under Article II. The historical practices of selecting the method of choosing electors evinces an implementation of the Framers' understanding—the state legislature cannot be removed from this process.

C. *The Historical Practice of Selecting the Method of Choosing Presidential Electors*

The historical practices of states altering their methods of selecting electors provide an important indicator of the correct interpretation of the word "legislature" in Article II, Section 1. In the 228 years since the ratification of the Constitution, a ballot initiative has never been used to alter the method of distributing electors, providing strong evidence that the use of an initiative is unconstitutional. Although various methods of selecting electors have been used, all have involved the state legislature.

¹⁰⁵ 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 197 (Bernard Bailyn ed., 1993).

¹⁰⁶ THE FEDERALIST NO. 45, at 287 (James Madison) (Clinton Rossiter ed., 2003).

¹⁰⁷ *But see Kirby, supra* note 5, at 501 ("The intent of the framers would be controlling if ascertainable but a reading of the debates in the Constitutional Convention and the State Ratifying Conventions is of little assistance.").

During the first presidential election of 1788, in six of the thirteen states, the state legislature directly chose the electors.¹⁰⁸ In four states, the people directly chose the electors using either an at-large vote or a vote by congressional district. One state, New York, could not agree on a method of distributing electors and did not elect any. Two states, North Carolina and Rhode Island, had not ratified the Constitution yet and could not select electors.¹⁰⁹ By 1828, twenty-four states had been admitted to the union.¹¹⁰ Twenty of the twenty-four states had used the legislature to select electors in at least one of the previous eleven elections. Between 1828 and 1868, only one state, South Carolina, left the choice of electors to the legislature.¹¹¹ After 1868, every state used some form of popular election,¹¹² with two exceptions: Colorado in 1876¹¹³ and Mississippi in 1944.¹¹⁴ Colorado had become a state only one month prior to the election and selected its electors via the state legislature rather than by popular vote, causing a great deal of controversy. Despite the uproar, the legislature's actions were never challenged in the courts.¹¹⁵ The Mississippi legislature, likely acting out of racial concerns,¹¹⁶ nominated a set of electors whose names were printed on a supplemental ballot, and allowed voters to choose between the electors nominated by the parties and those nominated by the legislature.¹¹⁷ The next year, the legislature returned the selection of electors to the people.

Although all states eventually used popular elections to determine electors, states used different forms of popular election. Since 1832, only five states have used a district-based system; the rest have used a winner-take-all system.¹¹⁸ Significantly, every change in methodology over the years was made by the legislature, not via a ballot initiative.

Since the Constitution was ratified, state legislatures have had universal control over the method of selecting electors. This power of the legislature is deeply rooted in our history, and strongly suggests that the word

¹⁰⁸ William Logan Martin, *Presidential Electors: Let the State Legislatures Choose Them*, 44 A.B.A. J. 1182, 1185–87 (1958).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1182.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *McPherson v. Blacker*, 146 U.S. 1, 14 (1892).

¹¹⁴ Logan Martin, *supra* note 108, at 1182.

¹¹⁵ *McPherson*, 146 U.S. at 35.

¹¹⁶ See generally O. Douglas Weeks, *The White Primary: 1944–1948*, 42 AM. POL. SCI. REV. 500 (1948).

¹¹⁷ Ruth C. Silva, *State Law on the Nomination, Election, and Instruction of Presidential Electors*, 42 AM. POL. SCI. REV. 523, 525 (1948); Logan Martin, *supra* note 108, at 1186.

¹¹⁸ Martin, *supra* note 108, at 1185–87. Michigan used the district-based system only once, in the 1892 election. Louisiana used it until 1844 and North Carolina until 1868; both then switched to a winner-take-all system. *Id.* Currently, Maine and Nebraska are the only two states to use a district-based system. See *supra* note 2.

“legislature” in the Distribution Clause does not include ballot initiatives. Prior to the Seventeenth Amendment, the Constitution similarly assigned the task of selecting senators to the state legislature. The historical practice of selecting senators almost universally included the state legislature, to the exclusion of ballot initiatives. This provides additional evidence the word “legislature” is limited to a state’s representative body.

D. *The Election of Senators*

The historical practice of selecting Senators helps determine the proper interpretation of the word “legislature” in Article I, Section 3,¹¹⁹ suggesting that the word “legislature” in the Distribution Clause does not include ballot initiatives. In addition to the power to select the method of presidential electors, the original Constitution also granted state “legislatures” the power to select senators, a practice that continued for over one hundred years until the ratification of the Seventeenth Amendment.¹²⁰ Although ballot initiatives were used to select senators in a limited number of elections, the ultimate selection almost uniformly rested with state legislatures.

At the Constitutional Convention, once the Framers reached the “Great Compromise” and determined the makeup of the Congress, they needed to choose the method of selecting members of Congress.¹²¹ They quickly decided that members of the House of Representatives would be chosen via a popular vote in state districts.¹²² However, the method of selecting senators was not as easily determined. Five methods were considered.¹²³ One of the five, appointment by state legislature, received overwhelming support.¹²⁴ This method was described as “the most congenial with public opinion.”¹²⁵

In the early years after the ratification of the Constitution, senators were usually appointed directly by the state legislature.¹²⁶ However, there were problems with the selection of senators. Deadlocks in the state legislature occurred, which led some states to go without full representation

¹¹⁹ “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof” U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1. For the purposes of this Comment, this clause will be known as the Senate Election Clause.

¹²⁰ U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

¹²¹ GEORGE H. HAYNES, 1 THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 10 (1938).

¹²² U.S. CONST. art. I, § 2, cl. 1.

¹²³ These included appointment by the executive, popular election, selection by special electors, and selection by the House of Representatives. HAYNES, *supra* note 121, at 11–12.

¹²⁴ *Id.* at 13.

¹²⁵ *Id.* at 35.

¹²⁶ *Id.* at 81. This was via a concurrent vote of each house, which led to frequent deadlocks. In 1866, Congress passed a bill calling for a vote via joint assembly each day until a senator was elected, in the event a concurrent vote failed. However, deadlocks still existed. *Id.* Note that the practice of appointment of senators did not involve participation by the executive. See Ralph A. Rossum, *California and the Seventeenth Amendment*, 6 NEXUS 101, 109 (2001).

in the Senate for months at a time.¹²⁷ There were also allegations of bribery and corruption. Between 1858 and 1893, Congress investigated nine cases of bribery and corruption, a large number compared to the one case Congress had investigated in the previous seventy years.¹²⁸ These issues eventually led to a change in the method of choosing senators. In the 1890s, the House of Representatives easily passed multiple resolutions calling for a constitutional amendment providing for direct election of senators; however, the amendment was unable to reach a vote in the Senate.¹²⁹

Between 1890 and 1900, states increasingly used direct primaries to nominate candidates for the Senate.¹³⁰ Illinois utilized a direct primary system, whereby the people chose the candidate of each party through direct election. Then, the legislature would choose the senator. In 1890, the voters in Illinois chose John M. Palmer in the Democratic primary by a plurality of the vote. However, the Democratically controlled legislature was deadlocked for several weeks before finally agreeing to seat Palmer.¹³¹

Oregon went further than Illinois in seeking its citizens' participation. In 1901, it passed a law that called for an advisory election where voters would express their choice for senator. Although this election was not binding on the legislature, the law implied that it was the legislature's duty to enact the will of the people. It stated "it shall be the duty of each house to count the votes and announce the candidate having the highest number, and thereupon the house shall proceed to the election of a Senator."¹³² Although this directive seemed rather clear, in the first election after this law passed, the person who received the most votes in the advisory election was not chosen by the legislature. Rather, a man who did not receive even one vote in the advisory election was chosen.¹³³

This was an unacceptable outcome for the people of Oregon. In 1904, by popular initiative, Oregon passed a law calling for candidates to the state legislature to sign one of two statements. The first said that the candidate would "pledge[] . . . always to vote for the candidate . . . who has received the highest number of the people's vote . . ." ¹³⁴ In the second, the candidate agreed to "consider the vote of the people . . . as nothing more than a recommendation . . ." ¹³⁵ Almost every candidate signed the first statement. The next election led to a showdown that tested Oregon's

¹²⁷ HAYNES, *supra* note 121, at 86.

¹²⁸ *Id.* at 91.

¹²⁹ *Id.* at 96–97.

¹³⁰ *Id.* at 99.

¹³¹ *Id.*

¹³² *Id.* at 100.

¹³³ *Id.* at 101. The author of this Comment cannot find an explanation for this occurrence.

¹³⁴ *Id.*

¹³⁵ *Id.*

system.¹³⁶ The people chose the Democratic candidate, but both branches of the legislature were controlled by Republican majorities. The Republican majority kept its promise and elected the Democratic candidate to the Senate.¹³⁷ The Oregon model was adopted by other states, with similar success.¹³⁸ Oregon altered its state constitution, while other states, such as Nebraska, passed legislation to provide that the state legislature must implement the outcome of the popular vote for senator.¹³⁹

Because not all states adopted the Oregon model, deadlocked elections and Senate vacancies continued. In 1909, a resolution calling for a constitutional amendment was referred to the Committee on the Judiciary of the Senate.¹⁴⁰ The Committee drafted an amendment that called for the election of Senators by direct vote of the people.¹⁴¹ Although it took almost three years to present the amendment to the states, three-fourths of the states ratified it in just over one year.¹⁴² The addition of the Seventeenth Amendment to the Constitution was complete.¹⁴³

The experience regarding the election of senators suggests that the word “legislature” in the Senate Election Clause mandated involvement of the state legislature and excluded the use of a ballot initiative. The textual similarity between this Clause and Distribution Clause provides further support for the argument that the Framers did not intend “legislature” to include ballot initiatives. Article I states that “[t]he Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof . . .*”¹⁴⁴ Article II directs that “[e]ach State shall appoint, in such Manner as *the Legislature thereof may direct*, a Number of Electors . . .”¹⁴⁵

The almost universal historical practice of inclusion of the state legislature provides strong evidence that a ballot initiative would not be constitutional under the original constitutional language, which granted the “legislature” the power to select senators. By analogy, the word “legislature” in the Distribution Clause must be construed to exclude the use of bal-

¹³⁶ *Id.* at 102.

¹³⁷ *Id.*

¹³⁸ *Id.* at 103–04. Nebraska and North Dakota were first to adopt a similar systems. *Id.*

¹³⁹ See Amar, *supra* note 6, at 634 (arguing that Oregon’s constitutional amendment to provide for direct election, along with other states legislative changes, combined with the ultimate acquiescence by all states, provide evidence that the removal of the power to select senators from state legislatures was constitutional). Any dispute about the constitutionality of these changes became moot with the ratification of the Seventeenth Amendment in 1936, which removed the need for any challenge.

¹⁴⁰ HAYNES, *supra* note 121, at 108. Remember, since the 1890s, the House had passed numerous resolutions calling for this amendment, but the Senate did not take up this issue until 1909. *Id.* at 96–97.

¹⁴¹ U.S. CONST. amend. XVII, § 1.

¹⁴² HAYNES, *supra* note 121, at 108–15.

¹⁴³ *Id.* at 115–16.

¹⁴⁴ U.S. CONST. art. 1, § 3, cl. 1, *amended by* U.S. Const. amend. XVII, § 1 (emphasis added).

¹⁴⁵ U.S. CONST. art. 2, § 1, cl. 2 (emphasis added).

lot initiatives. If one desires the people to have the ability to alter the method of selecting electors through a ballot initiative,¹⁴⁶ an amendment, similar to the Seventeenth Amendment, must be passed.

E. Prior Court Decisions

Prior Supreme Court decisions support the contention that ballot initiatives cannot be used to alter the method of distributing electors.¹⁴⁷ The Supreme Court has interpreted the word “legislature” as it appears in the Distribution Clause and elsewhere in the Constitution. None of the following cases directly addresses whether a ballot initiative is a constitutionally permissible mechanism for altering the distribution of electors, but each provides insight into the best interpretation of the word “legislature.” Every decision, except for one, supports an interpretation that excludes the use of ballot initiatives.

*I. Article II: Distribution Clause.—McPherson v. Blacker*¹⁴⁸ and *Bush v. Gore*¹⁴⁹ both interpreted the word “legislature” in Article II, Section 1.¹⁵⁰ Both concluded that state legislatures have plenary power in determining the method of selecting electors.¹⁵¹

In *McPherson*, the Supreme Court denied a challenge to a decision by the Michigan legislature to appoint presidential electors through a district-based system, rather than by a statewide vote.¹⁵² The appellant argued that this method violated Article II, Section 1 of the Constitution.¹⁵³ Rejecting this argument, the Court stated, “the insertion of [the] words [‘in such manner as the legislature thereof may direct’] . . . operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.”¹⁵⁴ With this in mind, the Court concluded that the Michigan legislature, if it so chose, could use a district-based system, rather than a statewide vote.

¹⁴⁶ As noted above, this Comment does not argue a referendum would be unconstitutional; therefore, a constitutional amendment is not necessarily needed for its use.

¹⁴⁷ See McLaughlin, *supra* note 6, at 2964–67 (discussing the Soldier-Voting cases of the 1860s and subsequent Congressional action that occurred prior to the Supreme Court decisions discussed in Part II.E.1). These cases support this Comment’s interpretation of Article II, Section 1.

¹⁴⁸ 146 U.S. 1 (1892).

¹⁴⁹ 531 U.S. 98 (2000).

¹⁵⁰ The text of that provision reads: “Each State shall appoint, in such *Manner as the Legislature thereof* may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress” U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

¹⁵¹ *McPherson*, 146 U.S. at 35; *Bush*, 531 U.S. at 104. The Court’s decisions go farther than necessary for this Comment, holding that the legislature’s power is plenary. This Comment only argues that the legislature cannot be removed from the process of selecting electors via a ballot initiative.

¹⁵² *McPherson*, 146 U.S. at 24; see also *supra* note 2 (describing the district-based system).

¹⁵³ *McPherson*, 146 U.S. at 24.

¹⁵⁴ *Id.* at 25.

The Court, after searching the records of the Constitutional Convention, found that participants proposed various methods to elect the President, including election by the state executive, election by electors selected by the people, election by popular vote, appointment by Congress, and election by electors chosen by state legislatures.¹⁵⁵ The Court noted that “[t]he final result seems to have reconciled contrariety of views by leaving [the choice] to the state legislatures.”¹⁵⁶

The Court also evaluated the historical practice of legislatures since the adoption of the Constitution, noting that state legislatures have used various methods to appoint electors.¹⁵⁷ Some simply appointed the electors themselves, while others used a district system. Each of these modes was acceptable.¹⁵⁸ Finally, the Court analyzed proposals to amend Article II and constitutionally prescribe the method of choosing electors.¹⁵⁹ A proposal to choose electors via popular vote was suggested at the time of the Twelfth Amendment. However, it was not incorporated into the Amendment. This plan was offered to Congress numerous times between 1813 and 1844, and was rejected on every occasion.¹⁶⁰ In 1874, the chairman of the Senate Committee on Privileges and Elections recommended a constitutional amendment that would remove the power of the state legislature and adopt a district-based plan. The Committee’s report provides additional evidence that a constitutional amendment was necessary.

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.¹⁶¹

The Court upheld the power of the Michigan legislature to use a district-based system to select electors. It concluded “that from the formation of the government until now the practical construction of the clause has

¹⁵⁵ *Id.* at 26–36.

¹⁵⁶ *Id.* at 28.

¹⁵⁷ *Id.* at 28–32.

¹⁵⁸ *Id.* at 31.

¹⁵⁹ *Id.* at 33.

¹⁶⁰ *Id.* The proposal of amendments to alter the method of election to a popular vote, which would have removed the power of the state legislature, suggests that an amendment is necessary to remove the state legislature from the process.

¹⁶¹ *Id.* at 34 (citing S. REP. No. 43-395, at 9 (1874)).

conceded plenary power to the state legislatures in the matter of the appointment of electors.”¹⁶²

The Court revisited this text in *Bush v. Gore*.¹⁶³ Chief Justice Rehnquist, joined by two Justices, based his concurrence on the rationale of *McPherson*.¹⁶⁴ He argued that under the Distribution Clause, the state legislature had plenary power over the distribution of electors.¹⁶⁵ Because the Florida Supreme Court made a significant departure from the scheme developed by the legislature, its action usurped the power conferred on the legislature by Article II, and therefore the court’s action was unconstitutional.¹⁶⁶ Justices Ginsburg,¹⁶⁷ Stevens,¹⁶⁸ Souter,¹⁶⁹ and Breyer¹⁷⁰ disagreed with the Rehnquist concurrence and argued that the state legislature cannot be placed above the state constitution.

If state legislatures have plenary power over the method of selecting electors, as Chief Justice Rehnquist argued, the use of a ballot initiative is unconstitutional. Notably, the dissenters’ argument in favor of deferring to a state constitution was in the context of judicial review, not a ballot initiative.¹⁷¹ These four Justices argued that, under the state constitution, the judicial branch must have the power of review. Judicial review does not remove the legislature from the process. If other branches of the government (or the people) were allowed to remove the legislature completely, the Constitution would not contain the term “legislature” in Article II.

2. *Article V: Ratification Clause.*—The Supreme Court’s interpretation of the word “legislature” in Article V also supports the argument that the word “legislature” in the Distribution Clause excludes the use of ballot initiatives.¹⁷²

¹⁶² *Id.* at 35.

¹⁶³ 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* *But see* Hasen, *supra* note 6, at 612–16 (arguing that *Bush* and the preceding cases shed little light on the question of whether a ballot initiative altering the method of selecting presidential electors violates Article II).

¹⁶⁶ *Bush*, 531 U.S. at 122.

¹⁶⁷ *Id.* at 141 (Ginsburg, J., dissenting) (arguing that “a State may organize itself as it sees fit”).

¹⁶⁸ *Id.* at 123 (Stevens, J., dissenting).

¹⁶⁹ *Id.* at 133 (Souter, J., dissenting).

¹⁷⁰ *Id.* at 148 (Breyer, J., dissenting).

¹⁷¹ See McLaughlin, *supra* note 6, at 2983–85, for a discussion of the dissenters’ arguments in *Bush*, and how such arguments do not undermine the argument that state legislatures cannot be removed from the process of selecting the method of choosing presidential electors.

¹⁷² Article V reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the *Application of the Legislatures* of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, *when ratified by the Legislatures* of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

In *Hawke v. Smith*¹⁷³ the Supreme Court held that a referendum on the Ohio legislature's ratification of a constitutional amendment was unconstitutional.¹⁷⁴ Ohio passed a constitutional amendment "reserv[ing] to [the people] the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States."¹⁷⁵ The Court first stated that during the drafting of the Constitution, "legislature" had a specific meaning—a "representative body which made the laws of the people."¹⁷⁶ The Court then compared this to the election of members of the House of Representatives, which was given to the people of the states, not to the legislatures.¹⁷⁷ The Court concluded that the Framers intentionally used the word "legislature" to the exclusion of a referendum.¹⁷⁸

The Court concluded that, although the power to enact laws came from the people of the states, the power to ratify a proposed amendment came from the federal Constitution; therefore, the meaning of the word "legislature" in the federal Constitution trumped any state power.¹⁷⁹ Because the Court defined "legislature" in Article V as excluding referenda, they were unconstitutional.

Although the decision occurred in the context of the Ratification Clause of Article V, the Court's rationale is applicable to the Distribution Clause.¹⁸⁰ First, the Supreme Court believed the Framers intentionally used the word "legislature" to exclude direct popular vote.¹⁸¹ This rationale is fully applicable to the Distribution Clause, as the Framers chose the same word, which had the same meaning to them. Second, similar to a constitutional amendment, a single state's method of selecting electors has the pos-

U.S. CONST. art. V (emphasis added).

¹⁷³ 253 U.S. 221 (1920). See Amar, *supra* note 6, at 637–39, for a comprehensive discussion of the facts.

¹⁷⁴ *Hawke*, 253 U.S. at 228.

¹⁷⁵ *Id.* at 225.

¹⁷⁶ *Id.* at 227.

¹⁷⁷ *Id.* at 228.

¹⁷⁸ *Id.* The Court also cited the deliberative nature of the legislature as one of the reasons the Framers called for ratification of a constitutional amendment by the legislature and not by the people. *Id.* at 227.

¹⁷⁹ *Id.* at 230.

¹⁸⁰ See Hasen, *supra* note 6, at 620 (agreeing that the Court's rationale is applicable to the Distribution Clause, although disagreeing that the applicability endorses the theory that initiated electoral college reform is constitutional). *But see* Amar, *supra* note 6, at 639–41 (arguing that the Court's arguments in *Hawke* are dicta, and that because the case could have been decided on narrower grounds, such arguments do not apply to Article V or Article II interpretation); Smith, *supra* note 5, at 738 (arguing that the context of the *Hawke* decision, Article V, is different from Article II; therefore, the Court's rationale of *Hawke* cannot apply to Article II).

¹⁸¹ *Id.* at 228.

sibility of altering not just a state election, but a national election.¹⁸² The deliberative nature of the legislative body is sufficiently important due to the large national impact—the possibility of altering the next presidential election. Therefore, just as under Article V, the use of a ballot initiative—which removes power granted to the legislature—cannot be used to alter the method of distributing electors under Article II.

3. *Article II: Times, Places, and Manner Clause.*—The Supreme Court has interpreted the Times, Places, and Manner Clause¹⁸³ in two relevant cases.¹⁸⁴ In *Davis v. Hildebrant*,¹⁸⁵ the Supreme Court held that a referendum¹⁸⁶ repealing a congressional redistricting passed by the Ohio legislature was constitutional.¹⁸⁷ The Court’s rationale was based on a grant of power by a congressional statute, which was passed pursuant to Congress’s power under Article II.¹⁸⁸ Prior to its alteration, the statute directed that existing congressional districts should continue in force “until the legislature of such State in the manner herein prescribed shall redistrict such state.”¹⁸⁹ In 1911, Congress altered the statute to provide that redistricting shall be made “in the manner provided by the laws [of the state] thereof.”¹⁹⁰ The Court concluded that this statute authorized redistricting by referendum when a state constitution treated referendums as legislative power.¹⁹¹ The Court did not interpret the text of Article II. Instead, it relied on the statute

¹⁸² See Bennett, *supra* note 26, at 83–84. See also McLaughlin, *supra* note 6, at 2976–78, 2992–95, for a discussion of the impact of the “special national interest of presidential elections” on this question.

¹⁸³ “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the places of ch[oo]sing Senators.” U.S. CONST. art. I, § 4 (emphasis added).

¹⁸⁴ One other court writing is noteworthy. In a dissent to denial of certiorari in *Colorado General Assembly v. Salazar*, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, argued that, in the context of the Times, Places and Manner Clause, there must be some “limit on the State’s ability to define lawmaking by excluding the legislature itself in favor of the courts.” 541 U.S. 1093, 1095 (2004) (mem.). Although this is not an opinion by the Court, it provides some evidence that a state constitution cannot completely remove the state legislature from the decisionmaking process under Article I, Section 4, which by analogy could be extended to the Distribution Clause.

¹⁸⁵ 241 U.S. 565 (1916).

¹⁸⁶ The action in question was closest to a referendum as defined by Schwarzschild, *supra* note 7, at 533. Although the legislature did not specifically authorize a referendum on this action, the Ohio Constitution reserved to the people the ability to approve or disapprove by popular vote any law passed by the legislature, therefore there was no action necessary by the people for the measure to be placed on the ballot. *Davis*, 241 U.S. at 566.

¹⁸⁷ *Davis*, 241 U.S. at 567–69. The Court determined that the state could define its legislative power, and the only remaining question was a Guarantee Clause question, which was nonjusticiable. For a stimulating evaluation of the impact of the Guarantee Clause on presidential elections, see Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009).

¹⁸⁸ *Davis*, 241 U.S. at 568–69.

¹⁸⁹ *Id.* at 568.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

to hold that the use of a referendum to override redistricting measures passed by the legislature was constitutional.¹⁹² Because the Distribution Clause does not contain any delegation of power to Congress, the allowance of a referendum does not apply to it. *Davis* supports the proposition that Congress, at least in 1911, and the Supreme Court, in 1916, interpreted the word “legislature” to exclude referendums under the Times, Places, and Manner Clause. This interpretation should be applied to Article II, Section 1 to exclude the use of ballot initiatives.¹⁹³

Additionally, Congress did not include referendums in its interpretation of “legislature” because Congress later amended the language to allow for the use of referendum. The change would not have been necessary had Congress believed the word “legislature” encompassed the use of a referendum. Although a previous Congress’s interpretation is not dispositive, it adds another piece to the puzzle in support of such an interpretation.

The Court next interpreted the word “legislature” under the Times, Places, and Manner Clause in *Smiley v. Holm*.¹⁹⁴ The Court held that the Minnesota legislature could not pass a congressional redistricting plan without gubernatorial approval.¹⁹⁵ For the first time, the Court distinguished between the different uses of the word “legislature” in the Constitution.¹⁹⁶ The Court determined that when the legislature acted under Article V, it was acting as a ratifying body, whereas when it elected senators, it was acting as an electoral body. Under Article I, Section 4, the Court determined the legislature was acting as a lawmaking body.¹⁹⁷

The Court also emphasized the second clause of Article I, Section 4, which provides that Congress can make regulations as it sees fit, with only one exception.¹⁹⁸ The Court reasoned that the use of the phrase “such regulations” in Article I, Section 4 was evidence that the legislature acts in its lawmaking capacity in regulating the times, places, and manner of elections.¹⁹⁹ Additionally, the congressional statute was passed pursuant to this express constitutional grant of power.²⁰⁰ Citing *Davis*, the Court argued that

¹⁹² *Id.* at 568–69.

¹⁹³ If referendum is unconstitutional, a ballot initiative would be too. *See supra* note 7.

¹⁹⁴ 285 U.S. 355 (1932).

¹⁹⁵ *Id.* at 373.

¹⁹⁶ *Id.* at 365.

¹⁹⁷ *Id.* at 366. *But see* Einer Elhauge, *The Lessons of Florida 2000*, 110 POL’Y REV. 15, 25 (2002) (arguing that when a state passes laws to govern a presidential election, such laws are not passed under authority granted by the state constitution, but rather by authority granted by the federal Constitution). Applying this reasoning to Article I, a legislature regulating congressional elections would not be subject to executive veto. *See* Saul Zipkin, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 376 n.127 (2003).

¹⁹⁸ *Smiley*, 285 U.S. at 367.

¹⁹⁹ *Id.*; *see* Hasen, *supra* note 6, at 620–21 (arguing that a ballot initiative in the context of selecting the method of choosing presidential electors is more similar to Article I, Section 4, than to Article V).

²⁰⁰ *Smiley*, 285 U.S. at 371.

altering the statute to include the words “in the manner provided by the laws thereof” indicated Congress’s intent to compel the state constitution to define the legislature power.²⁰¹

Smiley, however, only supports the proposition that when choosing the times, places, and manner of elections, the legislature must pass a law by the method normally used to pass laws, which could be subject to an executive veto. It does not hold that the selection of the times, places, and manner can occur without legislative involvement, such as by gubernatorial action alone. Although some might extend the Court’s reasoning to include ballot initiatives, as it might be one of a state’s chosen method of lawmaking, this inference is not warranted. Based on the rationale of section II.A, the inclusion of the word “legislature” must operate as some limit on the states’ power, otherwise another word would have been chosen. The complete exclusion of the legislature, as required by a ballot initiative, exceeds this limit.

Additionally, legislation passed under the Times, Places, and Manner Clause merely affects a single state. It only alters the election for that state’s senators or representatives. However, a state’s method of determining electors has an effect on the entire country because the Presidency is a national office.²⁰² The President represents “all voters in the Nation,”²⁰³ making the method of selecting electors more similar to ratifying a national constitutional amendment than to changing the manner of a local election.²⁰⁴ The use of coercive referendums for ratifying a constitutional amendment is unconstitutional.²⁰⁵ Similarly, due to the national effect of any change to the distribution of electors, the use of a ballot initiative is unconstitutional.

Thus, although the Supreme Court has interpreted the word “legislature” differently in different contexts, the Court’s decisions provide additional evidence that the “legislature” in the Distribution Clause must include a state’s legislative body and cannot include ballot initiatives.

Given the value a ballot initiative might have and that a ballot initiative is an unconstitutional mechanism for altering the method of choosing electors, the next Part outlines an alternative instrument to solicit the input of the people. A nonbinding ballot initiative would allow the people to speak to the legislature on this important question, and fulfill the constitutional obligation that the state legislature must decide.

²⁰¹ *Id.*; see also *supra* text accompanying notes 185–92 (explaining the Court’s rationale in *Davis*).

²⁰³ *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983)).

²⁰⁴ See Jonathan L. Walcoff, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525, 1527 (1985).

²⁰⁵ See *infra* Part II.E.2.

III. AN ALTERNATIVE PROPOSAL: A NONBINDING ADVISORY BALLOT INITIATIVE

As shown in Part II, altering the method by which electors are distributed through a ballot initiative is unconstitutional. However, the people should still have a say in the method of electoral distribution. This Comment proposes an alternative solution that addresses both of these concerns: a nonbinding advisory ballot initiative.²⁰⁶ Such initiatives have been utilized in two important constitutional contexts: the election of senators by state legislatures under Article I, and the ratification of constitutional amendments under Article V. This Part argues that the use of a nonbinding advisory ballot initiative is constitutional and that such an initiative would have meaningful influence on the decision of the legislature.

First, the use of a nonbinding advisory ballot initiative is a constitutional method by which to advise the legislature of the people's preference. States have historically utilized advisory referendums under Article I, Section 3 to inform the legislature about their constituents' preferences in the election of U.S. senators. For example, the "Oregon Plan" initially set up an advisory referendum to determine the popular will with regard to Senate elections.²⁰⁷

A similar plan could be utilized under Article II. States could hold advisory referendums to advise the legislatures on the most desirable method of distributing electors. The legislatures could then implement the results of the referendum if they chose to do so. As the language of Article I, Section 2 is similar to the language of Article II, Section 1,²⁰⁸ if a nonbinding advisory referendum could be used to inform the legislature regarding its choice of senators, a nonbinding ballot initiative could also be used to advise the legislature of the desired method of distributing electors. An advisory referendum has also been used in the context of Article V. Nevada held an advisory referendum to garner public opinion on the Equal Rights Amendment. In *Kimble v. Swackhamer*, then-Justice Rehnquist, sitting as a Circuit Justice, refused to enjoin Nevada's advisory referendum, holding that it did not violate Article V.²⁰⁹ Although use of this single-Justice case should be limited, Justice Rehnquist persuasively upheld the

²⁰⁶ Whether this action needs to be initiated by the legislature or can be done without the legislature is outside the scope of this Comment, as it would not encounter any constitutional problems under the Distribution Clause. Because this variable is removed, this Comment's arguments apply with equal force to referendums and ballot initiatives.

²⁰⁷ See *supra* Part II.D.

²⁰⁸ U.S. CONST. art. 1, § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ."). Compare 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 . . .").

²⁰⁹ 439 U.S. 1385, 1387–88 (1978) (Rehnquist, Circuit Justice).

validity of this advisory referendum because it did not bind the Nevada legislature.²¹⁰ He compared the advisory referendum to speaking to the public directly. “If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort.”²¹¹ Justice Rehnquist argued that the legislature’s freedom to disregard the advisory referendum was integral to its constitutionality under Article V.²¹²

If a nonbinding advisory referendum is constitutional under Article V, a nonbinding ballot initiative is constitutional under Article II. Both Article V and Article II direct the “legislature” to act on the respective issue. A nonbinding advisory ballot initiative simply provides the legislature with the people’s view. It does not remove legislative action. Its constitutionality is grounded in the fact that it leaves the ultimate decision of choosing a method of distributing electors to the legislature.

Prior court decisions on the constitutionality of *coercive* advisory referendums provide further evidence that nonbinding advisory ballot initiatives are constitutional. States have attempted to use referenda to *coerce* the representatives individually and the legislature itself into supporting or rejecting a constitutional amendment, and these attempts have been struck down by courts.²¹³

For example, Nebraska, via referendum, passed a state constitutional amendment that instructed its congressional delegation to propose and vote for a constitutional amendment, and placed labels on a future ballot in the event of noncompliance. In *Miller v. Moore*²¹⁴ a different panel of the Eighth Circuit struck down this state constitutional amendment for violating Article V because “[u]nlike the measure in *Kimble*, which specifically

²¹⁰ *Id.*

²¹¹ *Id.* at 1388.

²¹² *Id.* at 1386–87.

²¹³ In addition to *Miller v. Moore*, 169 F.3d 1119, 1124 (8th Cir. 1999), discussed below, see also *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1095 (D.S.D. 1998) (holding that a state constitutional amendment calling for “[e]ach member of the state’s congressional delegation [to] use all of their powers to pass a congressional term limits amendment[.]” coupled with ballot labels for noncompliance is unconstitutional under Article V); *League of Women Voters of Me. v. Gwadosky*, 966 F. Supp. 52, 57 (D. Me. 1997) (holding that ballot labels, similar to Missouri’s, in the event of a congressperson’s failure to vote for a constitutional amendment are unconstitutional under Article V); and *Simpson v. Cenarrusa*, 944 P.2d 1372, 1376 (Idaho 1997) (holding that “instructions” to members of Congress, without any further action, to propose and vote for a constitutional amendment do not violate Article V because the members are free to disregard the instructions).

Some commentators have argued that these coercive instructions are constitutional. See Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000); Kris W. Kobach, *May “We the People” Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1 (1999).

²¹⁴ 169 F.3d 1119 (8th Cir. 1999)

stated that legislators were not bound by the results of the referendum, we believe that Nebraska's [amendment to its constitution] represents a clear attempt to coerce or bind legislators.²¹⁵ The court continued, "[The amendment] does not, for example, 'advise' or 'suggest' or 'urge' Nebraska's legislators to pass a term limits amendment; instead, it 'instructs lawmakers to proceed on a precise and inflexible course of action utilizing the full range of their Article V authority.'²¹⁶

Although *Miller* struck down attempts to advise the legislature on a course of action, it did so because the advice crossed a constitutional boundary. The statute included both instructions and tangible negative consequences for noncompliance, in the form of ballot labels, if the advice was not followed. The *Miller* court likely would have upheld a completely nonbinding advisory ballot initiative, similar to the one used in *Kimble*, because under such a plan the legislature would not be coerced into following the results via actions like ballot labels.²¹⁷ The ballot initiative would "advise," "suggest," and "urge"²¹⁸ the legislature to distribute electors in a certain manner. However, the legislature would still be free to disregard the results of the referendum. In the context of Article II, the court would likely have upheld a similar nonbinding ballot initiative that simply suggested to the legislature that it alter the method of distributing electors.

Second, the result of a nonbinding advisory ballot initiative would likely be implemented by the legislature. Although the Oregon plan left the final choice of selecting a senator with the state legislatures, thereby ensuring its constitutionality, the state legislatures implemented the will of the people. Amazingly, when the people of Oregon selected a Democratic candidate in the advisory election, the Republican-controlled legislature elected the Democratic candidate to the Senate.²¹⁹

Similarly, Nevada's use of a nonbinding advisory referendum to provide advice on the Equal Rights Amendment had a profound impact on the Nevada legislature. The people overwhelmingly expressed opposition to the Equal Rights Amendment.²²⁰ Consequently, both houses of the Nevada legislature refused to bring the amendment to a floor vote.²²¹

Although not binding, an advisory ballot initiative under Article II would exert enormous pressure on the legislature to alter the method of

²¹⁵ *Id.* at 1124.

²¹⁶ *Id.* (quoting *Morrissey v. Colorado*, 951 P.2d 911, 916 (Colo. 1998) (en banc)).

²¹⁷ See *infra* text accompanying note 219.

²¹⁸ See *Miller*, 169 F.3d at 1123–24 (noting that a referendum with these purposes would likely be constitutional under Article V).

²¹⁹ See *supra* Part II.D.

²²⁰ See *Kobach*, *supra* note 213, at 23 (noting that 67% of the people voted against the amendment).

²²¹ *Id.*

distributing electors²²² because it would be extremely difficult for the legislature to ignore the expression of popular will.²²³

CONCLUSION

The 2000 Presidential election was intensely partisan. In its wake, both Republicans and Democrats continue to seek creative ways to tip the balance of electoral power in their favor. The most recent efforts to change various winner-take-all systems, if successful, have the potential to change the outcome of future presidential elections, affecting the entire country. However, one chosen mechanism, a ballot initiative, is barred by Article II of the Constitution because it removes the final decision from the state legislature. The people should have a voice in determining the method of their state's distribution of electors. A nonbinding advisory ballot initiative provides the people with that voice, and also heeds the Constitution's mandate by leaving the ultimate choice to state legislatures.

²²² *Cf. id.* at 23–25 (arguing that instruct-and-inform laws in the context of a constitutional amendment would have a “likely persuasive effect” and “offer . . . strong inducement”). Members of the legislature have disregarded constituent instruction. For example, Representative Jo Ann Emerson of Missouri informed members of the House that she would not follow all of her constituent's instructions. The voters of Missouri instructed its members of Congress to vote for six-year term limits for representatives, but vote against limits of a longer period of time. *Id.* at 24 n.93. Representative Emerson decided to vote for all term limits, regardless of length. In her defense, she stated:

I will vote in favor of each and every serious term limit amendment brought before the House this week. If that means I invoke a misleading scarlet letter, then so be it. Those of us charged with the responsibility of dealing with the legislative agenda of the people on a practical basis are duty-bound to deliver what is feasible, and that includes term limits that stand a chance of passing Congress.

143 CONG. REC. E277 (daily ed. Feb 13, 1997) (statement of Rep. Emerson). Representative Emerson likely believed that this was in the best interest of the citizens of Missouri, and that she would be able to explain to the public her rationale for disregarding their instructions. *See* Kobach, *supra* note 213, at 24 n.93. It is this ability to ignore the wishes of the public that makes a nonbinding advisory ballot initiative constitutional.

²²³ *See* Kobach, *supra* note 213, at 23.

