

**THE HISTORIAN’S CASE AGAINST THE
INDEPENDENT STATE LEGISLATURE
THEORY**

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THE HISTORIAN'S CASE AGAINST THE INDEPENDENT STATE LEGISLATURE THEORY

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Abstract: The Independent State Legislature Theory (ISLT) claims that the U.S. Constitution grants to state legislatures near-plenary authority to regulate federal elections, independent of other state actors, state courts, and state constitutions. The theory purports to find support in the text of the Elections Clause (Art. I, Sec. 4) and the Presidential Electors Clause (Art. II, Sec. 1) (together, the “Federal Election Clauses”), which assign the power to regulate federal elections to the “legislature” of each state. At least four sitting Justices on the U.S. Supreme Court have indicated support for the theory. The Court heard a case, *Moore v. Harper*, in December 2022 premised on this theory. This Essay—the first on the ISLT by an academic historian with an expertise in the founding period—demonstrates that the ISLT has no basis in historical fact. The Essay shows that the ISLT is inconsistent with: (1) the founding era’s rejection of legislative supremacy; (2) the framing of the Constitution; and (3) the conduct of legislatures during the first federal elections.

INTRODUCTION

In recent years, a legal theory has emerged called the Independent State Legislature Theory (ISLT) which argues that “[t]he U.S. Constitution does not confer authority to regulate federal elections on states as entities. Rather it grants that authority specifically to the ‘Legislature’ of each state.”¹ Extreme versions of the theory insist that only the legislatures themselves, acting independently of other branches of government, should have any role in making federal election laws. This formulation is sometimes also asserted to prevent state legislatures from delegating authority to other state actors, as in the case of independent redistricting commissions that draw congressional districts, or

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¹ Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 1 (2020); see also Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. 847 (2015) (arguing that redistricting by groups other than the elected legislature violate the Constitution).

to claim that state courts have no jurisdiction over a state's federal election laws, including laws regarding the method of balloting for president or the makeup of congressional districts in gerrymandering cases. This formulation, it should be emphasized, is a "theory," or an interpretation, and one of very recent vintage—rather than, as some of its proponents would maintain, a longstanding "doctrine," i.e., a legal rule grounded in established legal precedent.² As a theory, it has recently gained a surprising number of adherents in legal circles, including certain sitting justices of the Supreme Court.³

Neither a close reading of the historical evidence nor the judgment of generations of historians provides support for the ISLT. Legal scholars have extensively shown that the ISLT cannot be squared with founding era practice⁴ or understandings⁵ (to say nothing of various legal doctrines and interpretative methodologies).⁶ This Essay presents additional uncanvassed historical evidence against the ISLT.

The Essay proceeds in three parts. Part I shows how American political leaders considered but ultimately rejected legislative supremacy in the states, and instead chose to subordinate their legislatures to the state constitutions.⁷ Part II unearths evidence from the framing and ratification of the U.S. Constitution that is inconsistent with the ISLT.⁸ Part III turns to the practice of legislatures in making the first federal election laws. No state interpreted the term "Legislature" in the U.S. Constitution to empower the legislatures to act as

² See Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 574–75 (adopting the term "theory" rather than "doctrine"); Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091, 1093 n.5 (2022) (same).

³ See, e.g., *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., dissenting from denial of application for stay).

⁴ See generally Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022) (identifying founding era state constitutions that regulate federal elections); Krass, *supra* note 2 (identifying founding era state statutes that delegate authority to regulate federal elections to other state actors); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001) (identifying founding era state mechanisms that were applied to federal election regulations).

⁵ Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1063 (2021) (explaining how the ISLT is inconsistent with the purpose of the Elections Clause, which was designed to constrain state legislatures); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2022 SUP. CT. REV. 1, 22 (explaining how the ISLT is inconsistent with the founding era theories of sovereignty).

⁶ See generally, e.g., Amar & Amar, *supra* note 5; Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052 (2021); Nathaniel F. Rubin, Essay, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57 (2021), <https://cornelllawreview.org/wp-content/uploads/2021/01/Rubin-online-essay-final.pdf> [<https://perma.cc/NLA3-WGWB>].

⁷ See *supra* notes 10–89.

⁸ See *supra* notes 90–127.

independent bodies, free from the constraints of their individual state constitutions, when passing the first federal election laws.⁹

I. BEFORE THE FRAMING: THE RISE AND FALL OF LEGISLATIVE DOMINANCE

In order to understand why the framers used the term "Legislature" in the provisions concerning the federal election regulation, it is first necessary to review the role of the history of legislative assemblies prior to the American Revolution. This overview examines the role of colonial charters in the North American British colonies, the importance of the colonial assemblies as reflections of the popular will, and, with the coming of independence, the role of the first state constitutions in institutionalizing government based on popular consent.

Section A of Part I explores the role of legislatures in the colonial period.¹⁰ Section B looks at how early state constitutions defined the new legislatures.¹¹ Section C examines early revisions to these state constitutions.¹²

A. Pre-revolutionary History: Emergence of Legislative Dominance

Long before the American Revolution, all thirteen British colonies in North America were governed through their colonial charters. Bestowed by the British monarch, these charters granted settlers the right to reside in a certain region of North America, established the colony's boundaries, and guaranteed the inhabitants of the colony the privileges and liberties of free English subjects.¹³ Under the auspices of its charter, each colony had its own separate and distinct government, including a legislature, with an upper and lower house, which passed laws for the colony. Each colony also had a governor, appointed by the King in the royal colonies or by the colonial proprietor the colonies of Pennsylvania and Maryland (e.g., the Penn family in Pennsylvania or the Calvert family in Maryland).¹⁴ Only in Connecticut and Rhode Island did eligible voters elect their governors.¹⁵ Laws passed by the colonial legislature were

⁹ See *supra* notes 128–140.

¹⁰ See *supra* notes 13–35.

¹¹ See *supra* notes 36–64.

¹² See *supra* notes 65–89.

¹³ See JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788*, at 7–54 (1986); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 35–49 (1988).

¹⁴ See GREENE, *supra* note 13; LUTZ, *supra* note 13, at 35–49; EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* 15–17 (1953); BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 66–95 (1968).

¹⁵ See LUTZ, *supra* note 13, at 46–49; MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 82 (1997).

subject to approval by the colonial governor, and then submitted to Britain for final approval.¹⁶

During the colonial era, tensions frequently arose between the colonial governors and the colonial assemblies. Colonists regarded their governors with suspicion and mistrust. Mostly British in origin, governors came to the colonies for only a short time—on average, for about five years¹⁷—where they were regarded as interlopers who wished to enrich themselves at the colonists' expense. Seen as corrupt and self-serving, the governors occupied positions that, according to the colonists, concentrated too much power in the hands of a single individual.¹⁸ Although their tenure tended to be brief, the governors enjoyed a great deal of discretionary power over the colonial government: they could call and dissolve the colonial legislatures; appoint members to the legislature's upper house; assert extensive patronage powers for lower offices; dismiss judges; assess a variety of fees for their own benefit, and perhaps most importantly, veto laws.¹⁹ Their will could contravene that of the popularly elected assembly.²⁰

In the years immediately prior to the American Revolution, popular attachment to the colonial legislatures deepened. Colonial legislatures led the way in responding to a series of laws passed by Parliament, beginning with the Sugar Act of 1764 and the Stamp Act of 1765. These statutes were seen as infringing on the colonists' traditional rights and liberties, especially regarding taxation.²¹ The colonists elected no representatives to Parliament, only to their individual colonial legislatures. Prior to 1764, Parliament had never directly taxed the colonists; only their colonial legislatures had. As a result, colonists perceived parliamentary policies after 1764 as a frontal assault on their right to self-government.²² Over time, as Parliament enacted other policies that undermined American liberties, the colonists grew increasingly hostile, defensive, and rebellious.

By the eve of the American Revolution, tensions between the colonial legislatures, the Crown, and the colonial governors reached a fever pitch.²³ Not inaccurately, the legislatures came to be seen as hotbeds of resistance to royal

¹⁶ See BAILYN, *supra* note 14, at 67; GREENE, *supra* note 13, at 20–22.

¹⁷ See BAILYN, *supra* note 14, at 90–91; GREENE, *supra* note 13, at 19–54.

¹⁸ See BAILYN, *supra* note 14, at 69–95.

¹⁹ *Id.*

²⁰ See JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 128–46 (1989).

²¹ See ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763–1789*, at 53–65, 112–26, 165–80 (2005); MORGAN & MORGAN, *supra* note 14, at 21–69.

²² See MIDDLEKAUFF, *supra* note 21; MORGAN & MORGAN, *supra* note 14, at 21–69; GREENE, *supra* note 13, at 105–28; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 173–81 (1969).

²³ See MIDDLEKAUFF, *supra* note 21, at 165–80, 229–30; GREENE, *supra* note 13, at 128–50.

authority. After the Boston Tea Party, Parliament's passage of the so-called "Intolerable Acts" of 1774 punished the colonies. They altered the structure of the Massachusetts upper house, limited town meetings, and precluded the establishment of representative government in territories recently ceded from France.²⁴ Colonists regarded these acts not just as an assault on a particular colony but as an attack on the entire basis of self-government in the Anglo-American colonies.²⁵ When numerous colonial legislatures attempted to protest, royal governors dissolved the legislatures or refused to allow representatives to meet.²⁶

When their officially sanctioned legislatures could no longer meet, colonists mounted a different kind of resistance. As royal government lost legitimacy in the people's eyes, there was, according to Massachusetts governor Thomas Hutchinson a "general dissolution of the established government in all the colonies."²⁷ In response, the people assumed the reins of government, holding elections and electing delegates to represent them in their own self-governing representative bodies. Between 1774 and 1776, these extra-legal bodies—local committees and provincial congresses—provided an alternative to the official royal institutions of governance.²⁸ When North Carolina's governor failed to call its assembly into session in 1774, representative Joseph Hawley declared that "the people will convene themselves The people will have some government or other."²⁹ Existing outside the bounds of their royal charters, the provincial congresses had no sanction but the authority that came from the people themselves. They had come into being, according to Governor Hutchinson, "by the meer [sic] act of the People."³⁰ In his 1774 pamphlet, *A Summary View of the Rights of British America*, Thomas Jefferson emphasized that the colonists had every right to organize such extra-legal bodies, saying "[w]hen [legislatures] are dissolved by the lopping off one or more of their branches, the power reverts to the people, who may exercise it to un-

²⁴ See DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, at 1–17 (1974); MIDDLEKAUFF, *supra* note 21, at 179–80; GREENE, *supra* note 13, at 142.

²⁵ See PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776, at 228–70 (1972).

²⁶ See AMMERMAN, *supra* note 24, at 128–29; WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 27–48 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973).

²⁷ THOMAS HUTCHINSON, STRICTURES UPON THE DECLARATION OF THE CONGRESS AT PHILADELPHIA; IN A LETTER TO A NOBLE LORD, &C, at 15 (1776).

²⁸ See AMMERMAN, *supra* note 24, at 103–24, 139–45; MIDDLEKAUFF, *supra* note 21, at 230, 238; RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772–1774, at 210–12, 230–36 (1970); ROBERT M. WEIR, "A MOST IMPORTANT EPOCH": THE COMING OF THE REVOLUTION IN SOUTH CAROLINA 54–68 (1970); WOOD, *supra* note 22, at 310–28; ADAMS, *supra* note 26.

²⁹ WOOD, *supra* note 22, at 314 (quoting Joseph Hawley).

³⁰ HUTCHINSON, *supra* note 27, at 15.

limited extent, either assembling together in person, sending deputies, or in any other way they may think proper.”³¹

As a kind of shadow government, the provincial congresses were essentially free-standing, though irregular, legislative bodies. As royal authority in the colonies continued to deteriorate, the provincial congresses came to be seen as the colony's legitimate government.³² During the years from 1774 to 1776, the congresses assumed the functions of government within each colony: collecting taxes, raising troops, purchasing ammunition and supplies, and maintaining order within the colony.³³ Although their existence was assumed to be temporary, until more regular forms of government could be established or re-established, they provided a critical source of continuity, order, and stability within the colonies.³⁴ The provincial congresses also elected delegates to represent their colony at the first and second Continental Congress—representative institutions which were themselves extra-legal in nature.³⁵ By the time of the American Revolution, then, Americans regarded their legislatures as the most important branch of government, the bodies that were most reflective of the people's wishes, the most protective of their interests, and the most dedicated to preserving their rights and liberties.

B. Early State Constitutions: Embrace of Legislative Dominance

When it became clear that independence from Britain was on the immediate horizon, the Second Continental Congress ordered on May 10th and 15th, 1776, that each of the colonies should replace its colonial charter with a new form of government that would “best conduce to the happiness and safety of their constituents.”³⁶ Each of the thirteen “states” subsequently wrote their first constitutions. Rhode Island and Connecticut, which already had highly representative governments, simply revised their existing colonial charters.³⁷ (See Appendix.)

³¹ THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 19 (1774).

³² See AMMERMAN, *supra* note 24, at 128–29; ADAMS, *supra* note 26.

³³ See AMMERMAN, *supra* note 24, at 103–24, 139–45, 238–43; WEIR, *supra* note 28, at 54–68.

³⁴ See AMMERMAN, *supra* note 24, at 103–24, 139–45; WEIR, *supra* note 28, at 54–68; WOOD, *supra* note 22, at 301–28.

³⁵ See AMMERMAN, *supra* note 24, at 103–24, 139–45; WEIR, *supra* note 28, at 54–68; WOOD, *supra* note 22, at 301–28; JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 21–62 (1979).

³⁶ John Adams, *Preamble to Resolution on Independent Governments, 15 May 1776*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-04-02-0001-0006> [<https://perma.cc/3GRA-KXJR>]; ADAMS, *supra* note 26, at 59–62.

³⁷ See ADAMS, *supra* note 26, at 66–98; LUTZ, *supra* note 13, at 96–110. Connecticut and Rhode Island, whose charters contained many democratic features, only slightly modified their charters rather than wrote new constitutions. See ADAMS, *supra* note 26, at 66–68.

In contrast to the British Constitution, each of the states composed a single written documents that, like the colonial charters, created the framework of government for their individual polities.³⁸ In contrast to their colonial charters, however, the authority of the state constitutions flowed from the people themselves, not from a monarch. The North Carolina Constitution put the matter simply: “[t]hat all political power is vested in and derived from the people only.”³⁹ Similarly, the Maryland Constitution of 1776 stated, “[t]hat all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”⁴⁰ Elaborating on this idea, the Massachusetts Constitution of 1780 asserted: “[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”⁴¹ A state constitution, then, represented the original delegation of power from the people to their government, a compact based on the consent of the governed.⁴²

The new state constitutions specified how government would be structured in each of the states. The Georgia Constitution of 1777, for example, declared its purpose, saying: “[w]e . . . the representatives of the people, from whom all power originates, and for whose benefit all government is intended . . . do ordain and declare . . . that the following rules and regulations be adopted for the future government of this state.”⁴³ Despite a wide variation in details, each of the early state constitutions created a tripartite system of government that included an executive, legislative, and judiciary branch and described the powers that each branch possessed.⁴⁴ The first state constitutions also established the requirements of the state’s legislature. These requirements included: how the legislature should be structured (bicameral or unicameral), when the legislature should meet, how the representatives would be elected and by whom, qualifications for serving in office, what constituted a quorum,

³⁸ See ADAMS, *supra* note 26, at 66–98; LUTZ, *supra* note 13, at 96–110.

³⁹ N.C. CONST. of 1776, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2787 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE, CONSTITUTIONS].

⁴⁰ MD. CONST. of 1776, *reprinted in* 3 THORPE, CONSTITUTIONS, *supra* note 39, at 1686.

⁴¹ MASS. CONST. of 1780, *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 443 (Oscar Handlin & Mary Handlin, eds., 1966) [hereinafter POPULAR SOURCES OF POLITICAL AUTHORITY].

⁴² See WOOD, *supra* note 22, at 268–73; DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 43–52, 72–84 (1980); J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 524–26 (1966).

⁴³ GA. CONST. of 1777, *reprinted in* 2 THORPE, CONSTITUTIONS, *supra* note 39, at 778.

⁴⁴ See LUTZ, *supra* note 13, at 104–05, 131–54; KRUMAN, *supra* note at 15, 35–86; ADAMS, *supra* note 26, at 164–217, 230–55.

the basis of apportionment of representatives, and the relationship between the legislature and the other branches of government.⁴⁵ Without adhering to these provisions, the legislature did not represent a lawful assembly and could not pass bills that would become laws for the state.⁴⁶

In striking contrast to the provincial assemblies that had emerged in the colonies on the eve of the American Revolution, the authority of the new state legislatures did not come directly from the people but was mediated through the vehicle of the state constitution. In effect, the state constitutions created the legislatures; they brought the legislatures into being. Far from being independent, these legislatures had no existence apart from the constitutions that created them.⁴⁷

The early constitutions represented a reaction to the colonists' experience with government during the colonial period. In opposition to the hated royal governors, they markedly reduced the powers of the executive branch of government. To acknowledge their trust in their elected representatives, they significantly enhanced the powers of the legislative branch.⁴⁸ The diminution in the executive's power was dramatic. In most revolutionary-era state constitutions written in 1776–1777, governors lost many of the powers they had possessed in the colonial era. Instead of being appointed, they were (in most states) elected by the legislature and subject to term limits.⁴⁹ They were stripped of patronage powers, could no longer call or dissolve the assemblies, and could not serve in multiple branches of government.⁵⁰ Under its 1776 constitution, Pennsylvania did not even have a governor at all—though it did have an executive council, elected by the people, made up of twelve members.⁵¹ Most importantly, many of the first state constitutions, including Virginia, North Carolina, New Jersey, Maryland, and Delaware, deprived their governors of their ability to veto laws passed by the legislatures.⁵² Among the early constitutions, only the South Carolina Constitution of 1776 and Massachusetts in 1780 endowed their executive with a gubernatorial veto.⁵³

⁴⁵ See LUTZ, *supra* note 13, at 104–05, 131–54; KRUMAN, *supra* note at 15, 35–86; ADAMS, *supra* note 26, at 164–217, 230–55.

⁴⁶ See LUTZ, *supra* note 13, at 104–05, 131–54; KRUMAN, *supra* note at 15, 35–86; ADAMS, *supra* note 26, at 164–217, 230–55.

⁴⁷ See WOOD, *supra* note 22, at 127–43, 313–19.

⁴⁸ See KRUMAN, *supra* note 15, at 123–26, 132–34; WOOD, *supra* note 22, at 132–43, 155.

⁴⁹ See WOOD, *supra* note 22, at 132–61; LUTZ, *supra* note 13, at 104–07; ADAMS, *supra* note 26, at 271–75.

⁵⁰ See WOOD, *supra* note 22, at 132–61; LUTZ, *supra* note 13, at 104–07; ADAMS, *supra* note 26, at 271–75.

⁵¹ See LUTZ, *supra* note 42, at 29–49; WOOD, *supra* note 22, at 438–46.

⁵² See WOOD, *supra* note 22, at 132–43; KRUMAN, *supra* note 15, at 124–26, 133–34; ADAMS, *supra* note 26, at 271–75.

⁵³ See KRUMAN, *supra* note 15, at 123–26; ADAMS, *supra* note 26, at 271–75. Note that the South Carolina Constitution of 1778 took away the gubernatorial veto. KRUMAN, *supra* note 15, at 124.

Whereas governors were seen as threats to the people's rights, legislatures were thought to be the branch of government most responsive to the people's sentiments and the most reflective of their will.⁵⁴ In addition to their traditional authority over taxation and lawmaking, state legislatures gained many new powers, including patronage powers for lower offices and in most states, the ability to elect the governor.⁵⁵ Legislatures in New Jersey, North Carolina, Virginia, and Georgia also acquired extensive powers over appointing state judges, including their state's supreme court judges, inferior court judges, court clerks, and justices of the peace.⁵⁶ The structure of the legislature itself also came under scrutiny. Viewing the upper house of the legislature as too aristocratic, the Pennsylvania and Georgia Constitutions dispensed with an upper house altogether.⁵⁷

Under the theory of republican constitutionalism, the people were always considered to be the ultimate check on the legislature's power. Nonetheless, the new structure of government in the states meant that there were few institutional checks on the legislatures' power. The lack of a gubernatorial veto freed the legislatures from executive oversight. At the same time, since the courts had not yet fully embraced their role in reviewing legislation—through the doctrine later known as judicial review—the judiciary initially played a minimal role in controlling the legislatures.⁵⁸ A couple of states did, however, see the need for some mechanism to provide oversight to the legislature. New York, for example, provided for a Council of Revision which consisted of the governor, the chancellor, and two state supreme court justices. This body reviewed all bills passed by the assembly for “revisal and consideration” before the bill could become law.⁵⁹ The Pennsylvania Constitution provided for a Council of Censors, composed of two delegates from each city and state. Meeting once every seven years, this body was “to enquire whether the constitution has been preserved inviolate in every part” and identify laws that contravened the state's constitution.⁶⁰ Vermont, when it entered the union in 1791, and New Hampshire in its revised 1794 Constitution, also provided for a Council of Censors.⁶¹ Thus, even before the doctrine of judicial review could

⁵⁴ See WOOD, *supra* note 22, at 162–73; KRUMAN, *supra* note 15, at 61–86; ADAMS, *supra* note 26, at 23–253.

⁵⁵ See WOOD, *supra* note 22, at 143–61; KRUMAN, *supra* note 15, at 116–23.

⁵⁶ See KRUMAN, *supra* note 15, at 119.

⁵⁷ See LUTZ, *supra* note 42, at 85–128; ADAMS, *supra* note 26, at 264–66; WOOD, *supra* note 22, at 137, 163.

⁵⁸ See ADAMS, *supra* note 26, at 268–70.

⁵⁹ N.Y. CONST. of 1777, reprinted in 5 THORPE, CONSTITUTIONS, *supra* note 39, at 2629; ADAMS, *supra* note 26, at 268; WOOD, *supra* note 22, at 433.

⁶⁰ PA. CONST. of 1776, reprinted in 5 THORPE, CONSTITUTIONS, *supra* note 39, at 3091–92; LUTZ, *supra* note 42, at 129–49.

⁶¹ See LUTZ, *supra* note 42, at 142–49; WOOD, *supra* note 22, at 339, 407–08, 438–55.

be fully articulated, these mechanisms provided oversight in ascertaining whether legislative statutes conformed to the principles enshrined in a state's constitution.

While the structure of government under the first state constitutions made legislatures dominant, they did not make the legislatures independent. Legislatures were not free-standing entities. Nor did they exist separately from the constitutions that created them. A state's constitution literally defined the conditions that allowed a legislature to exist. Contrary to the precepts of the ISLT, a state legislature could not pass laws without the sanction provided by the state's constitution.

This point is especially evident when contrasting the first state legislatures with the provincial congresses that had emerged between 1774 and 1776. Because they were extra-legal in nature, the provincial assemblies had come into being through a direct grant of authority from the people.⁶² In fact, the provincial assemblies in each state either wrote their state's constitution or called for elections for delegates who would write their state's constitution.⁶³ Once the state's constitution was written, however, the provincial congresses stopped meeting.⁶⁴ Thus, when American political leaders of the revolutionary era had a choice, they did not choose to empower freestanding legislatures as the basis of their government. Instead, they drafted state constitutions in which the legislature's authority was subordinate to, and derived from, the authority of the state constitution, which in turn, received its authority from the people.

C. Revised State Constitutions: Retreat from Legislative Dominance

Even before the American Revolution had ended, states had begun to ascertain flaws in their first constitutions.⁶⁵ With few institutional mechanisms in place to check them, the state legislatures began passing many ill-conceived, unjust, or intemperate laws.⁶⁶ State and national leaders began to be alarmed at the legislatures' unchecked power and their injudicious governing of the states. In his *Notes on the State of Virginia*, Thomas Jefferson criticized the Virginia Constitution of 1776, saying, "[a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government."⁶⁷ Stating

⁶² See WOOD, *supra* note 22, at 319–35; ADAMS, *supra* note 26, at 29–48; KRUMAN, *supra* note 15, at 20–24, 111–16.

⁶³ See WOOD, *supra* note 22, at 319–35; ADAMS, *supra* note 26, at 29–48; KRUMAN, *supra* note 15, at 20–24, 111–16.

⁶⁴ See KRUMAN, *supra* note 15, at 23.

⁶⁵ See WOOD, *supra* note 22, at 403–39; KRUMAN, *supra* note 15, at 126–30.

⁶⁶ See WOOD, *supra* note 22, at 403–13.

⁶⁷ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., Univ. of N.C. Press 1982) (1785).

the matter even more emphatically, he pointedly observed, “[a]n *elective despotism* was not the government we fought for.”⁶⁸ In New York, Chancellor Robert Livingston condemned that state’s legislature, saying that it was “daily committing the most flagrant acts of injustice.”⁶⁹ In South Carolina, Aedanus Burke noted in 1783 that, “[a] popular assembly, not governed by fundamental laws, but under the bias of anger, malice, or a thirst for revenge, will commit more excess than an arbitrary monarch.”⁷⁰ James Madison himself claimed that the state legislatures’ excessive powers represented an existential threat to the union, having the potential to undermine the country’s very existence. “The legislative department is everywhere extending the sphere of its activity,” he said in *Federalist* No. 48, “and drawing all power into its impetuous vortex.”⁷¹

In an initial effort to address the emerging problems, many individual states, even during the Revolution itself, began to rewrite their state constitutions. During the period from late 1777 to 1789, five states, as well as Vermont (which had not yet entered the union) rewrote their constitutions.⁷² Eight more states wrote, or rewrote, their constitutions between 1790 and 1798.⁷³ The experience of writing and re-writing their constitutions at the state level would shape the delegates’ decisions at the Philadelphia Convention in 1787 about how to structure the U.S. Constitution.

One of the most distinctive features of these second and third-wave state constitutions was the effort to impose additional constraints on the powers of the legislatures, to curb and restrain legislative supremacy.⁷⁴ One way that the new constitutions addressed this issue was to heighten the distinction between statutory and constitutional law.⁷⁵ When it was determined that a new constitution was necessary, states would hold special elections specifically to choose delegates who would meet in convention and draft a new constitution. The separation of lawmaking from constitution-making enhanced the authority of the constitution as fundamental law.⁷⁶ Constitutional conventions, Thomas Jef-

⁶⁸ *Id.*

⁶⁹ GEORGE DANGERFIELD, CHANCELLOR ROBERT R. LIVINGSTON OF NEW YORK, 1746–1813, at 107 (1960) (quoting Chancellor Robert Livingston).

⁷⁰ AEDANUS BURKE, AN ADDRESS TO THE FREEMEN OF THE STATE OF SOUTH-CAROLINA 23 (Robert Bell ed., 1783).

⁷¹ THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

⁷² See LUTZ, *supra* note 13, at 104; *infra* Appendix.

⁷³ See LUTZ, *supra* note 13, at 104; *infra* Appendix.

⁷⁴ See LUTZ, *supra* note 13, at 106–09.

⁷⁵ See WOOD, *supra* note 22, at 273–82.

⁷⁶ See *id.*; ADAMS, *supra* note 26, at 86–93; POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 41, at 23.

person observed in his *Notes on the State of Virginia*, gave the constitution “an authority superior to the laws.”⁷⁷

In 1778 and 1780, Massachusetts, followed by New Hampshire in 1784, also made another important innovation: they subjected their constitutions to ratification by the people.⁷⁸ In response, the voters of Massachusetts actually rejected the first constitution proposed in 1778.⁷⁹ Another Massachusetts constitution, written largely by John Adams, was subsequently submitted to the people and received popular approval in 1780.⁸⁰ With the trend toward the use of drafting conventions and the implementation of a ratification process—procedures that were later adopted for the U.S. Constitution—states further solidified the distinction between statutory law, passed by the legislature, and fundamental law, embodied in the state constitution.⁸¹ Enhancing this distinction strengthened the case for judicial review, opening up the possibility for the state courts to review state laws for their conformity with their state constitutions.

Second- and third-wave state constitutions written between 1777–1798 also strengthened the institutional mechanisms that limited the powers of the state legislatures.⁸² (See Appendix.) They did so partly by increasing the powers of the other branches of government. The Massachusetts Constitution of 1780, along with the New York Constitution of 1777 and the Georgia Constitution of 1798, awarded governors the authority to exercise a veto over state laws.⁸³ Although the legislature could still override the governor's veto (or what in Georgia was called “the revision”), the restoration of the gubernatorial veto greatly strengthened the executive branch. The new constitutions of Massachusetts in 1780, New York in 1777, and New Hampshire in 1784 also removed the governor's election from the hands of the legislature and put it into the people's hands, either directly or indirectly. Popular election of the governor decreased the executive's dependence on the legislature, heightened the distinctiveness of each branch, and increased the separation of powers.⁸⁴ States

⁷⁷ JEFFERSON, *supra* note 67, at 124; see also JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 38–39 (2018) (discussing the importance of the emergence of constitutional drafting convention).

⁷⁸ See ADAMS, *supra* note 26, at 86–93; POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 41, at 5–51.

⁷⁹ WOOD, *supra* note 22, at 340–41; James Fred Hrdlicka, *War and Constitution-Making in Revolutionary Massachusetts, 1754–1788*, at 253–65 (2016) (Ph.D. dissertation, University of Virginia), https://libraetd.lib.virginia.edu/public_view/5m60qr91n [<https://perma.cc/39Y7-YZHR>].

⁸⁰ ADAMS, *supra* note 26, at 92–93; POLE, *supra* note 42, at 214–26.

⁸¹ See WOOD, *supra* note 22, at 328–43, 273–382; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 98–100 (1996).

⁸² See *infra* Appendix.

⁸³ See WOOD, *supra* note 22, at 430–38; KRUMAN, *supra* note 15, at 116–30; ADAMS, *supra* note 26, at 262–71; GA. CONST. of 1798, art. II, § 10, *reprinted in* 2 THORPE, *CONSTITUTIONS*, *supra* note 39, at 797.

⁸⁴ See WOOD, *supra* note 22, at 435; MASS. CONST. of 1780, pt. 2, ch. II, § I, art. III, *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 41, at 456–57; N.Y. CONST. of 1777,

such as Georgia and Pennsylvania also abandoned the experiment of unicameralism and multiple executives.⁸⁵

Several second- and third-wave state constitutions also made the state courts more independent of the legislatures, often by limiting legislatures' appointment powers over judges.⁸⁶ This shift was necessary, according to Thomas Jefferson, because a mingling of the branches left "[t]he judiciary and executive members . . . dependent on the legislative, for their subsistence in office, and some of them for their continuance in it."⁸⁷ Even more radically, certain state courts, especially in New York, New Jersey, Virginia, North Carolina, and Rhode Island, moved in the direction of embracing the doctrine that later became known as judicial review.⁸⁸ Judicial oversight was critical to reining in the power of the state legislatures. As Alexander Hamilton commented in *Federalist* No. 78, "courts of justice are to be considered the bulwarks of a limited Constitution against legislative encroachments."⁸⁹

These modifications attempted to solve the problem of the legislatures' excessive powers by reforming each state constitution individually. It soon became clear, however, that more top-down measures would be necessary to control and contain the state legislatures. Thus, at the time of the federal Constitutional Convention, while the state legislatures remained the most powerful and dominant branch of the state governments, they were also the most problematic.

II. THE FRAMING: THE U.S. CONSTITUTION MANDATES THAT STATE LEGISLATURES FOLLOW THEIR STATE CONSTITUTIONS

By 1787, many political leaders had concluded that granting too much power to the individual state legislatures had been a serious mistake.⁹⁰ Many delegates to the federal Convention were skeptical that simply revising the Articles of Confederation would solve the country's problems. Instead, James Madison and others proposed to create a stronger, more highly centralized national government that would be able to exert coercive power over the states. Far from seeking to empower the state legislatures, the proposed new U.S.

art. XVII, reprinted in 5 THORPE, CONSTITUTIONS, *supra* note 39, at 2632; N.H. CONST. of 1784, pt. II, reprinted in 4 THORPE, CONSTITUTIONS, *supra* note 39, at 2463.

⁸⁵ See WOOD, *supra* note 22, at 438–53; PA. CONST. of 1790, art. I, § 1, reprinted in 5 THORPE, CONSTITUTIONS, *supra* note 39, at 3092; *id.* art. II, § 1, *supra* note 39, at 3095; GA. CONST. of 1789, art. I, § 1, reprinted in 2 THORPE, CONSTITUTIONS, *supra* note 39, at 785; *id.* art. II, § 1, *supra* note 39, at 787.

⁸⁶ See WOOD, *supra* note 22, at 453–63.

⁸⁷ JEFFERSON, *supra* note 67, at 120.

⁸⁸ See WOOD, *supra* note 22, at 454–55. For a more detailed discussion of the emergence of judicial review in the states, see MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 186–96 (2004).

⁸⁹ THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁹⁰ See WOOD, *supra* note 22, at 238–43, 372–83, 430–38.

Constitution was explicitly designed to curb the excessive powers exercised by the legislatures in each state.⁹¹

Shortly before the start of the Philadelphia Convention, Madison discussed the role of the states in precipitating the crisis facing the union. In the *Vices of the Political System of the United States*, written in April 1787, Madison stated, “the evils which viciate [sic] the political system of the U. S.” are “found within the States individually, as well as those which directly affect the States collectively.”⁹² Some problems, he said, resulted from the federal government’s lack of coercive power over the states, including an inability to compel the states to pay their assessed taxes or to abide by treaty obligations to foreign nations.⁹³ An even more pernicious problem resulted from the arbitrariness of the state legislatures. Many legislatures passed laws that did not serve the public good: abolishing private debts, creating too much paper money, or failing to return confiscated loyalist property, contrary to the treaty made by the United States with Great Britain.⁹⁴

Provisions such as annual elections also caused problems. Legislatures experienced a great deal of turnover in membership, eroding both continuity and stability in the state governments. States also passed too many laws, changing or abolishing the laws before they could even go into effect.⁹⁵ In addition, some state legislatures passed laws that violated individual rights, thus fomenting what Madison called “injustice.”⁹⁶ Madison considered this last defect—injustice—to be the most serious defect, “not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”⁹⁷ Madison’s solution was neither to strengthen the Articles of Confederation nor to rewrite the state constitutions one by one. Instead, he proposed scrapping the Articles and replacing them with an entirely new system of national government that possessed sufficient power to control and contain the excesses of the state legislatures.⁹⁸

⁹¹ See *id.* at 463–99; GREENE, *supra* note 13, at 181–211; MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 41–48 (2016).

⁹² James Madison, *Vices of the Political System of the United States, April 1787*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0187> [https://perma.cc/8P2W-LAL2?type=image].

⁹³ *Id.*

⁹⁴ See WOOD, *supra* note 22, at 403–29, 463–67.

⁹⁵ See *id.*

⁹⁶ Madison, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ See WOOD, *supra* note 22, at 471–75.

Other delegates echoed Madison's concerns about the excessive powers of the state legislatures.⁹⁹ As John Francis Mercer of Maryland put it, "[w]hat led to the appointment of this convention? The corruption and mutability of the Legislative Councils of the States."¹⁰⁰ John Dickinson of Delaware agreed, saying that he "took it for granted that all [at the Convention] were convinced of the necessity of making the Genl. Govt. independent of the prejudices, passions, and improper views of the State Legislatures."¹⁰¹ In fact, Madison was so convinced of the need to limit the power of the state legislatures that in his initial draft of the Constitution, commonly called the Virginia plan, he included a provision giving Congress a veto over state laws.¹⁰² Although not included in the final Constitution, Madison's proposed veto reveals the extent to which the framers regarded the excessive powers of the state legislatures as one of the most pressing problems that the country faced.

Yet the nationalists at the Philadelphia Convention also had to contend with defenders of the Articles of Confederation, delegates who wished to preserve the powers of the state governments and contended that the states should remain the primary locus of authority in the new government.¹⁰³ These two conflicting views of federal power came into particularly sharp focus during the debate over the Elections Clause. This clause gave the state legislatures the power to make laws concerning the times, places, and manner of holding elections for members of Congress. The clause was necessary because under the new Constitution, voters in each state, not the state legislatures, would elect representatives to Congress. In addition, most states would elect multiple representatives. In the final version that became part of the Constitution, the Elections Clause, while granting a great deal of power to the states, also gave enormous power to Congress, allowing the federal government to alter the states' regulations "at any time."¹⁰⁴

During the debate over the Elections Clause, certain delegates who wished to protect state power objected to the reservation of power to Congress. Delegates from South Carolina, for example, insisted that the states should have the exclusive authority to make federal election regulations. "The States

⁹⁹ See *id.* at 393–429.

¹⁰⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 288 (Max Farrand ed., 1911).

¹⁰¹ *Id.* at 292.

¹⁰² RAKOVE, *supra* note 81, at 51–53, 81–82, 169. Madison's exact proposal, in Art. 6 of the Virginia Plan, read: "[T]hat the National Legislature ought to be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 100, at 21.

¹⁰³ See generally John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961).

¹⁰⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 100, at 239–40; RAKOVE, *supra* note 81, at 223–24.

... could [and] must be relied on in such cases," they said.¹⁰⁵ Madison and others defended the provision. States, Madison declared, "ought not to have the uncontroled [sic] right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power." States might, for example, fail to make the necessary laws for holding elections, refuse to call for the elections in a timely fashion, or to fail to hold the elections on the appointed days. The national government must have the power to protect itself, lest the states use their power to subvert the new system. Speaking to this point, Gouverneur Morris of New York added that, "States might make false returns and then make no provisions for new elections."¹⁰⁶ Roger Sherman of Connecticut, though more equivocal, was ultimately supportive of the clause, remarking, that "it might be best to retain the clause [giving Congress the ultimate authority over federal election laws], though he had himself sufficient confidence in the State Legislatures."¹⁰⁷ Whatever the reservations, the provision passed with only a few minor alterations and was incorporated into the Constitution.¹⁰⁸

The wording of the Elections Clause reveals the delicate nature of compromise necessary to craft a Constitution that could gain approval from both the delegates in Philadelphia and from the state ratifying conventions, from those with a vested interest in preserving state power and those who wished to enhance the power of the national government. While the clause gave the states a great deal of discretionary power in making federal election regulations, it gave Congress the ultimate authority to intervene in federal elections. Contrary to the interpretation advanced by the ISLT, the Elections Clause did not unleash the power of the state legislatures to act independently. Rather, it was explicitly designed to ensure that the states would not be able to manipulate federal elections in a manner that Congress deemed inappropriate or unjust.

At the same time, when the Framers crafted the Elections Clause, it is clear that they assumed that the state legislatures would operate within the parameters of lawmaking as determined by their individual state constitutions. This view is confirmed by examining the drafting and debate surrounding the Republican Guarantee Clause (Art. IV, Sec. 4). During the founding era, the term "republican government" was synonymous with a "representative" form of government in which the people (i.e., eligible electors) voted for representatives who would conduct the business of government.¹⁰⁹ As James Madison noted in *Federalist* No. 14, "in a democracy the people meet and exercise the

¹⁰⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 100, at 240.

¹⁰⁶ *Id.* at 241.

¹⁰⁷ *Id.*

¹⁰⁸ U.S. CONST. art. I, § 4, cl. 1.

¹⁰⁹ See WOOD, *supra* note 22, at 118–24; MAIER, *supra* note 25, at 271–96.

government in person; in a republic they assemble and administer it by their representatives and agents.”¹¹⁰ In its final form, the Republican Guarantee Clause states, in part, that: “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”¹¹¹ In proposing this clause, James Madison desired to give the federal government the power to intervene militarily in the states, primarily to protect the states against domestic insurrections.

Yet the Republican Guarantee clause clearly implies that the basis of republican government in the states rested on the foundation provided by the state constitutions. Madison’s original proposal, delivered on May 29, 1787, read: “that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State.”¹¹² In the process of arriving at the final language for the clause, the Philadelphia delegates altered and expanded on Madison’s original proposal and, in the process, articulated their assumptions about the fundamental nature of republican government and state constitutions to the union. On June 11, 1787, the delegates agreed to a modified proposal that read: “that a *republican Constitution*, and it’s [sic] existing laws ought to be guaranteed to each State by the United States.”¹¹³

Subsequent resolutions in July and August of 1787 expanded the clause to protect the states explicitly from foreign invasion as well as domestic upheavals. On July 18, Madison proposed a reworded clause: “that the *Constitutional authority* of the States shall be guaranteed to them respectively ag[ain]st. domestic as well as foreign violence.”¹¹⁴ This formulation highlights the emphasis on the state constitutions even more dramatically: the federal government was to protect the states’ “Constitutional authority.” Yet the delegates were not yet satisfied. The clause changed again as it went through successive rounds of revision.¹¹⁵ Although the explicit reference to the state constitutions was removed, the implication remained clear: state constitutions provided the vehicles that secured republican government in the states. Through the Republican Guarantee clause, the Constitution legitimized state constitutions, not state legislatures, as the basis of republican government in the states.

Ideas regarding the role of constitutions in republican government find fuller expression in the *Federalist* essays. In *Federalist* No. 49, for example, Madison observes that the executive, legislative, and judicial branches all derive their power from the “constitutional charter.” The constitution itself, how-

¹¹⁰ THE FEDERALIST NO. 14, at 100 (James Madison) (Clinton Rossiter ed., 1961).

¹¹¹ U.S. CONST. art. IV, § 4.

¹¹² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 100, at 22.

¹¹³ *Id.* at 194 (emphasis added).

¹¹⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 100, at 47–48 (emphasis added).

¹¹⁵ *Id.* at 133, 174, 459.

ever, derives its power from the ultimate source of authority: the people. “[T]he people,” he says, “are the only legitimate fountain of power and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived.”¹¹⁶ The constitution represents the original grant of authority from the people. The legislature’s authority is derived from that of the constitution; it has no authority independent of the constitution. Similarly, in his discussion of judicial review in *Federalist* No. 78, Alexander Hamilton also stressed the primacy of constitutions over legislatures. “[T]he courts,” he remarked, “were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter [the legislature] within the limits assigned to their authority A constitution is, in fact, and must be regarded by the judges as, a fundamental law.”¹¹⁷ If, according to Hamilton, a constitution represents fundamental law, then the constitution limits and circumscribes the legislature’s powers.

For Madison, Hamilton, and the other Framers, the implication of their theory for the states was clear. In a constitutional system, the legislature is, and must be constrained, by the constitution that created it. Accordingly, a theory such as ISLT, which postulates that a state legislature can operate separately from, or independently of, its state constitution, is antithetical to the fundamental theory of constitutional government underlying the U.S. Constitution. Though the state legislatures may have been the dominant branch of state government, they were not considered independent from the constitutions that created them.

Moreover, even the meaning of the term “state legislature” as used in the Elections Clause and the Presidential Electors Clause was far more ambiguous during the founding era than it may appear today. Evidence from the founding era reveals that when discussing the federal election clauses, members of the founding generation often used the terms “state governments” and “state legislatures” interchangeably. In *Federalist* No. 45, for example, Madison describes the particular role of the “*State legislatures*” in the election of the president and members of both houses of Congress.¹¹⁸ In the same paragraph, he also observes that “each of the principal branches of the federal government will owe its existence more or less to the favor of the *State governments*.”¹¹⁹

Other political leaders at the time also used “state legislature” and “state government” seamlessly and interchangeably. For example, during the debate at the Massachusetts ratifying convention, Mr. Bishop referred to Article 1, Section 4’s requirement that “each state by the *legislature* thereof” should make regulations regarding the time, place, and manner of electing members to

¹¹⁶ THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961).

¹¹⁷ THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹¹⁸ THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

¹¹⁹ *Id.*

Congress.¹²⁰ Then he defended the possibility of congressional intervention in making federal election laws, saying, “if the *states* shall refuse to do their duty, then let the power be given to Congress to oblige them to do it.”¹²¹ Similarly, during the North Carolina ratifying convention in 1788 James Iredell remarked that, “[t]he very existence of the general government depends on that of the *state governments*. The *state legislatures* are to choose the senators . . . [and] to direct the manner of choosing the President . . . [and] the House of Representatives Thus it is evident that the very existence of the general government depends on that of the *state legislatures*.”¹²² In two virtually identical sentences, Iredell makes no distinction between the term “state governments” and “state legislatures”; he uses the terms as synonyms. At the Pennsylvania ratifying convention, future Supreme Court justice James Wilson also used the terms interchangeably. “[W]hat pains,” he emphasized, “have been taken in the Convention to secure the preservation of the *state governments*.”¹²³ In making federal election laws, he noted, “I think it highly proper that the federal government should throw the exercise of this power into the hands of the *state legislatures*.”¹²⁴ But Congress, he said, must reserve the right to intervene, for there was the possibility that “[s]ome *states* might make no regulations at all on the subject.”¹²⁵ According to the usage during the Founding era, no substantive difference existed between the meaning of the terms “state governments” and “state legislatures.”

The terms continued to be used interchangeably even after ratification. During a 1789 debate in the House of Representatives over amending the Elections Clause, Thomas Tudor Tucker of South Carolina urged Congress to leave the states alone in making the laws, insisting that “the *State Legislatures* might be left to themselves to perform every thing they were competent to, without the guidance of Congress.”¹²⁶ He then proceeded to say, “[i]t seemed to him as if there was a strong propensity in this Government to take upon themselves

¹²⁰ *Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 16, 1788)*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 23 (Jonathan Elliot ed., 1836) (emphasis added) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

¹²¹ *Id.*

¹²² *Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 25, 1788)*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 120, at 53 (emphasis added).

¹²³ *The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution (Oct. 28, 1787)*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 120, at 440 (emphasis added).

¹²⁴ *Id.* (emphasis added).

¹²⁵ *Id.* (emphasis added).

¹²⁶ 1 ANNALS OF CONG. 800 (1789) (Joseph Gales ed., 1834) (emphasis added).

the guidance of the *State Governments*, which to his mind implied a doubt of their capacity to govern themselves.”¹²⁷

The interchangeability of the terms has a deeper significance. To members of the founding generation, the use of the term “state legislature” did not necessarily, or even usually, refer to the legislature acting alone or as an independent body. Rather, it was a shorthand reference to the legislature as it operated within the structure of its state government. The state government was created by the state’s constitution. Far from being allowed to act independently, the legislature’s functions were defined by and structured according to the provisions in each of the individual state constitutions.

This accumulated evidence thus calls into question the central contentions of the ISLT. Given the interchangeability of the terms “state legislature” and “state government,” along with the predominance of state legislatures at the time of the federal Convention, it is not surprising that the Framers used the term “Legislature” when writing the federal Elections Clause. At the time of the Philadelphia Convention, state legislatures were the most dominant and visible branch of the state governments. But they were also the most problematic. One of the primary purposes of the new Constitution was to control and contain the excesses of the states legislatures. The framers accomplished this mission in a variety of ways, but most importantly, by making the Constitution the supreme law of the land. Moreover, in making federal election laws, the framers made no distinction between the state governments and state legislatures; they used the terms interchangeably. At the same time, the Framers assumed that the basis of republican government, and the source of the legislatures’ authority, came from their individual state constitutions, and ultimately from the people themselves—not from state legislatures acting as independent bodies.

III. POST-FRAMING: THE LEGISLATURES’ IMPLEMENTATION OF THE FEDERAL ELECTION CLAUSES

Beginning in the Fall 1788 and continuing into 1789, states held their first federal elections.¹²⁸ Pursuant to the Elections Clause, each state “Legislature” had to determine the times, places, and manner of electing members to the House of Representatives. According to the Presidential Electors Clause, each state “Legislature” also had to determine the manner in which it would appoint their presidential electors. If the ISLT had any basis in the historical record, it might be expected that when writing the provisions to implement these provi-

¹²⁷ *Id.*

¹²⁸ See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 429–59 (2010). It should be noted that two states had not yet ratified the Constitution when the new government went into operation. North Carolina did not enter until late 1789 and Rhode Island in 1790. See *id.* at 403–25, 457–59.

sions at least some of the states would have understood the term “Legislature” to apply narrowly to the legislatures themselves, operating as independent bodies. This is not what happened.¹²⁹

When states made their first federal election laws, the legislatures followed their state’s normal lawmaking procedures, as prescribed by their individual state constitutions. The process went like this: the legislature, operating under the strictures of the state constitution, must be constituted as a legal body. Then, legislators had to pass election laws just as they would any other legislation. Both houses of the legislature (or in Georgia and Pennsylvania, the single unified assembly) would consider the bill; the bill would be debated, revised, and eventually passed.¹³⁰ In states where the governor had a say in the making of laws, it would go to the governor for approval. In states where laws were subject to oversight by another body (e.g., New York’s Council of Revision), laws would be submitted to that body, or later, subject to review by the state courts.¹³¹ From election to election, legislatures frequently passed new laws that changed the mode of electing members of Congress or presidential electors.¹³² In other words, far from acting as an independent body, the legislatures treated federal election laws as normal legislation, subject to the ordinary checks and balances prescribed by their state constitutions.

¹²⁹ See FRANK FLETCHER STEPHENS, *THE TRANSITIONAL PERIOD, 1788–1789*, IN *THE GOVERNMENT OF THE UNITED STATES* 32–83 (1909). For a chronology of the passage of the state election laws, as well as primary documents for each state, see *THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790* (Gordon DenBoer, Lucy Trumbull Brown & Charles D. Hagermann, eds., 1976–1989) [hereinafter *DOCUMENTARY HISTORY*].

¹³⁰ See, e.g., 2 *DOCUMENTARY HISTORY*, *supra* note 129, at 65–66 (Delaware); *id.* at 431–32 (Georgia); *id.* at 105–06 (Maryland); 1 *DOCUMENTARY HISTORY*, *supra* note 129, at 772–73 (New Hampshire); 3 *DOCUMENTARY HISTORY*, *supra* note 129, at 8–9 (New Jersey); *id.* at 199–201 (New York); 4 *DOCUMENTARY HISTORY*, *supra* note 129, at 310–11 (North Carolina); 1 *DOCUMENTARY HISTORY*, *supra* note 129, at 235–37 (Pennsylvania); 4 *DOCUMENTARY HISTORY*, *supra* note 129, at 383 (Rhode Island); 1 *DOCUMENTARY HISTORY*, *supra* note 129, at 150–51 (South Carolina); 2 *DOCUMENTARY HISTORY*, *supra* note 129, at 255–56 (Virginia).

¹³¹ Two states, Massachusetts and Connecticut, did deviate slightly and briefly from this pattern. For their first federal election, both states passed joint resolutions of both houses, rather than regular laws, to establish the procedures. Yet these were actually closer to laws than resolves. The Connecticut “resolve” was actually based on an earlier 1779 law, regarding the election of delegates to the Confederation Congress. In Massachusetts, resolves had to be signed by the governor and were thus, in effect, laws by another name. Even so, within only a few years, both states abandoned the resolution procedure and passed regular legislation for electing members of Congress and presidential electors. See 1 *DOCUMENTARY HISTORY*, *supra* note 129, at 440–43, 508–09 (Massachusetts); 2 *DOCUMENTARY HISTORY*, *supra* note 129, at 7, 18 (Connecticut); see also MASS. CONST. of 1780, ch. 1, § 1, art. II, *reprinted in* *THE POPULAR SOURCES OF POLITICAL AUTHORITY*, *supra* note 41, at 448 (“No bill or resolve of the Senate or House of Representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revival.”).

¹³² See ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850*, at 105–24 (1987); ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 31–85 (2020).

Significantly, legislatures took a different route when choosing senators pursuant to Article I, Section 3. As relevant here, that provision—since superseded by the 17th Amendment—provides: “[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years.”¹³³ In contrast to the Elections Clause, the legislatures understood the selection of Senators to refer narrowly to the legislature acting in its appointive capacity, not as passing a law.¹³⁴ As James Madison made clear in *Federalist* No. 45, “[t]he Senate will be elected absolutely and exclusively by the State legislatures.”¹³⁵ Legislatures simply had to decide whether to elect their Senators by concurrent votes or through a joint resolution of both houses.¹³⁶ Only in this case, as authorized by the U.S. Constitution, did state legislatures function as autonomous bodies. Even so, the prior election of representatives to the state legislature proceeded according to the dictates of the state constitution. The state constitution created the structure of government in which the legislatures functioned when they elected U.S. Senators.

The passage of New York’s federal election laws provides compelling evidence about the extent to which legislatures were constrained by their state constitutions when regulating under the Elections Clause. Under the New York Constitution, the governor, along with two judges from the state supreme court constituted a Council of Revision that would meet to review bills passed the legislature. Their assent was necessary before a bill became law.¹³⁷ In January 1789, the Council of Revision received a bill that had been passed by the New York legislature specifying the method by which the state would elect its members to the U.S. House of Representatives, pursuant to the Elections Clause. After reviewing the bill, the Council approved the measure and allowed it to become law. Far from operating as an independent body, the New York legislature recognized that its acts could not become law until all the constitutional requirements for lawmaking had been met, including review by the Council of Revision.¹³⁸

In July 1789, the Council reviewed another bill, this one relating to the election of U.S. Senators. The Council of Revision rejected the bill. “If by the Legislature,” the Council said, “is intended the Members of the two houses not

¹³³ U.S. CONST. art. I, § 3.

¹³⁴ See STEPHENS, *supra* note 129, at 10–30.

¹³⁵ THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).

¹³⁶ See STEPHENS, *supra* note 129, at 10–30.

¹³⁷ N.Y. CONST. of 1777, reprinted in 5 THORPE, CONSTITUTIONS, *supra* note 39, at 2628; see also DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 176–80 (2005).

¹³⁸ 3 DOCUMENTARY HISTORY, *supra* note 129, at 200 (recording that the legislature sent the bill regarding the election of Representatives to the Council of Revision); 3 DOCUMENTARY HISTORY, *supra* note 129, at 538–39 (recording that the Council of Revision vetoed a similar bill regarding the election of Senators); STEPHENS, *supra* note 129, at 26–27.

acting [in] their Legislative Capacity no Law is necessary to prescribe the Mode of Election.”¹³⁹ Such a law would be “a deviation from the Constitution of the United States” and “inconsistent with the Public good.”¹⁴⁰ In other words, the Council of Revision informed the New York legislature that when it came to choosing Senators under Article I, Section 3, the legislature acted in its appointive rather than its legislative capacity. It need not—in fact, it must not—pass a law in this instance.

In sum, during the first federal elections, state legislatures differentiated between their differing functions in electing federal representatives. When describing the procedures for electing presidential electors and members of the House of Representatives, states passed laws in a manner following their normal legislative practices and subject to the oversight provided by other branches of government. When they elected U.S. Senators, they exercised a particular power derived from the U.S. Constitution that authorized the legislatures to act as an independent body for that purpose alone. Yet the very composition and existence of each state legislature depended on the conditions set forth in the individual state constitutions.

CONCLUSION

The historical evidence from the founding era fails to support the contention advanced by supporters of the ISLT that state legislatures should be able to act as separate or independent bodies when making federal election laws. State constitutions created the structure of government in each state; the constitutions called the legislatures into being and defined the conditions for their existence. Legislatures were subordinate to, and controlled by, the provisions in their individual state constitutions. Although the first state constitutions initially provided minimal checks on the legislatures, almost immediately, during the Revolution itself, states began to revise their state constitutions so as to impose greater restraints on the legislatures’ powers. Nonetheless, at the time of the Philadelphia Convention, the state legislatures were the most dominant and visible part of the state government. This fact undoubtedly explains why the Constitution in the Election Clause gives the power of making federal election laws to the state “Legislature[s].”

Yet the framers found the excessive powers of the state legislatures to be problematic. A major purpose in writing the U.S. Constitution was to control and contain the excesses of the states legislatures. When writing the Election Clause, the framers made certain that Congress should retain the ultimate authority to make election laws if states failed to pass appropriate legislation. In fact, however, during the first federal elections all of the states passed federal

¹³⁹ 3 DOCUMENTARY HISTORY, *supra* note 129, at 538–39; STEPHENS, *supra* note 129, at 26–27.

¹⁴⁰ 3 DOCUMENTARY HISTORY, *supra* note 129, at 538–39.

election laws and prescribed how presidential electors and members of Congress should be elected in their states. Significantly, none of the states interpreted the words of the Constitution to mean that the legislature should operate as a separate or independent body when making federal elections laws. The legislatures made these laws in accordance with the procedures for lawmaking as prescribed by their individual state constitutions, and subject to the checks provided for in these constitutions, including oversight by the state courts. Their actions were consistent with principles of republic government under a written constitution. Legislatures received their authority from the state constitutions, which, in turn, derived their authority from the people. A legislature had no independent existence apart from the powers granted to it by the state constitution.

If members of the founding generation did not read the Constitution to authorize state legislature to act independently, it is inconceivable that the Constitution should be read so today. The notion propounded by the ISLT that a state legislature possesses authority separate from, or independent of, its state constitution is contrary to the Framers' understanding of constitutional government, diverges from a common reading of the Constitution during the founding era, and is contrary to the interpretation of the Elections Clauses at the time of the first federal elections. It has no basis in historical fact.

APPENDIX

FIRST STATE CONSTITUTIONS 1776–1798					
First Wave		Second Wave		Third Wave	
1776	New Hampshire	1777	New York	1789	Georgia
	South Carolina		Vermont	1790	South Carolina
	Virginia	1778	South Carolina		Pennsylvania
	New Jersey	1780	Massachusetts	1792	Delaware
	Maryland	1784	New Hampshire		Kentucky
	Delaware	1786	Vermont		New Hampshire
	Rhode Island			1793	Vermont
	Connecticut			1796	Tennessee
	Pennsylvania			1798	Georgia
	North Carolina				
1777	Georgia				
Source: DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 104 (1988).					