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ARTICLES

DEBUNKING THE NONDELEGATION DOCTRINE FOR STATE REGULATION OF FEDERAL ELECTIONS

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One objection to the conduct of the 2020 election concerned the key role played by state executives in setting election rules. Governors and elections officials intervened to change a host of regulations, from ballot deadlines to polling times, often acting pursuant to legislation granting them emergency powers. Some advocates, politicians, and judges cried foul. They argued that state legislatures may not devolve the power to set the "Times, Places, and Manner" of federal elections under Article I, Section 4 of the Constitution.

This Article contests that view. Drawing on a survey of elections statutes in the thirteen original colonies, I argue that local officials frequently made critical decisions about the time, place, and manner of early American elections. Executive officers like sheriffs and local officials like selectmen had enormous discretion to determine the time and place of elections, and sometimes also their manner. That discretion was repeatedly affirmed by Congress. Advocates of the Independent State Legislature ("ISL") theory must interpret these

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exercises of local power as evidence that Founding-era legislatures delegated their power under the Elections Clause. As a doctrinal matter, this history suggests that courts embracing the ISL theory ought to accord a broad permission for legislatures to delegate their Elections Clause powers today. For opponents of the ISL theory, the history of local power over federal elections may provide further reasons to question the literal meaning of the term "legislature" in Article I, Section 4.

INTRODUCTION

Imagine that a state legislature amends its election laws by passing the following statute: "The Secretary of State is authorized to amend existing election law if, in her judgement, such amendments would promote the fairness of an upcoming election." Call this the "Delegation Act"; assume it is legal under the state constitution. Would a regulation promulgated under this Act violate Article I, Section 4 of the U.S. Constitution?

This hypothetical question was exactly the one faced by tens of federal courts during the 2020 election, when state executives across the country began modifying election rules to ensure COVID-safe elections. The result was a serious divide between Supreme Court precedent and a literalist reading of the Elections Clause pressed by textualists.

Article I, Section 4's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*."[1] Precedent going back over a century reads this clause broadly, such that that "Legislature" means "whoever is allowed to legislate."[2] Under this rule, the Delegation Act is legal: the Secretary of State is authorized to promulgate regulations and is thus "allowed to legislate."[3] This interpretation was most recently affirmed by the U.S. Supreme Court in 2015.[4]

But several Justices have advocated discarding this precedent in favor of an alternative theory of the Elections Clause that features a so-called "Independent State Legislature" ("ISL").[5] When the Elections Clause speaks of the "Legislature," they say, it means that exactly one entity may regulate the time, place, and manner of federal elections: "the representative body which ma[kes] the laws of the people."[6] Legislatures are thus "independent" when regulating federal elections in the sense that they are unbound by state constitutions (and, by implication, are free of

[1] U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Constitution contains numerous references to elections, but in this Article, I use the phrase "Elections Clause" to refer specifically to this clause.

[2] See Smiley v. Holm, 285 U.S. 355, 368 (1932) (holding that a gubernatorial veto is part of the "legislature" for Elections Clause purposes); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 566, 568 (1916) (holding that the Elections Clause permits Ohio to use a referendum to pass its redistricting plan); see also infra Section I.A (discussing scholars' broad interpretation of "Legislature").

[3] Of course, the Secretary of State would still be restrained by a number of other federal constitutional provisions, like the Equal Protection Clause and the Due Process Clause.

[4] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC"), 576 U.S. 787, 808 (2015).

[5] Other scholars refer to an "Independent State Legislature Doctrine," see, e.g., Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 Fla. St. U. L. Rev. 731, 732 (2001), though referring to this view as a "doctrine" may lend it too much heft.

[6] *AIRC*, 576 U.S. at 825 (Roberts, C.J., dissenting) (alteration in original) (emphasis omitted) (quoting *Smiley*, 285 U.S. at 365).

the institutions that enforce state constitutions, namely state courts).[7] As this Article was going to press, the Court granted certiorari to reconsider the ISL theory.[8]

The Delegation Act raises a different question arising from the literalist reading of the Elections Clause: May the legislature itself convey its power? This Article argues that the right answer is yes. The Federal Constitution allows expansive legislative delegations under the Elections Clause.

That claim is contested among proponents of the Independent State Legislature theory. Some approve of delegations. Chief Justice Rehnquist's concurrence in *Bush v. Gore*[9] endorses the Florida Legislature's decision to "delegate[] the authority to run the elections and to oversee election disputes to the Secretary of State . . . and to state circuit courts."[10] The Arizona Legislature made similar arguments when it challenged a referendum establishing an independent redistricting commission in 2015: the legislature, it claimed, has total freedom to assign its regulatory duties to whomever it pleases.[11]

But more recent treatments of the ISL theory have begun to view delegations with greater skepticism. Several articles have expressed doubt about the propriety of delegations under the Elections Clause, arguing that the legislature cannot empower others to make rules for federal elections.[12] And even more modest proposals, like the proposal to use the

[7] See, e.g., Michael T. Morley, The Independent State Legislature Doctrine, Federal Elections, and State Constitutions, 55 Ga. L. Rev. 1, 8 (2020) ("[S]tate constitutions . . . cannot limit a legislature's power to regulate most aspects of federal elections.").

[8] See Moore v. Harper, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022) (granting certiorari).

[9] 531 U.S. 98, 112 (2000) (per curiam). An earlier per curiam decision in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76–77 (2000), had also strongly intimated that the Court was inclined to adopt the Independent State Legislature theory, but the opinion fell short of actually adopting the theory as its holding.

[10] *Bush v. Gore*, 531 U.S. at 113–14.

[11] *AIRC*, 576 U.S. at 814.

[12] I provide more detail on this claim in Section I.A, infra. To briefly summarize that discussion, two prominent scholars have advocated a strict view of statutory delegations. Derek Muller claims in a 2016 piece that "the historical understanding of the power of the 'Legislature' precluded a delegation of its power to another entity," an almost-wholesale repudiation of delegations. Derek T. Muller, Legislative Delegations and the Elections Clause, 43 Fla. St. U. L. Rev. 717, 718 (2016). In some of his writing, Michael Morley has likewise argued against any restrictions on legislative power to set election regulations, including restrictions passed by legislatures themselves. Morley, supra note 7, at 92 (arguing that state legislatures should not be able to restrict their own "inalienable authority granted by the U.S. Constitution" to write elections laws); Michael T. Morley, The New Elections Clause, 91

general federal nondelegation doctrine in federal elections, open the door to a future in which legislative delegations under the Elections Clause are highly contested.[13]

Some members of the judiciary appear even more hostile to Elections Clause delegations. During the 2020 election, a number of plaintiffs who brought Elections Clause challenges against executive actions found a sympathetic audience among federal judges. Citing the Elections Clause, for instance, the U.S. Court of Appeals for the Eighth Circuit overturned a Minnesota order extending the deadline for receiving mail-in ballots, even though the Minnesota Secretary of State claimed to possess delegated statutory authority to issue it.[14] Other judges either followed suit or issued dissenting opinions indicating they would have liked to.[15]

In short, an emerging movement that spans academia and the judiciary would severely curtail the power of state legislatures to delegate power over elections.

This Article's primary purpose is to show that, as a doctrinal matter, Elections Clause delegations are entirely permissible. The Federal Constitution recognizes the power of state legislatures to delegate their authority over elections to state executives and state courts. Federal courts reviewing such delegations should give full effect to Elections Clause delegations, regardless of their view on whether state legislatures are bound by state constitutions in making federal elections law, and regardless of the delegation rules they might apply to Congress under Article I, Section 8.

I argue that a delegation-friendly reading of the Elections Clause is the only interpretation that accounts for the clear course of practice in the

Notre Dame L. Rev. Online 79, 93–94 (2016) [hereinafter Morley, The New Elections Clause] (criticizing *AIRC* for foreclosing future delegation challenges). Note, however, that a more recent perspective disclaims hostility to delegations. Michael T. Morley, The Independent State Legislature Doctrine, 90 Fordham L. Rev. 501, 555 (2021) [hereinafter Morley, The Independent State Legislature Doctrine].

[13] That is, many scholars expect federal nondelegation doctrine to be significantly tightened in coming years. See, e.g., Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1295–97 (2021) (describing the support for a much more stringent version of the doctrine). If this were to occur, then applying federal nondelegation rules to state elections might prove problematic.

[14] Carson v. Simon, 978 F.3d 1051, 1062 (8th Cir. 2020); see infra Section I.B.

[15] Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 150 (5th Cir. 2020) (Ho, J., concurring); Wise v. Circosta, 978 F.3d 93, 104 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., dissenting); see infra Section I.B.

Founding era. Specifically, I undertake an original, comprehensive survey of election laws in the original thirteen states during the four decades following the ratification of the Constitution in 1788. While many scholars have used historical evidence to construe the meaning of the Elections Clause, all previous studies focus on evidence from the Civil War and the decades that followed it.[16] This is the first study to draw on the early American practice most relevant to an originalist interpretation of the Constitution.[17]

The historical evidence shows that local power over elections was widespread in the decades following the Founding. In nine of thirteen states, profoundly consequential control over the "Times" and "Places" of elections was exercised by local officials like sheriffs or justices of the

[16] See infra Section I.A; see also, e.g., Muller, supra note 12, at 718–20 (outlining an argument on legislative delegations rooted in late nineteenth-century congressional precedents and the pre-ratification history of the Seventeenth Amendment).

[17] The text of the Elections Clause is susceptible to interpretation by reference to historical practice because it is ambiguous with respect to delegations. See William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 14 (2019).

To see this, first note that the Elections Clause is simply equivalent to a grant of legislative power—no different than the grant of power to Congress in Article I, Section 8. In particular, no special significance should be attached to the appearance of the word "prescribe," a word that the Supreme Court's favorite Founding-era sources treat as synonymous with "make legislation about." See, e.g., 1 William Blackstone, Commentaries *38 (defining law as a "rule of action, which is prescribed by some superior, and which the inferior is bound to obey"); id. at *44 ("Municipal law . . . is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state . . . .'"); id. at *46, *52; see also The Federalist No. 57, at 280 (James Madison) (Terence Ball ed., 2003) (using the phrase "the mode prescribed by the Constitution for the choice of representatives" to refer to the states' control over elections under the Elections Clause); The Federalist No. 75, at 365 (Alexander Hamilton) (Terence Ball ed., 2003) ("The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society."). Because "prescribe" simply means "make law about," the Elections Clause is no different from other grants of legislative power. Does a grant of legislative power preclude delegations?

Virtually everyone agrees that the Constitution's other major grant of legislative power—Article I, Section 8—is textually ambiguous with respect to delegations. See, e.g., Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379, 389 (2017) (noting "[t]here is no explicit textual prohibition on the delegation of legislative power," though "such a rule has long been thought implicit"); Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 274, 324 n.233 (1993) (anchoring the nondelegation doctrine in the Necessary & Proper Clause, not in the grant of power at the outset of Article I, Section 8).

The conjunction of these two facts suggests that the propriety of Election Clause delegations cannot be determined from the text alone. Thus, historical evidence matters. It might either reveal Americans' expectations about what the Clause's text meant or reveal the settlement of their meaning in the first decades of the republic. See Baude, supra, at 14.

peace. To name just one example, Virginia sheriffs had the authority to adjourn elections up to four days, and they could relocate polling from the county courthouse if the county was "infected with any contagious disease, or . . . in danger of an attack from a public enemy."[18] Or take New York, where elections inspectors had total power to determine polling places and polling times.[19] Advocates of the Independent State Legislature theory must interpret these examples as delegations, and thus ought to embrace the legality of legislative delegations today.

In modern elections, of course, state executives have joined local officials in exercising power over federal elections. One might well wonder whether there is a constitutional difference between local power at the Founding and state executive power today.

Proponents of the ISL theory cannot sustain that view. First, as a factual matter, both "local" and "executive" officers received delegated power in the Founding era. Second, what makes Founding-era local governments arguably distinguishable from modern-day state executives is their claim to quasi-sovereignty in regulating their own affairs.[20] It might thus be plausible to see local control over federal elections as an exercise of inherent, rather than delegated, power, a very different matter than horizontal delegations to state executives. But that interpretation would be utterly incompatible with the Independent State Legislature theory, which requires that state legislatures be the *sole* sources of legitimate rulemaking authority for federal elections; an exercise of inherent local power would scramble that narrative. Thus, advocates of the ISL theory ought to embrace delegation as the explanation for the historical evidence presented below.

Getting the delegation question right matters a great deal. COVID-19 is a powerful illustration of the need for occasional flexibility in election regulation, with dozens of states shifting their rules via executive action.[21] It is an open question whether safe and fair elections could have been held absent such delegations. But the implications of a nondelegation doctrine for the Elections Clause go far beyond COVID. State and local elections

[18] Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39.

[19] See, e.g., Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 318; see also infra Appendix ("New York").

[20] See infra Part III.

[21] See infra note 72 and accompanying text.

officials depend heavily on delegation to keep their agencies moving.[22] Adopting a nondelegation rule would wreak havoc on those systems.

With that said, the primary purpose of this Article is to intervene in the doctrinal debate over Elections Clause delegation; its aim is not to defend the practice of delegation as a matter of policy. It may be true, as some political science research suggests, that delegation is a necessary (though insufficient) ingredient in creating independent and expert agencies, in which case we might see delegation as a good.[23] Some of the examples cited below demonstrate a darker side of delegation, which is the risk that delegees use their positions to further the political ambitions of their allies. For present purposes, I bracket the normative question of whether we ought to celebrate delegation or deplore it. The goal here is to show that local power was a fact that was widely viewed as legal and to draw out the doctrinal implications of that historical evidence.

This Article also does not resolve two broader issues raised by the Independent State Legislature theory, namely (1) whether state legislatures are bound by state constitutions and (2) whether state courts can review state election laws governing federal elections. To be sure, my argument matters most in a world where the ISL theory is adopted, since current doctrine would defer entirely to state constitutions to determine the legality of delegations.[24] And the evidence here may be relevant to debates over the ISL theory. As I note above, what I call "silent delegations" to local governments might instead be interpreted as evidence of inherent local power over federal elections, which would undercut the ISL theory's literalist reading of "legislature."[25] Also, as

[22] See, e.g., Justin Weinstein-Tull, Election Law Federalism, 114 Mich. L. Rev. 747, 778–80 (2016); Daniel P. Tokaji, The Future of Elections Reform: From Rules to Institutions, 28 Yale L. & Pol'y Rev. 125, 130–31 (2009) (describing the discretion baked into current election administration systems).

[23] See generally Gary J. Miller & Andrew B. Whitford, Above Politics 17–22 (2007) (arguing that delegation is key to establishing credibly neutral agencies like the Federal Reserve). As Michael McConnell points out, the issue of neutrality is less pronounced when legislatures make generalized ex ante rules. Michael W. McConnell, Two-and-a-Half Cheers for *Bush v Gore*, 68 U. Chi. L. Rev. 657, 661–62 (2001). But a regime without any delegation at all would inevitably require significant policy choices to be made at a close enough vantage point to an election that the stakes of any decision, and the likely beneficiaries, would be readily apparent.

[24] See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC"), 576 U.S. 787, 808 (2015) ("[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking.").

[25] As noted below, I thank Greg Ablavsky and Robert Gordon for helping me see this alternative possibility.

Hayward H. Smith has noted, the aggressive delegations I document below may undercut the view that legislative power over federal elections was sacrosanct.[26] But this Article is not primarily about whether the ISL theory is correct.

As I argue in Part I, that is partially in recognition of the fact that the ISL theory appears very likely to be adopted. The Supreme Court has not taken a case addressing the proper interpretation of the Elections Clause since the Arizona redistricting litigation in 2015. In that case, Chief Justice Roberts authored a ringing dissent, joined by Justices Thomas and Alito, effectively endorsing the ISL theory.[27] Today, the Chief Justice would almost certainly be in the majority. Justices Kavanaugh and Gorsuch trumpeted their adherence to the ISL theory during the 2020 election cycle, making five sitting Justices who have recently endorsed the ISL theory in their opinions.[28] In recent redistricting litigation, several Justices have restated their commitment to this view.[29] Even if it has not yet powered a majority opinion, the ISL theory already represents the views of the majority on the Supreme Court.

Finally, while this Article's primary purpose is to contribute to a revived debate on the meaning of the Elections Clause, the pervasiveness of local delegations I document here adds to a growing literature on delegations in the early republic more generally. Most notably, Nicholas Parrillo has recently uncovered the history of federal boards of tax assessors empowered in 1798 to review property assessments under an ambiguous congressional statute.[30] As Parrillo notes, originalist advocates of a more stringent nondelegation doctrine have traditionally argued that all Founding-era legislative delegations fall into the categories of (1) delegations concerning foreign affairs or (2) voluntary transactions and government benefits, such as those pertaining to veterans' benefits.[31]

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[26] Hayward H. Smith, Revisiting the History of the Independent State Legislature Doctrine, 53 St. Mary's L.J. (forthcoming 2022) (manuscript at 37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205 [https://perma.cc/78LE-H76B].

[27] *AIRC*, 576 U.S. at 824–25 (Roberts, C.J., dissenting); see infra note 69 and accompanying text.

[28] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch J. concurring); id. at 34 n.1 (Kavanaugh, J. concurring); see infra notes 70–71 and accompanying text.

[29] Moore v. Harper, 142 S. Ct. 1089, 1089–90 (2022) (mem.) (Alito, J. dissenting from denial of application for stay); id. at 1089 (Kavanaugh, J., concurring in denial of application for stay).

[30] Parrillo, supra note 13, at 1302, 1304.

[31] Id. at 1301 & n.48.

If, as advocates of the ISL theory believe, state legislatures make federal law when they regulate federal elections and are subject to the same nondelegation rules as Congress,[32] then the proliferation of delegation in the Elections Clause context would seem to provide another example of delegation under the Federal Constitution that affected the exercise of core political rights.[33]

This Article proceeds as follows. Part I places this intervention in context by reviewing the scholarly and judicial discussion of the Independent State Legislature theory. It argues that the issue of permissible delegations has yet to be answered by extant scholarship and demonstrates that delegations were a major issue during 2020 election litigation. Part II presents the historical evidence suggesting that expansive and politically significant delegations to local officials were a pervasive feature of early American elections. Part III links that historical record back to modern controversies, arguing that state executives are no different from local officials. I conclude with some reflections on how federal courts should analyze delegations in future litigation.

I. THE INCREASINGLY IMPORTANT—AND UNRESOLVED—DELEGATION QUESTION

The Supreme Court's current doctrine holds that the Elections Clause's reference to the "Legislature" of each state means any process "performed in accordance with the State's prescriptions for lawmaking."[34] But a specter is haunting election law: the Independent State Legislature theory, endorsed explicitly or implicitly by a majority of the Court, and the central question in a case to be heard by the Court in October Term 2022.[35] The ISL theory would change current precedent such that the only body with the power to regulate elections would be the legislature, i.e., "the representative body which ma[kes] the laws of the people."[36] One result

[32] See, e.g., Morley, The Independent State Legislature Doctrine, supra note 12, at 535 ("When plaintiffs allege a violation of their constitutional rights or federal voting-related statutes, they raise a federal question.").

[33] See *supra* note 17 for a defense of the view that the language of the Elections Clause is not meaningfully different from that in Article I, Section 8.

[34] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC"), 576 U.S. 787, 808 (2015).

[35] See Moore v. Harper, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022) (granting certiorari).

[36] *AIRC*, 576 U.S. at 825 (Roberts, C.J., dissenting) (emphasis omitted) (alteration in original) (quoting Smiley v. Holm, 285 U.S. 355, 365 (1932)).

of the ISL theory would be stripping state courts of the power to review federal elections law on state law grounds. A less-discussed implication of the ISL theory is that it would raise federal constitutional questions about state laws delegating Elections Clause powers to executive agencies.

In this Part, I review the scholarship and jurisprudence concerning the ISL theory. I argue that scholars have focused largely on the court-curbing dimension of the theory and have mostly ignored its implications for legislative delegations. I then turn to the case law to show just how important this gap is. Litigation related to the 2020 election cycle repeatedly raised delegation questions. Such questions are likely to intensify given the likely adoption of the ISL theory by the Supreme Court. In Part II, I begin answering some of the questions that courts continue to grapple with.

A. Scholarly Treatments of the ISL Theory

Legal scholarship paid little attention to the Elections Clause before the 2000 election.[37] In the ensuing two decades, most scholarly writing has primarily focused on the following question: When state legislatures make federal elections law, are they bound by their state constitutions?

The case against holding state legislatures to state constitutions hinges on the Federal Constitution's text. The Elections Clause says that the time, place, and manner of federal elections shall be determined "by the Legislature" of each state. For textualists, that's the ballgame: the Constitution's decision to grant power specifically to *the legislature* has a plain meaning, which is that the sole body permitted to regulate federal elections and choose presidential electors is "the entity within each state comprised of elected representatives that enacts statutes."[38] That meaning forecloses the use of any other mechanism—state constitution, referendum, whatever—to regulate the same subject matter.

[37] For an exception, see James C. Kirby, Jr., Limitations on the Power of State Legislatures Over Presidential Elections, 27 L. & Contemp. Probs. 495, 495 (1962).

[38] Michael T. Morley, The Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. 847, 849 (2015) [hereinafter Morley, Intratextual Legislatures] ("[T]he meaning of the term 'legislature' in the Elections Clause and Presidential Electors Clause appears quite clear: it refers to the entity within each state comprised of elected representatives that enacts statutes."); see also McConnell, supra note 23, at 661 (reviewing similar language in the Presidential Electors Clause of Article II); 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, 619 (2001) (same).

Any argument to the contrary, they claim, is foreclosed by examining the other references to state legislatures in the Constitution.[39] For example, Article V requires state legislatures to ratify amendments to the Constitution, and that provision has been interpreted as delegating power exclusively to the "entity that enacts statutes"—not to the state's general lawmaking authority. Likewise, until the Seventeenth Amendment was passed in 1913, the provision in Article I requiring the "Legislature" of each state to choose its senators was interpreted as a non-delegable grant to the "entity that enacts statutes"—prohibiting, for instance, the use of popular referenda to choose senators instead.[40] Further, at least one scholar claims that delegates at the Constitutional Convention assumed state legislatures would be the exclusive holders of power under the Elections Clause.[41]

ISL theory proponents also argue that their rule makes sense. Richard Posner has argued that delegating power *solely* to legislatures minimizes the risks of interbranch disputes over election rules within state governments.[42] Michael McConnell argues that state legislatures are both the most democratic branches of state government and that they are unique in having to create rules ex ante, reducing their ability to play favorites.[43]

By contrast, critics of the Independent State Legislature theory argue that "legislature" means different things in different contexts. As the Supreme Court reaffirmed in *Arizona State Legislature v. Arizona Independent Redistricting Committee* ("*AIRC*"), "the meaning of the word 'legislature' . . . differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise."[44] Sometimes state legislatures are called upon as mere ratifying bodies, not lawmaking bodies, as in

[39] See Morley, Intratextual Legislatures, supra note 38, at 855–60. This argument is also pressed by Chief Justice Roberts's dissent in *AIRC*. 576 U.S. at 829–32.

[40] See *AIRC*, 576 U.S. at 831–32 (Roberts, C.J., dissenting); see also Nicholas P. Stabile, Comment, An End Run around a Representative Democracy? The Unconstitutionality of a Ballot Initiative to Alter the Method of Distributing Electors, 103 Nw. U. L. Rev. 1495, 1496–97 (2009) (arguing that the use of a ballot initiative to change the method of selecting electors violates Article I).

[41] See Morley, Intratextual Legislatures, supra note 38, at 859–60.

[42] Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 155–56 (2001).

[43] McConnell, supra note 23, at 661–62.

[44] 576 U.S. at 808 (alteration in original) (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932)).

Article V or in Article I's Senatorial Selection Clauses. But the Elections and Electors Clauses call upon the legislature to exercise its lawmaking power and thus are properly read as invoking the lawmaking authority of the state generally.[45] In short, the apparently specific reference to the "legislature" of each state is ambiguous and might plausibly refer to the state's general lawmaking power.

The contention that the text is ambiguous is bolstered by historical accounts, which reveal little evidence that the use of the word "legislature" was understood literally. Hayward H. Smith's study of the original history of the Elections Clause argues that the reference to the state "legislature" was basically unremarked upon at the Constitutional Convention.[46] Further, the Elections Clause closely mirrors Article V of the Articles of Confederation, under which state legislatures had been bound by their state constitutions.[47] Smith goes on to document how state legislatures interpreted their own authority in the first several federal elections, showing that virtually all viewed themselves as bound by the procedural definition of "legislature" in their state constitutions, such as the availability of a gubernatorial veto.[48] Further, Smith has argued in more recent work that these structural provisions were every bit as binding as the kinds of substantive restrictions on legislation (for example, substantive guarantees of free and equal access to the ballot) that are often litigated today.[49] Not until the Civil War did courts suggest that state legislatures might have the authority to make federal elections rules unfettered by state constitutions.[50]

Opponents of the ISL theory have also proposed a number of policy-related reasons to prefer state constitutional supremacy. One is that states have developed significant reliance interests on current doctrine. Nathaniel Persily and co-authors argue that adopting a literalist reading of the Elections Clause would invalidate seven independent redistricting commissions, at least six voter-passed elections statutes modifying the

[45] Id. at 807; see also Saul Zipkin, Note, Judicial Redistricting and the Article I State Legislature, 103 Colum. L. Rev. 350, 373–76 (2003) (arguing for a two-step analysis to determine whether a state court may review a decision delegated by the Constitution to a state legislature, in which the second step is to ask whether the power in question is "essentially legislative").

[46] Smith, supra note 5, at 743.

[47] Id. at 754–56.

[48] Id. at 760–63.

[49] Smith, supra note 26, at 1.

[50] Smith, supra note 5, at 764–66.

rules of federal elections, and tens of state constitutional provisions.[51] Likewise, in other work, Persily has pointed out the enormous and discretion-laden role that election officials play in American elections—a role that might likewise be called into question were the Independent State Legislature theory adopted.[52]

A related set of arguments proposes structural reasons to respect the supremacy of state constitutional law. Joshua Douglas points to the legacy of state constitutionalism as a fount of substantive rights.[53] In a similar spirit, Richard Pildes has argued that the usual channel-clearing logic justifying federal courts' supervision of state election procedures is attenuated where popular referenda have made changes to state elections law.[54]

This voluminous literature largely sidesteps the issue of whether and to what degree state legislatures may convey their *own* power to other entities. The literature assumes the only meaningful constraints on state legislative power are those imposed from above, in the form of state constitutional constraints. But legislatures make meaningful grants of power via statute all the time, grants that can result in genuinely independent agencies.[55] Just ask the Federal Reserve. Thus, the largely overlooked issue of legislative delegations is worth paying close attention to.

[51] Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative, 77 Ohio St. L.J. 689, 715–18 (2016).

[52] See Nathaniel Persily, Celebrating the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States, 44 Ind. L. Rev. 85, 85–86 & n.4 (2010) (citing David C. Kimball & Martha Kropf, The Street-Level Bureaucrats of Elections: Selection Methods for Local Elections Officials, 6 Rev. Pol'y Res. 1257, 1257 (2006)).

[53] Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 Vand. L. Rev. 89, 89 (2014); see also James A. Gardner, The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections, 29 Fla. St. U. L. Rev. 625, 625 (2001) (discussing how state officials are understood to draw their power from state constitutions).

[54] Richard H. Pildes, Constitutionalizing Democratic Politics, *in* A Badly Flawed Election 155, 156 (Ronald Dworkin ed., 2002).

[55] See Gary J. Miller & Andrew B. Whitford, Above Politics: Bureaucratic Discretion & Credible Commitment 111–15 (2016) (discussing the bureaucratic machinations that maintained the Federal Reserve's independence, despite its formal weakness as a creature of statute); Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputation, Networks, and Policy Innovation in Executive Agencies, 1862–1928, at 5 (2001).

The one article to address the statutory delegation issue is Derek T. Muller's 2016 treatment.[56] That article presents a wealth of historical examples interpreting the Elections Clause in a way that suggests delegations are improper, most of which occur between the middle of the nineteenth century and the early twentieth century.[57] For instance, Muller discusses an 1880 controversy over whether Missouri could give St. Louis the right to set voter registrations and on the question of whether legislatures could divest themselves of power to appoint U.S. Senators before the passage of the Seventeenth Amendment.[58] But it is unclear how these examples connect to the way the ratifying generation of Americans would have understood the Elections Clause, which is, after all, the operative question for the originalist majority on the Supreme Court.[59]

The permissibility of delegations under the Elections Clause is thus unresolved by a literature focused mostly on the ISL theory. The sole scholarly treatment of delegation leaves much to be desired in helping us understand what the Elections Clause would have meant for delegation to the Americans who ratified it. As recent litigation has shown, this is a gap in need of filling.

B. The Emerging Judicial Focus on Delegation

The Supreme Court precedent on the books rejects the Independent State Legislature theory. Beginning with *Ohio ex rel. Davis v. Hildebrandt* in 1916,[60] the Supreme Court has repeatedly held that the State can define "Legislature" however it pleases. In *Hildebrandt*, Ohio said that its "Legislature" included a referendum process that could override enactments by the General Assembly; in *Smiley v. Holm*, the "Legislature" included a gubernatorial veto.[61] The Supreme Court approved both. Most recently, in *AIRC*, the Court upheld an Arizona constitutional amendment that transferred the power to draw congressional districts from the state legislature to a nonpartisan body.

[56] Muller, supra note 12.

[57] See, e.g., id. at 723–25 (discussing litigation on the Seventeenth Amendment in the early twentieth century); id. at 730–32 (discussing disputed congressional elections drawn, with two exceptions, from after 1850).

[58] Id. at 720–25, 732–33.

[59] For this reason, I view Muller's assertion that "there is deeply engrained in the constitutional structure a prohibition on delegation of the electoral power," id. at 739, as lacking a foundation in the original meaning of the text.

[60] 241 U.S. 565, 566 (1916).

[61] 285 U.S. 355, 368 (1932).

Once again, the majority found no Elections Clause violation, reasoning that the Commission was validly drawing on the state's lawmaking power.

Under the current rule, legislative delegations are minimally suspect. A legislature's power to issue them is beyond question—the Federal Constitution simply has nothing to say about how the State's lawmaking power is divvied up.[62] For the same reason, there is no special role for federal courts to play in monitoring delegations. Just the opposite. Given that *Hildebrandt* and *Smiley* focus on the *state* constitution's definition of legislative power, *state* courts are the logical forum for policing delegations.

It is thus unsurprising that, before 2020, only a handful of federal courts had ever even *considered* whether the Elections Clause would pose problems for legislative delegations.[63] And in the few cases where plaintiffs did bring Elections Clause challenges, they did not get far. Take *Baldwin v. Cortes*, which stemmed from a consent decree signed by the Pennsylvania Secretary of the Commonwealth changing the deadline for candidate registration.[64] The Third Circuit brushed away a minor party's challenge to the consent decree, summarily citing "the Pennsylvania legislature's explicit delegation of authority to the Secretary . . . to administer the state election scheme."[65] The court made no attempt to carefully parse the terms of the delegation and applied no constitutional scrutiny to the delegation itself. A facially valid delegation was enough.

Indeed, the only pre-2020 case invalidating an executive election regulation on the basis of the Elections Clause shows how low the bar has been. In *Libertarian Party of Ohio v. Brunner*, Ohio's Secretary of State rewrote the state's entire ballot access regime from scratch after the whole

[62] For a critical discussion of the way current precedent forecloses delegation-related challenges, see Morley, The New Elections Clause, supra note 12, at 93.

[63] See, e.g., Miller v. Treadwell, 736 F. Supp. 2d 1240, 1242–43 (D. Alaska 2010) (rejecting an Elections Clause challenge to the Alaska Department of Elections's policy on counting write-in votes); Woodruff v. Herrera, No. CV 09-449, 2009 WL 10668512, at *3 (D.N.M. Dec. 11, 2009) (summarily rejecting an Elections Clause challenge to the Secretary of State's decision to allow voters to select a "straight ticket" option, despite the fact that there was no statutory authorization for such an option on the ballot); Moore v. Hosemann, No. 3:08CV573, 2008 WL 11439423, at *1 (S.D. Miss. Sept. 29, 2008) (rejecting an Elections Clause challenge to the Secretary of State's decision to close candidate registration at 5:00 p.m. on the statutory deadline).

[64] Baldwin v. Cortes, 378 F. App'x 135, 138–39 (3d Cir. 2010).

[65] Id.

statutory scheme was deemed unconstitutional by the Sixth Circuit.[66] After the new rules were challenged, the court granted relief on the ground that there was "*no* evidence" that the state legislature had delegated the authority to craft the basic ballot access rules to the Secretary.[67] Rewriting an entire chapter of statutory law from scratch is not "delegation"; even the most deferential review would have reached the same result.

Times have changed. Though *Smiley* and *Hildebrandt* remain on the books, the Supreme Court recently granted certiorari in a case that squarely implicates the Independent State Legislature theory, adding to strong signals the Court sent during the 2020 election cycle.[68] As a matter of head-counting, litigants and lower courts might reasonably believe that the ISL theory is on the verge of formal adoption. Start with Chief Justice Roberts' dissent in *AIRC*, which endorses the ISL theory's key tenets and denounces the idea that elections regulations may be enacted by any entity other than the legislature itself.[69] That dissent was joined by Justices Alito, Thomas, and Scalia.

Next add Justices Gorsuch and Kavanaugh, who endorsed the ISL theory in the midst of the 2020 litigation cycle in *Democratic National Committee v. Wisconsin State Legislature*. Justice Gorsuch, joined by Justice Kavanaugh, wrote in a concurrence that "state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules," with no reference at all to *Smiley* or *Hildebrandt*.[70] Justice Kavanaugh, concurring alone, went even further, explicitly endorsing Chief Justice Rehnquist's *Bush v. Gore* opinion.[71] Both comments were all the more striking since they were utterly unnecessary to the resolution of the case.[72] Combining

[66] See 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008).

[67] Id. at 1012 (emphasis added).

[68] See Moore v. Harper, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022).

[69] 576 U.S. 787, 829–41 (2015) (Roberts, C.J., dissenting) ("Under the Elections Clause, 'the Legislature' is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process.").

[70] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring).

[71] Id. at 34 n.1 (Kavanaugh, J., concurring).

[72] That is because the underlying case was about a federal judge applying federal constitutional law. No state constitutional issues were presented. In *Democratic National Committee v. Bostelmann*, a federal judge in Wisconsin granted a preliminary injunction suspending a number of Wisconsin election regulations on Fourteenth Amendment grounds after applying *Burdick* balancing. 488 F. Supp. 3d 776, 799–801, 817 (W.D. Wis. 2020) (citing

Justices Gorsuch and Kavanaugh with the three *AIRC* dissenters still on the Court makes a majority that has endorsed the ISL theory in writing; three of the five have reiterated their commitment to the ISL theory as recently as this March.[73]

Litigants got the message. During the 2020 election cycle, at least *thirteen* federal courts heard Elections Clause challenges to state executive action. The factual catalyst for the uptick was COVID-19, which resulted in a wave of executive orders designed to make voting pandemic-safe. Thirty-nine of the fifty states changed their election procedures in some fashion to respond to the pandemic,[74] and while some of these changes were accomplished by statute, most involved at least some executive action.[75]

A comprehensive survey of Elections Clause challenges to exercises of delegated power suggested that there were roughly four categories of Elections Clause challenges.

> (1) Some litigants challenged regulations and guidance documents issued prospectively to guide policy implementation. Guidance was often issued by secretaries of state or by state elections boards,[76] but in some states, governors issued executive proclamations with

Burdick v. Takushi, 504 U.S. 428, 434 (1992)). The Seventh Circuit stayed the injunction. Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 641 (7th Cir. 2020).

[73] See Moore v. Harper, 142 S. Ct. 1089, 1089–91 (2022) (mem.) (Alito, J., dissenting from denial of application for stay) ("[I]f the language of the Elections Clause is taken seriously, there must be some limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for . . . federal elections.").

[74] Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020, Ballotpedia, https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/699T-VEWV] (last updated Nov. 19, 2020).

[75] See Wendy R. Weiser, Dominique Erney, Eliza Sweren-Becker & Anne Glatz, Mail Voting: What Has Changed in 2020, Brennan Ctr. for Just. (Sept. 17, 2020), https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020 [https://perma.cc/DGX6-HARR] (noting that of fourteen states to expand excuses for absentee ballot access, "[f]ive states did so by gubernatorial order, five through action by state election officials, and four legislatively," among many other accommodations won via executive action).

[76] See, e.g., Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620, 627–28 (E.D. Wis. 2020) (challenging guidance documents related to the proper interpretation of state law); Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020) (challenging guidance related to signature verification procedures).

implications for elections procedures.[77] Litigants claimed that these documents were invalid under the Elections Clause.

(2) Other challenges resulted indirectly from prior litigation when state executives entered into settlements or consent decrees with adverse parties. Litigants then brought Elections Clause challenges to the validity of those agreements or decrees.[78]

(3) Some post-election litigation alleged Elections Clause problems from executive noncompliance with statutes.[79]

(4) Finally, some claims challenged *county* decisions to accept private donations to help finance the election, on the grounds that private funding disrupted state control over county elections processes.[80]

In the majority of cases, Elections Clause challenges ended without fanfare. Many courts did not reach the merits, since private citizens[81] and

[77] See, e.g., Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 821 (D. Mont. 2020) (gubernatorial order suspending law limiting absentee voting); Minn. Voters All. v. Walz, 492 F. Supp. 3d 822, 836 (D. Minn. 2020) (alleging that a generally applicable executive order requiring masks in public places violated the Elections Clause as applied to polling places); Singh v. Murphy, No. A-0323-20T4, 2020 WL 6154223, at *6 (N.J. Super. Ct. App. Div. Oct. 21, 2020) (challenging executive order mandating that the election be conducted primarily with mail-in ballots).

[78] See, e.g., Carson v. Simon, 978 F.3d 1051, 1054 (8th Cir. 2020) (consent decree extending ballot-receipt deadline); Wise v. Circosta, 978 F.3d 93, 106 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., dissenting) (consent decree extending ballot receipt deadline); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1316–18 (N.D. Ga. 2020) (settlement agreement adding additional process before invalidating ballots); League of Women Voters of Va. v. Va. State Bd. of Elections, 481 F. Supp. 3d 580, 587 (W.D. Va. 2020) (consent decree eliminating witness requirement for absentee ballots).

[79] See, e.g., King v. Whitmer, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2020) (alleging that state officials violated the Elections Clause by failing to comply with relevant statutes).

[80] See, e.g., Tex. Voters All. v. Dallas County, 495 F. Supp. 3d 441, 449, 461–62 (E.D. Tex. 2020) (arguing that the Elections Clause prohibited counties from accepting COVID-19 relief grants from nonprofit organizations meant to ensure voter safety during 2020 election, and dismissing on standing grounds); Ga. Voter All. v. Fulton County, 499 F. Supp. 3d 1250, 1255 (N.D. Ga. 2020) (dismissing the case for lack of standing).

[81] See Lance v. Coffman, 549 U.S. 437, 442 (2007) ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.")

legislators[82] generally lack standing to bring Elections Clause challenges to state action.[83]

But in cases that did reach the merits, a surprising number of judges departed from the decades-long consensus and embraced a highly hostile view of delegations—implicitly setting aside *Smiley* and *Hildebrandt*.

Some just ignored precedent. In *Texas League of United Latin American Citizens v. Hughs*, the Fifth Circuit considered a challenge to a proclamation by Texas Governor Greg Abbott that limited the number of sites where voters could drop off absentee ballots.[84] The proclamation was issued pursuant to the Texas Disaster Act, which gives governors the power to suspend regulatory laws, and the validity of which under the state constitution has never been questioned since its passage in 1975.[85] Nonetheless, Judge Ho issued a concurrence in which he argued that the proclamation "conflicts with Articles I and II of the U.S. Constitution" by usurping the legislature's power to regulate federal elections.[86] That claim directly contradicts *AIRC* and was made without a single citation to Supreme Court precedent.

The more common approach for courts skeptical of executive action was to construe the underlying delegating statute narrowly, often by applying something like a clear-statement rule to delegating statutes.

That was the path taken in *Carson v. Simon*, where the Eighth Circuit considered a consent decree entered into by the Minnesota Secretary of State extending the deadline for the receipt of mail-in ballots.[87] The Secretary claimed that the consent decree was permitted by Minnesota law allowing the Secretary to "adopt alternative election procedures" if "a provision of the Minnesota Election Law cannot be implemented as a

[82] See Raines v. Byrd, 521 U.S. 811, 829–30 (1997).

[83] See, e.g., Bognet v. Sec'y of Pa., 980 F.3d 336, 345–46 (3d Cir. 2020), vacated as moot sub nom. Bognet v. Degraffenreid, 141 S. Ct. 2508, 2508 (2021); *Wood*, 501 F. Supp. 3d at 1320–21; Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020) (noting that plaintiffs withdrew an Elections Clause challenge because they acknowledged that they lacked standing to pursue it).

[84] 978 F.3d 136, 139–40 (5th Cir. 2020).

[85] Id. at 141–42 (describing the statutory scheme and executive proclamations issued pursuant to it).

[86] Id. at 150–54 (Ho, J., concurring) ("In response, the Secretary of State seeks a stay of the preliminary injunction pending appeal. Tellingly, however, nowhere in her stay papers does the Secretary suggest that the preliminary injunction conflicts with Articles I and II of the U.S. Constitution—perhaps because she recognizes that the Governor's proclamations suffer from the same defect.").

[87] 978 F.3d 1051, 1054 (8th Cir. 2020).

result of an order of a state or federal court."[88] The *Carson* court disagreed, using the Independent State Legislature theory as a substantive canon of statutory interpretation requiring the narrowest possible interpretation of delegating statutes. Thus, even though the consent decree was a judicial order[89] requiring the deadline extension, it was not covered by the statutory delegation because it was not imposed *adversely* and "[did] not declare the statute invalid."[90] Never mind that neither requirement is mentioned in the statute.[91]

A dissent issued by Judges Wilkinson and Agee in the Fourth Circuit case of *Wise v. Circosta* takes the same approach.[92] Just like in *Carson*, the North Carolina State Board of Elections entered into a consent decree after being sued.[93] Part of the consent decree extended the deadline for receiving ballots; the plaintiffs in *Wise* then sued the Board of Elections to enjoin it from implementing that portion of the consent decree. As in *Carson*, the Board argued that it could enter into the consent decree pursuant to its emergency powers, which come into force whenever "the normal schedule for the election is disrupted by . . . [a] natural disaster."[94] And just as in *Carson*, the dissenters read this provision narrowly to exclude the COVID-19 pandemic, reasoning that the "natural disaster" excludes a pandemic that unfolded over several months.[95] While plausible, this reading is not required by the text. Black's Law Dictionary, for example, defines "disaster" as a "calamity" or "catastrophic emergency," and COVID-19 would seem to fit the bill, as many other

[88] Id. at 1060; see also Minn. Stat. Ann. § 204B.47 (West 2021) ("When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order. The procedures may include the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order or any other order extending the time established by law for closing the polls.").

[89] To take just one example, the Supreme Court said in *United States v. Swift & Co.* that "[w]e reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act." 286 U.S. 106, 115 (1932).

[90] *Carson*, 978 F.3d at 1060.

[91] Needless to say, one can imagine plenty of court orders that "prevent a provision of the Minnesota Elections Law" from being implemented without "invalidating" the statute entirely—say, an order in an as-applied constitutional challenge. Cf. Minn. Stat. Ann. § 204B.47 (West 2021).

[92] 978 F.3d 93, 104–17 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., dissenting).

[93] Id. at 96–97 (majority opinion) (describing the history of the initial suit).

[94] N.C. Gen. Stat. § 163-27.1(a) (2021).

[95] *Wise*, 978 F.3d at 113 (Wilkinson & Agee, JJ., dissenting).

courts found during the 2020 litigation cycle.[96] But Judges Agee and Wilkinson invoked a kind of constitutional avoidance canon, among other factors, to justify their narrower reading: "If we refuse to defend the prerogative of the General Assembly to create election rules in a case as clear as this one, the power of the state legislatures under the Elections Clause and the Electors Clause will be at the mercy of other state-government actors."[97]

It is worth emphasizing that using constitutional avoidance to narrow legislative delegations cannot be justified under current Supreme Court doctrine, which expresses no preference for any particular distribution of legislative authority.[98] There is no Elections Clause problem if a delegation is consistent with the state constitution.

One way to read these cases, then, is that at least some lower court judges have concluded (as this Article does above) that *Hildebrandt*, *Smiley*, and *AIRC* no longer represent the doctrinal views of the majority of the Supreme Court.[99] The more aggressive approach to delegation cases may, that is, be a form of anticipatory overruling.[100]

II. THE EARLY PRACTICE OF DELEGATIONS TO LOCAL ELECTION OFFICIALS

Courts and scholars are increasingly concerned with the question of whether delegations to state executives are permitted by the Elections Clause. This Part draws on a comprehensive study of American election laws between 1788 and 1839 to show that delegations were a pervasive component of early American elections. During the first five decades after the ratification of the Constitution, state legislatures aggressively

[96] Disaster, Black's Law Dictionary (11th ed. 2019).

[97] *Wise*, 978 F.3d at 115 (Wilkinson & Agee, JJ., dissenting).

[98] Judges Agee and Wilkinson do raise a concern that would be problematic under the current reading of the Elections Clause, which is that the Board's interpretation of the underlying statute would violate a nondelegation doctrine that has been read into the North Carolina Constitution. See id. at 114–15 (citing Adams v. N.C. Dep't of Nat. & Econ. Res., 249 S.E.2d 402, 410 (N.C. 1978)). But current Supreme Court doctrine would place that state constitutional question within the ambit of state courts' primary competence—and a state court issued the underlying consent decree at the basis of the lawsuit.

[99] Recent scholarship joins with the opinions mentioned here in hotly anticipating that the Supreme Court will soon adopt the Independent State Legislature theory. See Morley, supra note 7, at 69.

[100] For a discussion of anticipatory overruling, see Richard M. Re, Narrowing Supreme Court Precedent From Below, 104 Geo. L.J. 921, 941 n.94 (2016).

delegated authority to determine the times, places, and manner of federal elections to local government officials.

Table 1 summarizes my findings. Nine of thirteen states engaged in some significant form of delegation. States allowed local election officials to pick where the polls would be located, open and close them at will, and make critical decisions about how voting would unfold. Even from today's vantage point, some of these delegations are surprising. Virginia's early practice of allowing sheriffs to adjourn elections up to *eleven days* past Election Day makes today's extension of ballot deadlines seem quaint.[101] Or take Massachusetts, where town selectmen had the authority to decide whether voters had to stay at the polling place for the entire duration of an election for their votes to count.[102] While plenty of early Americans decried these practices on political grounds, nobody thought they violated the Elections Clause. As I argue in the next Part, the apparent consensus around the permissibility of local delegations ought to inform our understanding of the Elections Clause today.

Table 1: State Delegations, 1788–1839, by Type and Duration

	Significant delegation throughout	Significant delegation for part of period	No or unknown degree of delegation
Time	Massachusetts, New Hampshire, New York, Rhode Island, Virginia	Connecticut, New Jersey, Maryland	Delaware, Georgia, North Carolina, Pennsylvania, South Carolina
Place	Connecticut, Massachusetts, New Hampshire, New York, Rhode Island	Delaware, Maryland, New Jersey	Georgia, North Carolina, Pennsylvania, South Carolina, Virginia
Manner	Massachusetts, Rhode Island, Virginia	Maryland, New Hampshire	Connecticut, Delaware, Georgia, New Jersey, New York, North Carolina, Pennsylvania, South Carolina

I begin by describing the methods used to generate the historical claims in this Part; a comprehensive description is also provided in the Appendix.

[101] See Richard R. Beeman, The Old Dominion and the New Nation: 1788–1801, at 34 (1972); see also infra Appendix (discussing Virginia's early election practices).

[102] See David Syrett, Town-Meeting Politics in Massachusetts, 1776–1786, 21 Wm. & Mary Q. 352, 363 (1964).

I then address each of the three forms of state legislative power over federal elections—Time, Place, and Manner—and synthesize the evidence on the degree to which states delegated control to local officials in the early republic. In the next Part, I connect this historical evidence to modern debates over delegations to state executive officials.

A. Background

The claims in this Part are based on a survey of election laws in force between 1788 and 1839 in the thirteen original states. I first summarize the relevant historical context and then describe the methods used to complete the survey.

Early American elections took place against the backdrop of electoral practices developed during the colonial period, along with the attendant assumptions about the distribution of power. As a matter of black letter law, elections in colonial America were initiated by a writ issued by the governor and delivered to each town's sheriff, chief magistrate, or selectman.[103] While elections had to be completed within forty days of the issuance of the writ, the timing was otherwise entirely up to the local magistrate to determine.[104] By the time of the Revolution, all of the colonies had converged on either paper balloting or *viva voce* voting, in which a voter publicly announced his vote before a crowd.[105]

These rules reflected a world where local communities had much thicker claims to control over their own affairs, including elections.[106] Thus, the fact that matters such as the sites and mode of election in each community were developed by custom and formally entrusted to the sheriff might best be seen as instances of a general theme of inherent local rights to self-government.[107] In some sense, this Article tells the story of

[103] Robert J. Dinkin, Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689–1776, at 122 (1977).

[104] Id. at 122–23 ("The date of election in each separate town was left to be established by the local selectmen.").

[105] See id.; see also Donald Ratcliffe, The Right to Vote and the Rise of Democracy, 1787-1828, 33 J. Early Republic 219, 234–35 (2013) (discussing the use of paper ballots in the colonial era).

[106] See Hendrik Hartog, Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American History, *in* Law in the American Revolution and the Revolution in the Law, 229, 234–35 (Hendrik Hartog ed., 1981).

[107] Stephen B. Presser, Revising the Conservative Tradition: Towards a New American Legal History, *in* Law in the American Revolution and the Revolution in the Law, supra note 106, at 125.

how the eighteenth century's localist worldview not only survived the disjuncture of the constitutional ratification but was in fact grafted onto the new elections organized for the Federal Congress despite that document's apparent commitment to the unitary domination of the state legislatures over federal elections.[108]

Another legacy of the colonial period was that access to suffrage was relatively limited and turnout anemic, which made small differences in electoral procedures enormously important to outcomes.[109] Turnout in elections was low both before and after independence: Figure 1 shows the number of votes cast (dashed line) and the share of the population voting (solid line) for every congressional election before 1825, as reported by Phillip Lampi.[110] Scholars have speculated on the reasons for low turnout; the best evidence suggests that some combination of restrictive voting qualifications, and the relative quiescence of federal politics in the first decade following the ratification of the Constitution, accounts for this striking trend.[111]

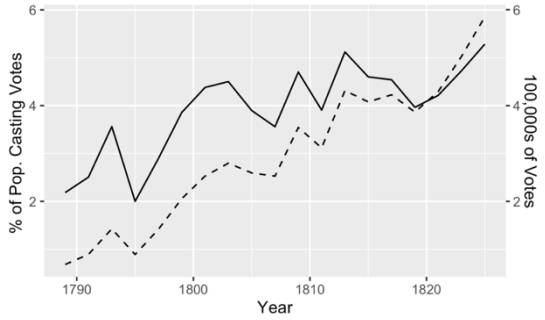
[108] See Gregory Ablavsky, Empire States: The Coming of Dual Federalism, 128 Yale L.J. 1792, 1823–24 (2019).

[109] See Chilton Williamson, American Suffrage: From Property to Democracy, 1760–1860, at 135 (1960) ("No state between the end of the Revolution and the Federal Convention divorced property from voting."). See generally Ratcliffe, supra note 105, at 223–30. (discussing how voting was limited and how no effort was made to allow poor men to vote).

[110] See generally Caroline F. Sloat, A New Nation Votes and the Study of American Politics, 1789–1824, 33 J. Early Republic 183, 183–86 (2013) (describing Lampi's data and the process by which it was collected).

[111] See Ratcliffe, supra note 105, at 228–29.

Fig. 1: Turnout and Votes Cast in Elections to the House of Representatives, 1789–1825[112]



In a low-turnout world, disenfranchising a few dozen voters by moving the polling place a few miles down the road might well change the winner of an election. Thus, we know that local election officials "continued to exert enormous influence upon the outcome of a contest,"[113] and we know that minor manipulations of the electoral rules had outsized influence on electoral outcomes.

The question is whether local officials' power over elections was a form of theft, or whether they were exploiting what was legitimately theirs—legislative power delegated by the state legislature.

I turn to the statutes governing elections to find out. The statutes governing the first federal elections are compiled in *The Documentary History of the First Federal Elections*. I added to this collection in two ways. First, I downloaded every single compilation of state statutes covering the study period available in HeinOnline's historical archive of state statutes. I used both optical character recognition-based searches and available indices to find all statutes mentioning the word "election" or "elections." Next, I searched for the word "election" in HeinOnline's state

[112] The elections data in this figure are from Philip J. Lampi, A New Nation Votes: American Election Returns 1787–1825, https://elections.lib.tufts.edu/ [https://perma.cc/5VS9-XQEQ] (last visited Feb. 28, 2021). The population data are taken from 1 U.S. Dep't of Com., Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, at 8 ser.A 1-5 (1975). Note that turnout is actually impossible to measure since we have no measure of how many people satisfied property and other qualifications. Nonetheless, even Donald Ratcliffe's account (which argues for a large upward revision in historians' estimates of turnout in early elections) suggests that in the states with the most participation, turnout in the early nineteenth century peaked in the neighborhood of sixty percent. See Ratcliffe, supra note 105, at 241.

[113] Dinkin, supra note 103, at 100.

session law library and downloaded any relevant statute passed within the study period. The average number of statutes yielded by this process was twelve per state, or around one every four years.

A number of the cases of local power I document below revolve around statutory silence. It is, of course, problematic to interpret every statutory silence as empowering local officials. To allay this concern, I undertook a parallel survey of the secondary historical literature on elections in each state. When a statute was silent on a particular kind of election power, I did not identify that as a delegation unless the secondary literature clearly demonstrated that the power was recognized as belonging to the local official. Relatedly, as I note in detail in Part III below, one might be skeptical that statutory silence is truly "delegation" at all rather than legislative deference to the colonial-era tradition of community self-governance over elections issues.[114] This Part simply assumes, however, that the right interpretation of these situations is that they are truly "delegations," since that is the interpretation most favorable to the ISL theory.

I offer one final methodological caveat concerning this Article's reliance on contested elections. Contested elections are a poor guide to the behavior of the average official, since the vast majority of elections are not contested.[115] If this Article were focused on defending the overall *virtues* of Elections Clause delegation, that would be a major problem. But it is not. My goal here is to map the outer limits of delegees' legitimate power to show just how expansive delegations were in the Founding era, and for this task, the exceptional circumstances of contested elections are ideal. I encourage readers to avoid drawing conclusions about whether Elections Clause delegations were typically abusive on the basis of the evidence below.

A complete description of the findings of my survey is contained in the Appendix. In the remainder of this discussion, I focus on synthesizing the key takeaways of my research for the Elections Clause by describing the delegations I identified pertaining to the time, place, and manner of conducting elections, respectively.

[114] Id. at 97.

[115] Sean J. Wright, The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections, 81 Alb. L. Rev. 609, 611 & n.14 (2017) (citing Jeffrey A. Jenkins, Partisanship and Contested Election Cases in the House of Representatives, 1789-2002, 18 Stud. Am. Pol. Dev. 112, 115 (2004)).

B. Time

In the early republic, every state's statutes defined some date as "election day." But the timing of elections remained, in important ways, a matter of local discretion. In eight of the thirteen states, the actual opening and closing times of the polls were left entirely to the discretion of local officials during at least part of the study period. And in four of the thirteen states, the presiding officers at elections had the power to adjourn elections, meaning that "election day" was only the beginning of a period whose length was committed at least partially to the discretion of local officials. While outer limits on the adjournment power emerged by the 1830s, in the first decades of American independence some local officials had virtually no legal check on their power to adjourn.

1. Polling Times

States generally fell into three categories when it came to the opening and closing times of polls.

1. In New England, votes were cast in town meetings.[116] While the opening time of each meeting was set by statute, exactly when votes would be taken—and when the polls would be closed—was a matter left in the hands of presiding officers. In Massachusetts, New Hampshire, and Rhode Island, this power came from statutory silence,[117] but it was well-understood: "[t]he polls stayed open as long as the town wished," and the

[116] See, e.g., Paul Goodman, The Democratic-Republicans of Massachusetts: Politics in a Young Republic 137–40 (1964) (discussing the power of Massachusetts town selectmen); Richard J. Purcell, Connecticut in Transition: 1775–1818, at 213 (1918) ("On the third Monday of September the freemen met in town meeting to select their representatives and to nominate twenty assistants and fourteen (later sixteen) Congressmen."); see also infra Appendix ("New Hampshire" & "Rhode Island").

[117] See Act of June 27, 1794, ch. 24, 1794 Mass. Acts 60, 63 (commanding selectmen to cause their constituents "to assemble on the first Monday of November . . . to give in their votes for their respective Representative to the Selectmen, who shall preside at said meeting"); Act of Nov. 12, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788–1790, at 790, 790 (Merrill Jensen & Robert A. Becker eds., 1976) (providing that "the Inhabitants of the several Towns, and Parishes, Plantations and Places [in New Hampshire] . . . assemble in their respective Towns, Parishes, or Places on the Third Monday of December, next" with no instruction on polling times); Act of June 12, 1790, *reprinted in* 4 The Documentary History of the First Federal Elections: 1788–90, at 409, 410 (Gordon DenBoer ed., 1989) (providing that a U.S. representative in New Hampshire "be elected by the Freemen of this State, in Town-Meetings legally assembled, on the last Tuesday in August next" under the same rules as applied for state elections); see also infra text accompanying note 310 (discussing how the state was the relevant unit for Rhode Island state elections).

selectmen could bring a motion to the meeting at any time to close them.[118] By the end of the study period, mild restrictions had appeared: an 1839 Massachusetts law required elections to stay open for at least two hours.[119] Not until 1841 did a Massachusetts statute specify that polling for federal elections had to begin by 2:00 p.m. (but "may be opened as early as nine o'clock").[120]

The importance of this power was repeatedly brought to the attention of the legislature in the form of disputes over state elections. In 1810, a group of citizens from Standish, Massachusetts, complained to the General Court that, among other violations, the town selectmen had promised to open voting for state representatives at 1:00 p.m. but ultimately waited until past 3:00 p.m. to do so, allegedly to advantage their partisan allies.[121] But the General Court's Committee on Elections simply noted that "these facts, if proved, would not affect the right of the member to his seat," because town control over the time of elections was such a well-recognized principle.[122]

In Connecticut, the mostly Federalist selectmen enjoyed a narrower power to set the time of elections by controlling the order and form of the town meeting in which the elections took place.[123] Thus, the authors of a Connecticut Republican circular in 1803 pleaded with party leaders:

> [T]o make every effort to get voters from distant areas to the freemen's meeting on time, because "every one should remember that the presiding officers are federal, and will open meetings, when they judge safest—that 9 o'clock will not tarry a moment . . . that the whole business can be done in two hours."[124]

[118] Syrett, supra note 102, at 364.

[119] See Benjamin F. Thomas, The Town Officer: A Digest of the Laws of Massachusetts in Relation to the Powers, Duties and Liabilities of Towns, and of Town Officers 94 (Worcester, Warren Lazell 1849).

[120] Id. at 91.

[121] Luther S. Cushing, Reports of Controverted Elections in the House of Representatives of the Commonwealth of Massachusetts, From 1780 to 1852, at 82 (Bos., White & Potter 1853).

[122] Id.

[123] The opening time of the meetings in which elections were to be held was set at 9:00 a.m. by statute, see Conn. Gen. Stat. (1784) (p. 44–45), but while towns were required to immediately open voting for state representatives, I could identify no similar strictures imposed on federal elections.

[124] Bruce P. Stark, Universal Suffrage, the "Stand-up Law," and the Wallingford Election Controversy, 1801–1818, 53 Conn. Hist. Rev. 16, 28–29 (2014) (quoting A Democratic

2. Elections in New York and New Jersey took place under procedures more similar to modern elections, that is, by means of the relatively fast submission of a ballot. But election inspectors, as the presiding officers were called, had well-established power to determine the opening and closing times of the polls.[125]

In New Jersey, for example, the 1779 state elections law (which came to govern federal elections in 1788[126]) provided that elections judges "shall have full Power . . . to close the [Election]" when all the voters present had voted or "a reasonable time for that Purpose shall have been allowed."[127] The import of this power was obvious. "[A] sheriff closed the polls in Trenton although he knew that forty voters were on their way to cast their ballots."[128] Elsewhere, "polling places remained open indefinitely in order to insure that all possible votes for a given faction were cast."[129] I could identify no challenge to these practices as illegitimate.

And while New Jersey adopted fixed polling times beginning in 1807, New York mostly did not. A single 1807 statute limited election inspectors' power by requiring that they open the polls by 10:00 a.m.—but only in New York City.[130] The decision to withdraw the power to set polling times from only one part of the state emphasizes that other election inspectors' power remained unfettered.

Scheme *Blown* Before it *Budded*, or, *the New Haven Thanksgiving*, Explained, The Visitor (New Haven), Feb. 22, 1803, at 132).

[125] See infra Appendix ("New York") (describing the statutes of 1797, 1801, and 1813); infra Appendix ("New Jersey"). Note that in New York, though election inspectors had absolute discretion over polling times during daylight hours, they were not permitted to keep polls open at night: "And the poll of every such election shall only be held open in the day time, and not before sun-rise nor after sun-set." Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 318.

[126] Act of Nov. 21, 1788, § 4, 1788 N.J. Acts 477, 480 ("That the said Election for Representatives for this State shall be had by Ballot . . . in like Manner as in those Counties where the Elections by Law are directed to be held by Ballot, by the same Officers, and under the same Regulations . . . .").

[127] See Act of Dec. 24, 1779, ch. 15, § 17, 1779 N.J. Acts 34, 37; infra Appendix ("New Jersey") (describing 1779 elections law).

[128] Williamson, supra note 109, at 57.

[129] Carl E. Prince, New Jersey's Jeffersonian Republicans: The Genesis of an Early Party Machine 1789–1817, at 8 (1967).

[130] Act of Feb. 20, 1807, ch. 17, § 1, 1807 N.Y. Laws 18, 18 ("That in all elections for . . . representatives to congress . . . in the city of New-York, the poll of every such election shall be opened at or before ten o'clock in the morning of every day on which the said election shall be held . . . .").

3. In Virginia (and initially in Maryland), the starting and ending time of *viva voce* elections was similarly subject to the sheriff's discretion.[131] This power was affirmed in the disputed Virginia congressional election between Abram Trigg and Francis Preston, ultimately challenged in Congress.[132] The dispute is better known because of one candidate's use of the state militia to intimidate voters.[133] But another part of the complaint concerned the sheriff's discretion to open and close polls.[134] In Lee County, the complaint alleged, the sheriff closed polls at 3:00 p.m. on election day and refused to reopen them even when a group of eligible voters arrived.[135] The report of the Committee on Elections responded as follows: "On recurring to the election law of Virginia, the sheriff appears to be vested with discretionary power to close the poll at any time of the day after three proclamations made, and no voters appearing."[136] That discretion was deemed unreviewable.

2. Adjournment Power

A related power enjoyed by election officials in Massachusetts, New Jersey, New York, Virginia, and likely in Maryland was the power to adjourn elections, which meant that polling would continue on a subsequent day.

In New York, New Jersey, and Virginia, the power to adjourn was a matter of complete discretion and was written into statutes. New Jersey's 1779 election law granted election judges "full Power to adjourn the Election, from Time to Time, as Occasion may require";[137] New York's 1797 election law recognized judges' power to "continue[] [elections] by adjournment, if necessary, from day to day, not exceeding five days."[138]

[131] See infra Appendix ("Maryland" & "Virginia"); David Alan Bohmer, Voting Behavior During the First American Party System: Maryland 1796–1815, at 11 (1974) (Ph.D. dissertation, University of Michigan) (ProQuest) ("Usually the polls closed at dusk, but in a close election the sheriff could influence the results by closing the polls earlier or later, whenever his own favorite was ahead. Such discretionary powers were rarely exercised but their existence helped to ensure that county leaders would control the process."). Note that Maryland created fixed polling times by 1799. Id. at 11–12.

[132] See 3 Annals of Cong. 598 (1794).

[133] See Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 44–46 (2016); Wright, supra note 115, at 642–44 (2018).

[134] 3 Annals of Cong. 598 (1794).

[135] Id.

[136] Id.

[137] See Act of Dec. 24, 1779, ch. 15, § 17, 1779 N.J. Acts 34, 37.

[138] See Act of Mar. 28, 1797, ch. 62, 1797 N.Y. Laws 441, 443.

Both states gradually limited the adjournment power over the course of the study period, such that by 1830 election judges had virtually lost their adjournment power.

Virginia sheriffs also enjoyed the power to adjourn. As in New York and New Jersey, that power was somewhat circumscribed, as a 1785 statute allowed a maximum of four days of adjournment and only in cases of bad weather or crowded polls.[139] But sheriffs enjoyed broad deference on when to use their power—and indeed the secondary literature suggests that the legislature's four-day limit was not religiously observed. "In some cases, as in Harrison County in 1790, the sheriff could keep the polls open for as many as eleven days."[140] The same statutory scheme remained in place until 1841.[141] Sheriffs' broad discretion over the adjournment power was underscored in the disputed congressional election between Abram Trigg and Francis Preston mentioned above. The complaint alleged that Washington County's sheriff adjourned the election due to rain, when in fact there was none. In response, the Committee on Elections blithely noted that "from the latitude of discretion vested in him by law, he was fully authorized to do so."[142] Similarly, Maryland election commissioners appear to have enjoyed the adjournment power at least in the 1788 elections to the state ratifying convention.[143] Given the similarity of Maryland's early electoral politics to those of Virginia, it is plausible to infer that commissioners enjoyed similar power in the first federal elections in the following year. The advent of ballot voting with fixed poll times in 1802 would likely have removed any such discretion, however.[144]

[139] Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 33.

[140] Beeman, supra note 101, at 34–35.

[141] Joseph Tate, Digest of the Laws of Virginia 310 (Richmond, Smith & Palmer 2d ed. 1841).

[142] 3 Annals of Cong. 598 (1794).

[143] L. Marx Renzulli, Jr., Maryland: The Federalist Years 77–78 (1972) (recounting the claims of Antifederalists in the 1788 election that "commissioners of election . . . had adjourned the election when they desired").

[144] Bohmer, supra note 131, at 4 n.11.

In Massachusetts,[145] adjournment was (and is[146]) considered an implicit incident of towns' ability to organize their own meetings and was thus unmentioned in statutory law.

Records of disputed elections in Massachusetts provide one indication that the power was understood and remained unregulated for the study period. For example, an 1800 dispute over a state election from the town of Harwich, treated in more detail below, centered on the power of the town selectmen to adjourn the election; the General Court's Committee on Elections affirmed the selectmen's adjournment power with nary a word.[147] A similar conclusion can be drawn from histories of individual towns. For example, one history of Springfield reports that in an 1849 town election, "sharp at 12" a Loco Foco Democrat "moved an adjournment without day before the whigs had assembled," preventing the Whigs from electing their preferred candidate.[148]All recognized that nothing could be done without special legislative intervention.[149] The persistence of the adjournment power even in 1849 suggests that it remained strong throughout the study period.

In short, local officials in seven states enjoyed some combination of (a) the power to determine the opening and closing times of polls and (b) the power to extend elections for days, at their sole discretion, and in several states, that power remained unabated for decades after the Constitution was ratified.

C. Place

Because of the difficulty of travel, location was of critical importance to the ability to vote—all the more so when elections took place in winter or spring, when mud or snow might make roads impassable.[150] Indeed, as late as 1870, Congress was still receiving complaints that the locations of

[145] Note that it is possible that towns in New Hampshire and Rhode Island enjoyed an adjournment power similar to those in Massachusetts but that the much sparser secondary literature investigating elections in those two states has simply failed to document it.

[146] See Joseph F. Zimmerman, The New England Town Meeting: Democracy in Action 35–36 & n.47 (1999) ("Voters are authorized by general law to adjourn a town meeting from time to time . . . .").

[147] See Cushing, supra note 121, at 38–39.

[148] Mason A. Green, Springfield: History of Town and City, 1636–1886, at 480 (n.p., C.A. Nichols & Co. 1888).

[149] Id.

[150] See Syrett, supra note 102, at 355 (describing the effect of weather on turnout in Massachusetts).

polls had made it impossible for a losing candidate's supporters to vote.[151] One can only imagine how much more important the power to choose polling places was in the first years of the republic.

Every state's election law said something about the geographic lines on which voting would be organized. But while some states also took the step of specifying where within those boundaries the polls would be held, others did not.

States south of Maryland delegated little discretion in the location of polls. Elections were at the county courthouse, and if an alternate location was required, it was typically provided for in a statute.[152] However, even these states occasionally provided sheriffs with discretion to change polling locations in situations where meeting at the courthouse was impracticable. In 1785—presaging today's election disputes—Virginia delegated to sheriffs the power to alter the polling location from the courthouse if the town was "infected with any contagious disease, or . . . in danger of an attack from a public enemy," a power that remained in force until at least 1818.[153] And while Georgia generally specified the location of elections in exacting detail, it occasionally permitted presiding justices to choose polling locations if thinly populated counties lacked a suitable courthouse by which to meet.[154]

By contrast, all of the states north of Maryland, except Pennsylvania and Rhode Island, conferred the choice of polling locations on local officials. Maryland, New York, and Delaware did so explicitly. New York election inspectors had discretion over polling places from the beginning; the state's 1787 election law instructed them to choose "the place (which shall be the most public and convenient for that purpose) . . . where such

[151] In a dispute over an 1868 Missouri election between John Hogan and William Pile, the losing candidate complained "that the county court arranged the voting precincts unfairly, and improperly discriminated against the contestant in so arranging the voting places where his friends were in the majority that the registered vote could not possibly be polled during the day of election." Digest of Election Cases: Cases of Contested Election in the House of Representatives From 1865 to 1871, Inclusive, H.R. Misc. Doc. No. 41-152, at 285 (D.W. Bartlett ed., 1870); Hogan v. Pile, H.R. Rep. No. 62-40 (1868). The complaint was soundly dismissed by the Committee on Elections on the grounds that the state legislature was well within its power to grant plenary authority to the county courts to choose polling locations. H.R. Misc. Doc. No. 41-152, at 285–88.

[152] See infra Appendix ("Georgia," "South Carolina," "North Carolina" & "Virginia").

[153] Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39.

[154] See infra Appendix ("Georgia").

election . . . next shall be held" and notify voters accordingly.[155] The power was repeatedly affirmed over the course of the next four decades.[156]

In Delaware and Maryland, delegation of place-related regulations emerged in the middle of the study period, as both states adopted voting at the local (i.e., subcounty) level.[157] In Delaware, the statute announcing voting by hundreds[158] provided default polling places but conferred discretion on election judges to "appoint some other place" for the polls if the default proved "impracticable."[159] In Maryland, the legislature named a number of specialized commissioners to divide each county except Baltimore into a "number of districts," and instructed the commissioners "make choice of a place in each district, at which the elections shall be held, as nearly central as shall be practicable, having regard to . . . the accommodation of persons attendant upon such elections . . . ."[160]

In New England and New Jersey, election laws either explicitly or implicitly permitted town meetings held before election day to set the polling place. New Jersey, like Delaware and Maryland, delegated that power only starting in 1790 as the state began switching from courthouse elections to town-based elections.[161] By 1797, when the elections were first held locally throughout the state, New Jersey election law instructed towns to "appoint the place or places, not exceeding two, for holding elections within their respective townships or precincts" at their annual town meetings.[162] But secondary sources document a muscular use of this power for political gain.[163]

In New England, the power to choose the location of the poll was an incident of the town's broader power to decide on its meeting place. For instance, Massachusetts election laws simply commanded voters to

[155] Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 317.

[156] See infra Appendix ("New York") (noting that statutes passed in 1791, 1792, 1801, and 1813 all explicitly reiterated inspectors' power to choose polling places).

[157] See infra Appendix ("Delaware"); Act of Jan. 28, 1825, ch. 257, § 7, Del. Laws 392, 399–400 (1825); Appendix ("Maryland"); Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws.

[158] The "hundred" is Delaware's traditional sub-county unit.

[159] Act of Jan. 28, 1825, ch. 257, § 1, Del. Laws 392, 394.

[160] See Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws.

[161] See infra Appendix ("New Jersey").

[162] Act of Feb. 22, 1797, ch. 634, § 17, 1797 N.J. Acts 171, 177.

[163] Prince, supra note 129, at 8 (noting that during the 1789 state election, "the poll was moved at will in order to favor one faction or another").

"assemble" in their towns with no instruction about where.[164] At least one contested election shows the import of this statutory silence. In the town of Harwich in the 1800 state elections to the General Court,[165] the town selectmen adjourned a town meeting set for electing state representatives on March 19 until March 28—and decided just days before the meeting was to resume that it would be held at a meeting house on the other side of the town.[166] A disgruntled group of citizens, complaining that the selectmen could not unilaterally change the location of the meeting, gathered at the original polling location, elected an alternative slate of representatives, and petitioned the General Court to recognize their election. But the dissenters lost; nobody doubted that the selectmen could move the town meeting without warning.[167] While this precedent concerned a state election, the town's power to organize its meetings was no different when the meetings concerned federal elections.

The rest of New England was much the same. Connecticut delegated the power to choose meeting places beginning in 1784 and in every election law through 1839.[168] New Hampshire election statutes were similar to those of Massachusetts, with no detail provided on location.[169] But given the similarity of town meeting traditions one might infer that New Hampshire towns could similarly change their meeting places at will.

Thus, slightly more than half of the thirteen states delegated significant discretion to determine the location of elections to local officials. In most cases, the delegees were the presiding officers of elections. In some cases, as in Maryland, specialized officers were commissioned expressly for the purpose of picking polling places.

One way to see why delegation would have been attractive is to consider how much legislative effort went into *avoiding* delegation in states where the legislature set polling places by statute. A single digest of Georgia election laws passed between 1821 and 1829 contains no fewer than *seventy-nine* statutes dedicated solely to specifying polling locations

[164] See, e.g., Act of June 26, 1794, ch. 24, 1794 Mass. Acts 60, 63 (ordering the selectmen of the towns and districts to "cause the inhabitants of their respective towns and districts . . . to assemble . . . to give in their votes for their respective Representatives . . . .").

[165] See Cushing, supra note 121, at 38–39.

[166] Id.

[167] Id. at 39.

[168] See Appendix ("Connecticut").

[169] See Appendix ("New Hampshire").

and election districts.[170] No wonder most state legislatures delegated their authority instead.

D. Manner

Compared with the extensive delegations of control over the time and place of voting, delegations respecting the manner of balloting are harder to document. For instance, New York and New Jersey—both of which empowered local officials to make critical time and place decisions—specified the procedures to be used at the polls in excruciating detail.[171] But some did delegate, and once again there was never a scintilla of opposition on Election Clause grounds.

1. *New England.* Massachusetts is where local officials' discretion over the manner of elections appeared most clearly. The early election laws of Massachusetts provided virtually no guidance on how elections were to be conducted beyond requiring that they be by ballot.[172] Thus, the fact that selectmen were "in a position to determine the manner in which elections were conducted" was widely understood.[173]

For instance, during the Boston elections for state representatives in 1785–86, "the selectmen ordered 'that no Votes would be received but such as are unfolded'" and required that "Persons who Vote for Representatives shall . . . enter into the Hall and there remaine, until the Poll is closed.'"[174] Needless to say, these requirements were nowhere contemplated in state law. There is every reason to think that selectmen enjoyed just as much control over town meetings where federal elections took place.

Things appear to have been similar in New Hampshire, where election statutes facially conferred vast discretion on selectmen. In the first federal elections law, the only instruction provided on how voting should proceed is as follows: "[T]he Selectmen of the several towns . . . shall give fifteen days notice of the design of sd. meeting & shall during the Choice of Representatives preside . . . impartially and shall receive the votes of all

[170] See William C. Dawson, Compilation of the Laws of the State of Georgia, Passed by the General Assembly, Since the Year 1819 to the Year 1830, Inclusive 155–86 (Milledgeville, Grantland & Orme 1831).

[171] See infra Appendix ("New York" & "New Jersey").

[172] See infra Appendix ("Massachusetts").

[173] Syrett, supra note 102, at 362.

[174] Id. at 362–63.

the Inhabitants . . . ."[175] The explicit statutory reference to the meeting's "design" is difficult to parse, as it could conceivably mean both the *order* of the meeting, which would imply extensive discretion, and the *purpose* of the meeting, which would mean little. But given that the rest of the statute is silent on the procedures to be followed, the inference that it conferred significant discretion seems at least plausible.

Finally, the statutes of Rhode Island give little explicit indication of voting methods. One secondary source argues that *viva voce* voting was the norm until 1851,[176] but a 1762 law appears to require the use of paper ballots.[177] A more plausible form of discretion concerned the secrecy of those ballots. One secondary observer claims that state law "requir[ed] a secret vote upon the request of a single freeman and a second to his motion,"[178] and another suggests that, as late as the 1850s, the secrecy of ballots was "optional."[179] While I could not locate a statute explicitly conferring upon towns the power to determine ballot secrecy, such a rule would represent a significant delegation over election procedures.

2. *The South.* Where *viva voce* voting was practiced, statutes hardly if ever provided any regulations governing the procedures to be employed, save that poll books had to be available on request.[180] Many secondary commentators have therefore inferred that sheriffs had immense discretion over the exact procedures used. For instance, the historian J.R. Pole wrote of Virginia that "the election laws provide the basic guide" but that "the intentions of the legislature were interpreted in a startling variety of practices" in towns across the state.[181] Kentucky, once part of Virginia, mimicked Virginia's minimalist statutory scheme for governing *viva voce* elections; one historian reported that "[i]n a formal sense the sheriff was in a potentially powerful position since he was chief election officer of

[175] Act of Nov. 12, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788–1790, supra note 117, at 790.

[176] Bohmer, supra note 131, at 2 n.6 ("New Jersey voted viva voce until 1797, . . . Rhode Island until 1851 . . . .").

[177] See An Act in Addition to, and Amendment of, the Several Acts Regulating the Manner of Admitting Freemen, and Electing Officers in this Colony, R.I. Laws 192, 195 (1762) ("[T]he Moderator of each Town-Meeting in this Colony, shall receive all the Proxes of the Freemen, legally qualified . . . .").

[178] See Irwin H. Polishook, Rhode Island and the Union: 1774–1795, at 29 (1969).

[179] Williamson, supra note 109, at 275 ("Rhode Island used the ballot in much the same way as Massachusetts. It made the use of the sealed envelope optional.").

[180] See infra Appendix ("Georgia" & "Virginia").

[181] J.R. Pole, Representation and Authority in Virginia from the Revolution to Reform, 24 J.S. Hist. 16, 31 (1958).

the county," and thus "[n]ot infrequently sheriffs became embroiled in local election disputes" owing to their discretionary choices.[182] The evidence of local control over election procedures in Kentucky supports Pole's description of Virginia's elections.

Unfortunately, the secondary evidence provides limited detail on just *how viva voce* voting was subject to manipulation, leaving us to speculate on the ways sheriffs might have deployed their power. An example of a procedural decision that *might* have been subject to sheriffs' discretion was the use of voter lists, which were printed tickets available "if a voter could not recall the list of candidates for whom he wished to vote."[183] The degree to which tickets were used, made available, or incorporated into elections procedures is never specified in the election laws of the states studied here. We might conjecture that sheriffs used their power to shape these kinds of procedural decisions—but that would be just a guess.

III. WHY THE HISTORY OF LOCAL DELEGATION ANSWERS MODERN ELECTION CLAUSE DELEGATION QUESTIONS

In the last Part, I showed that many particulars respecting the "Time, Place and Manner" of federal elections in the Founding era were determined not by state legislatures but by local officials and that the exercise of local power over federal elections was widely viewed as legitimate. In this Part, I canvass three objections to applying the history of local delegation to modern delegation disputes, which typically involve horizontal delegations to state executives. I argue that advocates of the ISL theory cannot press any of these objections without threatening the core assumptions of the ISL theory itself. Indeed, as I point out below, some of the delegations I document—especially the phenomenon of silent delegations in New England—suggest chinks in the ISL theory's story of state legislatures as the sole legitimate sources of federal elections law.

Before diving into these objections, it is important to highlight a factual point about the evidence presented in Part II. Although all of the examples highlighted involve "local" officials, these officials in fact include members of both local governments *and* state executive branches. For example, although Virginia sheriffs were local in jurisdiction, they were

[182] Robert M. Ireland, Aristocrats All: The Politics of County Government in Ante-bellum Kentucky, 32 Rev. Pol. 365, 368 (1970).

[183] Donald A. DeBats, In Practice How Different Were Ticket and Viva Voce Elections? 7 (2016), http://sociallogic.iath.virginia.edu/sites/default/files/BeforeSecret-Compare.pdf [https://perma.cc/JWQ3-PCY6].

state officials—"the kings deputyes within theire Countyes"[184] in the colonial era, and members of the state executive or judicial branches after the Revolution[185]—much the way that U.S. Attorneys are members of the federal executive despite serving defined local areas. By contrast, Elections Clause delegees in other states were members of local government bodies.[186] In other words, if we were to apply modern constitutional categories to Founding-era delegees, we would find little basis for distinguishing "local" from "executive" delegations; both are represented in the set of earlier examples.

The starting point for any of the objections raised below is therefore that the contrast between "local" and "executive" power goes beyond the formal nature of institutional affiliation and has to do with the legitimacy of local claims to power over elections rules. I now turn to explaining why that might be so.

[184] See Cyrus Harreld Karraker, The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and the Chesapeake Colonies, 1607–1689, at 93 (1930) (quoting a Jamestown court of quarter-sessions).

[185] Virginia sheriffs remained firmly ensconced in the state executive branch after the Revolution. Virginia's 1776 Constitution provided that "The Sheriffs and Coroners shall be nominated by the respective courts, approved by the Governor, with the advice of the Privy Council, and commissioned by the Governor." Va. Const. of 1776, ch. II, § 15. Although county courts' recommendations were rarely overruled, see Charles S. Sydnor, Gentlemen Freeholders: Political Practices in Washington's Virginia 83–84 (1952), the 1776 constitution listed sheriffs alongside officers of the state militia and judges as statewide appointees. The 1830 constitution provided for the same arrangement—local nomination, gubernatorial appointment—though sheriffs were now listed as "judicial" officers. Va. Const. of 1830, art. V, § 8. For further discussion of the appointment of Virginia sheriffs, see generally Sydnor, supra, at 78–87 (discussing in detail the process for appointment of Sheriffs in Virginia).

[186] New England's powerful town selectmen were elected at town meetings and were agents of the town. See, e.g., Austin DeWolf, The Town Meeting: A Manual of Massachusetts Law 30 (Bos., George B. Reed 1890); Kenneth A. Lockridge & Alan Kreider, The Evolution of Massachusetts Town Government, 1640 to 1740, 23 Wm. & Mary Q. 549, 555 (1966); William F. Willingham, Grass Root Politics in Windham, Connecticut During the Jeffersonian Era, 1 J. Early Republic 127, 137 (1981) (describing results of elections for selectmen). The office of election inspector in New York, holders of which enjoyed total discretion over the location of elections, was filled ex officio by locally elected "town-clerks, supervisors and assessors." See, e.g., Act of Feb. 13, 1787, ch. 15, § 2, 1787 N.Y. Laws 316, 317. New Jersey's Judges of Elections were elected at town meetings, see Act of Feb. 22, 1797, ch. 634, § 18, 1797 N.J. Acts 171, 177, and New Jersey statutory law gave the power to choose polling places directly to town voters in their annual meetings, see id. § 17. Delaware's election inspectors were elected by inhabitants of hundreds in special elections. Act of Nov. 1, 1766, ch. 187, §§ 2–3, 1 Del. Laws 429, 429–31 (1797).

A. The Structural Objection

One objection to deploying the history of local delegations to justify modern executive power is that local governments were *different* than state executives in the Founding era. Perhaps the statutory authorization for local officials to fill in the details of electoral laws was less a form of delegation and more a kind of deferral to the unique quasi-sovereignty of local governments still recognized in many communities until the mid-nineteenth century. In short, maybe we are talking about forbearance, not delegation.

It might be hard for modern readers to see the force of this objection, since it is hard for us to imagine local power as anything *but* a delegation. Contemporary American law holds that local officials are "in every essential sense, only auxiliaries of the State for the purposes of local government,"[187] and the power to regulate federal elections is viewed by modern courts as a grant emanating from the Federal Constitution. If local officials are mere "auxiliaries" to the state legislatures, which hold all power over federal elections by default, then they stand in the same position as statewide executive officers. Both are simply instruments for the execution of the legislature's will.

But this conception of local power is anachronistic as applied to the Founding era.[188] During the colonial period, local governments routinely invoked a kind of natural law right, supported by customary practice, to govern their own communities. Thus, "the concept of the community was the font of moral and political authority, invoked to justify both criminal and civil regulation," and institutions as varied as "juries, municipal corporations, militias, churches, and even mobs," argued that they had legitimate claims to exercising power on behalf of their constituents—a sort of competing form of quasi-sovereignty that was a competitor to the supremacy of state governments.[189] While the subsequent decades

[187] Atkin v. Kansas, 191 U.S. 207, 220 (1903).

[188] See generally Ablavsky, supra note 108, at 1805 (discussing the importance of quasi-official organizations and authority); Jack P. Greene, Law and the Origins of the American Revolution, *in* 1 The Cambridge History of Law in America 447, 469 (Michael Grossberg & Christopher Tomlins eds., 2008) ("[There was] an underlying preference for a system of authority in which local law, institutions, officials, and populations had ultimate authority over local and provincial matters."); Hartog, supra note 106, at 234–35 (discussing how law came to be viewed as an agency for the exercise of power).

[189] Ablavsky, supra note 108, at 1805 (citing 4 William E. Nelson, The Common Law in Colonial America: Law and the Constitution on the Eve of Independence, 1735–1776, at 23–45 (2018)).

eliminated the viability of local quasi-sovereignty, that notion remained current until well into the nineteenth century.[190]

The idea of local quasi-sovereignty suggests a new way of seeing the grants of Elections Clause power. On this view, local officials were not agents of the state but rather alternative sources of law.[191] That is, Founding-era Americans might have seen the empowerment of local officials not as a form of *delegation* but as a recognition of "preexisting claim[s]" to govern elections grounded in custom. This would have been consistent with the many other cases in which community and custom were seen as the source of local power, rather than the grace of the state.[192]

This objection might have special force in situations where the state legislature permitted local authorities to govern federal elections by legislative silence. For example, most of the powers exercised by New England towns—the power to adjourn and the power to choose polling locations being two notable examples—were granted by legislative silence, implicitly drawing on the towns' inherent powers to govern their meetings.[193] In such cases, it may seem especially implausible that the state legislature would have been understood as conveying *its own power* to the towns, rather than allowing them to exercise power they already had. If this claim were true, then it would complicate the analogy between Founding-era local power and modern delegations to state executives.

While this objection may be powerful, it is one that advocates of the ISL theory simply cannot make. Conceding that local officials exercised *inherent* power to determine the times or places of federal elections would be incompatible with defining the word "legislature" in Article I, Section 4 as a literal reference to the state legislature. After all, unlike other functions of local government, local power over federal elections cannot be explained as a continuing exercise of pre-existing power from the

[190] Ablavsky, supra note 108, at 1820–21.

[191] I thank Robert Gordon for articulating this point.

[192] An analogous example of such reasoning at work can be found in Hendrik Hartog's history of colonial New York City. When, in 1683, the city government petitioned the governor to recognize its monopoly over ferries to Long Island, this demand was viewed as a request to acknowledge a "preexisting right" stemming from "seventy years of possession of an exclusive franchise"—not a plea for a new grant of power. Hendrik Hartog, Public Property and Private Power 25–26 (1989). To complete the analogy, just as the charter granting New York's ferry monopoly merely quieted title to a right that already existed after seventy years of consistent usage, perhaps the laws granting local officials the right to determine convenient times and places for federal elections were likewise mere recognitions of local officials' pre-existing rights and not delegations at all.

[193] See supra notes 117–19, 164–67, and 172–75 and accompanying text.

colonial period. The right to regulate federal elections was only created, by operation of the Federal Constitution, in 1789.[194] In other words, one cannot see local governments regulating federal elections as exercising authority duly acquired during the colonial period and undisturbed by the revolution.[195]

Rather, if Founding-era local officials legitimately exercised power over the first federal elections *without delegation* by the state legislature, then they must have relied on the kind of inherent power that they claimed in other spheres. But that would require "legislature" to have a broader meaning—perhaps the meaning ascribed to it by the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* ("*AIRC*"), namely, any legitimate source of ex-ante legal rules.[196] Advocates of the ISL theory have no choice but to view the historical evidence here using the framework of delegation, and to assume away any historical distinction between local and executive power.

B. The Textual Objection

A perhaps more plausible version of the structural objection might instead focus on the precise wording of the Elections Clause, which requires that the rules for federal elections "shall be prescribed *in each State*" by the legislature.[197]

Given the background understanding that local governments could make rules even without explicit state authorization, perhaps Founding-era Americans would have understood the Elections Clause to refer only to election regulations that bound "each State"—that is, the whole thing. On this reading, the state legislature was the only entity entitled to make uniform, statewide federal elections law. So long as local sources of authority were limited in their exercise of power to sub-state geographic units, and so long as the state legislature retained exclusive authority to set statewide rules, statutes empowering local officials might comply with

[194] See, e.g., Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (arguing, in the analogous context of presidential electors, that "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2 of the United States Constitution"). For an example of an advocate of the ISL theory making much of this statement, see Michael T. Morley, The Independent State Legislature Doctrine, supra note 11, at 531.

[195] See William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1106–07 (2017).

[196] Ablavsky, supra note 108, at 1823–24 & n.163.

[197] U.S. Const., art. 1, § 4 (emphasis added).

the literal meaning of the Elections Clause without any need for delegation.

Like the structural objection, this objection would provide a basis for distinguishing contemporary delegations to state executives from the local delegations described in Part II, since it would imply *statewide* rulemaking authority is uniquely immune from transfer.

Even assuming the plausibility of this strained reading of the text, it, too, seems to prove too much for proponents of the Independent State Legislature theory. Limiting the effect of the Elections Clause to statewide rules would create an untenable loophole in the ISL theory's preferred reading of the text and would turn the ISL theory into a very limited theory of elections regulation.

Consider, for example, the ISL theory's putative ban on state court injunctions modifying state laws governing federal elections. If it were true that the Elections Clause protects the legislature's prerogative to set only statewide rules, then the ISL theory would become a restriction only on facial challenges to state law. As-applied challenges disputing the operation of an electoral regulation only *within a particular county* would be perfectly permissible, and judges deciding such challenges would be authorized to draw on any source of law, presumably including local custom, to resolve them. While critics of the ISL theory might welcome such a narrow reading, one imagines that its proponents would be dissatisfied with that result.

C. The Normative Objection

A final objection rests on the unique normative significance of local delegations, apart from any appeal to historical or textual distinctions. One might think that local power is more defensible than state executive power for any number of reasons. American elections scholars have long argued that local officials are better able to match election rules to community needs.[198] Further, local power might not evoke the traditional fear of executive overreach that animates opposition to executive power at all levels of government.[199]

[198] See, e.g., Weinstein-Tull, supra note 22, at 797–98 (2016) (praising the possibility that local control over elections could permit "local governments [to] tailor some parts of the elections process to the needs of their communities").

[199] See, e.g., Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 535–36 (2017) (listing examples of scholarship concerned with an overly powerful President and noting that the same concerns might suggest that gubernatorial power "raises significant risks"

But whatever one thinks of the merits of local power, advocates of the ISL theory must reject this line of reasoning out of hand. To permit local delegations because of their greater compatibility with favored constitutional values would open the door to a variety of uncomfortable objections to the ISL theory itself. To name just one example, the constitutional preference for democratic accountability may be poorly served by giving total control over election rules to legislatures gerrymandered to disenfranchise members of the opposite party.[200] Indeed, this kind of values-oriented analysis is precisely the kind undertaken by the Court in *AIRC* and decried by the ISL theory's defenders.

In short, the ISL theory is and must remain a highly formalist approach to the electoral power. An objection invoking functional values threatens the integrity of that approach and is basically incompatible with it.

* * *

CONCLUSION

The evidence presented here establishes that local power was a common feature of elections administration in the early years of the republic. In most states, the exact times and places of elections were left to local officials, and at least some also conferred power over the procedures of elections themselves. Advocates of the ISL theory must embrace this historical evidence as proof of the history of legislative delegation.

Plenty of Americans grumbled bitterly about the power local officials had over elections. "[L]oud were the complaints against sheriffs in Virginia, church wardens in South Carolina, town moderators in New England," and many other local officials besides.[201] In that sense, today's endless complaints about elections officials are part of a longstanding American tradition. But passionate though their complaints might have been, early Americans never suggested that the local officials' authority

at the state level). Of course, the highly despotic behavior documented in Part II, above, would seem to belie any such optimism about the virtues of local government.

[200] Samuel Issacharoff, Gerrymandering & Political Cartels, 116 Harv. L. Rev. 593, 609 (2002). Indeed, state legislators and local officials are probably *both* far less democratically accountable, in the sense of being electorally responsive to voter opinions, than state executives. David Schleicher, Federalism and State Democracy, 95 Tex. L. Rev. 773, 775–78 (2016).

[201] Williamson, supra note 109, at 57.

to regulate elections ran afoul of the Elections Clause. Delegation was constitutionally unremarkable.

The ubiquity of delegation in the first decades of the republic has lessons for our understanding of the Constitution. The only reading of the Elections Clause that can comport with the settled expectations of Founding-era Americans is that the Constitution permits even extensive legislative delegations of discretion to determine the time, place, and manner of elections. An alternative reading, in which delegation is prohibited or strongly disfavored, would lead to the absurd conclusion that the first several elections to Congress were basically illegal in most states. Courts should avoid reasoning that implies any disfavor towards delegations.

The conclusion that most delegations are compatible with the Elections Clause does not, however, end matters. Two legal questions remain for courts to resolve. One is how to identify delegations so extensive as to be impermissible, for surely even the most permissive delegation regime has limits.[202] The other is the how to reflect the historical evidence documented in this Article in interpreting delegating statutes.

Answering those questions completely is beyond the scope of this Article. But this Article suggests that two answers would be incompatible with the original meaning of the Constitution.

One wrong answer is to assert, as Judge Ho did in *Texas League of United Latin American Citizens v. Hughs*,[203] that extensive delegations to state executive officials are facially unconstitutional merely because they permit entities other than the legislature to make important decisions about the conduct of elections. That happened all the time in the early days of the republic. To take just one example, Judge Ho's rule would have invalidated Virginia's 1785 law permitting sheriffs to unilaterally choose alternative polling places in the event of a pandemic or public safety emergency, which remained in place for decades after the Constitution was ratified.[204] That is to say nothing of the scores of statutes conferring far greater discretion when public safety was *not* implicated. It

[202] See Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1723 (2002) (proposing the most minimalist nondelegation doctrine possible, while conceding that even their approach would still bar the transfer of de jure legislative powers to other branches).

[203] 978 F.3d 136, 154 (5th Cir. 2020); see supra Section 1.B.

[204] See Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39; infra Appendix ("Virginia").

is difficult to believe that the original meaning of the Constitution could be so dissonant from everyday American practice. Indeed, this Article argues that it is not. So long as there is a valid statutory authorization, there is no constitutional problem with a legislative delegation under the Elections Clause.

Nor is it consistent with the evidence presented here to impose a special clear-statement rule on Elections Clause delegations, which would imply that delegations "press[] against a favored constitutional value."[205] That was the approach adopted by the Eighth Circuit in *Carson v. Simon* when it declined to view a consent decree as an "order of a court" requiring compliance.[206] It is also the approach that Judges Agee and Wilkinson would have adopted in *Wise v. Circosta* by declining to treat the ongoing global pandemic as a "natural disaster" for elections law purposes.[207] Both opinions claim that a clear-statement rule is required to preserve the legislative supremacy encoded in the Elections Clause.

But this Article shows that delegations enhance legislative supremacy rather than curtailing it. The most faithful reading of the Elections Clause, and the only one capable of explaining the first forty years of American practice, would view delegations as fully consistent with the text of the Constitution. Indeed, the historical evidence presented above teaches us that permitting delegations *enhances* the power of state legislatures to govern elections. Some policy options would have been practically off the table in the Founding era if delegation had been illegal.

Take the expansion of township voting in New Jersey and Delaware, which increased the number of polling places by an order of magnitude. Without delegation, the cost of such a change would have would have been immense. For proof of that, look no further than Georgia, where the legislature had to pass eight laws a year just to keep polling places up to date.[208] Such an immense legislative burden might have been enough to dissuade Delaware and New Jersey from reform. Instead, township voting was easily accomplished by simply delegating the power to choose polling places to local officials. The result was a change "that greatly

[205] John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 401 (2010).

[206] See supra Section I.B.

[207] See supra Section I.B.

[208] See supra Section II.C.

increased the accessibility of the polls."[209] Delegation made this sensible policy option—and many others—practicable, enhancing the options available to legislators.

Courts would stray from the meaning of the Constitution by adopting a clear-statement rule that applies only in the context of federal elections and whose logic depends on the idea that delegations are constitutionally disfavored.

The evidence presented in this Article blocks off certain doctrinal paths, like a ban on delegations or a special Elections Clause clear-statement rule. But many remain. In particular, the question of how courts *should* interpret state statutes delegating power to executive or local officials merits much more discussion, especially if the Supreme Court chooses to adopt the ISL theory.

One alternative is to apply the state law of statutory interpretation to delegations. This approach has the virtue of staking the most plausible claim to capturing legislative intent, especially when Elections Clause delegations appear in trans-substantive statutes that apply beyond the context of elections; this is a point analogous to Carolyn Shapiro's broader argument against the ISL theory.[210] For example, the Texas Disaster Act that was at issue in the *Texas League of United Latin American Citizens* litigation was passed in 1975 and allows the Governor to "suspend the provisions of *any* regulatory statute prescribing the procedures for conduct of state business"; federal elections are just one example of such a regulatory statute.[211] The most plausible interpretation of the legislature's expectation in passing that statute is that these words would be construed using general state law principles of statutory construction and nondelegation. The same principle would apply to the numerous statutes permitting elections officials to issue regulations modifying elections rules in response to court orders.

An alternative approach would be to read state delegation laws as if they were federal statutes and apply some kind of federal interpretive rule to discern the state legislature's intent. Michael Morley has suggested

[209] Judith Apter Klinghoffer & Lois Elkis, "The Petticoat Electors": Women's Suffrage in New Jersey, 1776–1807, 12 J. Early Republic 159, 172 (1992).

[210] Carolyn Shapiro, The Independent State Legislature Claim, Textualism, and State Law, 90 U. Chi. Law Rev. (forthcoming 2023) (manuscript at 49–50), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322 [https://perma.cc/UE2K-AV7X].

[211] Texas Disaster Act of 1975, ch. 289, § 5(g)(1), 1975 Tex. Gen. Laws 731, 733 (emphasis added); see also Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 141–42 (5th Cir. 2020) (discussing the July 27 Proclamation which allowed for early voting in 2020).

simply applying the federal nondelegation doctrine to Elections Clause delegations, an approach that has the virtue of deploying a body of law well-known to federal courts.[212] But it is not obvious that the scope of delegations permitted by Article I, Section 8 is identical to that permitted by the Elections Clause. That concern would be even more acute if, as some observers expect,[213] the congressional nondelegation doctrine is significantly strengthened in the future, for instance by limiting delegations to factual determinations. Applying such a stringent rule to Elections Clause delegations would be difficult to square with the discretion-laden delegations described above, which go far beyond mere factual determinations. Instead, courts should make clear that Elections Clause delegations are permitted by the Federal Constitution, irrespective of what rules may apply to Congress.

APPENDIX: STATE LAWS GOVERNING FEDERAL ELECTIONS, 1788–1839

This Appendix reorganizes and extends the survey presented in the main body of the paper into a state-by-state survey of early statutory law governing elections. The main conclusions of the survey are summarized in Table A1, below. As I argue in the main body of the Article, virtually every state in the Union delegated significant authority to local elections officials to determine the times, places, and manner of elections. Following the table, I provide a summary of the relevant laws for each state.

A general methodological note worth emphasizing is that many forms of statutory discretion take a negative form: matters *not* specified are impliedly left in the hands of elections administrators. It can be challenging to infer legislative intent from a decision *not* to regulate a certain matter. Accordingly, in the discussion below, I use secondary sources to identify cases where legislative silence was recognized as conferring significant power and thus was less likely to be a merely accidental omission. By contrast, where I could find no evidence that legislative silence was recognized by relevant actors, I decline to draw a

[212] See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160–61 (2000) (announcing a substantive canon of statutory interpretation disfavoring silent delegations of significant powers).

[213] See Parrillo, supra note 13, at 1294–95; Andrew Coan, Eight Futures of the Nondelegation Doctrine, 2020 Wis. L. Rev. 141, 147 (noting it is plausible to imagine the Court adopting Justice Gorsuch's dissent in *Gundy v. United States*).

conclusion about the implications of the underlying law for delegation purposes.

A1. Varieties of Local Authority to Govern Federal Elections, by State, 1788–1839

State	Time	Place	Manner
Connecticut	Power to vary the length and exact timing of the freemen's meeting.	Complete discretion; decided by town meeting.	-
Delaware	-	Change polling place in case of inconvenience.	-
Georgia	-	Justices of the Peace in some outlying counties choose polling place.*	No manner prescribed in first law; considerable discretion over *viva voce* and/or balloting process in subsequent laws.
Maryland	Choose the time of polling on prescribed day; adjourn elections.*	Subdivide counties and choose polling places in each district.*	Considerable discretion over *viva voce* process.*
Massachusetts	Choose closing time of polls; adjourn elections.*	Town custom governs. In towns with more than one meeting place, selectmen can adjourn from one place to the other at will.	Vote is by ballot; most other aspects of the process are discretionary.
New Hampshire	Choose the time of polling on prescribed day.	Town custom governs.	Vote is by ballot; virtually all other details discretionary.*
New Jersey	Choose closing time of polls; adjourn elections.*	Complete discretion; decided by town meeting.*	-

New York	Choose polling times within prescribed period; adjourn elections.*	Complete discretion given to election inspectors.	-
North Carolina	†	-	-
Pennsylvania	-	-	-
Rhode Island	Choose polling times on prescribed day.	Left to the discretion of town meetings.	Possible discretion over ballot secrecy.
South Carolina	†	-	†
Virginia	Choose polling times on prescribed day; adjourn elections.*	-	Considerable discretion over *viva voce* process. Total discretion given to sheriffs in Kentucky region.*

Articles: (1) A dash (-) indicates that statutory law does not contemplate significant discretion. Needless to say, actual practice may have varied in fact. (2) An asterisk (*) indicates that the power mentioned was either created or removed at some point during the survey period. (3) A dagger (†) indicates that I was unable to locate relevant evidence corroborating an apparent grant of discretion. See text for details. (4) Please see accompanying text for citations to supporting authority.

Connecticut

Connecticut politics in the early republic were defined by conservatism and the total domination of a Federalist political machine.[214] Elections were held in town meetings, as elsewhere in New England, but Federalists in the state legislature aggressively regulated some aspects of those meetings to suppress rival votes, especially for the powerful position of governor's assistant (a sort of upper house or executive council).[215]

[214] See Purcell, supra note 116, at 175–76.
[215] Id. at 188–89.

Because the congressional election laws required that federal elections be held in the same manner as assistants' elections, Federalist efforts at the state level spilled over to federal elections.

For example, Connecticut law organized voting for assistants so that nominees were announced in order of seniority—incumbents first—with voters announcing their choices for each candidate in succession.[216] That is, the longest-serving incumbent would be announced, and then everyone supporting him would have to submit their votes; then the next candidate; and so forth. The effect of this method was to allow anyone present at the meeting to see who refused to support the incumbents, subjecting the deviants to potential sanction by local religious and political leaders.[217] This method was made even more coercive by the Stand-Up Law, passed in 1801, which required voters to stand or raise their hands when voting.[218] These techniques also reflect the power of local elites, invariably Federalist: all one had to do was force Jeffersonians to declare their support publicly and they would melt away.

Given the strength of local elite power, it is unsurprising that many of the less salient details concerning the time, place, and manner of elections were left to the control of each town. Beginning in 1784 and in every election law through 1839, towns were expressly empowered to vote wherever they pleased; and while they were required to open the meeting at 9:00 a.m., there was no regulation on when voting for any specific office was to occur.[219] Some primary sources document the importance of the flexibility of timing. For example, the authors of a Republican circular in 1803 pleaded with party leaders:

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[216] Id. at 193–94.

[217] Id. at 194. To circumvent the coercion associated with public voting, some voters began submitting blank ballots in protest, which was a form of protest inscrutable to onlookers, though one specifically forbidden by Connecticut election law. See id.; Conn. Gen. Stat. tit. 55, ch. 1 (1808) (p. 246) (providing that "no unwritten piece of paper shall be given in" during the nominating phase of elections).

[218] See Stark, supra note 124, at 22; Act of Oct. 8, 1801, § 4, 1801 Conn. Acts & Laws 565, 567.

[219] Conn. Gen. Stat. (1784) (p. 44) ("[A]ll Constables in the several Towns in this State, without further order, shall warn all the Freemen in their respective Towns, to meet together yearly . . . on the second Tuesday of September, about nine of the Clock in the Morning, at some convenient Place where they have usually been held, when and where they shall first choose Deputies or Representatives to attend the General Court . . . ."); see also Act of Jan. 1, 1789, 1789 Conn. Acts & Laws 371, 371–72 (elections to be held at same time and place as state general elections); Conn. Gen. Stat. tit. 28, ch. 1, § 1 (1835) (p. 168) ("[A]nd every town is authorized, at a meeting, when special notice has been given for that purpose, to designate the place of holding electors' meetings.").

> [M]ake every effort to get voters from distant areas to the freemen's meeting on time, because 'every one should remember that the presiding officers are federal, and will open meetings, when they judge safest—that 9 o'clock will not tarry a moment . . . that the whole business can be done in two hours.'[220]

Finally, some evidence suggests that the way Connecticut voters actually submitted their votes was a matter of local discretion. Richard Purcell's history of early Connecticut claims that between 1670 and 1814, towns could vote either by acclamation or by ballot.[221] However, the balance of evidence suggests that this flexibility did not extend to congressional elections (or at least that the law did not contemplate such flexibility). For one thing, given that congressional districts spanned many towns, it is unclear how voting by acclamation would have permitted the aggregation of votes across polling places. For another, the 1784 statute specifying the method for electing governor's assistants explicitly requires that "the Votes for election of Assistants shall be a written piece of Paper."[222] Accordingly, I draw no conclusion on the degree of local delegation regarding the manner of election.

Delaware

The available evidence suggests that Delaware was initially unsurpassed in leaving minimal discretion to any local official as to the conduct of elections. Even before the Revolution, Delaware law set out voting procedures in considerable detail: a 1772 law, for example, specified precisely the preparing, painting, and storing of ballot boxes; the casting and counting of ballots; and the timing of elections.[223] Again in 1794, the way ballots were to be written and cast was treated in detail.[224] Polling locations were specified in detail as well; polls for the first federal election, for instance, were held at the county courthouses.[225]

There was one major exception to the general lack of delegation to local officials. Beginning in 1779, the presiding officers at elections were

[220] Stark, supra note 124, at 28–29 (quoting A Democratic Scheme *Blown* Before it *Budded*, or, *the New Haven Thanksgiving* Explained, The Visitor (New Haven), Feb. 22, 1803, at 132).

[221] Purcell, supra note 116, at 214 n.70 ("A law of 1670 allowed choice by acclamation, and not until 1814 was it definitely provided that election must be by ballot.").

[222] Conn. Gen. Stat. (1784) (p. 45).

[223] See Act of June 13, 1772, ch. 207, §§ 2–5, 1 Del. Laws 500, 501–02 (1797).

[224] Act of Jan. 27, 1794, ch. 51, 2 Del. Laws 1170, 1170 (1797).

[225] Act of Oct. 26, 1790, ch. 188, 2 Del. Laws 931, 931–32 (1797).

entitled to "adjourn the said election from day to day, if he or they find it necessary" because of a disturbance at the polling place.[226] This exception was joined by another in 1825, when Delaware law provided that there would be a polling place in each hundred, which was a subcounty unit (there were about ten hundreds per county).[227] Perhaps owing to the multiplicity of polling sites, the Delaware legislature explicitly delegated authority to local elections officials to "appoint some other place" for the polls if a default location specified in the statute proved "impracticable."[228]

Georgia

Like many other southern states, politics in early Georgia were marked by efforts on the part of a small number of leading families to assert control and were partially structured around local units of government to achieve that end.[229] Unlike in Virginia, however, "the local magistracy was the product of the legislature, not its foundation and not its source of power."[230] The leading families used the legislature to dominate the counties.

Their preferred method for exercising control over local politics was to make participation extremely inconvenient. A 1784 law required all elections to be at the county courthouse, which may have been a considerable challenge to reach for settlers living on newly seized indigenous land.[231] While early Georgia statutes are difficult to find, the first easily accessible state election law, from 1796, also specifies the time of the election with precision.[232] This appears to have been a resounding success; the first congressional election saw "less than one in six white adult males cast a vote" in the six original counties.[233]

While the time and place of elections was tightly controlled, the method appears not to have been. The 1796 law says nothing about how

[226] See Act of June 5, 1779, ch. 44, 2 Del. Laws 665, 665–66 (1797).
[227] See Act of Jan. 28, 1825, ch. 257, § 7, Del. Laws 392, 399–400.
[228] Id. at 394.
[229] See George R. Lamplugh, Politics on the Periphery: Factions and Parties in Georgia, 1783–1806, at 21–22 (1986).
[230] William W. Abbot, The Structure of Politics in Georgia: 1782–1789, 14 Wm. & Mary Q. 47, 54 (1957).
[231] Lamplugh, supra note 229, at 27.
[232] Act of Feb. 22, 1796, *reprinted in* A Digest of the Laws of the State of Georgia 611, 611–13 (Phila., Robert Watkins & George Watkins eds., 1800).
[233] Abbot, supra note 230, at 55.

the vote is to occur. And while a statute from 1799 provides that elections are to be *viva voce*,[234] it was repealed the same year, leaving on the books only a provision in the 1798 state constitution requiring *viva voce* voting unless "the legislature shall otherwise direct."[235] I could identify no state law between 1799 and 1821 purporting to create any more clarity on the procedures to be used in voting; only in 1821 is an offhand reference made to the procedure needed to "count out the ballots . . . taken" by "the justices and freeholders that superintend the election."[236] Given the decision to repeal the *viva voce* provision, it is reasonable to conclude that local magistrates in some locales had switched to ballot-based voting in the ensuing years. No statutory standard I could identify governs that choice or says anything about how such balloting is to take place.

Finally, despite the tight control over the time and place of elections in the original eastern counties of Georgia, the state's early history is defined by its aggressive settlement of indigenous territories.[237] In the thinly populated counties on the state's western periphery, the legislature often made exceptions to general time, place, and manner provisions and delegated additional discretion to local magistrates. For example, an 1801 law governing elections in Jefferson County provided that "the Justices of the Inferior Court . . . are hereby authorized and empowered, to fix on some fit and convenient house in the town of Louisville, in which Courts and Elections for said county of Jefferson, shall be held, until a Court-House shall be erected."[238] Thus, local magistrates enjoyed even greater discretion over elections in the hinterlands.

Maryland

The first Maryland law governing federal elections was passed in 1789. It provided that elections were to be held "on the first Wednesday of January next at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of

[234] Act of Feb. 11, 1799, § 1, *reprinted in* Digest of the Laws of the State of Georgia 199, 199 (Savannah, Horatio Marbury & William H. Crawford eds., 1802).

[235] Ga. Const. of 1798, art. IV, § 2.

[236] See Act of Dec. 24, 1821, § 5, 1821 Ga. Acts 70, 71.

[237] See, e.g., Greg Ablavsky, Book Review, 75 Wm. & Mary Q. 165, 165–66 (2018) (discussing the period "when Anglo-Americans greedily sought to obtain title to vast western acreages").

[238] Act of Dec. 4, 1801, § 2, 1801 Ga. Acts 50, 51.

delegates . . . ."[239] This arrangement constrained local discretion in some respects. For instance, the state constitution of 1776 specified that electors should "assemble" at the "court-houses in the said counties, or at such other place as the legislature shall direct."[240] And obviously the date of the election was provided for by statute. Maryland experienced a series of election reforms in the first decades of the republic, moving from the traditional *viva voce* county courthouse elections typical of most southern states, to *viva voce* polls with multiple election sites in 1799, to finally a ballot-based system beginning in 1802.[241]

Within the frame created by these shifting election laws, election officials (first sheriffs, and then dedicated officials called judges,[242] and sometimes commissioners) possessed significant discretion. First, no law I could identify before 1799 specifies the time when polls were required to be opened or closed. At least one secondary source reports that sheriffs in the earliest elections thus enjoyed discretion over at least poll closing times.[243] Further, Maryland elections before 1799 lasted up to four days,[244] and at least in the 1788 elections to the ratifying convention, sheriffs enjoyed the power to adjourn elections when they wished.[245] As to the manner of election, the Maryland Constitution provided that delegates should be "elect[ed] *viva voce*," but said nothing about the procedures to be used at elections.[246] Like other southern states, then, the county courthouse was precisely fixed as the sole *place* of elections, but the time and manner in which those elections took place were prescribed only in broad strokes.

Over the course of the ensuing decades, the legislature changed the arrangement of discretion considerably. On the one hand, it surrendered

[239] Act of Dec. 22, 1789, *reprinted in* 2 The Documentary History of the First Federal Elections: 1788–1790, at 136, 137 (Gordon DenBoer, Lucy Trumbull Brown & Charles D. Hagermann eds., 1984).

[240] Md. Const. of 1776, art. II, *reprinted in* 2 The Documentary History of the First Federal Elections, supra note 239, at 140 n.2.

[241] Bohmer, supra note 131, at 8–14.

[242] Election judges were appointed annually by the county courts. See, e.g., Act of Jan. 25, 1806, ch. 97, § 6, 1805 Md. Laws.

[243] Bohmer, supra note 131, at 11.

[244] Id. at 10 ("The whole county voted at the Court-house and the election lasted four days.").

[245] Renzulli, supra note 143, at 77–78 (recounting the accusations of Antifederalists in the 1788 election that "commissioners of election . . . had adjourned the election when they desired").

[246] Md. Const. of 1776, art. II, *reprinted in* 2 The Documentary History of the First Federal Elections, supra note 239, at 140 n.2.

the power to set the location of elections. An 1800 election law appointed a set of commissioners to divide each county into a "number of districts" and to "make choice of a place in each district, at which the elections shall be held, as nearly central as shall be practicable, having regard to . . . the accommodation of persons attendant upon such election . . . ."[247] In the following year, the legislature—apparently dissatisfied with some of the districts—appointed new commissioners in several counties and emphasized that commissioners were to "carefully mak[e] the several districts as nearly equal as possible, having regard to population, extent, and the convenience of the voters" and also to choose polling places within each district "having regard to the circumstances aforesaid."[248]

On the other hand, the legislature set down the time and manner of elections in more detail. The same 1799 statute required balloting to be complete on a single day and fixed poll closing times. And in 1803, polls were required to be open from 9:00 a.m. until 6:00 p.m., and congressional elections were also required to be conducted by ballot.[249] The legislature provided detailed instructions for the first time on how votes were to be delivered, stored, and counted by election judges.[250]

This arrangement remained substantially unchanged through the publication of the first Code of Maryland in 1860: commissioners were empowered to set polling places, but the time and manner of elections were detailed by statute.[251] There were, to be sure, occasional exceptions. An 1827 statute, and a similar law passed in 1832, authorized the governor to choose an election day for congressional elections if the President called Congress into special session after the terms of the previous representatives had expired.[252] But apart from these exceptions, legislative control over the time and manner of elections was generally extensive.

Massachusetts

Massachusetts selectmen, sitting atop the storied town meeting, were given great power by the legislature to govern elections. Outside of a few

[247] Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws.
[248] Act of Dec. 31, 1801, ch. 59, § 2, 1801 Md. Laws.
[249] See Act of Jan. 8, 1803, ch. 66, § 4, 1802 Md. Laws; Bohmer, supra note 131, at 11–13; Act of Jan. 25, 1806, ch. 97, § 7, 1805 Md. Laws.
[250] See Act of Jan. 25, 1806, ch. 97, § 8, 1805 Md. Laws.
[251] See Md. Code, art. 35 (1860).
[252] Act of Mar. 12, 1827, ch. 234, 1826 Md. Laws.

baseline requirements set by statute, town selectmen had latitude to regulate every aspect of the electoral process. For example, Massachusetts's 1794 congressional election law states simply that the selectmen shall "cause the inhabitants of their respective Towns and Districts . . . to assemble on the first Monday of November . . . to give in their votes for their respective Representative, to the Selectmen, who shall preside at said meeting."[253] Other laws specified Election Day and required voters to vote using ballots, but said little else about how the ballots were to be written, cast, counted, or stored.[254] The contrast with states like Delaware and New York is striking.

Further, that selectmen were "in a position to determine the manner in which elections were conducted" was widely understood because they did not hesitate to use their power.[255] For instance, during the Boston elections for state representatives in 1785–86, "the selectmen ordered 'that no Votes would be received but such as are unfolded' " and required that "Persons who Vote for Representatives shall . . . enter into the Hall and there remaine, until the Poll is closed," two requirements found nowhere in state law.[256] Likewise, while the polls in most places were required to open past 11:00 a.m. on election day,[257] "[t]he polls stayed open as long as the town wished," and the selectmen could bring a motion to the meeting at any time to close them.[258]

Such ample discretion was certainly not limited to Boston. A series of state election disputes from the early nineteenth century show the total consensus around the power of selectmen to alter the time and place of elections. For example, an 1800 state election dispute in the town of Harwich centered around the decision to adjourn a March 19 town meeting, where elections were to occur, until March 28 at a meeting-house on the other side of town.[259] A disgruntled group of citizens and a minority set of selectmen met at the original location and elected an alternative slate of representatives. But the legislature accepted the

[253] See Act of June 26, 1794, ch. 24, 1794 Mass. Acts 60, 63.

[254] See, e.g., Act of Feb. 24, 1796, ch. 55, § 1, 1795 Mass. Acts 415, 415–16; Act of June 29, 1798, ch. 31, 1798 Mass. Acts 40, 40–41.

[255] See Syrett, supra note 102, at 356, 362.

[256] Id. at 362–63 (internal references omitted).

[257] See Act of Mar. 15, 1805, ch. 117, § 1, 1804 Mass. Acts 165, 165 (permitting towns with more than 500 voters to open the polls before 11:00 a.m.).

[258] Syrett, supra note 102, at 364.

[259] See Cushing, supra note 121, at 38–39.

representatives elected at the official session instead with nary a word.[260] Likewise, in 1808, a group of citizens from Standish complained to the General Court that, among other violations, the town selectmen had promised to open voting for state representatives at 11:00 a.m. but ultimately waited until past 3:00 p.m. to do so, allegedly to advantage their partisan allies.[261] But the General Court Committee on Elections simply noted that "these facts, if proved, would not affect the right of the member to his seat," presumably because town control over the time of elections was such a well-recognized principle.[262]

While these precedents emerge from state elections, they practically govern federal elections as well. Federal elections were simply appended to town meetings, and there is no indication that they were treated with any greater formality or reverence. Indeed, the reverse is true: voters cared much more about state politics than about federal elections in the early years.[263] The Massachusetts legislature simply did not determine the actual time, place, or manner of most federal elections.

New Hampshire

In the initial years following New Hampshire's ratification of the Constitution, its statutory election law appeared similar to that of Massachusetts: it provided exceptionally little guidance to the town selectmen in how they were to conduct elections. Voters were instructed to assemble in their town parishes "on the third Monday of December," but the only specification provided on how the assemblies are to proceed was as follows:

> [T]he Selectmen of the several towns . . . shall give fifteen days notice of the design of sd. meeting & shall during the Choice of Representatives preside . . . impartially and shall receive the votes of all the Inhabitants . . . and shall sort and count the same in the meeting . . . .[264]

[260] Id. at 39.
[261] Id. at 82.
[262] Id.
[263] See Van Beck Hall, Politics Without Parties: Massachusetts, 1780–1791, at 90–92 (1972) (reporting turnout of thirteen percent and sixteen percent for the first two federal elections, but twenty-eight percent turnout for the 1787 gubernatorial elections).
[264] Act of Nov. 12, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788–1790, supra note 117, at 790.

Selectmen were told nothing about the procedures to be used, much less the precise time and place of the meetings. Indeed, the requirement to publicize the "design of sd. meeting" in advance arguably functions as an express grant of discretion.[265]

The total deference to local preference as to the exact time and place of the polls remained constant for at least the next thirty years.[266] But the manner of election was gradually made clearer. By 1813, an extensive set of regulations—governing how voters were to submit their ballots, how the ballots were to be stored and counted, and how returns were to be remitted—was included in the election law.[267] That this change apparently took nearly two decades to occur emphasizes the scale of the discretion previously granted to town selectmen to "design" election meetings however they wished.

While the scale of local discretion in New Hampshire appears to have been vast, little secondary evidence exists surrounding actual election practices in New Hampshire towns. The state's cultural and physical proximity to Massachusetts, however, and the similarity of the two states' legal frameworks and even jargon suggest that the power granted to town selectmen was not a matter of mere neglect. Rather, it reflects the significance of the town meeting in New England's early political culture.

New Jersey

As is true of New York, the mode of elections in New Jersey has long been prescribed in exacting detail by state legislation. While the first congressional election law was passed in 1788, the governing state election law that actually specified the mode of elections dated to 1779.[268] In it, the legislature specified the location of every poll[269] and, in the

[265] 1 The Documentary History of the First Federal Elections, supra note 117, at 794 (showing warrant for a town meeting issued in New Hampshire that appears similar in key respects to similar warrants from Massachusetts).

[266] See Act of Dec. 16, 1824, ch. 60, §§ 3–4, 1824 N.H. Laws 24, 25–26 (same formulation as the 1788 law); Act of June 23, 1813, §§ 3–5, 1815 N.H. Laws 250, 251–52.

[267] Act of June 23, 1813, § 3, 1815 N.H. Laws 250, 251 ("[T]he selectmen of the several towns and parishes aforesaid shall provide, at the expense of such towns and parishes, a suitable box, or boxes, to receive the ballots of the legal voters; on which ballots shall be written or printed the name or names of the person or persons voter for; and the ballots shall be given in, in the manner following—that is to say: each voter shall deliver his ballot to the moderator, in open town meeting; and the moderator, on receiving the ballot, shall direct the town clerk to check the name of the voter . . . .").

[268] See Act of Dec. 24, 1779, ch. 15, 1779 N.J. Acts 34.

[269] Id. § 1.

counties where voting was conducted by ballot, provided an extremely specific process for how ballots would be cast and counted.[270] This aspect of New Jersey elections remained constant throughout the period under study: the mode of balloting was heavily regulated, down to details like whether ballots could be printed, at least through the 1830s.[271]

Regulations concerning the time and place where the polls were to be held were subject to more change. The timing of elections was initially a matter of discretion determined by election judges. For instance, the 1779 election law provided that:

> [T]he Judges of each Election . . . shall have full Power to adjourn the Election, from Time to Time, as Occasion may require; and also to close the same when the Votes or Tickets of all the Electors present are delivered in, or a reasonable time for that Purpose shall have been allowed . . . .[272]

The delegation of power to set the times of elections was universally understood as such—and actively used by political entrepreneurs.[273]

Over the course of the next fifty years, that discretion was gradually limited. A 1790 law required polls to be open by 10:00 a.m. and prohibited the judges from adjourning the election for longer than half an hour.[274] By 1807, the opening and closing of the polls was governed by explicit statutory rules.[275] Thus, while the exact timing of polls was

[270] Id. § 14. In five counties, the legislatures provided that *viva voce* voting would continue, but the congressional elections statute specified that federal elections were to be by ballot, so I omit further discussion of the *viva voce* counties. See Act of Nov. 21, 1788, § 4, 1788 N.J. Acts 477, 480 ("[T]he said Election . . . shall be had by Ballot of the Citizens of this State in like Manner as in those Counties where the Elections by Law are directed to be held by Ballot.").

[271] See Act of Feb. 23, 1811, § 1, 1811 N.J. Laws 37, 37–38 ("[A]t any future election . . . it shall be lawful for any person being entitled to vote at any election hereafter to be held in this state, to vote by delivering to the officers of the election a ticket either written or printed, or partly written and partly printed.").

[272] Act of Dec. 24, 1779, ch. 15, § 17, 1779 N.J. Acts 34, 37.

[273] See Prince, supra note 129, at 8 (describing that, in the election of 1789, "some polling places remained open indefinitely in order to insure that all possible votes for a given faction were cast").

[274] Act of Nov. 18, 1790, ch. 322, §§ 1, 3, 1790 N.J. Acts 669, 669–70 (instructing that the election judges "may at any Time during the Day, adjourn the poll for a short Period, not exceeding half an Hour, in Case no Electors appear to give in their Votes, and shall close the Poll").

[275] See Act of Dec. 3, 1807, ch. 9, § 1, 1807 N.J. Acts 40, 40.

initially a matter delegated almost entirely to the discretion of election judges, the legislature slowly reversed its decision to delegate.

The story of poll locations is just the opposite. The 1779 election law required all elections to be held at a specific place, usually the location of the county-level Courts of General Quarter-Sessions, and every exception was specifically enumerated (and an alternative provided for).[276] But in 1790, the New Jersey Federalists, looking to increase their vote share in statewide races, instituted township-level voting—but only in "the state's seven most Federalist counties."[277] By 1797, Federalists "were no longer able to block demands for the extension of township voting to Republican counties."[278] The result was the dramatic expansion in the number of polling places, making it much more costly for the legislature to set the location of each one in a statute.

The legislature's solution was to simply delegate responsibility for setting the places where elections would be held to the towns themselves. The 1797 law extending township voting to the entire state provides that "the inhabitants of each township and precinct within this state, at their annual town meetings," shall "appoint the place or places, not exceeding two, for holding elections within their respective townships or precincts . . . ."[279] And while an 1807 congressional election law constrained townships to keeping polling places at the same locations as during the previous elections,[280] a later 1839 revision of the elections code reverted to the rule that each township could put its poll wherever it liked.[281] In short, New Jersey ended the period under study with a firmly established rule delegating the "Place" of federal elections to towns.

New York

Like New Jersey, New York law exhaustively regulated the way voters cast ballots and especially the way those ballots were treated after being cast. As early as 1787, election laws explicitly required that ballots be written and folded in half so as to conceal the writing they contained and

[276] Act of Dec. 24, 1779, ch. 15, § 1, 1779 N.J. Acts 34, 34.

[277] See Klinghoffer & Elkis, supra note 209, at 172–75.

[278] Id. at 175.

[279] Act of Feb. 22, 1797, ch. 634, § 17, 1797 N.J. Acts 229, 233.

[280] Act of Dec. 3, 1807, ch. 9, § 3, 1807 N.J. Acts 40, 41–42 (requiring that elections be held "at the places where the last election for the state legislature shall have been holden in the respective townships").

[281] Act of Mar. 12, 1839, § 11, 1839 N.J. Acts 199, 201.

provided detailed instructions for how the election inspectors were to canvas the vote and report it.[282] These instructions only got more elaborate over time. An 1801 law, for example, required that ballot boxes have a "sufficient lock," that the election judges vote on which of them was to keep the key, and that the box have "a small hole . . . sufficient only to receive each ballot, and through which all the ballots shall be put into the box."[283]

One notable area of discretion pertaining to the "manner" of conducting elections was New York's method for resolving election disputes. In the last decades of the eighteenth century, New York law provided that the physical votes for all statewide elections were to be delivered to and counted by a canvassing board consisting of appointees chosen by the state House and Senate.[284] The canvassing board's decision on whether to count ballots was "in all cases, binding and conclusive,"[285] a fact which caused a great firestorm in the disputed 1792 gubernatorial election when the board decided to throw out several hundred votes over a technicality, handing the election to George Clinton.[286] The ensuing uproar, however, resulted in the board being stripped of the duty of canvassing individual votes by 1799; thereafter, local officials counted ballots and transmitted certificates of their counts to Albany.[287]

But it was on the matters of time and especially place where New York's grant of discretion to local officials was noteworthy and durable. Election inspectors elected at the local level could determine when polls opened and closed.[288] This power was reaffirmed by statutes in 1801[289] and 1813.[290] Beginning in 1807,[291] a single exception appeared: the legislature chose to limit discretion over time, but *only* for New York City, where polls were required to be open from 10:00 a.m. until sunset—strengthening the implication that other localities received intentional

[282] See Act of Feb. 13, 1787, ch. 15, § 6, 1787 N.Y. Laws 316, 319.
[283] Act of Mar. 24, 1801, ch. 61, § 6, 1801 N.Y. Laws 264, 267.
[284] See Act of Feb. 13, 1787, ch. 15, § 11, 1787 N.Y. Laws 316, 323.
[285] Id. § 11.
[286] See Edward B. Foley, The Founders' *Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance, 44 Ind. L. Rev. 23, 35–36 (2010).
[287] Id. at 73–75.
[288] See Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 318 ("[T]he poll of every such election shall only be held open in the day time, and not before sun-rise nor after sun-set.").
[289] Act of Mar. 24, 1801, ch. 61, § 4, 1801 N.Y. Laws 264, 266–67.
[290] Act of Apr. 6, 1813, ch. 68, § 5, 1813 N.Y. Laws 241, 243.
[291] Act of Feb. 20, 1807, ch. 17, § 1, 1807 N.Y. Laws 18, 18.

discretion to determine voting times. New York election inspectors also enjoyed the power to adjourn elections, sometimes for days at a time,[292] and they were held to be "the exclusive judges of the necessity of the adjournment."[293]

The apogee of the New York election inspectors' power was their control over the location of polls. The state's 1787 election law provided that inspectors were to give "eight days notice of the place (which shall be the most public and convenient for that purpose) . . . where such election . . . then next shall be held . . . ."[294] That power was repeatedly reaffirmed, first by the 1791 congressional election law,[295] and again in 1792,[296] 1801,[297] and 1813.[298] The New York legislature thus occupied virtually the entire field in determining the manner of elections while leaving the time and place of elections to local officials.

North Carolina

North Carolina's first federal election law provided that the elections were to be held "on the first *Thursday* and *Friday* in *February* next ensuing, at the Places appointed by Law for the annual Elections of Members of the General Assembly, and the same are to be conducted in like Manner with the said annual Elections . . . ."[299] Like most southern states, North Carolina elections were required by statutory law to be held at county courthouses.[300] Unlike many of its neighboring states, however, North Carolina held its elections by ballot starting at the early date of 1777 and provided detailed instructions on how such votes were to be cast and

[292] See Act of Mar. 28, 1797, ch. 62, 1797 N.Y. Laws 441, 443 (elections to be held on the last Tuesday in April, "from which days the same may be respectively continued by adjournment, if necessary, from day to day, not exceeding five days").

[293] See George W. McCrary, A Treatise on the American Law of Elections 124 (Chi., Henry L. McCune ed., Callaghan & Co 1897).

[294] Act of Feb. 13, 1787, ch. 15, § 4, 1787 N.Y. Laws 316, 317.

[295] Act of Feb. 10, 1791, ch. 5, § 3, 1791 N.Y. Laws 339, 339.

[296] Act of Dec. 18, 1792, ch. 5, § 6, 1792 N.Y. Laws 4, 7.

[297] Act of Mar. 24, 1801, ch. 61, § 4, 1801 N.Y. Laws 264, 265–66.

[298] Act of Mar. 20, 1813, ch. 61, § 4, 1813 N.Y. Laws 247, 248–49.

[299] Act of Dec. 16, 1789, *reprinted in* 4 The Documentary History of the First Federal Elections: 1788–90, supra note 117, at 347.

[300] 4 The Documentary History of the First Federal Elections: 1788–90, supra note 117, at 349 n.2.

counted.[301] The same 1777 statute provided that polls were to open at 12:00 p.m..[302] The one possible source of discretion is the time at which polls were to be closed; however, because I was unable to identify significant secondary evidence corroborating variation in closing times, I reach no conclusion on whether power was actually exercised or recognized.

Pennsylvania

The dominant political ideology in post-Revolutionary Pennsylvania was one thoroughly committed to legislative supremacy.[303] Perhaps it is therefore unsurprising that Pennsylvania was far and away the state in which the least discretion was delegated away from the state legislature in the first decades of American independence. The first election law, for example, specified the manner of voting in great detail, requiring each voter to write eight names on a ticket and providing extensive instructions for how ballots would be counted.[304]

The places of voting had long been specified in detail by the legislature.[305] Further, the exact locations where voters would be allowed to vote were specified with such detail that a supplementary law had to be passed in late 1788 allowing voters attending court on the day of the election to cast their ballots at a different precinct within the same county.[306] This trend continued: the index to a statutory compilation covering the years 1803–1805, for example, includes seventy-one separate entries for provisions setting out election districts and the places

[301] Id.; see also An Act Directing the Method of Electing Members of the General Assembly, and Other Purposes, 1 N.C. Pub. Acts 227, 227–28 (1777) (detailing the method of electing members of the state's legislature in a sixteen-section act).

[302] An Act Directing the Method of Electing Members of the General Assembly, and Other Purposes, § 10, 1 N.C. Pub. Acts 227, 227 (1777).

[303] See Rosalind L. Branning, Pennsylvania Constitutional Development 14–15 (1960).

[304] Act of Oct. 4, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections, 1788–1790, supra note 117, at 299–301.

[305] See, e.g., Act of June 14, 1777, ch. 757, § 5, 9 Pa. Stat. 114, 116 (dividing Philadelphia County into three electoral districts and providing locations within each district where the election would be held—including one poll "at the public house formerly kept by Jacob Coleman").

[306] See Act of Nov. 13, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections: 1788–1790, supra note 117, at 337.

where voting would occur within them.[307] Suffice to say that delegation was not the order of the day.

Finally, the time when polls would be open was also specified by statute. One law from 1777, for instance, required that polls in Philadelphia be held open between 10:00 a.m. and 2:00 p.m..[308] To be sure, some secondary literature contains reports of profligate sheriffs disregarding the law and manipulating elections for partisan gain.[309] But these instances tell us more about the challenges of governance in a large state than they do about early Americans' understanding of the powers that could be legitimately alienated by the legislature.

All indications suggest that the phenomenon of virtually total legislative control over elections continued throughout the study period.

Rhode Island

It is difficult to characterize early election practices in Rhode Island with great precision. As a background matter, Rhode Island's size meant "that the crucial electoral arena was the colony—later the state—as a unit,"[310] so that sub-state institutions were historically weak.[311]

Nonetheless, Rhode Island towns appear to have enjoyed similar reserve powers to govern the times and places of their meetings as did towns elsewhere in New England. The first federal election statute, passed in 1790, provided that elections would be held in "Town meetings legally assembled on the last Tuesday in August next."[312] A statute passed in 1798[313] provided the same instruction, but further required that the

[307] See 7 Laws of the Commonwealth of Pennsylvania 551–52 (Phila., John Bioren 1806) (listing provisions under the heading "Election Districts"). Strikingly, the same index lists only *ten* provisions related to the general conduct of elections, further highlighting the enormous legislative effort required to avoid delegation over the specifics of election logistics. Id. at 550–51.

[308] Act of June 14, 1777, ch. 757, § 5, 9 Pa. Stat. 114, 121.

[309] Fed. Gazette, Feb. 2, 1789, *reprinted in* 1 The Documentary History of the First Federal Elections to 1788–1790, supra note 117, at 388 (complaining about the endless delays in holding federal elections in outlying counties).

[310] Patrick T. Conley, Democracy in Decline: Rhode Island's Constitutional Development, 1776–1841, at 51 (1977) (quoting Richard P. McCormick, The Second American Party System 76 (1966)).

[311] Id.

[312] Act of June 12, 1790, *reprinted in* 4 The Documentary History of the First Federal Elections: 1788–90, supra note 117, at 410.

[313] An Act Directing the Mode of Choosing Representatives to Congress, R.I. Laws 25, 25 (1798).

election conform to the rules set out previously for state elections in a statute governing town meetings passed in 1762. That 1762 statute was concerned mostly with defining voter qualifications. It laid down the day when town meetings were to be held but did not specify their precise time or place.[314] Given that Rhode Island towns (like other towns in New England) enjoyed the freedom to set the time and place of their meetings during the colonial period,[315] and given the continuity of Rhode Island's charter following the Revolution, it seems likely that the statutory silence as to the meeting places and opening times of town meetings held for elections implied that towns had discretion to fill in these details. Rhode Island election laws thus seemed to allow some latitude for determining the time and place of meetings.

Some caution is needed in drawing a similar inference with respect to manner. The law provided some instruction on the order of town meetings in which elections were to be held.[316] And a 1762 law, in force throughout the study period, required that electors employ "Proxes"—probably a reference to paper ballots in voting.[317] However, two secondary sources suggest that whether those ballots were secret may have been left to the discretion of towns. Irwin Polishook writes that state law "require[d] a secret vote upon the request of a single freeman and a second to his motion."[318] Consistent with that claim, Chilton Williamson claims that placing the ballot in a sealed envelope was "optional."[319] The power to decide whether voting was secret would represent a significant delegation to towns in the mode of elections, but I could not locate a statute explicitly granting that power.

[314] See An Act in Addition to, and Amendment of, the Several Acts Regulating the Manner of Admitting Freemen, and Electing Officers in this Colony, R.I. Laws 192, 195 (1762).

[315] Bruce C. Daniels, Dissent and Conformity on Narragansett Bay: The Colonial Rhode Island Town 98–100 (1983) (noting that, during the early colonial period, towns usually "rotat[ed] the place of the meeting around the town" and set their meeting times to "make the meeting time as convenient as possible").

[316] Id.

[317] See An Act in Addition to, and Amendment of, the Several Acts Regulating the Manner of Admitting Freemen, and Electing Officers in this Colony, R.I. Laws 192, 195 (1762) ("[T]he Moderator of each Town-Meeting in this Colony, shall receive all the Proxes of the Freemen, legally qualified . . . .").

[318] See Polishook, supra note 178, at 29.

[319] Williamson, supra note 109, at 275.

South Carolina

Unfortunately, comprehensive treatments of early South Carolina elections law are difficult to find. For example, *The Documentary History of the First Federal Elections* reports that the engrossed version of South Carolina's first federal election law has not been located; the version in that volume comes from a series of certified copies.[320] The difficulty of finding early South Carolina law makes it difficult to conclude much from the first federal election statute, which provides merely that "the said Elections shall be holden at the times and places and regulated and conducted in the same manner as the Elections for the Members of the House of Representatives of this State at the next general Election."[321]

However, what evidence is available suggests that South Carolina mirrored its neighbors in limiting the discretion of localities to choose the locations of their polls. A 1791 joint resolution by the state legislature, for example, contained a list of every town in the state and specified in great detail where the next general election was to be conducted and by whom.[322] A similar statute appeared in 1797.[323]

As for the time and manner of election, the state constitution of 1778 specified two days for election.[324] I could identify no law, as late as 1814, providing any further guidance on the times when polls were to be open or the mode of conducting elections. This is facially consistent with a great deal of discretion to determine the exact times when polls would be open and consistent with the kinds of discretion given to officers in other states. But because I was unable to identify secondary sources positively confirming the existence of variation in the actual election practices in towns across the state, I reach no conclusion on the discretion delegated by the legislature.

The sole form of discretion that appeared consistently was the authorization for "managers of elections" to verify the qualifications of

[320] See 1 The Documentary History of the First Federal Elections, 1788–1790, supra note 117, at 169 n.1.

[321] Act of Nov. 4, 1788, *reprinted in* 1 The Documentary History of the First Federal Elections, 1788–1790, supra note 117, at 167.

[322] See Act of Dec. 20, 1791, 1791 S.C. Acts 52, 54 (instructing that the election for Kingston, S.C., is to be held "at the house of Moses Floyd," and appointing John Sarvis and Thomas Livingston as managers).

[323] See Act of Dec. 9, 1797, 1797 S.C. Acts 159, 164.

[324] S.C. Const. of 1778, art. XII (commanding that elections be held "on the last Monday in November next and the day followings and on the same days of every succeeding year thereafter").

voters in the following manner: "[T]he respective managers of elections . . . are hereby empowered, if they think it necessary, to administer the usual oaths to any person or persons, whatever, who shall appear to give their votes at such elections."[325] But this was a form of discretion pertaining to voter qualifications, not time, place, or manner.

Virginia

Apart from the New England town meeting tradition, Virginia was the epicenter of localism in early America. The local gentry exercised "continuing control" over government and were the potent force organizing county elections.[326] Their primary instruments were the justices of the peace, who ran county governments.[327] While theoretically appointed by the Governor, in fact, local justices hand-selected their successors, as well as most of the important county-level officials, including sheriffs.[328]

Their discretion in the realm of elections was profoundly ensconced in the law and society of early Virginia: "There were no institutional checks guaranteeing that the sheriff would use his power impartially," and although appeals could theoretically be lodged with the House of Delegates, "it rarely ruled against [them]."[329] Indeed, it is more helpful to ask what *was not* delegated than to ask what was.

Start with the timing of elections. While the statutes directing the holding of congressional elections provided that elections were to be held on a specific day, Virginia sheriffs held unlimited authority over the times when polls would be open. In the years immediately preceding the Revolution, the sheriff "opened the poll when he pleased and closed it when he pleased, sometimes closing it despite the pleas of a candidate to keep the poll open until more voters could be corralled."[330] The same was true in the first decades of the republic.[331]

[325] Act of Dec. 9, 1797, 1797 S.C. Acts 159, 164; see also Act of Dec. 18, 1801, 1801 S.C. Acts 113, 120 (same); Act of Dec. 11, 1805, 1805 S.C. Acts 105, 113 (same).

[326] 2 The Documentary History of the First Federal Elections, supra note 239, at 251.

[327] See Sydnor, supra note 185, at 78–87.

[328] Id. at 83.

[329] Beeman, supra note 101, at 35.

[330] Sydnor, supra note 185, at 71.

[331] Beeman, supra note 101, at 34 ("In the 1780s and 1790s, as in the past, the county sheriff controlled nearly every step of the election process. If he thought most freeholders had voted, he could close the polls after a few hours . . . .").

Further, the sheriff could adjourn elections for long periods. In 1785, just before the first federal elections, the legislature passed a law providing that sheriffs could adjourn elections for up to four days if there were too many voters or inclement weather.[332] In practice, a strong presumption of regularity applied to sheriffs' decisions, so that their determination about weather or crowds was effectively unreviewable.[333] Further, the maximum adjournment period appears to have been more suggestion than rule: "In some cases, as in Harrison County in 1790, the sheriff could keep the polls open for as many as eleven days."[334] The importance of the adjournment power did not go unnoticed. It was the subject of constant complaints to the legislature, not to mention the several elections disputes raised before Congress complaining of an unfair extension or closing of the polls in some Virginia county.[335] But in almost every case, the sheriff's power was affirmed.[336]

A similar degree of discretion was afforded in the mode of election. Virtually the only thing prescribed by law was that "no determination shall be had by view," that is by acclamation or show of hands, "but each person qualified to vote shall fairly and publicly poll."[337] Apart from that, "the intentions of the legislature were interpreted in a startling variety of practices."[338] For instance, one account of a *viva voce* election in Kanawha County had the candidates for office lined up in a row facing the place where a voter would announce his decision, the better to thank each voter for his support.[339]

Two additional manner-related issues where significant statutory regulation was imposed were (1) a series of proclamations to be announced at various stages in the polling process and (2) the procedure by which county sheriffs would meet to combine and compute returns for

[332] Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 33.

[333] McCrary, supra note 293, at 207. ("In accordance with this rule it has been held that where the law allows the officers of the election, upon the happening of certain contingencies, to adjourn the election for one of more days; and if it be shown that they did in fact adjourn the election; it will be presumed that the adjournment was proper . . . .").

[334] Id.

[335] Id. at 35.

[336] Id. ("The House of Delegates served as the court of appeal in cases where the sheriff was charged with abusing his power, but it rarely ruled against him.").

[337] Act of Nov. 17, 1788, ch. 1, § 3, 1788 Va. Acts 3, 3.

[338] Pole, supra note 181, at 31.

[339] See Wesley J. Campbell, Whiskey, Soldiers and Voting: Western Virginia Elections in the 1790s, 15 Smithfield Rev. 65, 66 (2011).

congressional districts.[340] Also, statutes beginning at an early date imposed fines on sheriffs for failing to behave impartially or failing to fulfill their responsibilities under the law. But, strikingly, even these mild limits on discretion were waived for sheriffs in the most outlying counties of the state, who were instructed to execute their responsibilities "under the best circumstance which the promulgation of this act will admit of."[341] In short, necessity trumped legislative supremacy.

The one area where Virginia generally left little room for discretion was the location of elections, which were always held at county courthouses.[342] Even here, however, sheriffs had the power to move the polls in emergency circumstances. For instance, the 1785 law provided that if an election needed to be held in a courthouse to count votes, but the town be "infected with any contagious disease, or be in danger of an attack from a public enemy," then the sheriff could move voting to "some other place."[343]

[340] See, e.g., Act of Nov. 17, 1788, ch. 1, § 4, 1788 Va. Acts 3, 3–4 (requiring that sheriffs meet to count votes within seven days of the election and prescribing the oath that sheriffs had to take to certify the results).

[341] Id. § 10.

[342] Id. § 2; see also Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39 ("[T]he Sheriff . . . shall . . . cause the poll to be taken in the Court-house . . . .").

[343] Act effective Jan. 1, 1787, ch. 55, § 3, 1785 Va. Acts 38, 39.