

When “Legislature” May Mean More than “Legislature”: Initiated Electoral College Reform and the Ghost of *Bush v. Gore*

by RICHARD L. HASEN*

Introduction

Imagine the following scenario, which, when I wrote the initial draft of this article, was not at all far-fetched: Hillary Clinton is locked in a close race with Rudolph Giuliani to become the forty-fourth President of the United States. California Republicans raise funds to qualify a ballot measure to appear on the November 2008 ballot that would change the allocation of California’s fifty-five Electoral College votes used to determine the next President. Rather than using a statewide winner-take-all system, which appoints all of the state’s fifty-five electors to the winner of the statewide popular vote, this initiative would change the method to appoint two of the electors based on a statewide popular vote, and the remaining electors based on the results of the popular vote for President in each state congressional district.¹ The measure is widely expected to help Republicans capture as many as twenty Electoral College votes and could well make the difference in the election nationally. Democrats file a pre-election suit to keep the measure off the ballot arguing, among other things, that the measure violates Article II of the United States Constitution, which they claim allows only the state *legislature*, and not the people legislating through the initiative process, to pick the rules for choosing presidential electors.² The California Supreme Court, citing precedent allowing it to

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1. See *infra* Part I.A.

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

decline pre-election review of substantive constitutional claims,³ denies review. The measure passes at the same time California voters vote for President, and the fate of the presidency stands in the balance: Without a portion of California's votes, Clinton wins and Giuliani cannot become President. With twenty of California's electoral votes, Giuliani becomes President.

The California Supreme Court rules on the legality of the initiative, and the losing party files a petition for certiorari in the United States Supreme Court, which for the second time in three elections, must decide a case that will determine the outcome of the presidential election.⁴ The identity of the forty-fourth President turns on a single legal question: Does the reference to "Legislature" in Article II refer only to the state legislature itself, or can it include the legislative power of the people to govern by initiative, recognized in a state constitution? The results may depend upon whether the conservatives on the Court will stick with a strict textual reading of the term "Legislature" set forth in a concurring opinion in *Bush v. Gore*⁵ to the detriment of Giuliani and upon whether the liberals on the Court will abandon their skepticism of the textualist reading of "Legislature" expressed in their *Bush v. Gore* dissents,⁶ to the detriment of Clinton. The irony meter is off the charts.

Though the above scenario did not come to pass, a similar one could face the courts in the near future. This Article examines the question of the constitutionality of changes to the Electoral College accomplished through the initiative process. However, this article does not discuss the merits of either the Electoral College or reforms that have been proposed to change it (whether through the initiative process or otherwise). Part I gives the brief history of attempts to use the state initiative process to change the rules for choosing presidential electors, beginning with Colorado's Amendment 36, which failed to pass in the 2004 election, to the current California measure, which failed to qualify for the ballot. It also explains that this issue could well arise in a future election because of general dissatisfaction among segments of the population with the Electoral College system for choosing the President. Part II turns to the constitutional question whether initiated changes to rules for choosing presidential electors violate Article II. It offers an analysis of the question based upon the text of Article II, relevant

3. *Indep. Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 183-84 (Cal. 2006). See *infra* Part III.A.

4. The first such case, of course, was *Bush v. Gore*, 531 U.S. 98 (2000).

5. See *id.* at 112-22 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

6. See *id.* at 123-25 (Stevens, J., dissenting); *id.* at 130-33 (Souter, J., dissenting); *id.* at 141-43 (Ginsburg, J., dissenting); *id.* at 147-52 (Breyer, J., dissenting).

Supreme Court case law involving Article II, as well as Articles I and V, and the possible purposes behind Article II's use of the term "Legislature." It concludes that the issue of the constitutionality of initiated Electoral College reform is one about which reasonable jurists will differ, and because of that difficulty resolution by the Supreme Court could appear tainted by the political considerations, raising the specter of another *Bush v. Gore*. Part III concludes with two strategies that can help avoid the Article II question from becoming the next *Bush v. Gore*. First, courts should be more willing to engage in pre-election review of such measures, so that these issues can be resolved before, rather than after, an election. Second, Congress should consider amending the Constitution with an election administration amendment that would impose a two-year waiting period before any state's changes to Electoral College rules may go into effect. An amendment changing the Electoral College itself would be difficult to pass through Congress and the states. But my proposal is a neutral amendment *ex ante* that could decouple the consideration of the merits of Electoral College reform from the short-term political advantages that could come from such a change.

I. The Brief History of Initiated Electoral College Reform

A. 2004: Colorado's Amendment 36

The election of the United States President is hardly a straightforward affair. Major party presidential candidates are chosen at presidential conventions, whose delegates are chosen through primaries, conventions, or caucuses conducted in each state.⁷ Each state has its own rules on who may vote in party primaries, and these rules are subject to constitutional objections by the political parties.⁸ Independent candidates may attempt to bypass the nomination process and qualify state-by-state to appear on the general election ballot for President. Each state sets its own rules for independent candidacies, some of which have been struck down as too onerous.⁹

In the general election, presidential candidates compete for presidential electors state-by-state. Each state is entitled to a number of electoral votes equal to the number of its members of Congress in the

7. For an overview of the presidential primary process and the development of the direct primary for choosing nominees of the major political parties, see ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* (Cambridge University Press 2002).

8. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

9. *E.g. Anderson v. Celebrezze*, 460 U.S. 780 (1983).

House of Representatives (which in turn is determined by the state's population), plus one for each of the state's two U.S. Senators.¹⁰ All but two states provide that the plurality winner of a popular vote among eligible voters in each state is entitled to *all* of that state's electoral votes. Two states, Maine and Nebraska, currently provide that two of the state's Electoral College votes go to the statewide plurality winner, with the remainder allocated by the plurality winner of each congressional district.¹¹ The states send their certified Electoral College votes to Congress, which counts and certifies the votes.¹² A candidate obtaining a majority of Electoral College votes becomes President.¹³ In the event there is no majority winner, the Constitution provides a convoluted procedure for the House of Representatives to pick the President and for the Senate to choose the Vice President.¹⁴

Controversy over the merits of the Electoral College system for choosing the U.S. President are not new¹⁵ and, over time, there have been thousands of proposals for changing or even abolishing the Electoral College system.¹⁶ The most straightforward way to change to the Electoral College system is through a constitutional amendment or through an Article V constitutional convention.¹⁷ But both of these routes for amending the Constitution are exceedingly difficult: Constitutional amendments require approval of a two-thirds vote of Congress and an affirmative vote of three-quarters of the state legislatures.¹⁸ Article V

10. U.S. CONST. art. II. For a more detailed overview of the procedure for choosing a President, see GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 1-30 (Yale University Press 2005).

11. ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 43 (Stanford University Press 2006).

12. *Id.* at 1.

13. U.S. CONST. amend XII.

14. *Id.* Professor Levinson calls the provisions in the Twelfth Amendment for resolving elections in which no candidate has a majority of Electoral College votes "a national constitutional crisis just waiting to happen." SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006). The merits of these provisions are beyond the scope of this Article.

15. For a recent and thoughtful debate on the merits of the Electoral College among Professors Sanford Levinson, John McGinnis, and Daniel Lowenstein, see *Should We Dispense with the Electoral College?*, PENNUMBRA, <http://pennumbra.com/debates/debate.php?did=8>.

16. Joy McAfee, *Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000*, 32 CUMB. L. REV. 643, 645 n.8 (2002).

17. See LEVINSON, *supra* note 14, ch. 6 (chapter entitled "The Impermeable Article V").

18. U.S. CONST. art. V. It should be noted, however, that despite political difficulties the Seventeenth Amendment, providing for the direct election of Senators rather than their selection through state legislatures, was accomplished by amendment. Levinson minimizes the significance of the Seventeenth Amendment's passage to passage of future Amendments.

conventions are even harder, requiring two-thirds of the state legislatures to call the Convention and approval of the Convention's proposed amendments by three-quarters of the state legislatures or three-quarters of state conventions as Congress determines.¹⁹ And to the extent that Electoral College reform could hurt some states, those states would have a strong incentive to block, and relative ease in blocking such reforms, either in Congress or in state legislatures.

For this reason, some Electoral College reformers recently have preferred to move state-by-state. Some of these proposed reforms, as we shall see, seek to make changes only *within* one state. Other proposed reforms seek to impose a national change to the Electoral College system *through an agreement among the states* as to the allocation of Electoral College votes.²⁰ The most prominent of the current crop of proposals is the National Popular Vote plan, which would have states agree to allocate all of their electors to whoever was declared the winner of the popular vote for President in the entire United States. The agreement would become effective only when approved by states with a majority of the electors in the Electoral College.²¹

As far as I can tell, all of the changes to the means for allocating Electoral College votes have been accomplished through actions of state legislatures.²² Indeed, before 2004, it appears that no state ever even considered the question of Electoral College reform through a voter initiative.²³ In 2004, however, Colorado voters considered a voter

LEVINSON, *supra* note 14, at 161-62 (He says that its history does not "demonstrate that the Constitution . . . is *not* an iron cage.").

19. U.S. CONST. art. V.

20. There remains a serious question about whether such end runs around the amendment process would run afoul of the Constitution's "Compact Clause" in Article I, Section 10. For competing analyses, see Derek T. Muller, *The Compact Clause and the National Popular Vote Compact*, 6 ELECTION L.J. 372 (2007) and Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College* (Nov. 15, 2007) (unpublished draft), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030385. That question too is beyond the scope of this Article.

21. For the detailed plan of the organization as well as legal analysis, see JOHN R. KOZA et al., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (2006), available at www.every-vote-equal.com, with additional information about the National Popular Vote group at www.nationalpopularvote.com.

22. Maine adopted its change to partial allocation by congressional district in 1969. KOZA, *supra* note 21, at 54. Maine's current rule is codified at ME. REV. ST. ANN. tit. 21-A § 802. Nebraska enacted a similar change in 1992. See KOZA, *supra* note 21, at 54. Nebraska's is currently codified at NEB. REV. STAT. ANN. § 32-710.

23. A search of M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC (2003) reveals no initiative titles on the subject of Electoral College reform. In contrast to initiatives directly changing the means for choosing electors, there have been initiatives proposed that would

initiative, "Amendment 36," which would have changed the Colorado Constitution to provide for allocation of the state's Electoral Votes *proportionally* according to the results of the popular vote for President in the state.²⁴ Thus, a presidential candidate receiving seventy percent of the state's popular votes for President would receive roughly seventy percent of Colorado's electoral votes, and the candidate receiving thirty percent of the popular votes would receive about thirty percent of the electoral votes.²⁵

Amendment 36 was controversial when it was proposed, and it was subject to legal challenge while voters considered it. Among the arguments raised against it was that under Article II of the Constitution only a state *legislature* may make changes in the rules for allocating presidential electors.²⁶ Opponents also argued that the measure, even if it passed, could not go into effect for the 2004 election.²⁷ A federal district court refused to rule on the merits of the legal arguments before the election,²⁸ and the issue

have otherwise changed the nature of who may vote for president or how votes are cast or counted. For example, Alaska voters considered, and rejected, a measure to use instant runoff voting in a number of elections, including for the president. See Alaska Ballot Measure 1, August 2002, Section 4, available at <http://www.gov.state.ak.us/litgov/elections/petitions/99prvt.htm>; Rachel D'Oro, *Preferential Voting Suffers Sound Defeat*, ALASKA DAILY NEWS, Aug. 28, 2002, available at <http://www.adn.com/front/story/1678169p-1794934c.html>. But these measures apparently have never been challenged on Article II grounds.

24. The text of the initiative, Amendment 36, Selection of Presidential Electors, is available at <http://www.lawanddemocracy.org/pdf/COamend36.pdf> [hereafter "Amendment 36 Text"]. For additional background on the measure and the litigation, see David S. Wagner, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575 (2006).

25. The amendment provided detailed rounding rules to proportionally allocate Colorado's 9 electoral votes. See Amendment 36 Text, *supra* note 24.

26. See Complaint, *Napolitano v. Davidson*, No. 04-RB-2114, (D. Colo.), para. 4i available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/amend36complaint.pdf> ("Plaintiff maintains that Article II, § 1 of the United States Constitution requires that the Colorado Legislature direct the manner of choosing presidential electors, that the Proposal prevents the Colorado Legislature from doing so in the 2004 election, and, accordingly, that the Proposal is unconstitutional in this regard.").

27. See Wagner, *supra* note 24, at 600.

28. See Kirk Johnson, *Judge Allows Referendum on Dividing Colorado Electoral College Vote*, Oct. 26, 2004, <http://www.nytimes.com/2004/10/26/politics/campaign/27electcnd.html?hp&ex=1098849600&en=ac6e91fd999e7728&ei=5094&partner=homepage>. Napolitano, who brought suit without a lawyer, did not appeal. Rick Hasen, *Judge Dismisses Federal Lawsuit Challenging Colorado's Amendment 36*, ELECTION LAW BLOG, Oct. 26, 2004, <http://electionlawblog.org/archives/002205.html>. It does not appear that the district court judge issued a written ruling in dismissing Napolitano's claim, but instead incorporated his oral findings of fact and conclusions of law into the final judgment.

was mooted when voters rejected Amendment 36 by a vote of about sixty-five percent against the measure to sixty-five percent in favor.²⁹

B. 2008: The California Electoral College Measure

The question of initiated Electoral College reform again emerged in the 2008 election, this time in California.³⁰ A prominent California Republican election lawyer, Tom Hiltachk, began circulating a ballot measure³¹ which would have changed California's system for allocating the state's 55 electoral votes from a winner-take-all system to a districting system, along the lines of the Maine and Nebraska systems.³² The measure was immediately attacked by some liberals as a Republican power grab; Professor (and Maryland state senator) Jamin Raskin wrote that the "real purpose [of the measure] is to break up the state's 55 electors, which typically go to the Democrats in a bloc as inevitably as Texas, Georgia, and Oklahoma give their 56 combined electors to the Republicans. Following the proposed division of California's well-gerrymandered blue and red congressional districts, it is likely that the 2008 GOP nominee under this plan would carry away about 20 electors. In one fell swoop, this would ruin the Democrats' chances for winning the presidency."³³

Hiltachk abandoned the effort to qualify the measure after some controversy over the source for funding the qualification of the measure for the ballot,³⁴ but other Republicans continued the effort.³⁵ Democrats vowed to challenge the measure, including on grounds that it violates

29. See *Official Publication of the Abstract of Votes Cast 2003-2004*, COLORADO SECRETARY OF STATE ELECTIONS CENTER, at 137-38, <http://www.elections.colorado.gov/WWW/default/Prior%20Years%20Election%20Information/2004/Abstract%202003%202004%20082305%20Late%20PM-5.pdf>.

30. Earlier in the year, Democrats in the North Carolina Legislature attempted to make a similar change in their state through the legislative process, only to be asked to abandon the effort by the chairman of the National Democratic Committee. James Romoser, *N.C., California in an Electoral Juggle; Bids to Alter System May Favor Either Party*, WINSTON-SALEM J., Aug. 17 2007, at A1.

31. The full text of the proposed ballot measure, No. 07-0032, is available at http://ag.ca.gov/cms_pdfs/initiatives/2007-07-17_07-0032_Initiative.pdf.

32. See Hendrik Hertzberg, *Votescam*, THE NEW YORKER, Aug. 6, 2007, at 21, available at http://www.newyorker.com/talk/comment/2007/08/06/070806taco_talk_hertzberg.

33. Jamin Raskin, *Deformed Reform: The Cure for the Electoral College is Worse Than What Ails Us*, SLATE, Aug. 24, 2007, <http://www.slate.com/id/2172700/>.

34. Carla Marinucci, *Democrats Wants Feds to Investigate Electoral College Ballot Effort*, S.F. CHRONICLE, Oct. 2, 2007, at A4, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/10/02/MND2SHTNQ.DTL&tsp=1>.

35. See *id.*; Kevin Yamamura, *Issa Boosts Electoral Measure*, SAC. BEE, Nov. 1, 2007, at A3, available at <http://www.sacbee.com/111/story/465074.html>.

Article II of the Constitution.³⁶ The challenge never materialized, because the measure ultimately failed to qualify for the ballot, apparently because of a lack of funds to collect enough signatures.³⁷ Had the measure qualified for the ballot, it was not clear whether the California Supreme Court would have engaged in pre-election review, a point addressed in Part III A of this Article.

C. The Future of Initiated Electoral College Reform

Even though the California measure failed to qualify for the ballot, Electoral College reformers are likely to continue to look to the initiative process as a potential avenue for Electoral College reform. Indeed, proponents of the National Popular Vote plan devote considerable space in their book to argue for the constitutionality of enacting their proposal via the statewide initiative process³⁸ (though it appears that all of the action on the plan thus far has taken place in state legislative chambers and not through the initiative process).³⁹ Given the difficulties with formally amending the U.S. Constitution, it is not at all surprising that proponents of reform have looked in the direction of initiatives, which bypass both Congress and state legislatures. If popular dissatisfaction⁴⁰ and academic

36. Kevin Yamamura, *Legal Challenge on Electoral Change*, SAC. BEE, Nov. 2, 2007, at A4, available at <http://www.sacbee.com/111/story/467322.html>. If the measure would have appeared on the November ballot and passed, it would have been vulnerable to challenge on grounds that it could not have gone into effect until the 2012 presidential election because initiative measures, unless they otherwise provide, go into effect the day after the election. CAL. CONST. art. II, § 10a (“An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.”). This question is beyond the scope of this Article.

37. Sacramento Bee Capitol Alert, *Electoral College Measure Falls Short*, Feb. 5, 2008, <http://www.sacbee.com/static/weblogs/capitolalert/latest/010429.html>.

38. KOZA et al., *supra* note 21, at 291-337.

39. So far, Maryland is the only state to pass the National Popular Vote plan through legislative enactment. MD. CODE ANN., ELEC. LAW § 8-5A-01 (1957). State legislatures in California and Hawaii passed the measure, but the governor of each state vetoed the plan. Brian Charlton, *House Democrats Choose Not to Override Electoral College Veto*, AP, May 4, 2007; 5/4/07 AP Alert - HI 05:02:53. Steve Lawrence, *Senate OKs Giving State's Electoral College Votes to Popular Vote Winner*, AP, May 15, 2007, 5/15/07 AP Alert - CA 00:22:35. It is beyond the scope of this Article whether Article II of the United States Constitution obviates the need for state legislatures to obtain the signature of the governor to make Electoral College change effective.

40. “Polls since the 1970s consistently show approximately 60 percent of Americans agree” that the Electoral College should be abolished. LARRY J. SABATO, *A MORE PERFECT UNION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* (2007).

dissatisfaction⁴¹ with the Electoral College continues, expect to see more Electoral College initiatives in the future, at least until the Supreme Court rules on the Article II question.

II. The Constitutionality of Initiated Electoral College Reform

A. Introduction

The primary legal question over initiated Electoral College reform is easily stated: Article II of the Constitution provides: “Each state shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress”⁴² Does vesting power in each state’s “Legislature” to set the manner of choosing presidential electors mean that only the state legislature can choose such rules, or does the term refer instead to the state’s entire “legislative process,” including the initiative process in states that give the people the power to legislate via direct initiative? If it means the former, which I will refer to as the “Legislature means Legislature” theory of Article II,⁴³ initiated Electoral College reform is unconstitutional. If it means the latter, which I will refer to as the “Legislature as legislative process” theory of Article II, then there is no Article II objection to initiated Electoral College reform.

In a comment to *New York Times* columnist Bob Herbert, noted constitutional law scholar Laurence Tribe stated that the proposed California Electoral College initiative,

clearly violates Article II of the Constitution, which very explicitly requires that the electors for president be selected ‘in such manner as

41. Among the recent academic books criticizing the current electoral college are BENNETT, *supra* note 11; LEVINSON, *supra* note 14; EDWARDS, *supra* note 10. See also SABATO, *supra* note 40, at 134-53 (arguing that we “mend,” not “end” the Electoral College).

42. U.S. CONST. art. II, § 1 (emphasis added).

43. See C. Bryan Wilson, *What’s a Federalist to Do? The Impending Clash Between Textualism and Federalism in State Congressional Redistricting Suits Under Article I, Section 4*, 53 DUKE L.J. 1367, 1383 (2004) (discussing, in terms of Article I, Section 4, “The Literal Meaning: ‘Legislature’ Means ‘Legislature’ and No Other State Entity.”). The “Legislature means Legislature” concept sometimes goes under the name “Independent State Legislature” theory. See Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 732 (2001). The “Independent” portion of the term refers to the right of the state legislature to set rules for choosing electors unencumbered by other branches of state government or other state-based constraints, such as state constitutions. In the context of the dispute over initiated Electoral College reform, I believe the term “Legislature means Legislature” theory is more intuitive than the term “Independent State Legislature.”

the Legislature' of the state directs In Mr. Tribe's view, the 'one and only way' for California to change the manner in which its electoral votes are apportioned is through an act of the State Legislature.⁴⁴

Professor Tribe's certitude is an eerie echo of Justice Stevens' dissent in the 2000 *Bush v. Gore* case, in which the Justice stated the opposite position, finding it "perfectly clear" that the term "Legislature" used in Article II should be interpreted as parallel to its use in Article I, section 4—which Justice Stevens read as consistent with the "Legislature as legislative process" theory.⁴⁵

As I will argue, the answer to the constitutional question is far from clear in either direction. There is no case law directly on point, and the remaining case law can be used to support either position. Even if one moves beyond precedent to the possible purposes behind Article II—from democratization/legislative filtration, to anti-partisan manipulation, to preserving the national interest or promoting federalism—the issue is not easily resolved. As Professor Pildes told Bob Herbert, "This is not an open-and-shut case."⁴⁶

B. The Textualist Argument and Original Understanding

The strongest argument in favor of the "Legislature means Legislature" theory is a purely textual one with great intuitive appeal. Article II provides that each state "Legislature" gets to "direct" the "manner" for choosing presidential electors. There seems little question

44. Bob Herbert, *In 2008, Bush v. Gore Redux?*, N.Y. TIMES, Sept. 22, 2007, at A15, available at <http://www.nytimes.com/2007/09/22/opinion/22herbert.html>.

45. *Bush v. Gore* 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting) ("It is perfectly clear that the meaning of the words 'Manner' and 'Legislature' as used in Article II, § 1, parallels the usage in Article I, § 4, rather than the language in Article V. Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision.") (citations omitted).

46. Herbert, *supra* note 44. Professor Amar initially took a middle position as well: "There is a significant chance the current Court would continue to hold that Article II's specific reference to state 'legislatures' insulates those legislatures from judicial oversight that otherwise would be provided for under state law If that is so, it is at least arguable that the same could be said about popular initiatives that override and thus displace the statutes the California legislature has already passed in this area: These initiatives, too, might be seen by the Court as impermissibly interfering with the legislature's complete discretion in this area." Vikram David Amar, *The So-Called Presidential Election Reform Act: A Clear Abuse of California's Initiative Process*, FINDLAW, Aug. 17, 2007, <http://writ.lp.findlaw.com/amar/20070817.html>. In his current piece in this symposium, however, he has come to the view that "Article II should *not* be read to foreclose (even ill-advised) initiative measures" reforming a state's system for allocating Electoral College votes." See Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631 (2008).

that the term “Legislature,” used at the time of the ratification of the Constitution (and today), meant (and means) the body of representatives that passes laws in each state.⁴⁷ Applying this definition, the people of a state, acting through the initiative process, may not “direct” the “manner” of choosing presidential electors because the “people” are not the “Legislature.”⁴⁸

The drafting history of Article II is scant,⁴⁹ though we do know that the drafters put the power to choose the rules for presidential electors in the hands of the state legislatures rather than mandating—as in the case of choosing members of the House of Representatives⁵⁰—the popular election of the President.⁵¹ The initiative process did not exist in the states at the time of the ratification of the United States Constitution at the end of the eighteenth century⁵² and, unsurprisingly, I am aware of nothing in Article II’s drafting history suggesting the drafters or ratifiers considered the question of the propriety of initiated Electoral College reform.

To some, the textualist argument may be enough to embrace the “Legislature means Legislature” theory and to reject initiated Electoral College reform as a violation of Article II. It appears that this instinct is

47. As the Supreme Court explained in *Hawke v. Smith*, 253 U.S. 221, 227 (1920), discussing the term in the context of the Constitution’s Article V: “A Legislature was [at the time of the ratification of the Constitution] the representative body which made the laws of the people.” The Supreme Court approved this language in *Smiley v. Holm*, 285 U.S. 355, 365-66 (1931), an Article I, Section 4 case. See also *id.* (“Wherever the term ‘legislature’ is used in the Constitution, it is necessary to consider the nature of the particular action in view.”).

48. Professor Epstein appears to view this textualist interpretation of Article II as self-evident: “Article II, Section 1, Clause 2 reads like a strict liability provision. The Florida legislature directs the manner in which presidential electors are appointed, and all other actors within the Florida system have to stay within the confines of that directive.” Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, in *THE VOTE: BUSH, GORE AND THE SUPREME COURT* 13, 20 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

49. The most extensive discussion of Article II’s drafting history that I have found appears in Smith, *supra* note 43, at 743-64. See Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in *THE VOTE*, *supra* note 48, at 99, 103 (“There is no relevant legislative history explaining why the framers of the Constitution made [the departure from the ‘usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among state governing institutions.’]”).

50. U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

51. Smith, *supra* note 43, at 748-56.

52. WATERS, *supra* note 23, at 3, (reports that Thomas Jefferson proposed an initiative process for Virginia in 1775 but it was not put in the Virginia Constitution).

behind Professor Tribe's comment that the Constitution "very explicitly" leaves the question in the hands of the legislature.⁵³

But textualist arguments do not always persuade even textualists, especially in the face of case law and practice that has already added nuance to the meaning, or even changed the plain meaning, of words.⁵⁴ Indeed, as we shall see, despite the apparent clarity of the meaning of the term "Legislature," in some constitutional contexts the Supreme Court has read the term "Legislature" more broadly to include the "legislative process" of the state. These precedents could weigh heavily on Supreme Court Justices who might have decided the issue differently were they writing on a clean slate. Thus, I turn to the relevant precedents and policy arguments on this question.

C. The Relevant Precedents under Article II, and under Articles I and V

1. Article II Precedent

As there is no direct Supreme Court precedent on the question of the constitutionality of initiated Electoral College reform against an Article II challenge, I turn to the closest cases on point, beginning with other Article II cases.

Article II achieved something of national prominence during the 2000 election and the ensuing controversy over allocation of Florida's electoral votes. This is not the place for a rehash of all the legal issues arising out of that controversy.⁵⁵ But the Supreme Court dealt with Article II in *both* of the cases it heard arising out of the Florida controversy, and these decisions may shed some light on the initiated Electoral College reform issue as well.

In the first of these cases, *Bush v. Palm Beach County Canvassing Board*,⁵⁶ the Supreme Court considered the constitutionality of a decision issued by the Florida Supreme Court concerning Democratic presidential candidate Al Gore's request for a recount in four Florida counties.⁵⁷ The

53. Herbert, *supra* note 44 (quoting Professor Tribe).

54. Perhaps the best example comes in the area of the Eleventh Amendment, where Justice Scalia, arguably the Justice on the current Supreme Court most committed to textualism, has rejected the literal words of the Eleventh Amendment in favor of century-old precedent. See Lackland H. Bloom, Jr., *Interpretive Issues in Semonole and Alden*, 55 SMU L. REV. 377, 380 (2002).

55. For my own brief summary, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 42-46 (2003). For a more extensive analysis, see ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY* (2001).

56. *Bush v. Palm Beach Canvassing Board*, 531 U.S. 70 (2000).

57. *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000).

Florida Supreme Court reversed the Florida Secretary of State's decisions regarding whether or not to include in electoral returns the results of some of these recounts and to extend the time for some of the recounts.

The Supreme Court's decision in *Bush v. Palm Beach County Canvassing Board* was per curiam and rather cryptic. The Court noted:

As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, 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 Article II, § 1, cl. 2, of the United States Constitution.⁵⁸

The Court then quoted from an 1892 Supreme Court case, *McPherson v. Blacker*,⁵⁹ to the effect that the key words in Article II "operat[e] as a limitation upon the State in respect of any attempt to circumscribe the legislative power"⁶⁰ to set the manner for choosing presidential electors. The Supreme Court then stated that the Florida Supreme Court's decision "may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"⁶¹ The Court remanded the case "for proceedings not inconsistent with this opinion"⁶² for the lower court to explain "the extent to which [it] saw the Florida Constitution as circumscribing the legislature's authority under Article II, § 1, cl. 2."⁶³

Stripped of the obtuse language, the point of the Supreme Court's first Florida case appeared to be this: Article II of the Constitution vests "authority" for setting the manner of choosing presidential electors in the hands of the legislature. In *McPherson*, the Supreme Court wrote that Article II prevents the state from "circumscrib[ing] the legislative power" to set those rules. This principle might apply even to limits on legislative

58. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 76.

59. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

60. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 76 (quoting *McPherson*, 146 U.S. at 25).

61. *Id.* at 77. The Court also noted that it was unclear the extent to which the Court considered the effect of a federal statute, 3 U.S.C. § 5, regarding a "safe harbor" preventing Congressional challenge to a state's Electoral College votes submitted within a certain period of time. *Id.* at 77-78. This point is irrelevant to the Article II analysis in the text.

62. *Id.* at 78.

63. *Id.* The Court also directed the Florida Supreme Court on remand to explain "the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5." *Id.*

power contained in the state's own constitution. Because it was unclear whether the Florida Supreme Court read the Florida constitution's right to vote as trumping the Florida state legislature's rules for choosing presidential electors, remand was in order.⁶⁴

Eight days after the Supreme Court decided *Bush v. Palm Beach County Canvassing Board*, it decided a second case arising from the Florida controversy. Al Gore, by this point, had contested the results of the election and asked for additional manual recounts of votes in certain Florida counties. A Florida trial court judge denied the request for recounts, but the Florida Supreme Court reversed, ordering a statewide recount of all the undervotes cast in the state in the presidential election, along with other relief.⁶⁵ The Florida Supreme Court ruling depended upon several controversial interpretations of Florida's election statutes, and it drew a blistering dissent from the chief justice of that court.⁶⁶

As is well known, in *Bush v. Gore*⁶⁷ the Supreme Court, by a 5-4 vote, reversed the Florida Supreme Court, ending the recount process and leading to the selection of George W. Bush over Al Gore as President. A per curiam opinion for five Justices held that the recounts ordered by the Florida Supreme Court failed to comply with the requirements of the Fourteenth Amendment's Equal Protection Clause, and that a remand for recounts under acceptable standards was inappropriate (with the result being that Florida's votes would be certified for candidate Bush and he would be declared President).⁶⁸ Four Justices rejected the per curiam opinion.⁶⁹

Three of the five Justices signing on to the majority opinion—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—wrote separately as well to argue that the Florida Supreme Court's opinion violated Article II. Whereas the Article II issue in the first Florida case concerned the question whether the state *constitution* was improperly trumping the state legislature's wishes as to the manner of choosing electors, the question in the second Florida case concerned whether *the Florida Supreme Court*

64. On remand, the Florida Supreme Court reached the same decision, this time without relying on the state Constitution. *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1273 (Fla. 2000).

65. *Gore v. Harris*, 772 So.2d 1243, 1247 (2000).

66. *Id.* at 1262-70 (Wells, C.J., dissenting).

67. *Bush v. Gore*, 531 U.S. 98 (2000).

68. *Id.* at 110-11.

69. Two of the Justices in dissent, Justices Breyer and Souter agreed there were constitutional problems with the Florida Supreme Court order, but rejected the majority's decision to end the recounts. The other two Justices, Justices Ginsburg and Stevens, rejected the equal protection argument *in toto*.

itself was improperly trumping the state legislature's wishes as to the manner of choosing electors.

Chief Justice Rehnquist wrote that under Article II,

[T]he general coherence of the legislative scheme [for the appointing of Florida's 25 electors] may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies What we would do in the present case is . . . hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.⁷⁰

In other words, in the view of the concurring Justices, the Florida Supreme Court's interpretation of Florida statutes governing election contests so mangled Florida's legislatively-created statutes as to create "new law" for choosing presidential electors in violation of Article II.

The four *Bush v. Gore* dissenters took great issue with the view of Article II expressed in Chief Justice Rehnquist's concurrence. Justice Stevens wrote that "nothing in Article II of the Constitution frees the state legislature from the constraints in the State Constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicated that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes."⁷¹ He added that "[i]t is perfectly clear that the meaning of the words 'Manner' and 'Legislature' as used in Article II, § 1, parallels the usage in Article I, § 4, rather than the language in Article V. Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision."⁷²

70. *Bush v. Gore*, 531 U.S. at 114-15 (Rehnquist, C.J., concurring).

71. *Id.* at 124 (Stevens J., joined by Ginsburg, J., and Breyer, J., dissenting). Justice Souter wrote that the Florida Supreme Court's interpretation was not "unreasonable to the point of displacing the legislative enactment" in violation of Article II. *Id.* at 131. Justice Ginsburg wrote that "[b]y holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit." *Id.* at 141 (Ginsburg J., joined by Stevens, J., Souter, J. and Breyer, J., dissenting). Justice Breyer wrote that "neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson v. Blacker* [], leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of pointing electors. . . Nor, as Justice Stevens points out, have we interpreted the federal constitutional provision most analogous to Art. II, § 1—Art. I, § 4—in the strained manner put forth in the concurrence." *Id.* at 148 (Breyer, J., joined by Stevens, J., Ginsburg, J., and Souter, J., dissenting) (citations omitted).

72. *Id.* at 124 n.1 (Stevens, J., dissenting) (citation omitted).

What do these two cases tell us about the Supreme Court's understanding of Article II in relation to the question of the constitutionality of initiated Electoral College reform under Article II? Very little. It is possible to read *Bush v. Palm Beach County Canvassing Board* as supporting the "Legislature means Legislature" theory of Article II. After all, the case cited *McPherson v. Blacker* for language suggesting that no organ of state power—presumably from a state constitution to the state judiciary to the people acting through the initiative process—may "circumscribe the legislative power" to set the manner for choosing presidential electors. That reading is consistent with a strict textualist reading of the clause.

But a closer look at *Palm Beach County Canvassing Board* shows that it did not actually endorse this language from *McPherson*. The Court first described *McPherson* as "not address[ing] the same question petitioner raises here."⁷³ It then quoted *McPherson* without necessarily endorsing it. It concluded without any statement that the legislature's Article II power is plenary and exclusive in determining the rules for choosing presidential electors. Instead, after quoting from *McPherson*, the Supreme Court in *Palm Beach County Canvassing Board* simply remanded the case to the Florida Supreme Court for *clarification of the basis* for the lower court's ruling, *without committing itself* to striking down the lower court's decision even if it determined that the lower court ruling was based upon a holding that the Florida state constitution trumped the Florida legislature's statutes governing the presidential election process.

This reading of *Palm Beach County Canvassing Board* is consistent with the posture and politics of the case. There was undoubtedly pressure both inside and outside the Supreme Court to issue a unanimous opinion in the Florida cases to show that the Supreme Court as an institution stood above politics. To reach such a unanimous opinion, however, the Court had to craft an opinion that would satisfy divergent views of the constitutional question. *Palm Beach County Canvassing Board* is more of a punt than an opinion; by remanding, it bought time for the issue to resolve itself some other way. It is not strong authority for the "Legislature means Legislature" theory of Article II.

Further support for the argument that *Palm Beach County Canvassing Board* decided nothing on the Article II question comes from the Court's decision issued only eight days later in *Bush v. Gore*. Though *Palm Beach County Canvassing Board* was unanimous, in *Bush v. Gore* the Court divided bitterly on the meaning of Article II and the appropriate reading of

73. *Palm Beach County Canvassing Bd.*, 531 U.S. at 76.

McPherson. Three Justices read *McPherson* and Article II as supporting the “Legislature as Legislature” theory of Article II; four Justices strongly reject this reading in favor of the “Legislature as legislative process” reading of Article II; and two Justices, Justices Kennedy and O’Connor, did not express an opinion on the issue at all.⁷⁴

Thus, a fair reading of both Florida cases is that there is not a majority opinion on the meaning and proper scope of Article II. Moreover, even if there were a majority on the questions presented in the Florida cases—whether a *state constitution* or the *state judiciary* may trump a state legislature’s rules for choosing presidential electors—that decision does not necessarily answer the question whether *the people using the initiative process* can trump an earlier legislatively-enacted set of rules.

Nor does it appear that the 1872 case of *McPherson v. Blacker*, which figured so prominently in the two Florida cases, answers the question of the proper reading of Article II. In *McPherson*, the Supreme Court rejected a complaint that the decision of the Michigan legislature to use electoral districts for the allocation of presidential electors violated Article II. There seems little question on the merits that a state legislature has such power under Article II, and therefore any statements about whether Article II limits state constitutions, courts, or the people is unnecessary to the decision and therefore *obiter dicta*. Moreover, what the *McPherson* Court *did* say on that score was contradictory. On the one hand, the *McPherson* Court wrote that Article II prevents the state from circumscribing legislative power.⁷⁵ It also stated that Article II leaves the selection of the manner for choosing presidential electors “exclusively” to the legislatures.⁷⁶ On the other hand, *McPherson* implicitly rejects the “Legislature means Legislature” theory by stating that “[t]he Legislative power is the supreme authority *except as limited by the constitution of the*

74. Professor Amar states that Chief Justice Rehnquist’s *Bush v. Gore* concurrence “likely had the tacit support of Justice’s O’Connor and Kennedy, as well.” Amar, *supra* note 46. I am not sure why Professor Amar draws this conclusion. If anything, the opposite appears to be the case. Many people have speculated that the Rehnquist concurrence was originally to be the majority opinion of the Court, and that Justices Kennedy and O’Connor, uncomfortable with the Rehnquist approach, drafted the *per curiam* opinion. See, e.g., Linda Greenhouse, *Bush v. Gore: A Special Report; Election Case a Test and Trauma for Justices*, N.Y. TIMES (Feb. 20, 2001) at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9A03EED71F30F933A15751C0A9679C8B63> (“although intended as a majority opinion, the chief justice’s opinion failed to get the support of Justices Kennedy and O’Connor. They drafted their own opinion, concluding that the standardless recount violated the guarantee of equal protection”).

75. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

76. *Id.* at 27.

State.”⁷⁷ Zipkin, noting the conflicting dicta, concludes quite correctly that *McPherson* “is a very weak foundation for an important decision on constitutional law; the plaintiff’s claim was patently unsound and anything the Court would have said beyond its rejection would be extraneous.”⁷⁸

One other set of Article II cases merits a brief mention before turning to cases under other provisions of the Constitution. The Supreme Court has repeatedly upheld *congressional* power to regulate federal elections, despite the fact that by its own express terms Article II gives Congress no more than the power to set the *time* for the choosing of presidential electors.⁷⁹ While these precedents by no means speak directly to the question of the propriety of *initiated* Electoral College reform, they do represent a rejection of a narrow textualist approach to the meaning of Article II. Even Justice Scalia, a committed textualist, has rejected a narrow textualist reading of Article II in the context of the question of Congressional power to regulate presidential elections, at least to some extent.⁸⁰

2. *The Article I, Section 4, and Article V Cases*

Faced with the lack of any definitive precedent in the Article II area, we might look fruitfully to interpretation of two other Constitutional provisions that require understanding the meaning of the term

77. *Id.* at 25; see also *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting) (quoting this language from *McPherson*). *McPherson* further provides that “the sovereignty of the people is exercised through their representatives in the legislature, unless by fundamental law power is elsewhere reposed.” *McPherson*, 146 U.S. at 25 (emphasis added). This language of course suggests power could be reposed in the people themselves, through devices of direct democracy.

78. Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 362-63 (2003). Both Zipkin, *id.* at 358-64, and Smith, *supra* note 43, 764-83, trace the history of the “Legislature means Legislature” reading of Article II in some state supreme court cases which did not reach the United States Supreme Court.

79. In *Burroughs v. United States*, 290 U.S. 534, 545 (1934), the Court held that Congress had the power under Article II to regulate corrupt practices that could affect presidential elections. In *Buckley v. Valeo*, 424 U.S. 1, 3 (1976), the Court upheld Congress’s power to regulate campaign financing in both congressional and presidential elections. And in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld Congress’s power to change the voting age for president to 18. Justice Black cast the decisive vote on the issue, concluding that “[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.” *Id.* at 124 (opn. of Black, J.). I recently cited these cases in testimony before the Senate Rules and Administration Committee on the likely constitutionality of a proposed federal statute that would set the dates for a regional presidential primary system. See *Regional Presidential and Primary Caucus Act of 2007: Hearing on S. 1905 Before United States Senate Committee on Rules and Administration*, 110th Cong. (2007) (statement of Richard L. Hasen), available at <http://rules.senate.gov/hearings/2007/HasenTestimony091907.pdf>.

80. Antonin Scalia, *The Legal Framework for Reform*, 4 COMMONSENSE 40, 47 (1981).

“Legislature.” Article I, Section 4 of the Constitution 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*; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.”⁸¹ Article V requires ratification of constitutional amendment “*by Legislatures* of three fourths of the several States.”⁸² Unfortunately, from the point of view of clarity, the term “Legislature” has been interpreted in contradictory ways in these two constitutional provisions.

The two leading cases in the Article I, section 4 context support the “Legislature as legislative process” reading of the Constitution. In *Ohio ex rel. Davis v. Hildebrant*,⁸³ the Ohio Constitution had been amended to provide that legislative power was vested not only in the state legislature, but also “in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly.”⁸⁴ The Ohio general assembly passed a redistricting act for congressional elections, and enough electors petitioned for the measure to be subject to voter approval through a referendum. Voters rejected the redistricting act in a referendum. The Supreme Court considered whether, under Article I, Section 4, the results of the referendum affected the validity of the redistricting measure passed by the Ohio general assembly. Rejecting the “Legislature as Legislature” theory in this context, the Supreme Court held that “the referendum constituted a part of the state Constitution and laws; and was contained within the legislative power; and therefore the claim that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit.”⁸⁵ The Court also suggested that any further challenge to the use of the referendum power (such as by claiming it violated the constitutional guarantee of a republican form of government) was a nonjusticiable political question best addressed by Congress.⁸⁶

Similarly, in *Smiley v. Holm*,⁸⁷ the two houses of the Minnesota state legislature passed a bill dividing the state into nine new congressional districts following a decennial census. The governor returned the bill

81. U.S. CONST., art. I, § 4 (emphasis added).

82. *Id.*, art. V (emphasis added).

83. *Ohio ex rel Davis v. Hildebrant*, 241 U.S. 565 (1916).

84. *Id.* at 566.

85. *Id.* at 568.

86. *Id.* at 569.

87. *Smiley v. Holm*, 285 U.S. 355 (1932).

without his approval. The Minnesota legislature took the position that under Article I, Section 4, the governor's approval was not necessary for the redistricting measure to go into effect. The Supreme Court disagreed, ruling that in the absence of a contrary intent, "the exercise of the authority [to regulate congressional elections] must be in accordance with the method which the state has prescribed for legislative enactments."⁸⁸ Because normal laws in Minnesota were subject to gubernatorial veto, the redistricting measure returned by the governor could not be effective.⁸⁹

These cases remain good law today under Article I, section 4, and lend some support to the initiated Electoral College reform power. To the extent there is reason to read the term "Legislature" in Article I, section 4 parallel to its use in Article II, *Smiley* and *Hildebrant* stand for the proposition that "Legislature" can mean "legislative power" and not just the actual state legislature. It should be noted, however, that in both *Smiley* and *Hildebrant* the state legislature still retained *some role* in the choice of congressional districting. Laws passed by the initiative process would completely exclude the legislature from that process (or the analogous process of selecting the manner of choosing presidential electors under Article II). So it would be possible to (1) accept the analogy between Article II and Article I, Section 4 and (2) accept *Smiley* and *Hildebrant* as good law, (3) but still hold that *initiated* Electoral College reform violates Article II because it leaves no role for the state legislature.⁹⁰

One recent Article I, section 4 case deserves mention. In *Colorado General Assembly v. Salazar*,⁹¹ the Supreme Court denied certiorari in a case involving a Colorado Supreme Court decision on Congressional redistricting. The Colorado Supreme Court had held that under the Colorado constitution, there could be only one redistricting conducted per decade. A court had ordered redistricting earlier in the decade when the Colorado legislature failed to pass a redistricting plan, and in *Salazar* the Colorado Supreme Court held that the earlier, judicially-mandated

88. *Id.* at 367.

89. *Smiley*, 285 U.S. at 372-73.

90. Indeed, Justice Stevens, speaking only for himself, has suggested that under Article I, section 4, initiated changes to the manner of conducting Congressional elections that are not changeable by the state legislature may be unconstitutional. See *California Democratic Party v. Jones*, 530 U.S. 567, 602 (Stevens, J., dissenting) ("The text of [Article I, section 4] suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislature[s].'"); see also *Cook v. Gralike*, 531 U.S. 517, 526 n.20 (2001) (refusing to reach question whether initiative requiring disclosure of congressional candidate's views on term limits violated Article I, section 4).

91. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004).

districting prohibited the state legislature from redistricting again until the next decade. The Colorado General Assembly and Secretary of State argued that the Colorado Supreme Court's construction of the Colorado Constitution violated Article I, Section 4—paralleling the argument about the Florida Supreme Court usurping the Florida legislature's Article II power in *Bush v. Gore*. The same three Justices advancing the Article II theory in a concurrence in *Bush v. Gore*—Chief Justice Rehnquist, and Justices Scalia and Thomas—dissented from the denial of certiorari in *Salazar* on similar grounds. “[T]o be consistent with Article I, § 4, there must be some limit on the State’s ability to define lawmaking by excluding the legislature itself in favor of the courts.”⁹² Though the statement seems to support the “Legislature means Legislature” theory, the dissenters distinguished *Smiley* and *Hildebrant* in a way that could actually support the constitutionality of initiated Electoral College reform: “Conspicuously absent from the Colorado lawmaking regime, under the Supreme Court of Colorado’s construction of the Colorado Constitution to include state-court orders as part of the lawmaking, is participation in the process by a body representing the people, or the people themselves in a referendum.”⁹³ The denial of a writ of certiorari is not a ruling on the merits, so we should be careful not to read too much into the fact that only three Justices advanced some version of the “Legislature means Legislature” theory in the Article I, section 4 context.

Though the leading Article I, section 4 cases endorse the “Legislature as legislative process” theory, on the other side of this divide are Article V cases. In *Hawke v. Smith*,⁹⁴ the Supreme Court considered the propriety of an Ohio constitutional provision reserving the right of voters to adopt or reject at the polls a decision by the state legislature to ratify an amendment to the United States Constitution. Article V of the U.S. Constitution requires ratification by “the Legislatures of three-fourths of the several states.”⁹⁵ And in *Hawke* the Supreme Court held that the term “Legislature” in this context meant the actual state legislature, and not the “Legislature as legislative power.”

The Court held the error with the “Legislature as legislative power” theory of Article V is that it rested on the “fallacious” idea that ratification of a constitutional amendment was an act of legislation. Instead, ratification “is but the expression of the assent of the State to a proposed

92. *Salazar*, 541 U.S. at 1095 (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting).

93. *Id.*

94. *Hawke v. Smith*, 253 U.S. 221 (1920).

95. U.S. CONST. art. V.

amendment.”⁹⁶ The Court further endorsed an administrative rationale for the rule that only the state *legislature* plays a role in ratification of amendments to the U.S. Constitution: “Any other view might lead to endless confusion in the manner of ratification of federal amendments.”⁹⁷

Finally, the *Hawke* Court distinguished its decision in *Hildebrant* on two grounds. First, Congress itself had recognized the power of states to approve referenda concerning redistricting matters, and Article I, Section 4 (unlike Article II) gives Congress the power to choose rules for congressional elections that trump state rules.⁹⁸ Second, the *Hawke* Court contrasted the *nature* of the action of a state legislature in setting rules for Congressional elections under its Article I, Section 4 power compared to its ratification of constitutional amendments under its Article V power: “Such legislative action [in the Article I, Section 4 context] is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.”⁹⁹ As Zipkin puts it, in the Article V context, “the state has no power to define its legislature as it chooses when the legislature is co-opted to perform a federal task.”¹⁰⁰

Taken together, these cases provide a reasonable amount of support for the “Legislature as legislative power” theory of Article II, which would allow for initiated Electoral College reform. The Court in its Article I, Section 4 cases has endorsed this theory, and it appears that Article II legislating the rules for choosing presidential electors is more like Article I, Section 4 legislating the rules for congressional elections than like Article V ratification of constitutional amendments. In both the Article I, Section 4 and Article II contexts, the Constitution contemplates “legislative action,”¹⁰¹ which may extend beyond the pure actions of the legislature to other organs of state power. In the Article V context, in contrast, there is simply the question of legislative “assent or dissent.”¹⁰² As Justice Stevens put it in his dissent in *Bush v. Gore*, “Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V

96. *Hawke*, 253 U.S. at 229.

97. *Id.* at 230.

98. *Id.*

99. *Id.* at 231.

100. Zipkin, *supra* note 78, at 373; *see also* *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (“[T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.”).

101. *Hawke*, 253 U.S. at 229.

102. *Id.* at 231.

simply calls on the legislative body to deliberate upon a binary decision.”¹⁰³ On the other hand, Article II gives more power to the state legislature than Article I, Section 4. The former gives the state legislature the power to choose electors directly; the latter gives the state legislature only the manner for running congressional elections (subject, of course, to congressional override, absent in Article II).

The case for the Article I, Section 4 analogy is not ironclad, especially given the force of the contrary textualist argument and the strong contrary views in the two recent Florida decisions, which could weigh heavily on the Supreme Court if the issue comes before it. Whether the similarities between the two sections of the Constitution would be enough for the Supreme Court to uphold initiated Electoral College reform as consistent with Article II—especially given the fact that such reform cuts the state legislature completely out of the process of setting the manner for choosing presidential electors, remains to be seen.¹⁰⁴ Given this uncertainty, I turn finally to policy-based arguments supporting the two alternative theories of Article II.

D. A Purposivist/Policymaking Approach to Article II’s Use of the Term “Legislature”

Faced with a textualist argument pointing in one direction on the meaning of Article II and a case law analysis pointing, at least moderately, in the other direction, it is fruitful to turn to policy arguments that might break the tie over whether initiated Electoral College reform violates Article II. Here, I consider three potential clusters of theories about the purpose of Article II—democratization/filtration, anti-manipulation, and national interest/federalism—and consider whether initiated Electoral College reform is consistent with, or in opposition to those purposes. Unfortunately, these theories too point in conflicting directions.

103. *Bush v. Gore*, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting); *see also* Wagner, *supra* note 24, at 599 (“given the strong viewpoints of the four dissenters in *Bush v. Gore*, as well as the appeal of a structural argument highlighting the similarities between Article I, Section 4 and Article II, Section 1, the better answer is to regard ballot initiatives as a constitutional exercise of a state’s legislative power under Article II, Section 1.”).

104. The issue could become even more complicated if a state legislature acted *after* initiated Electoral College reform passes in a state to reverse the initiated reform. Even if state law would ordinarily prevent the state legislature from overruling an initiative unless the initiative so provides (*see, e.g.*, CAL. CONST. art. II, § 10), perhaps Article II of the U.S. Constitution would give the state legislature the power to do so.

1. Democratization/Filtration

Judge McConnell, writing in the context of *Bush v. Gore*, gives “two apparent functional justifications”¹⁰⁵ for the provision. His first is a theory of democratization:

[Article II] ensures that the manner of selecting electors will be chosen by the most democratic branch of the state government. The election of presidential electors need not be directly democratic; the legislature could select the electors itself, or even delegate authority to a more limited body. . . . But by vesting the authority to choose the mode of selection in the most democratic branch, the framers gave that decision a democratic bias.¹⁰⁶

Judge McConnell offered this theory in favor of the concurring opinion’s approach in *Bush v. Gore* finding that the state supreme court had usurped the power of the state legislature to choose presidential electors: Certainly legislatures are more “democratic” than the courts and perhaps more democratic than the executive branch. But arguably the initiative process is even more “democratic” than the state legislature, in that the people themselves, rather than their representatives, get to choose the rules. Indeed, the initiative process is particularly valuable when it can be used for election law reform that might not otherwise take place because of the self-interest of legislators.¹⁰⁷ If the purpose of Article II is democratization, then initiated Electoral College reform should be constitutional, even encouraged.

However, to the extent one cares about the framers’ intent, there is reason to doubt the premise of the argument that Article II’s purpose is democratization. What we know from Article II’s scant legislative history is that at least some of the Constitution’s drafters favored giving control over the rules of choosing presidential electors in the hands of state legislatures rather than, as in the case of choosing members of Congress, directly in the hands of the people.¹⁰⁸

105. McConnell, *supra* note 48, at 103.

106. *Id.*, at 103-04.

107. Even some opponents of the initiative process have recognized the point. See Richard L. Hasen, *Comments on Baker, Clark, and Direct Democracy*, 13 J. CONTEMP. L. ISSUES 563, 564 (2004).

108. See Smith, *supra* note 43, at 752-53 (explaining that Elbridge Gerry favored legislative appointment to protect state interests and to “filter the popular will through an intermediate body.”).

Though this history is far from clear, and some of the ratifiers likely believed Article II gave the power to choose electors to the people,¹⁰⁹ in the end the framers of Article II made a *less democratic* choice than direct election of the president by the people. Indeed, it is just as plausible to reject the *democratization* theory in favor of a *filtration* one. The framers put the power in the hands of legislatures to *lessen* the amount of the direct influence of the people. Legislatures act as agents for filtering popular will, and provide various means by which those with intense feelings can block controversial legislation. Allowing Electoral College reform through the initiative process eliminates the legislative filtration function. Thus, if we read Article II's true purpose as *filtration* rather than *democratization*, initiated Electoral College reform should be rejected.

2. *Anti-manipulation*

Judge McConnell offers a second rationale for Article II:

[L]egislatures, in contrast to courts and executive officials, must enact their rules in advance of any particular controversy. A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates. . . . To be sure, this veil of ignorance is only partially opaque: it is sometimes possible to make an educated guess about the probable partisan consequences of particular electoral rules. For example, favorable rules for recognizing absentee ballots from abroad could be expected to benefit Republicans, and easy registration of voters could be expected to benefit Democrats. Partisan calculation therefore can play a role. By requiring the manner of selection of electors to be specified in advance by the legislature, however, the Constitution limits the ability of political actors to rig the rules in favor of their candidate.¹¹⁰

The anti-manipulation rationale, as offered by Judge McConnell, moderately supports the constitutionality of initiated Electoral College reform. Initiatives, like statutes passed by legislatures, must be written in advance. Indeed, given the lead time necessary to write an initiative, obtain a title and summary from a government agency, collect signatures, and have those signatures verified, the lead time on initiatives is much longer than legislation. Presumably there are some rules for choosing presidential electors that a *legislature* can choose up to the last minute (or even beyond,

109. Smith ultimately concludes that even at the time of ratification of the Constitution, "Article II, Section 1 meant different things to different people; some would have state legislatures choose electors, while others would have the people do it." *Id.* at 757.

110. McConnell, *supra* note 48, at 103-04.

as we shall see); that is not true with an initiative. If anything, initiatives should be *preferred* to legislative enactments on anti-manipulation grounds.

There are two potential problems with the anti-manipulation rationale, however. First, to the extent one cares about original intent, there is nothing I am aware of that indicates anti-manipulation as a basis for the framers' decision in Article II's language vesting the power for choosing electors in the hands of the state legislature. Indeed, Judge McConnell appears to have generated the rationale not from history but upon considering the facts of the Florida controversy: He was reacting to what he saw as post-election judicial rule changes for choosing presidential electors.

Second, and more importantly, though there is much to be said for setting the rules of the game in advance to prevent partisan manipulation of the process,¹¹¹ Article II is not a very good tool for preventing such manipulation. Indeed, the very essence of the political case against the recent California initiative is that it is just such a partisan manipulation: Republicans proposed it to help the Republican presidential candidate by capturing a portion of the very large set of California electoral votes. Legislatures can play this game too: It is worth recalling that during the Florida controversy, the Florida legislature, dominated by Republicans, stood ready *post-election* to choose an alternative Republican slate of electors should the Florida courts have declared Gore the winner of the state's electoral votes.¹¹² Indeed, the winner-take-all strategy for awarding electoral votes was pushed in Virginia soon after ratification of the Constitution as a means to favor Thomas Jefferson's election as President.¹¹³ Thus, it is difficult to read an anti-manipulation intent into Article II given how little Article II (under either theory) does to prevent such manipulation.

3. *National Interest/Federalism*

There is no question that there is a unique federal interest at stake in the selection of the President.¹¹⁴ Indeed, this policy preference underlies Judge Posner's defense of the result in *Bush v. Gore* as a means of avoiding

111. See *infra* Part III.B.

112. Cf. Cass R. Sunstein, *Order Without Law*, in *THE VOTE*, *supra* note 48, at 204, 217 ("Almost certainly [if the counting went beyond December 12, 2000], the Republican-dominated Florida legislature would have promptly sent a slate of electors, thus producing two (identical) slates for Bush . . .").

113. Bennett, *supra* note 11, at 43.

114. Cf. Zipkin, *supra* note 80, at 375-76 (suggesting in context of Articles I and II there is not a "significant federal interest" in assuring that the state *legislature* plays a substantive federal role).

a potential “constitutional crisis” which would have resulted had Congress been forced to choose between conflicting slates of Florida presidential electors.¹¹⁵ Moreover, it provides a strong reason why the Florida courts in 2000 should not have ordered a “revote” in Palm Beach County despite very strong evidence that the poorly designed “butterfly ballot” caused many voters to mistakenly cast a vote for a different presidential candidate than the one they preferred.¹¹⁶

If it could be shown that the use of the initiative process makes it more likely that the outcome of presidential elections would be in dispute compared to legislatively-set rules for choosing presidential electors, then there might be a compelling reason based on the national interest to read “Legislature” more narrowly. But it is hard to see the case *ex ante* that initiated Electoral College reform is more likely than legislatively-enacted reform to create such uncertainty, except insofar as the Article II cloud now hangs over the controversy before the Supreme Court finally resolves it. Once that issue is resolved, assuming the Court approves initiated Electoral College reform, initiated rule changes seem no more problematic to the national interest than legislative ones.

To promote the interest of national uniformity of the rules for choosing presidential electors, the framers could have adopted a uniform rule for how states choose presidential electors; the Constitution does just that in providing that members of the House of Representatives must be chosen in popular elections. However, the Constitution’s choice to leave it to the states without even the possibility of congressional override of state rules—as in Article I, section 4—shows a commitment not to national uniformity but to *federalism and diversity*. Once we accept the principle of state variation, it makes sense to allow those states that have adopted the initiative process as a means of making all kinds of important public policy decisions to be able to use it for Electoral College rule choice as well. Thus, federalism supports the idea of initiated Electoral College reform.¹¹⁷

115. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001). For my critique of this analysis, see Richard L. Hasen, Book Review, *A “Tincture of Justice:” Judge Posner’s Failed Rehabilitation of Bush v. Gore*, 80 TEXAS L. REV. 137 (2001).

116. On the evidence of the effect of the butterfly ballot, see Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793 (2001). On the legal question of the propriety of a revote in the Palm Beach County case, see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 991-93 (2005); Steven J. Mulroy, *Right Without a Remedy? The “Butterfly Ballot” Case and Court-Ordered Federal Election “Revotes,”* 10 GEO MASON L. REV. 215 (2001).

117. Cf. Wilson, *supra* note 43, at 1388-98 (apply federalist approach to question of constitutionality of state court review of legislatively-enacted congressional redistricting plans).

I am afraid that this policy analysis too leaves us in something of a muddle. There are reasonable policy arguments to be made on both sides of this question, and none of these arguments appears to be a strong trump of the others. There are sound arguments to be made on both sides, and a Supreme Court decision either way is both plausible and defensible.

III. Avoiding Post-Presidential Litigation Over Article II Challenges to Initiated Electoral College Reform

A. The Benefits of Pre-election Review of Article II Challenges

Part II demonstrates that the constitutional question surrounding initiated Electoral College reform is difficult indeed. But sooner or later, courts are going to have to resolve it. In this part, I argue that the question should be resolved sooner rather than later.

I have elsewhere made the general case that courts should resolve election law disputes as early as possible and use the doctrine of “laches” to bar suits filed after an election that could have been filed earlier.¹¹⁸ Pre-election review sometimes provides the only way to give plaintiffs effective relief;¹¹⁹ in contrast, post-election litigation, when the winner and loser of the election will be determined by a court decision, injects courts into the political thicket, threatening the legitimacy of both the courts and the electoral process.¹²⁰ Generally speaking, a rule encouraging pre-election review and discouraging post-election review serves the public interest best.

Nonetheless, courts sometimes have been reluctant to engage in pre-election review,¹²¹ perhaps hoping that some issues will resolve themselves before the election. The Supreme Court’s recent opinion in *Purcell v. Gonzalez*¹²² may have made things worse in this regard, by suggesting that courts should avoid pre-election review where doing so can engender voter confusion about the rules applicable to an upcoming election.¹²³

Regardless of the general merits of delaying a decision in election law cases, courts should not delay decisions on the constitutionality of

118. Hasen, *supra* note 115, at 991-99.

119. *Id.* at 992.

120. *Id.* at 993.

121. *Id.* at 994-99.

122. *Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006).

123. For my criticism of *Purcell* on this point, see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 36-37 (2007).

initiatives that would change the means for allocating Electoral College votes. As the 2000 Florida controversy showed, every court decision made when the presidency of the United States may be on the line will be scrutinized, and every judicial decision inconsistent with an observer's political leanings may be characterized, rightly or wrongly, as a political decision made by a biased judge. This danger is especially strong when it comes to an issue such as the Article II issue, for which there is no easy answer to the question of constitutionality.

For this reason, it is good news that had the California Electoral College measure qualified for the November 2008 ballot, the California Supreme Court could have relied upon precedent to entertain a pre-election challenge to the measure's constitutionality. As a general rule, that court will not entertain a pre-election challenge to an initiative raising the claim that the "substantive provisions of the measure are unconstitutional."¹²⁴ However, when the challenge to the measure "rests instead on the contention that the measure is not one that properly may be enacted by initiative,"¹²⁵ pre-election review "may be appropriate."¹²⁶ Thus, in *American Federation of Labor v. Eu*,¹²⁷ the California Supreme Court engaged in pre-election review to strike from the ballot as a violation of Article V of the U.S. Constitution an initiative that would have directed the California legislature to ratify a proposed balanced budget amendment to the Constitution.¹²⁸

Though the California court "may" find it appropriate to engage in pre-election review, there is no guarantee it would do so.¹²⁹ And other states will not engage in substantive pre-election review under any circumstances.¹³⁰ Given the high costs of uncertainty in this area, one would hope that state courts would exercise their discretion to find a way to

124. *Independent Energy Producers v. McPherson*, 38 Cal.4th 1020, 1029 (Cal. 2006).

125. *Id.*

126. *Id.*

127. *American Federation of Labor v. Eu*, 36 Cal.3d 687, 695-97 (1984).

128. The measure also withheld legislative pay in the event the legislature failed to do so, and directed the secretary of state to send a notice of ratification of the amendment to Congress if the state legislature failed to ratify the amendment within forty days of its passage. *See id.* at 693-94.

129. Once the California Supreme Court makes a decision on whether or not the measure violates Article II, the U.S. Supreme Court would appear to have jurisdiction over the case given the federal question presented. *Bush v. Gore*, 531 U.S. 98 (2000). Standing also would appear not to be a problem. *See ASARCO, Inc. v. Secretary of Labor*, 490 U.S. 605, 617-24 (1989).

130. *See Wyoming National Abortion Rights League v. Karpan*, 881 P.2d 282, 286 (Wyo. 1994) (stating that a "majority of courts" in "sister jurisdictions" "have ruled that a controversy over the constitutionality of an initiative is justiciable only after it has been enacted. These courts clearly have held that any challenge to the constitutionality of an initiative does not present a justiciable controversy under any circumstances.").

engage in pre-election review of initiated Electoral College reform before the fate of the presidency would be at stake in the litigation. The costs of waiting to decide such a case until after such a measure passes greatly outweigh the benefits of doing so.

B. The Benefits of a Constitutional Amendment to Delay Implementation of Electoral College Reform Measures

Given uncertainty as to both the Article II question itself and the willingness and ability of the courts to resolve such questions before a presidential election, it is worth considering the merits of an amendment to the U.S. Constitution that would bar changes in a state's rules for the manner of choosing presidential electors from going into effect for at least two years after passage of the change.

Unlike other Electoral College reform proposals that have clear winners and losers, this amendment would be politically neutral, aimed at preventing last minute uncertainty and partisan manipulation of the rules for choosing each state's presidential electors. *Ex ante*, all relevant political actors should favor reducing uncertainty, and all but the most venal will favor eliminating partisan manipulation (and even the venal might favor this proposal if they expect they could be on the wrong end of such manipulation at some point in the future).

On the merits, the only downside I see to such a constitutional amendment is that it might create a problem in the event of some kind of major catastrophe, either within a state or nationally. That is, there may be pressing emergency reasons for allowing immediate changes to the means for choosing presidential electors. For this reason, the amendment should be written to provide for an escape clause from the measure in the event of such a catastrophe.

Consider the following language for a proposed Amendment:

No changes in any state's manner for choosing presidential electors shall be effective until two years after such change is put in effect; except that such changes shall be effective immediately upon a declaration by a majority of Congress, the state's governor, or a 2/3 majority of the state legislature that a state or national catastrophe requires the change to take effect immediately.

As with any constitutional amendment, such a measure is unlikely to pass. It is hard to see what political incentive enough members of Congress and state legislatures would have for carrying this good government provision through the many hurdles of the amendment

process.¹³¹ Still, such a measure *ought* to pass, even if more significant changes to our system for choosing the president remain necessary.

Conclusion

Whether or not the California Electoral College measure qualifies for the ballot and is voted upon, courts eventually will have to confront the question whether initiated Electoral College reform violates Article II of the U.S. Constitution. With the National Popular Vote movement in full swing, and other proposals for Electoral College reform floating around, it is only a matter of time before some initiative changing the system qualifies for a state ballot and stands a chance of passing.

Though the constitutional question is straightforward, the answer is not: A strict textual view suggests that initiated reform is unconstitutional; case law and policy arguments show the question is more uncertain. Reasonable judges could reach opposite conclusions on the question. Lacking any clear constitutional answers, there is a danger that judges deciding the question will appear to the public to be swayed—consciously or subconsciously—by political considerations. If the timing goes just wrong, we could have another *Bush v. Gore* on our hands, with the Supreme Court deciding yet another presidential election under contested standards.

Because of these uncertainties, we should consider steps to avoid another presidential election decided by the courts on these grounds. I have proposed two steps. First, courts should be willing to engage in pre-election review of Electoral College changes by initiative, even if the courts do not otherwise engage in pre-election review of the constitutionality of initiatives. Second, we should amend the Constitution to put a delay on Electoral College reforms, to give time for courts to work out the legal issues surrounding such reforms out of the context of an immediate presidential election. Such a delay also minimizes the chances that partisans (either in the legislature or through the initiative process) could attempt to manipulate Electoral College rules for short-term political gain.

For good or for bad, we appear to be stuck with both the Electoral College for the foreseeable future and fairly widespread opposition to its use. With that combination, it is only prudent to plan how avoid a constitutional crisis over attempts to reform the system.

131. Consider, along similar lines, Congress's inaction over legislation to deal with national catastrophes affecting the composition of Congress despite the major activity of the Continuity of Government Commission. See <http://www.continuityofgovernment.org>.

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