Hastings Constitutional Law Quarterly

Volume 35
Number 4 *Summer 2008*

Article 2

1-1-2008

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Recommended Citation

Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 Hastings Const. L.Q. 631 (2008).
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol35/iss4/2

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Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections

by VIKRAM DAVID AMAR*

In this essay, I focus on the first of the two questions Professor Richard Hasen's graceful and thoughtful essay on whether "initiated changes to rules for choosing Presidential electors violate Article II."[1] Everything Professor Hasen has said on this score is helpful. To the extent that I go beyond Professor Hasen's bottom line of equipoise on this issue[2] and assert (as I do) that Article II should not be read to foreclose (even ill-advised) initiative proposals such as California's (now moot) "Presidential Election Reform Act,"[3] it is because I do more of what Professor Hasen has done in his piece. Namely, I look closely at places other than Article II where the Constitution uses the phrase "legislature of the States" and carefully examine Supreme Court cases on the topic. My own plowing of the ground Professor Hasen stakes out leads me to a firmer conclusion than the one he ventures.[4]

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1. Richard Hasen, *When "Legislature May Mean More than Legislature:" Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599 (2008).

2. *See generally id.*

3. As Professor Hasen points out, the California initiative proposal has apparently failed to garner enough signatures to qualify for the ballot. *Id.* at 606 n.36. The California Secretary of State's website still lists the initiative as pending, subject to a signature count and verification. *See* http://www.sos.ca.gov/. Had the initiative qualified and been passed, I believe it could not have applied to the 2008 election in any event. Vikram Amar, *The So-Called Presidential Election Reform Act: A Clear Abuse of California's Initiative Process*, FINDLAW, Aug. 17, 2007, http://writ.news.findlaw.com/amar/20070817.html.

4. Professor Hasen implies that I have altered my position on this question over the last few months. *See* Hasen, *supra* note 1, at 608 n.46 ("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 .... These initiatives, too, might be seen by the Court as impermissibly interfering with the legislature's complete discretion in this area.' In his

I. The Virtues of Careful Intratextualism

As Professor Hasen apparently believes, oftentimes interpretation of a phrase in the Constitution benefits from a comparison of how similar language elsewhere in the document has been understood.[5] "Legislatures" of the "States" are authorized (and sometimes required) by the Constitution to do a variety of things, and Professor Hasen is wise to consult some of these other areas of the Constitution. In particular, the word "legislature" (referring to States) appears (in its singular or plural form) outside of Article II in Article I, Section 4, Article IV, Sections 3 and 4, Article V, and the Seventeenth Amendment's Section 2.[6] But in consulting and comparing each of these provisions, we must also be sensitive to even subtle textual differences among them.[7]

Regarding the question at hand, one such difference is that the sentence relating to Presidential elections in Article II—where the word "legislature" appears—is one in which the "State" rather than the "legislature" is the subject. Article II provides that "each *State*, shall appoint, in such manner as the legislature thereof may direct" a number of electors.[8] While the institution of the state "legislature" is specifically mentioned, it is the "State"—a term that might naturally be read to include the people thereof—that is textually empowered and/or obligated to appoint electors under the provision. This linguistic feature arguably makes Article II, Section 2 textually different from others such as Article I, Section 4;

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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.")

But any perceived difference between my earlier writing on the Presidential Election Reform Act and the present essay dissolves on a closer reading of my earlier comments. What I wrote last year was that there was a "significant chance the Court *would* strike down" the California measure if it were enacted because the initiative "*might be seen* by the Court as impermissibly interfering with the legislature's complete discretion in this area." Vikram David Amar, *The So-Call Presidential Election Reform Act: A Clear Abuse of California's Initiative Process*, FINDLAW, Aug. 17, 2007, http://writ.news.findlaw.com/amar/20070817.html (emphasis added). My entirely consistent position today is that the Court "should not" do so. My FindLaw analysis was more predictive than the prescriptive discussion I offer today.

5. "Intratextualism,"—a term I use here—describes the interpretive method by which similar words or terms in the Constitution are analyzed by reference to each other. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748-49, 788-95 (1999). For an extensive example of intratextualism see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

6. Even this list is not exhaustive. *See* U.S. CONST. art. I, §§ 2–4, 8; U.S. CONST. art. IV, §§ 3–4; U.S. CONST. art. VI, cl. 3.

7. *See, e.g.*, Akhil Reed Amar, *supra* note 5, 776-77 (noting that sometimes similar words or series of words contain subtle differences).

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

Article IV, Section 3; and, Article V that textually empower state "legislatures" only.[9] Similarly, the fact that Section 2 of the Seventeenth Amendment refers to state "legislatures" in the same sentence that also refers to state "executive authorit[ies]" textually suggests more specific delineation of federally delegated duties and powers than would be the case for those provisions in which the term "legislatures" appears alone.[10]

In addition to noting this intratextual nuance, I might expand my intratextual scope to include provisions other than Article I, Section 4 and Article V (on which Professor Hasen devotes his attention). I have already mentioned the Seventeenth Amendment. But I would also include a look at the pre-Seventeenth Amendment experience of selecting Senators and the textual light it sheds on the term "legislature" as used in the original Constitution.

II. Senate Elections

Article I, Section 3 (later amended by the Seventeenth Amendment in 1913) provides that the "Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."[11] Like Article I, Section 4 and Article V, Article I, Section 3 textually makes the state legislatures the actors: it is the "Legislature[s] thereof," and not the "states" more generally, that shall do the "cho[osing]."[12]

For present purposes, I need not fully engage the question whether, as an originalist matter, "legislature" in Article I, section 3 was intended to

9. *See* U.S. CONST. art. I, § 4 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."); U.S. CONST. art. IV, § 3 ("[N]o new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress."); U.S. CONST. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.").

10. The same would be true for Article IV's so-called "Guarantee Clause," which provides in relevant part that the federal government shall protect each state against domestic violence "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." U.S. CONST. art. IV, § 4. *See generally* Vikram David Amar, Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?, 36 HASTINGS CONST. L.Q. (forthcoming).

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

12. *Id.* Once again, compare this language with Article II, Section 2, Clause 2, providing that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, [the state's electoral college] Electors." *Id.* at art. II, § 2, cl. 2 (emphasis added).

mean "independent standing legislature" or instead could include the people of a state.[13] Whether they were intended to be guaranteed independence by the Constitution as originally written or not, state legislatures did enjoy independence from initiated measures in selecting their preferred persons for the Senate for the first one hundred years of the Republic.[14] But state legislative independence had eroded by the late nineteenth century,[15] well before the formal enactment of the Seventeenth Amendment that concretized direct election.[16]

Beginning in the 1890s and continuing through the early 1900s, the people of various states were devising increasingly effective ways to limit state legislators' discretion in their choice of federal Senators.[17] What evolved into the most sophisticated approach, the so-called "Oregon Plan" (or Scheme), began simply as an opportunity for state legislative candidates to formally pledge to follow the will of the voters, as expressed through an advisory popular election, when it came time to pick the next federal Senator.[18] The pledges were considered merely moral at first.[19] But as other states began to follow Oregon's lead, more creative and more

13. There may be some originalist support for this. *See, e.g.*, THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) ("The Senate will be elected absolutely and exclusively by the State legislatures."). Moreover, as a textual matter, Article I, section 3's use of "legislature" can be contrasted with Article I, Section 2's use of the term "people thereof" in providing for U.S. House elections, raising an inference that legislatures should be understood as distinct from the people who elected them, in the same way that when the term "legislature" is used next to the term "executive," the Constitution intends to allocate power exclusively between the two institutions. Yet state peoples create state legislatures in a way that state legislatures do not create state executives or *vice versa*, so there is at least a plausible textual/structural argument that Article I, section 3 merely authorized, as opposed to mandated, states to delegate United States Senate elections to standing legislatures. *See generally*, Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000).

14. C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT, 16-17, 84-85 (Transaction Publishers 1995).

15. I, along with several other commentators, have written about these events at some length. For the most thorough of these accounts, see GEORGE H. HAYNES, THE ELECTION OF SENATORS (1906). *See also* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996); Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987); Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971 (1994); Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENT. 201 (1996).

16. *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . .").

17. *See* Rotunda, *supra* note 15, at 206-09.

18. *Id.*, at 208-09.

19. *Id.*

coercive devices were employed. Nebraska, in fact, pioneered a "scarlet letter" approach, in which elected legislators who broke the pledge they took as state legislative candidates were burdened with a ballot notation to that effect in the event they sought state legislative reelection.[20] Other states followed suit, crafting variations on the Oregon and Nebraska devices to suit their local needs.[21] Oregon voters ultimately adopted a state constitutional amendment that, as a matter of state law, legally bound state legislators to select the United States Senate candidates who were most popular among state voters.[22] By 1912, when the U.S. Senate approved the Seventeenth Amendment, nearly sixty percent of the senators were already selected by some means of direct election (and thus had nothing to fear from it).[23] For this reason, it seems likely that even without ratification of the Seventeenth Amendment, direct election would in fact be with us today in most, if not all, States.[24]

In reality then, the Seventeenth Amendment was a formalizing final step in an evolutionary process.[25] To be sure, the Amendment's acknowledgment of an already-existing condition has made that condition more impervious to alteration and has symbolic meaning as well. But it would be a mistake to minimize the force and effect of state constitutional law innovations.

Of course, the Oregon state constitutional provision, binding state legislators, the Nebraska scarlet letter devices, and the somewhat similar measures from other states were never litigated in the United States Supreme Court[26] or in lower courts. Yet that fact may itself be telling.

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20. *See generally* HAYNES, *supra* note 15; Rotunda, *supra* note 15, at 209.

21. *See* Rotunda, *supra* note 15, at 209; Kobach, *supra* note 15, at 1978-79 & n.33.

22. *See* Brooks, *supra* note 15, at 208.

23. *Id.*, at 208-09.

24. *Id.*, at 209.

25. *Id.*, at 206.

26. The Supreme Court in *Hawke v. Smith*, 253 U.S. 221 (1920), seven years after the enactment of the Seventeenth Amendment, observed that: "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the [Seventeenth] Amendment to accomplish the purpose of popular election is shown in the adoption of the Amendment." A determination in 1920 that the Oregon Plan was unconstitutional would have sent shock waves through the country. Moreover, the *Hawke* Court's reasoning in this dictum is flawed. The Seventeenth Amendment could have been enacted to clarify the people's (preexisting) power to elect Senators. Clauses in the Constitution are often inserted for this clarifying effect. *See* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 2-7 (1998) (discussing the idea of redundancy as a tool for clarification). Moreover, the Seventeenth Amendment could merely have changed the "default rule" from legislative to popular election, even though the people of the state had always enjoyed the right to make this change on a state-by-state basis on their own.

And if the Oregon and Nebraska models were indeed unconstitutional, would that not have meant that all the Senators elected from all the states that employed such devices for over a decade were illegitimate? The Supreme Court Justices and lower federal court judges who were confirmed by these tainted Senators might also therefore be thought illegitimate in some sense. Laying to one side the obvious point that there would be no easy judicial remedy for any such illegality, it seems implausible to think that anyone in any of the three branches of the federal government considered the entire federal regime to be *ultra vires* in this way for over a decade. Thus, this pre-Seventeenth Amendment history may be strong historical support for modern direct democracy proponents on the latitude provided in the term "legislature," at least in Article I, Section 3.[27]

III. Other Uses of Similar Language

Two other places in the Constitution where "state legislatures" are empowered warrant discussion. As noted above, Article I, Section 4 allows the "legislature" of each state to "prescribe" the "Times, Places and Manner of holding Elections for Senators and Representatives . . . ."[28] As Professor Hasen explains, the Supreme Court has held—and I completely agree—that this clause does not prohibit a state constitution from vesting reapportionment power in the people of a state acting through their referendum and initiative powers.[29] Thus, in this clause of the Constitution, the term "legislature" of a state has not meant "legislature independent of the people." Finally, Article IV, section 3 provides that no new state shall be carved out of territory from existing states "without the Consent of the Legislatures of the States concerned . . . ."[30] Although the question does not seem to have been discussed in case law or literature, I see no constitutional reason why direct popular consent, or consent through a special convention, should not suffice to validly cede state property.

27. *See* Rotunda, *supra* note 15, at 210. Of course, technically speaking, legislatures—not the people in lieu of them—were still electing Senators under the Oregon and Nebraska plans, which is not true for "initiated" measures. But this kind of formalism seems unavailing. *Cf.* Thornton v. U.S. Term Limits, Inc., 514 U.S. 779, 831 (1995) ("Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism.).

28. U.S. CONST. art. I, § 4, cl. 1.

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

30. U.S. CONST. art. IV, § 3, cl. 1.

Of course, even a devout "intratextualist" must acknowledge that a single term like "state legislature" can mean different things in the same document.[31] For myself, however, these analogies, particularly the Oregon Plan history, are helpful ones because they refute the simplistic textual argument that "legislature" has to mean "independent legislature" free from direct democracy.

IV. (Re)reading the Cases—The Thorny Language in *Hawke v. Smith*

As Professor Hasen's article illustrates, the "hardest" case to deal with for proponents of direct democracy in the Article II setting is *Hawke v. Smith*.[32] But a careful look at *Hawke* shows that the troublesome language used by the Court was unnecessary, and that the Court's result in that case made eminent sense, even if we embrace direct democracy possibilities. A closer look is thus in order.

The facts of *Hawke* are rarely presented in modern cases citing it,[33] and indeed are not all apparent from the Supreme Court opinion itself.[34]

31. For example, the term "person" may mean different things in different constitutional contexts; corporations are persons for purposes of the Due Process Clause of the Fourteenth Amendment, even though they are not persons for purposes of the Census Clause.

32. *Hawke*, 253 U.S. at 221. Hawke is really the only difficult case for initiative proponents because it is the only Supreme Court decision that insulates state legislatures from popular input or usurpation. Other cases, such as *Bush v. Gore*, 531 U.S. 98 (2000), involve interferences in the work of the legislature not by the people, but rather by other branches of government such as the judiciary. Reading the constitutional references to "legislature" to preclude involvement from the judiciary or the executive branch is easier than reading them to preclude popular control because legislatures are created by the people in a way they are not created by other state branches. *See* Amar, *supra* note 13. As Professor Hasen himself notes, the same three Justices who spoke directly on this issue in *Bush v. Gore* dissented from the Court's denial of certiorari in *Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (cert. denied), indicating their discomfort with state judicial involvement in Congressional district line drawing. But, notably, their dissent from the denial of certiorari in *Salazar* intimated that popular, as opposed to judicial, involvement would be less constitutionally troubling. Hasen, *supra* note 1, at 618-19.

Moreover, as Professor Hasen also observes, the Court has allowed popular input in other areas of the Constitution where state "legislatures" are mentioned. For example, in *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932), the Supreme Court in 1932 said that the fact that Article I of the Constitution directs state "legislatures" to draw congressional district lines (subject to congressional override) does not prevent a state from involving the state Governor—through his veto power—in the state lawmaking process used to draw federal district boundaries. Given all this, close analysis of the *Hawke* hurdle is justified.

33. *See, e.g.*, Miller v. Moore, 169 F.3d 1119, 1123-24 (8th Cir. 1999); Donovan v. Priest, 931 S.W.2d 119, 125-27 (Ark. 1996); League of Women Voters of Maine v. Gwadosky, 966 F. Supp. 52, 56-57 (D. Me. 1997).

34. *See Hawke*, 253 U.S. at 224-25.

But appreciating the sequence of events is crucial to understanding what was at stake and how best to understand the decision.[35]

On December 1, 1917, two-thirds of each house of Congress adopted a resolution proposing and submitting for ratification what ultimately became the Eighteenth Amendment to the Constitution: the alcohol prohibition amendment.[36] An important feature of the resolution was its provision "that the Amendment should be inoperative unless ratified" by the requisite number of legislatures of the states "within seven years from the date of . . . submission."[37] On January 7, 1919, the Senate and House of Representatives of Ohio, acting as the General Assembly of the state of Ohio, adopted a resolution ratifying the proposed prohibition amendment and mandated that certified copies of the joint resolution of ratification be forwarded by the governor of Ohio to the United States Secretary of State and to the presiding officer of each house of Congress.[38] On January 27, 1919, the Governor of Ohio complied with the legislature's resolution.[39] Two days later, the Secretary of State of the United States proclaimed that the Eighteenth Amendment had been ratified, listing Ohio as one of the thirty-six states having ratified the same.[40]

On March 11, 1919,[41] six weeks after the United States Secretary of State proclaimed ratification, a voter in Ohio filed with defendant Harvey Smith, the Secretary of State of Ohio, a referendum petition pursuant to provisions in the Ohio Constitution.[42] The petition, which had been signed by the requisite number of voters, six percent, requested that Mr. Smith prepare ballot materials for an election to be held by the people of Ohio to approve or reject the alcohol prohibition amendment to the United States Constitution.[43] The 1918 Ohio Constitution "reserve[d] to [the people] themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution

35. *See* Amar, *supra* note 13, for a fuller form and discussion of the facts.

36. The Eighteenth Amendment, which was repealed by the Twenty-first Amendment, *see* U.S. CONST. amend. XXI, § 1, had "prohibit[ed] the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." *Hawke*, 253 U.S. at 224-25.

37. *Hawke*, 253 U.S. at 225.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Petition in Common Pleas Court, Record at 16; *Hawke*, 253 U.S. 221 (1920) (No. 582).

42. Petition in Common Pleas Court, *supra* note 41, Record at 16-17.

43. *Id.* at 19.

of the United States."[44] By its terms, the Ohio Constitution required that any legislative ratification not go into effect "until ninety days after it shall have been adopted by the General Assembly," during which time signatures could be gathered and a referendum petition could be filed.[45]

In April of 1919, plaintiff George Hawke brought suit in Ohio county court to enjoin Smith from expending any State monies in preparing and printing forms for the referendum ballot, on the ground that such a referendum under these circumstances would violate federal law.[46] The trial court, the State appellate court, and the Ohio Supreme Court all rejected this claim, holding that the referendum ballot could proceed.[47]

The United States Supreme Court reversed, in effect refusing to permit the Ohio Constitution's referendum provisions to be implemented on these facts.[48] In doing so, the Court spoke in the broad terms Professor Hasen quotes,[49] essentially saying that a legislature is a legislature, and not the people.

Yet the Court's broad language here was unnecessary to resolve the case before it; there was a much easier ground on which to do so, and one that the Court itself suggested. After explaining that the Ohio referendum could not proceed, the Court observed: "Any other view might lead to endless confusion in the manner of ratification of [the] federal amendments."[50] Now here is a concern that is rooted in the structure and history of the Constitution itself. And the facts of the case implicate this concern as powerfully as one could imagine. Let us not forget that by the time the referendum petition was filed, the Governor of Ohio had already told the federal authorities that the legislature of Ohio had ratified the Eighteenth Amendment.[51]

Indeed, things were worse than that for the Ohio referendum proponents. The United States Secretary of State had *already proclaimed* the validity of the new amendment.[52] Did anyone really think the people of Ohio could reopen the validity of an amendment already proclaimed by the federal government to be the Supreme Law of the Land? To put the point another way, by ordering the Governor to communicate ratification—

44. *Id.*
45. *Id.*
46. *Id.* at 16-21.
47. Hawke v. Smith, 253 U.S. 221, 224 (1920).
48. *Id.* at 231.
49. *See* Hasen, *supra* note 1, at 619.
50. *Hawke*, 253 U.S. at 230.
51. *See generally Hawke*, *supra* note 26.
52. *Id.*

apparently in violation of the ninety day waiting period[53]—the Ohio legislature effectively blocked the State referendum procedure from being used. A very different case would have been presented, however, had referendum proponents been able to get into court to enforce the Ohio Constitution before legislative ratification was communicated to Washington. Given the way things happened, had the United States Supreme Court given effect to the referendum provision, an immensely uncertain situation would have resulted. In some ways then, *Hawke* can be understood to be more about the lack of remedies for state law breaches than it was about state law conflict with Article V.[54]

The Supreme Court acknowledged this two years later, in *Leser v. Garnett*,[55] when it affirmed the validity of the Nineteenth Amendment over objections that various states had improperly ratified the Amendment in violation of state legislative procedures.[56] In dispensing with the challenge, the Court explicitly relied on the ground that the governors of the states in question had—whether or not they complied with state law in doing so[57]—already certified to the federal government, and that certainty required respect for these certifications.[58] This makes perfect sense. How could we expect federal executive and legislative officials, to whom notice of certification by states is sent, to arbitrate disputes about what state law means? One way to understand the reference to "legislatures" in Article V, then, is to say that their communication to Congress counts as "official." But this does not mean that Article V prevents state law from coercing state

53. The Governor communicated ratification to the United States Secretary of State twenty days after the State legislature ratified the Amendment. *See supra* notes 38-39 and accompanying text. This apparently violated Ohio's law because the Constitution of Ohio mandated that no ratification "shall go into effect until ninety days after it shall have been adopted by the General Assembly." Petition in Common Pleas Court, *supra* note 41, at 19.

54. *Cf.* 1 ANNALS OF CONG. 741 (Joseph Gales ed., 1834) (observing that "binding" instructions need not void the vote of faithless agents).

55. Leser v. Garnett, 258 U.S. 130 (1922).

56. *See id.* at 137. The plaintiffs in *Leser* also challenged ratification in some states on the same ground unsuccessfully urged in *Hawke*; namely, that violation of state referendum laws made ratification ineffective. *See id.* On this point, the *Leser* Court merely cited *Hawke*. *See id.*

57. The *Leser* Court explained that as long as the "legislatures . . . had power to adopt the resolutions of ratification," their having done so was conclusive upon the United States Secretary of State. *Id.* Of course, this reasoning really did consider the plaintiff's argument that because the legislatures in question had violated "rules of legislative procedure," they lacked "power." *Id.* In any event, for our purposes, if violation of procedural rules in *Leser* does not deprive a state legislature of power, then neither should violation of the referendum provisions at issue in *Hawke* and at issue in another part of *Leser* have deprived the Ohio legislature of its power. Ohio's certification to the federal government in *Hawke*, then, is "conclusive" by the reasoning of *Leser* without regard to whether Ohio law violated Article V.

58. *See id.* (relying on Field v. Clark, 143 U.S. 649, 669-73 (1892)).

legislatures into communicating to the federal government the message that pleases the people. Courts are fully capable of enforcing this coercion before the fact[59] in ways that avoid confusion and uncertainty. Given all this, to the extent that *Leser* adds anything, [60] the light it casts backward on *Hawke* might be a narrowing one. [61]

Conclusion

Given that initiative proponents are not necessarily foreclosed by the text of the Constitution, or Supreme Court case law, and given that initiative backers have some nineteenth and twentieth century history on their side, I think courts should be hesitant to invalidate all initiated changes to presidential selection procedures.

59. As Professor Hasen rightly notes in the latter part of his article, early rather than later judicial review is generally preferable in this area of law. Hasen, *supra* note 1, at 628.

60. The precedential value of *Leser* is weakened by the fact that, as the Court itself noted, the states whose ratification was in question were unnecessary to the ultimate ratification of the Nineteenth Amendment inasmuch as enough states had already ratified it. *See Leser*, 258 U.S. at 137. One could argue that because some of the unchallenged state ratifications took place after some of the challenged state ratifications, those unchallenged subsequent ratifications may have been improperly influenced by the earlier "illegal" ratifications being contested in *Leser*. Perhaps it is for this reason that the Court went on to discuss the merits of the plaintiffs' claims that various ratifying states had violated state referendum and state procedural rules.

61. Mike Paulsen has noted this aspect of *Leser*: "Of course, the state's transmission of its ratification should be one that federal authorities may take at face value .... (The Court so held just two years after *Hawke*, in *Leser v. Garnett*). It is thus the responsibility of state authorities to enforce any state law *procedural* condition subsequent prior to transmittal." Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 732 (1993). Because of the opacity of the *Hawke* opinion, however, Professor Paulsen did not realize that *Leser* narrowed *Hawke* and at the same time made its outcome correct. Accordingly, Professor Paulsen suggests that *Hawke* was "wrongly decided." *See id.* at 731 ("On balance .... the [best thing to do] is simply to recognize that *Hawke* was wrongly decided."). In a discussion with him, I think I have convinced Professor Paulsen that *Hawke* has unnecessary and unpersuasive language but is correct on its facts and susceptible of a narrower reading consistent with its reference to "confusion."

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