No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, *et al.*,

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

EUGENE H. GOLDBERG, ESQ.
Counsel of Record
686 Harrison Avenue
East Meadow, NY 11554
(516) 485-9344
eman352@optonline.net

Attorney as Amicus Curiae

316643

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICUS[1]

Amicus is a New York construction lawyer and a student of 17th-18th Century British and American history. Amicus is admitted to the bar of this Court.

History has been ignored in briefs so far submitted on this appeal. Therefore, this brief primarily references 18th Century historical materials and cases.

This amicus brief supports respondents, but on different grounds.

SUMMARY OF ARGUMENT

This appeal presents a question about United States Constitution Art. §4 Cl.1, the House of Representatives election clause. The clause grants both a State Legislature and Congress the right to make laws regarding United States House of Representative elections. A State Legislature may enact election laws, but Congress may make its own election laws or alter the State election laws. In the absence of Congressional action, may the State enact an election law which trumps its own State constitution?

The issue is one of State sovereignty between branches of a State government. State sovereignty belongs to a

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

State's citizens. State citizens may distribute and parcel out State sovereignty as they see fit. They may grant and deny powers as they choose. The State's citizens allow the State Legislature the power to enact laws. The State's citizens, by their State constitution, restrain a State Legislature in the laws the Legislature may enact.

The power to amend the North Carolina constitution resides with its citizens. The United States Constitution recognizes this by referencing a State convention, a special body distinct from a State Legislature. If North Carolina's citizens choose, they can authorize a State convention to do things that its State Legislature cannot, such as create/amend the North Carolina constitution, or have the work of the State convention be submitted for popular approval to the State's citizens. The North Carolina citizens permit the North Carolina Legislature to submit proposed amendments to the citizens for popular approval. But the citizens of North Carolina do not allow the State Legislature to unilaterally amend a State constitution.

The House of Representatives elections clause does not allow the North Carolina Legislature to override its own State constitution.

GLOSSARY

For ease of reading, a glossary has been established. The following shorthand definitions are used.

Congress means the United States Congress.

Federalist#ZZ means Federalist paper Number ZZ.

ISL means the independent state legislature theory.

Parliament means the Parliament of the United Kingdom of Great Britain and Scotland (which existed from 1706 until 1801, when the United Kingdom was expanded to include Ireland).

USConstitution means the United States Constitution.

USHSRepresentatives means the legislative body, the United States House of Representatives.

1787Philadelphia means the Constitutional Convention held in Philadelphia, Pennsylvania in 1787.

1787USConstitution means the United States Constitution as originally ratified, prior to amendment by the Bill of Rights.

INTRODUCTION

1765-1791 America witnessed a debate about sovereignty--the sharing of power. Initially, the debate was about sharing power between Great Britain (Parliament and King) and the American Colonies. Great Britain denied power could be shared. The Colonies argued they were like Scotland before the 1706 Act of Union, sharing a common King but not a common legislature.[2]

2. Ammerrman, The British Constitution and the American Revolution: A Failure of Precedent, 17 William & Mary L. Rev. 473, 476-478 (1975-1976); Federalist#5 (Queen Anne's letter to the soon-to-be-abolished Scottish legislature).

The American Revolution and the Declaration of Independence resulted. While fracturing their connections with the mother country, each independent State (beginning in 1776) tried to show the rupture did not internally cause anarchy or threaten security of rights and property.[3] Each State created written constitutions demonstrating that the better parts of Colonial government (and the rule of law) continued while simultaneously excising British flaws.

Many of the delegates at 1787Philadelphia knew of the 1706 Act of Union with Scotland; 6 Anne Ch. 11; uniting the separate Kingdoms of England and Scotland each of which had a common monarch. I Farrand, The Records of the Federal Convention 493 (Rufus King on June 30, 1787); I Farrand, Id. at 198 (Nathaniel Gorham on June 11, 1787, discussing forty [sic] Scottish members of Commons and sixteen Scottish representative peers).

The 1706 Act of Union merged the two separate countries into a single country, Great Britain. The unicameral Scottish legislature (a parliament with commons and peers sitting together) ceased to exist. To each Parliament of Great Britain, Scotland elected forty-five members to the House of Commons. Sixteen Scottish peers were elected by other Scottish peers in block voting to sit as representative peers in the House of Lords. 6 Anne Ch. 23. The election of sixteen representative Scottish peers continued until the late 20th Century. Lord Gray's Motion, [1999] UKHL 53, [2002] 1 AC 124 (advisory opinion).

3. Federalist#62. The comparison was with the Glorious Revolution of 1688-1689 which legitimated the illegal and pretended view that a Revolution never occurred. Nenner, By Colour of Law—Legal and Constitutional Politics in England, 1660-1689, at 173 (1977).

Then the debate was amongst the now independent American States in creating a national government.[4] The 1787USConstitution and the Bill of Rights resulted.

The 1787USConstitution created a national government with limited powers. It prohibited the States from exercising certain powers, but the States kept others. Sovereignty was shared. When Congress exercised a proper power, Congress could also go beyond and enact necessary and proper laws relating to the exercised power.[5] The Supremacy Clause made the 1787USConstitution, federal law, and treaties supreme over State law.

Each State was a republic. In a republic, the delegation of government is to representatives, a smaller number *elected* by the rest. Federalist#10. "The process of voting was not incidental to representation but was at the heart of it." Wood, Creation of the American Republic 1776-1787 (1998) at 182. A State had a protective power to regulate elections because it was essential to the State being a republic.

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4. The thirteen independent States adopted the 1781 Articles of Confederation. Article II thereof read:

> Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

5. AntiFederalists during ratification debates warned the national government would eventually overwhelm the States and reduce them to nonentities. Wood, Power and Liberty: Constitutionalism in the American Revolution at 92-93 (2021). The 1791 Tenth Amendment prevented this. Id at 99.

The national government was also a republic. Elections for the USHsRepresentatives were central to the national government so as permit delegation of government from citizens to a smaller number.[6] The national government had a similar protective power to regulate elections.

Election law in 1787 had to be considered in light of the mechanisms for elections. Elections were much simpler. Writs were issued calling for an election officer to conduct an election for a certain position to be held in a place and on a certain date. The writs were posted. Voter registration lists did not exist.[7] Voter qualifications were challenged on polling day. Election districts were adjustable.[8] Outside of well populated areas, a single polling place necessitated voters might travel miles. Viva voce or ballot voting[9] was allowed, and sometimes proxies.[10]

Under the protective power, the national government could assume the entire control of elections for the

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6. The national government, needing State elections mechanisms, guaranteed State republican government. Federalist#43 at Point 6.

7. Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S.1, 28-29 (2013) (Thomas, J., dissenting).

8. "Whether the electors …should be divided into districts or all meet at one place, shd all vote for all the representatives, or all in a district vote for a number allotted to the district…" Farrand, II The Records of the Federal Convention of 1787 at 240 (Madison's notes of August 9, 1787).

9. Farrand, II The Records of the Federal Convention of 1787 at 240 (Madison's notes of August 9, 1787).

10. 6 Anne Ch. 23, §6 (proxies for election of 16 Scottish representative peers)

USHsRepresentatives. This would involve the national government issuing writs, posting notices, setting places and times for voting, the national government's employing persons to conduct the elections, purchasing of devices to tally votes, creating forms in connection with polling, enacting laws for the custody and counting of votes, establishing procedures for resolving disputes regarding elections, and establishing laws for accurately reporting election results.[11]

1787 voting qualifications involved age, residency in the State, length of residency, ownership of property in the State, and/or payment of State taxes. The State and its local/municipal government were most knowledgeable about this information. For this reason (amongst others), the 1787USConstitution provided suffrage qualifications would be set by the State. Qualification verification was also better placed in the State's hands.

As State and national government otherwise had similar needs and similar protective powers, 1787Philadelphia proposed that State and national government need not duplicate election mechanisms. Thus, the 1787USConstitution in Art.I§4Cl.1 provided for a *concurrent* power regulating USHsRepresentative elections. The clause reads:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such

11. Ex parte Siebold, 100 U.S. 371, 396 (1879).

> Regulations[12], except as to the Places of chusing Senators.[13]

Each State was *commanded* to enact such election laws,[14] subject to Congressional control ("make or alter").[15]

The 1787USConstitution contemplated a *cooperativ*e arrangement for USHsRepresentative elections.[16] Since 1788, State mechanisms are "borrowed".[17] *State writs of*

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12. Each could "regulate" USHsRepresentative elections, but neither created suffrage. Compare USConstitution Art. III§2cl.2 (Congress can make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction) with the Act of Union 6 Anne Ch. 6, Article 19 (Parliament can "regulate" Scottish Court of Sessions' jurisdiction).

13. The Export Import Clause, USConstitution Art.1§10Cl.2, explicitly shares a power between a State and Congress.

14. Martin v Hunter's Lessee, 14 U.S. 304, 343 (1816) (dictum).

15. Art.I§4Cl.1 contains an internal definitional hierarchy. A State may "prescribe" and "regulate" election laws. Congress may "make" its own election laws or "alter" State election laws. The authority in "prescribe" and "regulate" is subordinate to the authority to "make" and "alter." See Ex parte Siebold, 100 U.S. 371, 386 (1879).

16. Ex parte Siebold, 100 U.S. 371, 382-396 (1879); Ex parte Clarke, 100 U.S. 399, 404 (1879) (Election clause allows Congress to punish in USHsRepresentative election for violating State election law). Three Justices dissented in Ex parte Siebold. Their dissent is found in Ex parte Clarke, 100 U.S. 399, 404-421 (1879).

17. The existing greater government, in recognizing a subordinate local (municipal) government, conditioned recognition on the subordinate's election administration. 18th

election issue to fill vacancies.[18] *Notice of elections* and *places of polling* are per State law. Those elected present credentials to the USHsRepresentative clerk[19] who examines S*tate prepared election certificates* for compliance with *State law*.[20] Disputes as to elections are resolvable by State procedures: the USHsRepresentative review of election results can be deferred until State procedures' completion.[21] Originally, regular USHsRepresentative elections were not necessarily simultaneous with regular

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Century Massachusetts town election mechanisms were used to elect MassHRepresentatives. So too the 1787USConstitution conditioned creation of the national government on state administration of USHsRepresentative elections.

No comparison is possible to 18th Century English municipal/local government. 18th Century City of London was an exception. The local election mechanism was used to elect Common members. Elsewhere, municipal/local government was generally in exclusive corporate bodies with no community of interest with the municipalities they were named after. The corporate electorate was small. The corporations frequently enacted bylaws to disenfranchise. This was not changed until the Municipal Reform Act of 1835, 5 & 6 William 4, Ch. 76 §§2, 4, and 5.

18. USConstitution Art.I§3cl.3; see also Seventeenth Amendment §2. See generally 2 U.S.C.§9(b).

19. 2 U.S.C. §26 provides the Clerk examines the electees' credentials to determine if "they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States."

20. House Document 115-62, Precedents of the United States House of Representatives, Ch.2 §2 at 174. See Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791, 795 (7th Cir. 1995).

21. Hartke v Rudebusch, 405 U.S. 15 (1972).

local/State elections. E.g., Virginia Session Laws of 1802, Ch. 304, §2 (USHsRepresentative election to be held on 4th Wednesday of April]. For reasons of economy, today USHsRepresentative and local/State elections often occur on the same day.

In the absence of Congressional action, State power as to elections initially was greater than Congress's power. States were not bound by the 1st Amendment (until post-1868 incorporation), but some states were constrained by State constitutional provisions (e.g., a State's Bill of Rights). Absent a strict State separation of power provision in a State constitution or State statute, State judges/legislators can be State election officials.

Some aspects of USHsRepresentative elections are beyond both a State's and Congress's power. Candidate qualifications are established in USConstitution Art.1§2cl.2.[22]

This appeal raises one issue. When Congress is silent, does Art.I§4Cl.1 restrict allocation of powers amongst a State government's branches?

Amicus argues it did not.

ARGUMENT

From a Lockean view, a constitution is a social contract derived from the consent of the governed. A constitution, like a contract, need not be interpreted solely by using

22. Powell v McCormick, 395 U.S. 486, 527-532 (1969) (John Wilkes's disqualification as a Member of Commons but omitting reference to the 1769 Commons declaration of Henry Luttrell the winner despite Wilkes receiving 847 more votes).

extrinsic dictionaries. Circumstances at creation are important. Restatement of Contracts (2nd) §202 comment b. Practical construction colors ambiguity. Nau v. Vulcan Rail & Construct. Co., 286 N.Y. 188, 199 (1941).

Art.I§4Cl.1 must be interpreted through the lens of 17th and 18th Century history; debates prior to, at 1787Philadelphia, and during ratification of the 1787USConstitution; and post-1788 conduct.

CIRCUMSTANCES AT THE CREATION OF THE 1787 CONSTITUTION

In 1765, the British Parliament laid stamp taxes on the American Colonies. The Colonies protested. This was "taxation without representation" and an internal tax.[23] Parliament repealed the stamp taxes but declared Parliamentary sovereignty over the Colonies.[24] The Colonies responded they shared the person of the King, but not a common Parliament.

The Colonial assemblies, particularly Massachusetts' General Court, battled Royal Governors and disputed Parliament's sovereignty. Parliament insisted on indivisible sovereignty: *imperium in impervo*. The dispute was primed for explosion after Parliament passed

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23. The distinction between internal and external taxes; 1766 Examination of Dr. Benjamin Franklin in the House of Commons, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=4119; was subsequently rejected by the Colonies.

24. Declaratory Act (1766), 6 Geo. III, Ch. 12, §2; Campbell v Hall, 98 Eng. Rep. 1045, 1049, 2 Cowp. 206, 211-12 (K.B. 1774). See MacDonald, Select Charters and Other Documents Illustrative of American History 1606-1775 at 261-396 (1914).

the four Intolerable Acts (punishing Massachusetts for the December 1773 Boston Tea Party).

The most significant Intolerable Act (for this appeal) was the May 20, 1774, Massachusetts Government Act, 14 Geo. 3, Ch.45 which abolished many rights to Massachusetts' self-government.

THE MASSACHUSETTS GOVERNMENT ACT ("MGA")

Massachusetts government derived from a 1691 Royal Charter. The Charter created a General Court (assembly) of two bodies: the lower house, the House of Representatives ("MassHRepresentatives"), and an upper house, the Massachusetts Senate. The MassHRepresentatives was annually elected[25] by town residents. Different from other Colonial charters, the MassHReprepresentatives elected 28 councilors to the Massachusetts Senate, subject to the Governor's approval. The Massachusetts Senate with judges functioned as the Governor's Council. The Governor, with the advice and consent of his Council, appointed judges, marshals and other court officers. The officials were answerable to the Council but paid by the General Court.

In the late 1760's and early 1770's, the Governor had protracted disputes with the General Court. When

25. Altering slightly an English Whig maxim, John Adams famously wrote "[W]here annual elections end, there slavery begins." Compare Adams, Thoughts on Government Applicable to the Present State of the American Colonies (1776) at 17 and 18 with Wood, Creation of the American Republic 1776-1787 (1998) at 166. Anti-Federalists used this to criticize the 1787USConstitution. Federalist#53 responded.

the Council refused to cooperate, the Governor needed appointed officials' cooperation to carry out his policies. The appointed officials refused, siding with the General Court.

MGA changed this. The MassHRepresentatives no longer elected the Senate. The Governor selected them. MGA provided in part

> …that all and every clause, matter, and therein contained [in the 1691 Charter] which relates to the *time and manner of electing*[26] the assistants or counsellors for the said province, be revoked… MGA§1 (emphasis added)

MGA made another important change. Effective August 1, 1774, new town meetings could not be held without Governor's leave. Local control of local government ended although annual town meetings would elect MassHRepresentatives and local officers. The Governor would control local officers. MGA§7.[27] Towns no longer selected grand jurors. MGA§8. Town meetings had regularly instructed MassHRepresentatives. Reid, The Concept of Representation in the Age of the American Revolution 86-92 (1989).

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26. The Rhode Island Charter had used similar language when discussing its Assembly's power to pass laws concerning elections. The Rhode Island Charter provided for enacting laws "… to regulate and order the way and manner of all elections to offices and places of trusts…" Constitutions of the Several Independent States of America at 42 (1785).

27. It was not unusual for Parliament to limit business discussed at local meetings. 6 Anne, Ch. 23, prohibited non-election business from being discussed by Scottish peers when electing sixteen representative peers. The Act of Union abolished the Scottish legislature.

Massachusetts responded to MGA. Town meetings prior to August 1, 1774, did not conclude, instead adjourning or recessing. Towns elected new MassHRepresentatives. The Governor directed the MassHRepresentatives to meet in Salem instead of Boston. The Governor then refused to call the MassHRepresentatives into session. The MassHRepresentatives convened as an extra-legal "convention" --styled a provincial Congress.[28] Courts stopped functioning.

John Adams wrote British writer James Burgh[29] describing the situation.

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28. Webster, Collection of Essays and Fugitiv Writings on Moral, Historical, Political and Literary Subjects at 166 (1790). Calling of assemblies at unusual places is Declaration of Independence Grievance 4. It is also the basis of Art.I§4Cl.1's language preventing Congress from altering the place of choosing a senator.

29. Burgh was a Whig writer critical of the unreformed House of Commons. In Volume I Political Disquisitions 410 (1774) he wrote

> It cannot be just, that what our kings have no right to take away, our representatives may give without law, or that the people should be obliged to endure the tyranny of 500 usurpers, more than of one, since no number nor quality of persons can make that lawful which in its own nature is not so.

Burgh was widely read in the American Colonies. E.g., Federalist#56's footnote. Echoes of his writings can be found in Jefferson's famous comment about elective despotism not being the Revolution's aim: "173 despots can be as oppressive as one." Jefferson, Notes on the State of Virginia, Query XIII part 4, at 195 (1784).

> We are, in this province, Sir, at the brink of a civil war. Our Alva[30], Gage[31], with his fifteen Mandamus counsellors[32], are shut up in Boston, afraid to stir, afraid of their own shades, protected with a dozen regiments of regular soldiers and strong fortifications in the town, but never moving out of it. We have no council, no house, no legislative, no executive. Not a court of justice has sat since the month of September. Not a debt can be recovered, nor a trespass redressed, nor a criminal of any kind brought to punishment. What the [British] ministry will do next, is uncertain. Enforce the act for altering our government they cannot; all the regiments upon the establishment would not do it, for juries will not serve[33] nor represent. Letter of December 28, 1774, IX The Works of John Adams at 350, 351 (1854).

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30. Fernando Álvarez de Toledo y Pimentel, 3rd Duke of Alba, commanding Spanish troops occupying the Spanish Netherlands in 1567-1573.

31. General Thomas Gage, Royal Governor of Massachusetts, May 1774 until September 1775.

32. Gage selected new counsellors and judges for his Council using the writ of mandamus, hence the name "Mandamus counsellors." Washburn, Sketches of the Judicial History of Massachusetts from 1630 to the Revolution of 1775 (1840) at 161. Those outside of Boston were threatened with mob violence if they joined. Many refused.

33. Court clerks and jurors refused to serve. Washburn, Sketches of the Judicial History of Massachusetts from 1630 to the Revolution of 1775 (1840) at 195.

Declaration of Independence Grievance 21[34] concerned MGA.

In 1774 as a result of MGA, Nathaniel Gorham (the Massachusetts House of Representative from Charlestown) lost his right to vote for members of the Massachusetts Senate.

18th Century remedies existed for a loss of the right to vote.

A voter maliciously denied his vote by a government official could sue for damages. Ashby v White, 2 Lord Raym. 938, 1 Salk. 19, 92 Eng. Rep. 126, (K.B. 1703) (Holt, J., dissenting), rev'd, VI Parliamentary History of England at 225-324 (House of Lords 1704)(a decision that "a person having a right to give his vote at an election, and being hindered so to do by the [election] officer, who ought take the same, is without remedy …is destructive of the property of the subject, against the freedom of elections, and manifestly tends to encourage corruption and partially in officers…") discussed in Uzuegbunam v. Precewski, 141 S. Ct. 792, 799 (2021).

If a State limited suffrage in violation of its charter, quo warranto would lie to invalidate election results. Rex v. Spencer, 97 Eng. Rep. 1121, 3 Burr. 1827 (K.B. 1766) (bylaw limiting electorate in conflict with charter is void); Rex v Cutbush, 98 Eng. Rep. 149, 4 Burr. 2204 (K.B. 1768)

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34. "For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments."

(same); Rex v. Head, 98 Eng. Rep. 320, 4 Burr. 2515 (K.B. 1770) (same).[35]

Some statutes allowed a voter a qui tam action concerning election issues. Virginia Session Laws of 1802, Ch. 304, §7 ($100 penalty, half to plaintiff, half to commonwealth); Maryland Session Laws of 1798, Ch. 115, §§12, 13, 17, 18, 19, and 23.

An election officer could be criminally prosecuted for violating election laws. Vermont Session Laws of 1796, Ch. 79 § § 9-12.

Gorham however had no remedy because Parliament by statute changed the Massachusetts Charter and deprived him of his vote.[36]

In Great Britain, there was another remedy. The unwritten "Law of Parliament" made each of the House of Commons and the House of Lords the sole judge of its own members' election results.[37] Each house was the sole judge

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35. The principle was upheld in Hoblyn v The King, 1 Eng. Rep. 916, 2 Brown 229 (H.L. 1772). If the election bylaw did not conflict with the charter, it would stand. Newling v Francis, 3 T.R. 189, 29 Eng. Rep. 525 (K.B. 1789).

Hamburger, Law and Judicial Duty at 188 (2008) cites Hoblyn as a source of judicial review in the United States. Hoblyn and its predecessors are cited here because of the remedy for denying suffrage.

36. Parliament was not bound by natural law. Calder v Bull, 3 US 386, 398 (1798) (Iredell, J.). But cf. dictum in Bonham's case, 77 Eng. Rep. 638, 8 Co. Rep. 107 (Com. Pl. 1610).

37. After 1706, a dispute about electing Scottish Representative Peers was heard by the House of Lords. In the United States, see USConstitution Art.1§5Cl.1.

of its own election disputes. This "Law of Parliament" was not based on judicial reasoning.[38]

Nathaniel Gorham later was a Massachusetts delegate to 1787Philadelphia. He was Chairman of the Committee of the Whole. He played a significant role on the Committee on Detail. He helped write the 1787USConstitution to forever prevent Congress from fundamentally altering a State's Constitution.

Art.I§4Cl.1 was written with MGA in mind.

A SHORT HISTORY OF STATE CONSTITUTIONS 1776-1788

The American Revolution began in April 1775. At the May 15, 1776, urging of the Second Continental Congress[39] to deal with the exigencies of the circumstances, eleven American States enacted their own written constitutions.[40]

38. Legislative statements as to contested election disputes are of lesser authority than judicial authority. Election contests are highly political when determined by a legislature. Reed, Contested Elections, 151 North American Review 112, 113-114 (1890); Cushing, Elements of the Law and Practice of Legislative Assemblies of the United States of America at 57-58 (1856); see The Committee of Elections Under Walpole, https://www.historyofparliamentonline.org/periods/hanoverians/committee-elections-under-walpole.

39. Wood, Creation of the American Republic 1776-1787 at 131-132 (1998 ed.)

40. South Carolina and Rhode Island had already acted. Wood, Creation of the American Republic 1776-1787 at 131 (1998 ed.)

Rhode Island's and Connecticut's legislatures kept their colonial charters but eliminated references to the Crown. Wood, Power and Liberty: Constitutionalism in the American Revolution at 34-35(2021); Story, III Constitution of the United States §585 (noting 1662 and 1663 royal charters).

Two provincial congresses (North Carolina and South Carolina) acting as legislatures adopted new constitutions. Three provincial congresses (New Jersey, Virginia, and New York) each denominated itself as a convention and adopted a new constitution. Six States (Delaware, Pennsylvania, Maryland, Georgia, Massachusetts, and New Hampshire) used popularly elected conventions to create new State constitutions. Vermont, not yet a state, by convention adopted a constitution in 1777. See Jameson, The Constitutional Convention, Its History, Power, and Modes of Proceeding (1867) §§130-158. More will be said infra about conventions.

By 1784, the original thirteen States each had written state constitutions.[41]

The constitutions varied. Many had a two-house legislature, but Pennsylvania had a unicameral legislature.[42] Some States adopted Montesquieu's separation of powers. Others did not. Some States adopted strict separation of functions by barring State legislators

41. The 1787USConstitution in Article VI Cl.2 supremacy clause states in part "…any Thing in *the Constitution …of* any *State* to the Contrary notwithstanding."

42. Vermont also had a unicameral legislature.

and Governors from serving as judges. Others did not.[43] New York's upper house and some of its judges sat as its highest judicial court, the New York Court of Trials of Impeachment and Correction of Errors (modeled on the 18th Century House of Lords). Some barred State legislators from simultaneously serving as executive officers.[44] Massachusetts allowed advisory opinions.

Seven States included Bills of Rights in their constitutions. Connecticut created a statutory bill of rights.[45]

It was a time of constitutional experimentation.

There were developments as to judicial review. In Virginia, judges issued an order outside a legal proceeding--a resolution--declaring a state law unconstitutional. Compare In re Judges, 8 Va. 135 (1788) with Hayburn's Case, 2 U.S. 409 (1792).[46] Pennsylvania and Vermont

43. There was no universal principle of separation of power applicable to all states. Rhode Island's General Assembly occasionally exercised judicial power until 1843. G & D Taylor & Co. v. R.G & J.T. Place, 4 R.I. 324, 340 (1856). Rhode Island then adopted a written constitution. Connecticut's General Assembly exercised judicial power; Calder v Bull, 3 U.S.386 (1798); Lung's Case, 1 Conn. 428 (1815); until a new written constitution was adopted in 1818.

44. E.g., 1787USConstitution Art.I§6 Cl.2.

45. Webster, A Comparative Study of State Constitutions of the American Revolution at 69 footnote 9 (1897).

46. A "resolution" was a type of advisory opinion by English judges. For example, the rule in M'Naghten's Case, 8 Eng. Rep. 718, 10 C.&F. 200 (1843), was an answer to the House of Lords on legal issues resulting from M'Naghten's not guilty verdict.

created a council of censors to assess/prevent State Legislatures from violating written State constitutions and to opine on the need for constitutional reform.[47] Some State courts (in lawsuits) took their first steps to declaring State statutes unconstitutional for violating written State constitutions. See Hamburger, Law and Judicial Duty (2008).

Thus, at 1787Philadelphia, there was no consensus as to how to deal with State Legislatures violating State written constitutions. But 1787Philadelphia had definite views on how the national government's judiciary would deal with Congress's violations of the 1787USConstitution.

THE MEANING OF "CONVENTION" IN AMERICA 1689 UNTIL TODAY

ISL focuses on State Legislature and emphasizes the word "Legislature" and the power of the Legislature in its analysis of the 1787USConvention.

The 1787USConstitution Article V contrasts a State "convention" with a State Legislature. The 1787 USConstitution in Article VII refers to State "conventions." ISL omits reference to the word "convention" in discussing the 1787USConstitution. There is a distinction between a State "convention" and a State Legislature. The distinction is significant.

Several of Coke's famous opinions in the early 17th Century were resolutions. E.g., The Case of Prohibitions, 77 Eng. Rep. 1342, 12 Co. Rep. 64 (1607); The Case of Proclamations, 77 Eng. Rep. 1352, 12 Co. Rep. 74 (1611).

47. Madison proposed the council of censors at 1787Philadelphia, but this was rejected.

"Convention" (when used in connection with government) meant, in the 1780's, an extra-legal body.

The word was originally British. At monarchical interregnums, conventions convened in 1399 (England), 1660 (England), and 1689 (in each of England and Scotland) to allow the legislature to assemble.

In America, "convention" had a broader meaning. A State's citizens could, by convening a constitution, bridge a gap in constitutional authority/continuity. A convention could propose/authorize governmental acts which an existing legislature could not. See generally Wood, Creation of the American Republic 1776-1787 (1998) at 310-343.

A convention assembled in 1689 in Massachusetts (after Governor Edmund Andros was overthrown), necessitated because Charles II (and the English Court of Chancery) revoked the original colonial charter. In 1689 during Leisler's rebellion and when New York's status as a royal proprietary colony was in limbo, a convention was held in Albany. The 1754 Albany Convention considered Benjamin Franklin's plan of colonial union. The 1765 Stamp Act Congress was also called a convention. In or about 1774-1776, many State counties held conventions.

After 1776, four States empowered special popularly elected assemblies denominated as conventions to adopt new constitutions (Delaware, Pennsylvania, Maryland, and Georgia). In Massachusetts, a specially elected assembly in 1779-1780 drafted a state constitution, which was popularly approved by its citizens. See generally Bryce, A Collection of the Constitutions of the Thirteen United

States of North America (1783). In New Hampshire, a specially elected assembly drafted a state constitution and put it to towns for approval in 1784. See generally Wood, Power and Liberty: Constitutionalism in the American Revolution 32-53(2021).

1786 witnessed the Annapolis Convention.

1787Philadelphia was a "convention." It exceeded the authority granted by the Articles of Confederation Congress—to report to that Congress recommendations for revising the Articles of Confederation. The 1787USConstitution exceeded the authority granted by providing for ratification through a method not provided in the Articles of Confederation.

The 1787USConstitution Articles V and VII refer to State conventions. Each granted additional powers to State conventions as to ratification of the 1787USConstitution, proposing Amendments, or calling for a national convention.

Within eighty years after ratification of the 1787USConstitution, the seven original States (which created constitutions without using a convention) had adopted new constitutions. The new constitutions were drafted by popularly elected State conventions which were subsequently popularly approved. This is set forth below in tabular form.

State	Year of Convention and Approval
Connecticut	1818
New York	1821
Virginia	1830
Rhode Island	1842
New Jersey	1844
North Carolina	1868
South Carolina	1868

After 1791, new States were admitted. The process was simple: Congress passed an enabling act for admission. Admission promised equal treatment with those States already admitted. In many enabling acts, drafting of a constitution in a constitutional convention is referenced.

What follows is a brief history of State enabling acts including comments about State constitutional conventions and adoption of a State constitution.

Vermont by popularly elected convention in 1777, enacted a state constitution. Vermont was admitted by enabling act, Act of Feb. 18, 1791, which was silent as to Vermont's constitution.

Kentucky's enabling act was silent as to its state constitution when admitted. Act of Feb. 4, 1791. Kentucky

by convention adopted a state constitution in 1792, after admission.

Tennessee by popularly elected convention adopted a state constitution before Congress passed the Tennessee enabling act, Act of June 1, 1796, Ohio's enabling act, April 30, 1802, began a pattern for many states arising out of the Northwest Territory. §5 of the Ohio enabling act called for drafting a state constitution by popularly elected convention with the convention to either adopt or require popular approval.

Louisiana's enabling act, Act of Feb. 20, 1811, called for drafting a state constitution by popularly elected convention and adoption by the convention.

Mississippi's enabling act, Act of March 1, 1817,followed Louisiana's model.

Alabama's enabling act, Act of March 2, 1819, followed Louisiana's model, calling for a popularly elected convention to draft and adopt a state constitution.

Amicus omits many other examples of subsequent state admissions but note five exceptional cases.

The admissions of the states of Arkansas, Michigan, Florida, California and Oregon were similar to Tennessee's admission. Each initiated their own popularly elected conventions which drafted a state constitution. Following adoption of a state constitution, Congress passed an enabling act.

West Virginia also adopted a constitution before passage of an enabling act. The West Virginia enabling act references both the convention and the popularly adopted State constitution. See Virginia v West Virginia, 78 U.S. 39, 44 (1870).

To summarize, after 1788, putative states by convention drafted written constitutions before admission[48] and sometimes afterwards. Many times, Congress in advance empowered the putative state to elect a convention to draft a state constitution.

1787USConstitution is silent as to what is the difference between a State convention and a State Legislature, and what powers a State convention has that a State Legislature does not. Circumstances at creation and history—practical conduct—illustrates the difference. A State convention has "a power superior to the ordinary legislature." Wood, Creation of the American Republic 1776-1787 (1998) at 328-343. A State convention has a power a State Legislature does not: the power to draft/create a State constitution.

Three additional consequences follow, dependent upon the language in a State constitution. First, a State convention can draft an entirely new State constitution or amendments to an existing State constitution. The greater power includes the lesser power. Second, popular approval of a new State constitution similarly allows for popular approval of amendments. Third, popular approval may alone be sufficient for a State constitutional amendment.

48. The typical state creation act allowed for constitution adoption by the convention or by popular vote.

Thus, a State constitution may provide for popular approval of a State constitutional amendment drafted by a State Legislature. Laughlin, A Study in Constitutional Rigidity, 10 University of Chicago L. Rev. 142 n.4 (1943).[49]

The States are still laboratories, experimenting in writing constitutions.

THE EFFECT OF USING A STATE CONVENTION IN ADOPTING A STATE CONSTITUTION

Before 1787Philadelphia, Jefferson pondered the fact that Virginia's provincial Congress (in default of its House of Burgess) created and enacted its Revolutionary era constitution. Jameson, The Constitutional Convention, Its History, Power, and Modes of Proceeding (1867) §138. The Virginia House of Burgess ceased to exist in mid-1776, and the Virginia General Assembly began. The General Assembly (and its predecessor) had authority to create laws, but its predecessor had created something more fundamental, the Virginia constitution. There had to be a difference between a law and the Virginia constitution, else its General Assembly could amend its written constitution as easily as it could grant a turnpike franchise. Compare Jefferson, Notes on the State of Virginia, Query XIII part 5, at 197-205 (1784) with Noah Webster, lawyer and later lexicographer, Collection of Essays and Fugitiv Writings on Moral, Historical, Political and Literary Subjects at 72-

49. This would allow for a State Constitutional amendment enacted by initiative. Here the North Carolina Constitution allows the State Legislature, by a 3/5 vote, to propose an amendment to the State Constitution subject to approval by its citizens. 1971 North Carolina Constitution Article XIII §4.

80 (1790).[50] See Wood, Creation of the American Republic 1776-1787 (1998) at 273-282. Connecticut's constitution was equally malleable.[51]

In a similar vein, some argued State legislators were their constituents' agents, bound to follow their constituents'/principals' direction. Others argued they were fiduciaries, with discretion to act as legislators saw in the best interest. If what legislators did displeased, citizens by election could unseat them.[52] Reid, The Concept of Representation in the Age of the American Revolution 102-109 (1989); Wood, Creation of the American Republic 1776-1787(1998) at 379-389.

Today, the two debates are resolved by referencing a specially elected convention in adopting a State constitution. All State governmental power flows from a State's citizens. The State's citizens parcel and distribute the State's powers amongst a State government as they see fit. Citizens grant legislators powers to enact State

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50. Webster's essays were earlier published. Wood, Creation of the American Republic 1776-1787 (1998) at 376-382. See generally Wood, Power and Liberty—Constitutionalism in the American Revolution 48-53 (2021).

51. Calder v. Bull, 3 U.S. 386, 395 (1798) (Patterson, J. The Connecticut Constitution is made of usages); at 398 (Iredell, J.,) (Connecticut Legislature has been in the uniform uninterrupted habit of a general superintending power over its courts); at 392-93(Chase, J. asserted by counsel that Connecticut constitution is composed of charter, acts of legislature, and usages)

52. Terranova, The Constitutional Life of Legislative Instructions in America, 84 New York University Law Review 1332, 1343-1349 (2009).

laws. Citizens do not grant legislators the *unilateral* power to create/amend a State constitution.[53] The power to create/amend a State Constitution is found elsewhere—with the citizens. The citizens grant some of that power to a convention.[54] The citizens retain the power to approve the convention's work.

Jefferson's quandary is resolved. Constituents *request* legislators follow their instructions.[55] Legislators have discretion to enact laws. Election defeat is not the only method of controlling State legislators. State legislators are denied *in advance* the authority to contravene an expressed State constitution.[56]

ISL ignores a basic rule of document interpretation. An entire document including all its parts must be read harmoniously together. There is purpose for using a specific phrase in one part of a document but then contrasting it

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53. There is no need to consider to what extent that the body calling a State convention can limit the convention's agenda.

54. Some States today allow citizen initiative regarding States constitution. Some States require the Legislature to initiate constitutional amendments, but they nonetheless require State citizen approval.

55. Terranova, supra.52, at 1360-1367.

56. [T]o guard against so great an evil [as a legislature able to enact whatever it chose], it has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution…to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act …of the Legislature of a state, violates those constitutional provisions, it is unquestionably void… Calder v. Bull, 3 U.S. 386, 399 ((1798) (Iredell, J.)

with another phrase in a different part. If ISL were read into the USHsRepresentative election clause, ISL would undermine the purpose of written constitutions in the thirteen original States—demonstrating continuity and rule of law. For new states subsequently admitted, ISL would ignore Congress's repeatedly empowering or recognizing putative state constitutional conventions in State enabling acts.

ISL, reduced to its essentials, argues that a State Legislature performs a federal function when prescribing the times, manners and places for USHsRepresentative elections. Under ISL, performing a federal function permits the North Carolina Legislature to traverse bounds created by North Carolina citizens in their State constitution.[57] The State Legislature is not a State convention. Nor is the State Legislature equal to the citizens of North Carolina. Because ISL limits a State's citizens' distribution of sovereignty, ISL should be found inapplicable.

Further, when read textually, ISL is applicable only to the seven States which, by unilateral Legislative action, created their own State Constitutions. North Carolina was such a state. Circumstances changed. In 1868, a North Carolina convention drafted a constitution which was

57. 1971 North Carolina Constitution Article XIII §2 provides "The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way." One way is by convention. The other way is by the North Carolina Legislature on a 3/5 vote submitting a proposal to the North Carolina citizens for popular approval. Id. at §§3 and 4.

popularly approved. In 1971, a North Carolina convention drafted a new constitution which was popularly approved. ISL no longer applies to North Carolina.

CONSEQUENCES IF ISL APPLIES

ISL is not merely a contest between two branches of state government. It can also involve personal rights.

A hypothetical illustrates this. In 1899, the North Carolina Legislature proposed a constitutional amendment; 1899 North Carolina Session Laws Ch. 218 which was popularly approved in 1900. Amicus focuses on §6 which provides:

> All elections by the people shall be by ballot, and all elections by the [North Carolina] General Assembly shall be viva voce.[58]

Suppose the North Carolina Legislature enacts a law. The law provides in USHsRepresentatives special elections (filling unexpired terms), each voter shall deposit his sealed ballot in a separate ballot box which box is labeled for the candidate for whom the vote is cast.[59] The law provides a misdeposited ballot is not counted. This prevents election fraud and facilitates counting. The deposit, however, makes a voter's choice public. When ballots are public, retaliation may follow; free will is suppressed. The hypothetical law violates North Carolina

58. This is found in 1971 North Carolina Constitution Article VI Section 5.

59. State citizens overseas (mainly armed forces) covered by 52 USC §§20301 – 20311 are excepted.

Constitution Article 5 §5. Withers v. Board of County Comm'rs, 196 N.C. 535, 146 S.E. 225 (1929); Jenkins v. State Board of Elections, 180 N.C. 169, 104 S.E. 346 (1920). The hypothetical law does not violate 2 USC §9.[60]

A voter refuses to deposit his ballot in a labeled box. An election worker *destroys* this ballot. The voter sues for damages. The worker may defend by proving absence of malice: the worker complied with the new law. But the new law did not contemplate destruction. The new law provided *the ballot would not be counted*. The voter loses his right to challenge the law and if successful, *have his ballot counted*. May the voter recover damages?

In this appeal, the remedy is an order for reapportionment--but in the proper circumstances, it could be monetary damages. ISL must be analyzed without regard to the remedy.

MISCELLANEOUS ARGUMENTS

Amicus will not repeat arguments made elsewhere but will raise other concerns.

Older authority should not be forgotten. Carroll v. Becker, 285 US 380 (1932), aff'g 329 Mo. 501, 45 SW2d 533; Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932); Koenig v. Flynn, 285 U.S. 375 (1932), aff'g 258 N.Y. 292,

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60. All votes for Representatives in Congress must be by written or printed ballot or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect. 2 USC §9

aff'g 234 A.D. 139, 254 N.Y.S. 339 (3rd Dept. 1931), aff'g 141 Misc. 840, 253 N.Y.S. 554 (Sup. Ct. Albany Co.); State ex rel Schrader v. Polley, 26 S.D. 5, 127 NW 848 (1910); Note, Independent Power of State Legislatures to Create State Congressional Districts, 45 Harv. L. Rev. 355 (1931).[61]

There is a difference between Art.I§4Cl.1 and the Presidential Electors clause, USConstitution Art. 2 §1 cl.2. Congress has control over USHsRepresentative election laws. Each house of Congress is the judge of elections, returns and qualifications of its members. USConstitution Art. 1 §5 Cl.1. The USConstitution calls for casting of presidential electoral ballots in a State with the State's certificate of results to be sent to Congress. The USConstitution omits mention of any Congressional control over the Presidential Elector process, only specifying opening by Congress of State sealed certificates (which can lead to a possible contingent presidential/vice presidential election). The separate balloting by electors was deliberate, ensuring any tumults in a Presidential election were dispersed amongst the states, and not centralized in one place. DeTocqueville, I Democracy in America (3rd ed. 1839) 124-127 (mode of election); Federalist#68.

The USConstitution does not generally prohibit a State from distributing its powers amongst its own branches. Satterlee v. Matthewson, 27 U.S. 380, 413 (1829) ("There is nothing in the constitution of the United States, which forbids the legislature of a state to exercise judicial functions"); Winchester & S.R. Co. v. Commonwealth, 106

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61. This Court's opinions in Carroll v. Becker and Koenig v Flynn are cited by the Non-State Respondents.

Va. 264, 55 S.E. 692 (1906). For example, a State may ask its populace for an advisory ballot on future legislative action. Howard Jarvis Taxpayers Assoc. v. Padilla, 62 Cal.4th 486, 363 P.3d 628 (2016).

This appeal is on certiorari under 28 USC §1257(a) from the North Carolina Supreme Court. The statute embodies a longstanding policy limiting this Court's review of State Court decisions.

> Without giving an opinion, at this time, whether this Court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void; I am fully satisfied that this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution (or law) in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, *393 acts of assembly, and usages, and customs. I should think that the courts of Connecticut are the proper tribunals to decide, whether laws, contrary to the constitution thereof, are void. In the present case they have, both in the inferior and superior courts, determined that the Resolution (or law) in question was not contrary to either their state, or the federal, constitution.

Calder v Bull, 3 US 386, 392-393 (1798) (Chase, J.).

Someday, a State's citizens in a State Constitution may expressly set forth the relationship between citizen sovereignty and the Legislature and grant the State Legislature power to make unilateral amendments to the State constitution. Someday, a State's citizens may in a State Constitution limit its Legislature's power to choose Presidential Electors. These issues are not presently before the Court. When and if this happens, ISL can be considered anew. Ashwander v TVA, 297 US 288, 346-347 (1936)(Brandeis, J., concurring).

CONCLUSION

Petitioners' appeal should be denied in all respects.

Respectfully submitted,

Eugene H. Goldberg, Esq.
Counsel of Record
686 Harrison Avenue
East Meadow, NY 11554
(516) 485-9344
eman352@optonline.net

Attorney as Amicus Curiae