

**CONGRESSIONAL AND PRESIDENTIAL  
ELECTORAL REFORM AFTER *ARIZONA  
STATE LEGISLATURE V. ARIZONA  
INDEPENDENT REDISTRICTING  
COMMISSION***

I. FACTS AND HOLDING .....	157
A. FACTS.....	159
B. HOLDING .....	160
II. BACKGROUND.....	161
A. THE ELECTIONS CLAUSE AND 2 U.S.C. § 2A(C) .....	161
B. DEFINING THE FUNCTION OF THE “LEGISLATURE” WITHIN THE ELECTIONS CLAUSE AND THE 1911 ACT .....	162
III. THE COURT’S DECISION.....	167
A. THE MAJORITY OPINION.....	168
1. DEFINING THE FUNCTION OF THE LEGISLATURE WITHIN THE RELEVANT PRECEDENT.....	169
2. WHETHER 2 U.S.C. § 2A(C) PERMITS ARIZONA’S ADOPTION OF THE INDEPENDENT REDISTRICTING COMMISSION .....	169
3. WHETHER THE ELECTIONS CLAUSE PERMITS ARIZONA’S ESTABLISHMENT OF THE INDEPENDENT REDISTRICTING COMMISSION .....	170
4. THE ELECTIONS CLAUSE: A SEEMING ATTEMPT AT CONGRESSIONAL PREEMPTIVE POWER TO REGULATE ELECTIONS.....	171
5. THE AUTONOMY OF THE STATE AS A LABORATORY TO ESTABLISH LEGISLATIVE PROCESSES.....	172
B. CHIEF JUSTICE ROBERTS’S DISSENT.....	174
1. THE LEGISLATURE UNDER THE ELECTIONS CLAUSE IS THE REPRESENTATIVE BODY WHICH MAKES LAWS .....	174
2. THE MAJORITY’S UNNECESSARY AND UNCONSTITUTIONAL APPLICATION OF 2 U.S.C. § 2A(C) .....	176
IV. ANALYSIS .....	177

A. <i>AIRC</i> 'S IMPACT ON CONGRESSIONAL ELECTORAL REFORM.....	178
1. THE DETRIMENTAL EFFECTS OF GERRYMANDERING ON AMERICA'S POLITICAL CULTURE: CLEAR CUT OR OPEN FOR DEBATE? .....	178
2. THE IMPACT OF <i>AIRC</i> ON CONGRESSIONAL GERRYMANDERING.....	180
a. The Case for Independent Redistricting Commissions.....	180
b. The Future of Independent Redistricting Commissions As a Result of <i>AIRC</i> .....	183
B. <i>AIRC</i> 'S IMPACT ON PRESIDENTIAL ELECTORAL REFORM.....	184
1. THE NATIONAL POPULAR VOTE COMPACT .....	184
2. THE POTENTIAL IMPACT OF <i>AIRC</i> ON THE NPV COMPACT.....	186
V. CONCLUSION .....	188

In an effort to eliminate the practice of gerrymandering congressional electoral districts, Arizona voters established an independent redistricting commission in 2000 and granted it autonomous congressional redistricting authority.<sup>1</sup> This independent commission brought to the forefront deep concerns regarding the constitutionality of using a ballot initiative to adopt legislation aimed at congressional electoral reform. Subsequent litigation brought by the Arizona State Legislature culminated in the recent landmark Supreme Court decision *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*.<sup>2</sup> In *AIRC*, a five-to-four majority found that the Elections Clause of the United States Constitution and § 2a(c) of Title II of the United States Code permit the use of the ballot initiative to adopt congressional redistricting legislation.<sup>3</sup>

This Note proposes that *AIRC* may transform the American electoral process by enabling other states to adopt and improve upon the independent commission model. Section I of this Note discusses the facts relevant to the Court's decision in *AIRC*.

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1. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1048–49 (D. Ariz. 2014), *aff'd*, 135 S. Ct. 2652 (2015).

2. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 (2015).

3. *Id.* at 2677.

Next, Section II provides a background of the constitutional provisions, congressional statutes, and case law relevant to understanding the issue of the constitutionality of the Arizona Commission. Section III outlines the rationale the Court used to find the enactment of the commission constitutional, as well as a discussion of Chief Justice Roberts's dissenting opinion. Finally, Section IV analyzes the impact of the Court's interpretation of the "state legislature" under the Elections Clause and § 2a(c) in *AIRC*. More specifically, this section examines whether the adoption of electoral legislation by ballot initiative will reduce gerrymandering by allowing states to improve the independent commission model. It also discusses the potential impact that *AIRC* may have on presidential electoral reform through the effective dissolution of the Electoral College by the National Popular Vote Interstate Compact.

### I. FACTS AND HOLDING

In 2000, Arizona voters adopted Proposition 106—a ballot initiative<sup>4</sup> aimed at “ending the practice of gerrymandering<sup>5</sup> and improving voter and candidate participation in elections.”<sup>6</sup> Proposition 106 amended the Arizona Constitution<sup>7</sup> to divest the state legislature of congressional redistricting authority and reallocated this authority to the Arizona Independent Redistricting Commission (*AIRC* or the Commission).<sup>8</sup> From

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4. The Arizona Constitution reserves the power for voters to propose any amendment to the constitution through a voter initiative. ARIZ. CONST. art. IV, pt. 1, § 1(2). The initiative power is in keeping with the principle that “[t]he legislature and electorate share lawmaking power under Arizona’s system of government.” *Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 1155 (Ariz. 2013) (internal quotation marks omitted).

5. Gerrymandering is named after former Massachusetts Governor Elbridge Gerry. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 244 (2009) (noting that “in 1812 [Gerry] approved a redistricting plan containing a bizarre, salamander-shaped district designed to enhance the political fortunes of his own political party”). The Supreme Court has noted that partisan gerrymanders are “incompatib[le] . . . with democratic principles.” *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004).

6. Joint Appendix at 50, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13-1314), 2014 WL 6847178.

7. See ARIZ. CONST. art. IV, pt. 2, § 1.

8. Joint Appendix, *supra* note 6, at 50, 61. Prior to the adoption of Proposition 106, the Arizona State Legislature established congressional districts by proposing legislation that was debated in committee, approved or disapproved by the body as a whole, and then approved or disapproved by the governor. *Id.* at 16–17; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1048

1912 until 2000, Arizona used a multi-step legislative process to adopt its congressional districts. First, a legislator would introduce proposed redistricting legislation.<sup>9</sup> Second, the proposed legislation would be referred to a bipartisan, joint committee on redistricting.<sup>10</sup> Third, the joint committee would then recommend the proposal to the legislative body as a whole for approval or modification.<sup>11</sup> Finally, upon passage the redistricting measure was sent to the Governor for approval or disapproval.<sup>12</sup>

Proposition 106 amended the Arizona Constitution to outline the composition of the AIRC, providing that the commission consist of five members; no more than two may be from the same political party, and none may have been a public official, candidate for public office, lobbyist, or officer of a political party.<sup>13</sup> The commission on appellate court appointments<sup>14</sup> establishes a bipartisan nomination pool of twenty-five candidates (Nomination Pool).<sup>15</sup> Then, state legislative leaders appoint four members from the Nomination Pool. These four commissioners then select a fifth member from the nomination pool who may not be registered with any political party already represented on the commission.<sup>16</sup> The term of each commissioner lasts until the appointment of the next commission, which occurs the year following every federal census.<sup>17</sup>

Once the AIRC is appointed, it must convene after each census to establish final district boundaries and certify the new districts to the Arizona Secretary of State.<sup>18</sup> Additionally, the

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(D. Ariz. 2014) (“From the first year of its statehood in 1912 until 2000, the Arizona State Legislature . . . was granted the authority by the Arizona Constitution to draw congressional districts, subject to the possibility of gubernatorial veto.”), *aff’d*, 135 S. Ct. 2652 (2015).

9. See Joint Appendix, *supra* note 6, at 16.

10. *Id.*

11. *Id.*

12. *Id.*

13. ARIZ. CONST. art. IV, pt. 2, § 1(3).

14. The commission on appellate court appointment is one of four Arizona judicial nominating commissions and is composed of sixteen members: ten public members, five attorney members, and the Chief Justice of the Arizona Supreme Court sitting as chair. *Judicial Nominating Commissions*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/jnc> (last visited Mar. 22, 2016).

15. ARIZ. CONST. art. IV, pt. 2, § 1(5).

16. *Id.* art. IV, pt. 2, § 1(8). This commissioner serves as the AIRC chair.

17. See *id.* art. IV, pt. 2, § 1(3), (23).

18. *Id.* art. IV, pt. 2, § 1(14), (16)–(17).

state legislature may submit recommendations to be considered by the Commission prior to establishing the final districting.<sup>19</sup>

### A. FACTS

On January 17, 2012, the Commission approved finalized redistricted maps based on the 2010 census to be used in all congressional elections until 2021.<sup>20</sup> Soon thereafter, the Arizona State Legislature filed suit in the United States District Court for the District of Arizona against the AIRC, its five commissioners, and the Arizona Secretary of State.<sup>21</sup> The Legislature sought a judgment declaring that Proposition 106 violated the Elections Clause of the United States Constitution<sup>22</sup> and a permanent injunction against using any map created by the Commission after the 2012 congressional election.<sup>23</sup> The Legislature maintained that the Elections Clause expressly grants sole authority to the “legislature”—meaning the “representative body which makes the laws of the people”—to create congressional districts.<sup>24</sup> Because the AIRC is not the legislature and the Commission “divested” the legislature of its authority to adopt congressional districts, the Legislature argued that Arizona’s use of the Commission to engage in congressional redistricting violated the Elections Clause.<sup>25</sup>

AIRC moved to dismiss for failure to state a claim and for lack of standing.<sup>26</sup> The Commission argued that the adoption of the AIRC did not violate the Elections Clause because the Commission was established by a voter initiative.<sup>27</sup> AIRC maintained that because the Arizona Constitution reserves for

19. ARIZ. CONST. art. IV, pt. 2, § 1(16).

20. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 (2015); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014), *aff'd*, 135 S. Ct. 2652 (2015).

21. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2662.

22. U.S. CONST. art. I, § 4, cl. 1 (“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 Regulations, except as to the Places of chusing Senators.”).

23. *Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d at 1049.

24. *Id.* at 1051.

25. Complaint at 8, *Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (No. 2:12-cv-01211).

26. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014), *aff'd*, 135 S. Ct. 2652 (2015).

27. See Defendants *Ariz. Indep. Redistricting Comm'n* and Comm’rs Mathis, McNulty, Herrera, Freeman, and Stertz’s Motion to Dismiss at 9–10, *Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (No. 2:12-cv-01211).

voters the power to propose laws by initiative, the adoption of the Commission was legally within the legislative process of Arizona.<sup>28</sup>

A three-judge district court denied AIRC's motion to dismiss for lack of standing, granted AIRC's motion to dismiss for failure to state a claim, and denied the Legislature's preliminary injunction as moot.<sup>29</sup> On the merits of the case, the majority found that the Elections Clause did not preclude the establishment of an independent redistricting commission by voter initiative because under Arizona law, "the lawmaking power plainly includes the power to enact laws through initiative."<sup>30</sup>

## B. HOLDING

The Legislature appealed to the United States Supreme Court.<sup>31</sup> Upon AIRC's motion to dismiss or affirm,<sup>32</sup> the Court postponed consideration of the question of standing to the hearing of the case, which was limited to the following two questions: "1) Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts? 2) Does Arizona Legislature have standing to bring this suit?"<sup>33</sup> The Court held in a five-to-four

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28. See Defendants Ariz. Indep. Redistricting Comm'n and Comm'rs Mathis, McNulty, Herrera, Freeman, and Stertz's Motion to Dismiss, *supra* note 27, at 9–10.

29. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014), *aff'd*, 135 S. Ct. 2652 (2015); see also 28 U.S.C. § 2284(a) (2012) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

30. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d at 1056.

31. Plaintiff's Notice of Appeal Pursuant to 28 U.S.C. § 1253, Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047 (No. 2:12-cv-01211). The legislature appealed directly to the Supreme Court pursuant to a federal statute allowing a direct appeal from an order determined by a three-judge district court. 28 U.S.C. § 1253 (2012). In AIRC, a three-judge court was convened pursuant to 28 U.S.C. § 2284(a), which requires that a three-judge court hear any action "challenging the constitutionality of apportionment of congressional districts." Plaintiff's Motion to Convene a Three-Judge Statutory Court, Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047 (No. 2:12-cv-01211); see 28 U.S.C. § 2284(a) (2012) ("A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts . . .").

32. Motion to Dismiss or Affirm, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) (No. 13-1314), 2014 WL 2986590.

33. Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 46 (2014) (mem.).

decision that the Legislature had standing to bring the suit,<sup>34</sup> and that neither the Elections Clause nor 2 U.S.C. § 2a(c) precluded Arizona's establishment of an independent redistricting commission adopted by voter initiative.<sup>35</sup>

## II. BACKGROUND

This section discusses the relevant constitutional provisions, statutes, and case law. First, this section provides a brief description of the Elections Clause and 2 U.S.C. § 2a(c)—both of which are paramount to the *AIRC* Court's rationale in determining whether the Constitution and congressional law envision the ballot initiative as existing within the scope of the power of the state legislature to engage in redistricting. Second, this section outlines the case law relevant to interpreting the function of the legislature contemplated by both the Elections Clause and § 2a(c).

### A. THE ELECTIONS CLAUSE AND 2 U.S.C. § 2A(C)

The Elections Clause of the United States Constitution grants state legislatures “a broad power to prescribe the ‘Times, Places and Manner of holding Elections for Senators and Representatives.’”<sup>36</sup> However, the Elections Clause additionally confers upon Congress the preemptive power to alter those regulations.<sup>37</sup> The scope of the clause is comprehensive,

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34. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015). This Note addresses only the issue of whether the Elections Clause and 2 U.S.C. § 2a(c) permit Arizona's adoption of an independent commission to engage in congressional redistricting. For a short discussion of the Court's analysis finding that the Legislature had standing, see *infra* note 71.

35. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. at 2677.

36. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. CONST. art. I, § 4, cl. 1). The Elections Clause does not merely grant states the power to regulate elections, but rather requires it. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof . . .” (emphasis added)); see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995) (noting that the Elections Clause “provides one of the few areas in which the Constitution expressly requires action by the State”); see also *Grills v. Branigin*, 284 F. Supp 176, 180 (S.D. Ind.) (citing *Smiley v. Holm*, 285 U.S. 355 (1932) (“This power [to create congressional districts under the Elections Clause] is granted to the Indiana General Assembly . . .”), *aff'd without opinion*, 391 U.S. 364 (1968)).

37. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013); accord *Ex parte Siebold*, 100 U.S. 371, 392 (1879) (“The power of Congress [with respect to the adoption of congressional election regulations] . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the

permitting the state to adopt regulations relating to registration, voting supervision, voter protection, voter fraud and corruption prevention, the publication of election returns, and more.<sup>38</sup>

While the Elections Clause delegates to state legislatures the power to establish congressional district lines, a statute—2 U.S.C. § 2a—prescribes how Congress should delegate the apportionment of representatives among such districts.<sup>39</sup> Section 2a(c) provides, “Until a State is redistricted in the manner *provided by the law thereof* after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected [in a particular way].”<sup>40</sup> Section 2a(c) was modeled after the Reapportionment Act (1911 Act), passed by Congress in 1911, which contained nearly identical language.<sup>41</sup>

#### B. DEFINING THE FUNCTION OF THE “LEGISLATURE” WITHIN THE ELECTIONS CLAUSE AND THE 1911 ACT

Central to the issue presented in *AIRC* was whether the Elections Clause and § 2a(c) envision the power of the state legislature in enacting congressional districts to include redistricting legislation enacted through ballot initiative. Thus, the relevant jurisprudence largely concerns the particular issue of the substantive function and definition of the legislature within the Election Clause and § 2a(c).<sup>42</sup>

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State which are inconsistent therewith.”); *see also* THE FEDERALIST NO. 59, at 300–01 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“[E]very government ought to contain in itself the means of its own preservation. . . . Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.”).

38. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (citing *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972); *United States v. Classic*, 313 U.S. 299, 320 (1941)); *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

39. 2 U.S.C. § 2a (2012).

40. *Id.* § 2a(c) (emphasis added).

41. *See Arizona State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (2015); *see also* Apportionment Act of 1911, Pub. L. No. 62-5, § 4, 37 Stat. 13, 14 (“That in the case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the state at large and the other Representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof . . .”).

42. *Cf. Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932) (“[T]he meaning of the word ‘Legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depending upon the character of the function which that body in each instance is called upon to



The first Supreme Court decision to define the scope of the legislature with regard to the adoption of congressional districts was *Ohio ex rel. Davis v. Hildebrant*.<sup>43</sup> In *Hildebrant*, the Court found that Ohio's legislative authority to adopt congressional districts under the Elections Clause and the 1911 Act included the authority of the voter referendum.<sup>44</sup> The Court reached its conclusion by analyzing the authority of the State of Ohio, the authority of the Congress, and the function of Elections Clause.<sup>45</sup> First, the Court found that "the referendum . . . was contained within the legislative power" of the state as a part of the Ohio Constitution.<sup>46</sup> Second, the Court found that in enacting the 1911 Act, Congress:

expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional district by law.<sup>47</sup>

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exercise." (citing *Smiley v. Holm*, 285 U.S. 355 (1932)); cf. *Hawke v. Smith*, 253 U.S. 221, 227 (1920) (noting that the predominate question was "[w]hat did the framers of the Constitution mean in requiring ratification [of amendments] by 'legislatures?'"). Though *Hawke* concerned the ratification of the Eighteenth Amendment rather than a redistricting claim, the *AIRC* Court distinguished the role of the legislature in redistricting versus its role in ratifying constitutional amendments. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015) ("As we explained in *Hawke*, the power to legislate in the enactment of the laws of a State is derived from the people of the State. Ratification, however, has its source in the Federal Constitution and is not an act of legislation within the proper sense of the word." (internal quotations and citations omitted)).

43. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). At issue in *Hildebrant* was an act passed by the Ohio General Assembly governing the redistricting of the state for congressional elections. *Id.* at 566. After the passage of the act, Ohio voters disapproved of the law through a popular referendum. *Id.* The Ohio Secretary of State filed suit, maintaining that a referendum vote could not be a part of the legislative authority granted power to influence congressional districting under the Elections Clause and the 1911 Act. *Id.* at 567.

44. *See id.* at 569–70. Voter referendum is "the process of referring a state legislative act . . . or public issue to the people for . . . approval by popular vote." *Referendum*, BLACK'S LAW DICTIONARY (10th ed. 2014). The referendum differs from a voter initiative, which is a process by which the citizenry may *propose* legislation by popular vote and compel either the legislature or the electorate to vote on it. *Initiative*, BLACK'S LAW DICTIONARY (10th ed. 2014).

45. *See Hildebrant*, 241 U.S. at 567.

46. *Id.* at 568. The Ohio Constitution expressly declares that the legislative power of the state is vested in the general assembly *and* in the people by way of referendum. *Id.* at 566.

47. *Id.* The legislation preceding the 1911 Act required that the existing districts

Finally, the *Hildebrant* Court found “plainly without substance” the contention that the Elections Clause does not permit the inclusion of a referendum within a state’s legislative power for the purpose of congressional districting.<sup>48</sup>

In *Smiley v. Holm*, the Court similarly found that a state’s legislative power is not limited strictly to the representative body for the purposes of congressional redistricting under 2 U.S.C. § 2a and the Elections Clause.<sup>49</sup> In *Smiley*, the Court determined that the Elections Clause did not preclude the use of a governor’s veto against legislation creating congressional districts where the gubernatorial veto *had* legislative authority as provided by the constitution.<sup>50</sup> There, the Court noted the ultimate question with regard to whether the state’s legislative power is relevant to the adoption of congressional districts under the Elections Clause: whether the Elections Clause invests the state legislature with the authority *to make laws* by establishing districts or simply “designate[s] [the legislature] as a *mere agency to discharge the particular duty*.”<sup>51</sup> In other words, the issue is whether the state has been delegated lawmaking authority, or has been instructed

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in the state should continue in force “until the legislature of such state *in the manner herein prescribed* shall redistrict such State.” *Id.* (emphasis added) (quoting Act of February 7, 1891, ch. 116, § 4, 26 Stat. 735, 736). The substituted provision in the 1911 Act provided that the redistricting should be made by the state “in the manner *provided by the laws thereof*.” *Id.* (emphasis added).

48. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916).

49. *See Smiley v. Holm*, 285 U.S. 355, 372–73 (1932). In *Smiley*, the Minnesota Senate and House of Representatives passed a bill that redistricted Minnesota’s congressional districts following the fifteenth census as provided by 2 U.S.C. § 2(a). *Id.* at 361. The governor subsequently disapproved of the bill. *Id.* Despite the governor’s veto, the redistricting plan was deposited with the Minnesota Secretary of State. *Id.* Suit was then brought by a “citizen, elector, and taxpayer” of Minnesota, alleging that the redistricting plan was a nullity because of the governor’s veto. *Id.* at 362. Minnesota law requires that for a vetoed bill to become law, the bill must be reconsidered and passed by a two-third vote in each house. MINN. CONST. art. IV, § 23.

50. *See Smiley*, 285 U.S. at 372–73.

51. *Id.* at 364–66 (emphasis added) (quoting *State ex rel. Smiley v. Holm*, 238 N.W. 494, 499 (Minn. 1931)). This question arises from the Supreme Court of Minnesota’s finding that:

The Legislature in districting the state is not strictly in the discharge of legislative duties as a lawmaking body, acting in its sovereign capacity, but is acting as representative of the people of the state under the power granted by said article 1, § 4. It merely gives expression as to district lines in aid of the election of certain federal officials . . . The Legislature is designated as a mere agency to discharge the particular duty. The Governor’s veto has no relation to such matters; that power pertains under the state Constitution, exclusively to state affairs.

*Smiley*, 238 N.W. at 499.

by Congress to pass a particular law.

The Court further noted that while the term legislature at the time of the drafting of the Constitution clearly referred to the state's representative body, the primary question in answering the aforementioned issue is the *function* of the legislature contemplated by the Elections Clause.<sup>52</sup>

The *Smiley* Court found that the function of the legislature within the Elections Clause is that of *lawmaking*.<sup>53</sup> The Court based its finding first on the fact that the subject matter of the legislature's duty in the Clause relates to the "time, places, and manner of holding elections for senators and representatives."<sup>54</sup> The comprehensiveness of the legislature's duties outlined therein "embrace authority to provide a *complete code* for congressional elections."<sup>55</sup> Second, the Court noted that the phraseology of the second clause within the Elections Clause, providing that "Congress may at any time by law make or alter *such regulations*," necessarily refers to "regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections."<sup>56</sup>

The Court in *Smiley* further found that the 1911 Act similarly contemplates the exercise of lawmaking power by the state legislatures.<sup>57</sup> Citing the majority's analysis in *Hildebrant*, the Court found that the 1911 Act's use of the phrase "in the manner provided by the laws *thereof*" was intended to recognize the authority of the legislative process of the individual state.<sup>58</sup>

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52. See *Smiley v. Holm*, 285 U.S. 355, 365–66 (1932) ("Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by [the Elections Clause] is that of making laws.")

53. *Id.* at 366.

54. *Id.*

55. *Id.* (emphasis added) ("[I]n short, [the Clause grants authority] to enact the numerous requirements as to procedure and safeguards which . . . are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments.")

56. *Id.* (emphasis added) (quoting U.S. CONST. art. I, § 4).

57. *Id.* at 371. The Supreme Court decided two other cases on the same day as *Smiley*. See *Carroll v. Becker*, 285 U.S. 380 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932). The issues in *Carroll* and *Koenig* were "substantially the same" as those presented in *Smiley* and both were thus decided on the same grounds as *Smiley*. *Carroll*, 285 U.S. at 403.

58. See *Smiley v. Holm*, 285 U.S. 355, 371 (1932). ("The significance of the clause, 'in the manner provided by the laws thereof' is manifest from its occasion and

Because it is clear that the Elections Clause and the 1911 Act contemplate the legislature's function in redistricting as that of lawmaking, federal authority could not preempt Minnesota's use of a gubernatorial veto against a redistricting plan passed by the state legislature.<sup>59</sup>

Some have suggested that the Court's holdings in *Hildebrant* and *Smiley* are incompatible with *Hawke v. Smith*, where the Court found that the ratification of a constitutional amendment *did* preclude the use of a state referendum.<sup>60</sup> In *Hawke*, the Court found that the extension of a voter referendum to Ohio's ratification of a proposed constitutional amendment was improper because of the specific authority granted to Congress and the state by the Constitution.<sup>61</sup> As in *Hildebrant* and *Smiley*, the primary question was what the Framers of the Constitution meant by legislatures.<sup>62</sup> In finding that the legislature does not include the power granted to the people through voter referendum, the Court reasoned that the power of ratification "derives its authority from the federal Constitution" and thus differs from the enactment of state laws, where the power to legislate is derived from the citizens.<sup>63</sup>

In justifying *Hawke* within the context of the seemingly incongruous *Hildebrant*, the Court noted that under *Hildebrant* Congress recognized the state referendum as *part of the legislative process* in adopting congressional districts pursuant to

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purpose. It was to recognize the propriety of the referendum in establishing congressional districts where the state had made it part of the legislative process.").

59. See *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932).

60. See *Hawke v. Smith*, 253 U.S. 221, 230–31 (1920) ("But it is said that this view runs counter to the decision of this court in *Davis v. Hildebrant* . . .").

61. See *id.* at 227. In *Hawke*, the Ohio Senate and House of Representatives passed a resolution ratifying a proposed amendment to the United States Constitution. *Id.* at 224–25. However, the citizens of Ohio sought to submit the question of the ratification to a referendum. *Id.* at 224. The question before the Court was "[w]hether the provision of the Ohio Constitution . . . extending the referendum to the ratification by the General Assembly of proposed amendments to the federal Constitution is in conflict with article 5 of the Constitution of the United States." *Id.* at 225.

62. *Id.* at 227. Article V lays out two methods by which to amend the Constitution: "by action of the *Legislatures* of three-fourths of the states, or conventions in a like number of states." *Id.* (emphasis added) (citing *Dodge v. Woolsey*, 59 U.S. 331, 348 (1855)). The question of the scope of the "legislature" within *Hawke* concerns the first of these methods.

63. See *id.* at 229–30. ("[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.").

the Elections Clause.<sup>64</sup> Accordingly, the clause “plainly gives authority to the state to legislate within the limitations therein named.”<sup>65</sup> The legislative authority granted to the states under the Elections Clause is “entirely different” from a state’s duty to merely express assent to the ratification of a proposed Constitutional amendment.<sup>66</sup>

In sum, the relevant precedent interpreting the scope of the legislature within the Elections Clause and § 2a(c) articulates a fundamental question central to the issue in *AIRC*: what is the function of the state legislature contemplated by these laws—that of direct lawmaking or that of a mere duty of assent similar to the ratification of a proposed Constitutional amendment? The relevant precedent elucidates this issue further: if the function contemplated by the Elections Clause and § 2a(c) is that of lawmaking, then states are clearly able to legislate within their own constitutional provisions—even if this includes the legislative authority of the gubernatorial veto or popular referendum.

### III. THE COURT’S DECISION

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the majority relied upon the rulings in *Hildebrant*, *Smiley*, and *Hawke*, as well as expressions made by the Framers surrounding the ratification of the Constitution.<sup>67</sup> Based on this analysis, the majority held in a five-to-four ruling that the function of the legislature within the Elections Clause and 2 U.S.C. § 2a(c) includes the ability to adopt legislation by popular initiative.<sup>68</sup> Accordingly, the Court held that neither the Elections Clause nor § 2a(c) preclude Arizona’s adoption of an independent commission to establish congressional districts.<sup>69</sup> Justice Ginsburg authored the majority opinion, joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.<sup>70</sup> Dissenting

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64. See *Hawke v. Smith*, 253 U.S. 221, 230–31 (1920).

65. *Id.* at 231.

66. *Id.* (“Such legislative action 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.”).

67. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2666–69, 2672, 2674–75 (2015).

68. *Id.* at 2671.

69. *Id.* at 2657.

70. *Id.*

opinions were filed by Chief Justice Roberts (joined by Justices Scalia and Alito), Justice Scalia (joined by Justice Thomas), and Justice Thomas (joined by Justice Scalia).<sup>71</sup>

This section details the Court's findings and analysis in *AIRC*. Subsection A discusses the majority's rationale regarding the function and scope of the legislature under the Elections Clause and § 2a(c). Subsection B discusses Chief Justice Roberts's dissenting opinion, which draws upon a contrasting analysis of the relevant precedent and documents authored by the Framers to arrive at the conclusion that the legislature can only be interpreted as the "representative body that makes laws."

### A. THE MAJORITY OPINION

In *AIRC*, the Supreme Court held that the Elections Clause and 2 U.S.C. § 2a(c) do not preclude states from adopting independent redistricting commissions by ballot initiative.<sup>72</sup> First, the Court interpreted the meaning of the word legislature within the relevant precedent.<sup>73</sup> Next, the Court analyzed 2 U.S.C. § 2a(c) to determine whether it permits the use of an independent commission to adopt Arizona's congressional

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71. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2657 (2015). Justice Scalia dissented on the grounds that the Legislature lacked standing, and thus the Court lacked jurisdiction to hear the claim. *Id.* at 2694–97 (Scalia, J., dissenting). Justice Scalia additionally voiced his support for the Chief Justice's dissent on the merits, noting "the majority's resolution on the merits question ('legislature' means 'the people') is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislatures, that I cannot avoid adding my vote to the devastating dissent of the Chief Justice." *Id.* at 2697. Justice Thomas's dissent agreed that the suit should be dismissed for lack of standing, but also rejected the Court's appeal to "faux federalism." *Id.* at 2699 (Thomas, J. dissenting). Justice Thomas also criticized the Court's inconsistent record concerning ballot initiatives: approving of the initiative in *AIRC*, but expressing disdain for other ballot initiatives that "reflected the traditional definition of marriage." *Id.* at 2697.

72. *See id.* at 2671 (majority opinion). Before ruling on the constitutionality of the *AIRC*, the Court was first tasked with the threshold question of whether the Arizona State Legislature had standing to bring suit. *Id.* at 2663. To qualify for standing, the Legislature must have demonstrated an "invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Id.* (internal quotation marks omitted). The Court ultimately found that the Legislature met this standard, holding that Proposition 106, in addition to the Arizona Constitution's "ban on efforts to undermine the purposes of an initiative, . . . would completely nullify any vote by the Legislature, now or in the future, purporting to adopt a redistricting plan." *Id.* at 2665 (internal citations and quotation marks omitted).

73. *Id.* at 2666–68.

districts.<sup>74</sup> Third, in determining the scope of the legislature under the Elections Clause and 2 U.S.C. § 2a(c), the Court looked first to the general textual understanding of the term during the founding era and then to the Founders' and Congress's intent.<sup>75</sup> Finally, the Court analyzed the Framers' understanding of what the proper legislative process of the states should be in the context of a republican democracy.<sup>76</sup>

### 1. DEFINING THE FUNCTION OF THE LEGISLATURE WITHIN THE RELEVANT PRECEDENT

The Court first examined the relevant precedent defining the legislature under the Elections Clause and 2 U.S.C. § 2a(c).<sup>77</sup> In the Court's short discussion on this topic, the majority ultimately found that in the context of regulating congressional elections, a state's legislature may comprise the power of the state referendum and gubernatorial veto in addition to that of its representative body.<sup>78</sup> Citing *Hawke*, the Court noted that the composition of the legislature differs in the context of ratifying a Constitutional amendment—granting authority only to the representative body, rather than to the referendum and gubernatorial veto.<sup>79</sup> Under *Hildebrant* and *Smiley*, the Court found that the legislative function in drawing congressional districts was one of “lawmaking, which may include the referendum and Governor's veto.”<sup>80</sup> However, because the Court's precedent did not review the legislative function of a state initiative within the context of congressional redistricting, the majority analyzed congressional intent, legislative history, and textual interpretation.<sup>81</sup>

### 2. WHETHER 2 U.S.C. § 2A(C) PERMITS ARIZONA'S ADOPTION OF THE INDEPENDENT REDISTRICTING COMMISSION

Section 2a(c) was enacted in 1941, adopting language nearly identical to the preceding Reapportionment Act passed by

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74. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668–71 (2015).

75. *Id.* at 2668–72.

76. *Id.* at 2673–77.

77. *Id.* at 2666 (citing *Smiley v. Holm*, 285 U.S. 355 (1932); *Hawke v. Smith*, 253 U.S. 221 (1920); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)).

78. *See id.* at 2668.

79. *Id.* at 2667–68.

80. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015).

81. *See id.* at 2668–77.

Congress in 1911 (1911 Act).<sup>82</sup> Prior to 1911, the decennial congressional apportionment Acts required states to follow federal procedures in apportioning congressional districts, “unless ‘the legislature’ of the State drew district lines.”<sup>83</sup> The 1911 Act was drafted to include language that eliminated reference to the state legislature and instead provided that the state should use the default apportionment procedures, “until such State shall be redistricted *in the manner provided by the laws thereof*.”<sup>84</sup> This change in phraseology arose expressly because Congress wanted to include within the legislature the popular initiative and referendum that had, at that point in time, been adopted by several states.<sup>85</sup>

Though, the Court noted, the 1911 Act applied only to the reapportionment of congressional districts after the 1910 census, § 2a(c) adopted “virtually identical language.”<sup>86</sup> Based on the legislative history of § 2a(c), the Court found that “[s]o long as a state has ‘redistricted in the manner provided by the law thereof—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map.”<sup>87</sup> Having found that § 2a(c) permitted the Commission through the section’s contemplation of the voter initiative within the “legislative process,” the Court next turned to an analysis of the Elections Clause.<sup>88</sup>

### 3. WHETHER THE ELECTIONS CLAUSE PERMITS ARIZONA’S ESTABLISHMENT OF THE INDEPENDENT REDISTRICTING COMMISSION

The *AIRC* majority focused its principal analysis by looking to the Founders’ understanding of the role of state legislatures under the Elections Clause.<sup>89</sup> As the following two subsections

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82. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2669–70 (2015).

83. *Id.* at 2668 (citing Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734; Act of July 14, 1862, ch. 170, 12 Stat. 572).

84. *Id.* (quoting Apportionment Act of 1911, Pub. L. No. 62-5, § 4, 37 Stat. 13, 14).

85. *Id.* at 2668–69 (citing 47 CONG. REC. 3508 (1911) (statement of Senator Burton)).

86. *Id.* at 2669–70 (citing Act of Nov. 15, 1941, Pub. L. No. 77-291, 55 Stat. 761, 762).

87. *Id.* at 2670.

88. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2671–77 (2015).

89. See *id.* at 2671–72.



describe, the Court dovetailed deep-seated federalism values with the overwhelming need for a more politically engaged citizenry in local policy-making.

#### 4. THE ELECTIONS CLAUSE: A SEEMING ATTEMPT AT CONGRESSIONAL PREEMPTIVE POWER TO REGULATE ELECTIONS

The overriding purpose of the Elections Clause, the *AIRC* Court noted, “was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the federal Congress.”<sup>90</sup> The Court further recognized an additional purpose underlying the Elections Clause: the prevention of conflicting interests from politicians and political factions.<sup>91</sup> In drafting the clause, the Court noted James Madison’s response to a motion from the delegates of South Carolina who sought to remove federal power from the Clause because the state’s coastal elite politicians desired to retain their ability to maintain an unfairly portioned legislature.<sup>92</sup> There, “Madison urged, without the Elections Clause, ‘whenever the State Legislatures had a favorite measure to carry, they would take care so to mould [sic] their regulations as to favor the candidates they wished to succeed.’”<sup>93</sup>

The Court also cited other arguments demonstrating the support among delegates to state ratification conventions for congressional and federal control through the Elections Clause.<sup>94</sup> The Court found that in the debate surrounding the ratification of the Elections Clause, “attention focused on potential abuses by state-level politicians, and the consequent need for congressional

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90. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (internal quotations omitted) (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013)).

91. *Id.*

92. *Id.* (citing JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 223–24 (1996)).

93. *Id.* (quoting 2 RECORDS OF THE FEDERAL CONVENTION 241 (Max Farrand ed., 1966)). The Court additionally noted, “[t]he problem Madison identified has hardly lessened over time. Conflict of interest is inherent when ‘legislators dra[w] district lines that they ultimately have to run in.’” *Id.* (citing Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer*, 121 YALE L.J. 1808, 1817 (2012)).

94. *Id.* (noting a warning that “‘when faction and party spirit run high,’ a legislature might take action like ‘mak[ing] an unequal and partial division of the states into districts for the election of representatives’” and a remark that the Clause was necessary because “‘the State governments *may* abuse their power, and regulate . . . elections in such a manner as would be highly inconvenient to the people’”).

oversight.”<sup>95</sup> Despite the delegates’ apparent attempt to avoid placing legislative power in the hands of state legislatures under the Elections Clause, the Court ultimately found that the Elections Clause should not be read to preclude states from adopting legislation by popular initiative or referendum.<sup>96</sup> This holding came by the majority’s deeper analysis of the role of state governments and its citizens as sources of institutional legitimacy within the federal landscape.<sup>97</sup>

##### 5. THE AUTONOMY OF THE STATE AS A LABORATORY TO ESTABLISH LEGISLATIVE PROCESSES

Although the Court in the first half of its discussion in *AIRC* recognized the early desire among the Framers and delegates to adopt an Elections Clause as a means to *limit* the power of state legislatures in the regulation of elections, its analysis ultimately led to a discussion of the importance of federal deference to state legislative processes—particularly those that have adopted the use of citizen initiatives and referendums.<sup>98</sup>

This analysis began with the principle that “it is characteristic of our federal system that States retain autonomy to establish their own governmental processes.”<sup>99</sup> This autonomy, the Court noted, has historically existed largely due to the fact that local policy-making is “more sensitive to the diverse needs of a heterogeneous society,” and “enables greater citizen involvement in democratic processes.”<sup>100</sup> The Court further recognized that though the Framers could not have imagined the modern popular initiative as a method of state-level policy-making, the subsequent adoption of the initiative “was in full

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95. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2672 (2015).

96. *See id.* (“The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people’s hands.”)

97. *See id.* at 2673.

98. *Id.*

99. *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999) (“A State is entitled to order the processes of its own governance.”); *THE FEDERALIST* NO. 43, at 223 (James Madison) (Ian Shapiro ed., 2009) (“Whenever the States may choose to substitute other republican forms, they have a right to do so . . . .”)); *see also* *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”).

100. *See id.* (internal quotations omitted) (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

harmony with the Constitution's conception of the people as the front of governmental power."<sup>101</sup> This recognition was founded in expressions made by the Framers propounding the need for sovereignty to exist not only through a representative republican government, but in the *people*.<sup>102</sup> The Court also drew upon the Declaration of Independence's proclamation that "Governments are instituted among Men, deriving their just powers from the consent of the governed," and the Constitution having derived its authority from "We the People."<sup>103</sup> These early documents emphasize that the government derives its legitimacy from the people and, thus, the Court found it to be "perverse" to interpret the use of the term legislature in the Elections Clause in a manner that excludes lawmaking by the people through the voter initiative.<sup>104</sup>

In sum, the majority upheld the use of a ballot initiative to enact redistricting measures by appealing to the fundamental role of an engaged citizenry as necessary actors in fomenting legislative change.<sup>105</sup> Such local action, the Court believed, combined with the relevant precedent and legislative history of 2 U.S.C. § 2a(c) suggest that ballot initiatives are a constitutional means of establishing redistricting measures.<sup>106</sup> As the following

101. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2674 (2015). At the time of the drafting of the Constitution, direct lawmaking by the people through the voter initiative or referendum was "virtually unknown." *Id.* at 2659. It was not until the turn of the twentieth century that such a concept was adopted by state governments. *Id.* The first state to adopt the initiative as a means to enact legislation was Oregon in 1902. *Id.* at 2660. By the end of the twentieth century, twenty-one states had established the initiative to reserve the power of direct lawmaking to the electorate. *Id.*

102. *See id.* at 2674–75 ("The genius of republican liberty seems to demand . . . not only that *all power should be derived from the people*, but that those intrusted with it should be kept in dependence on the people." (emphasis added) (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961))).

103. *Id.* at 2674 (citing U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)). The Court further noted that the Declaration of Independence drew from John Locke, who in 1690 argued that "the legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream [sic] Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them." *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149, at 385 (Peter Laslett ed., 1964)).

104. *Id.* at 2675. The Court further noted that it would be particularly perverse to interpret the term "legislature" to exclude lawmaking by the people "where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen . . . by the People of the several States.'" *Id.* (quoting U.S. CONST. art. 1, § 2).

105. *See id.* at 2674–77.

106. *See id.* at 2666–77.

section reveals, Chief Justice Roberts's dissent focused on a contrasting analysis of the same debate over federalism and direct democracy to reach the opposite conclusion.<sup>107</sup>

## B. CHIEF JUSTICE ROBERTS'S DISSENT

Chief Justice Roberts's dissent—joined by Justice Scalia, Justice Thomas, and Justice Alito—found that the Elections Clause does not empower Arizona's ballot initiative redistricting measure because the legislature is limited under the Clause to the representative body of the state legislature.<sup>108</sup> The majority, Chief Justice Roberts noted, “largely ignore[d] [the relevant] evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy.”<sup>109</sup>

### 1. THE LEGISLATURE UNDER THE ELECTIONS CLAUSE IS THE REPRESENTATIVE BODY WHICH MAKES LAWS

In defining the legislature as “the representative body which makes the laws,” the dissent first criticized the majority's textual analysis of the meaning of the legislature in the Founding era.<sup>110</sup> There, the dissenting opinion noted that even under the majority's preferred definition of legislature during that era, the legislature “referred to an institutional body of representatives, not the people at large.”<sup>111</sup> The dissent also drew upon an analysis of documents from the Founding era, ultimately finding that “[a]s [the Court] put it nearly a century ago, ‘Legislature’ was ‘not a term of uncertain meaning when incorporated into the Constitution’ . . . ‘[a] legislature’ is ‘the representative body which make[es] the laws of the people.’”<sup>112</sup>

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107. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677–92 (2015) (Roberts, C.J., dissenting).

108. See *id.* at 2678 (“This Court has accordingly defined ‘the Legislature’ in the Elections Clause as “*the representative body* which ma[kes] the laws of the people.” (quoting *Smiley v. Holm*, 285 U.S. 355, 365 (1932))). This Note discusses only Chief Justice Robert's dissent. Additional dissenting opinions were authored by Justice Scalia (joined by Justice Thomas), *id.* at 2694–97 (Scalia, J., dissenting), and Justice Thomas (joined by Justice Scalia), *id.* at 2697–99 (Thomas, J., dissenting).

109. *Id.* at 2678 (Roberts, C.J., dissenting).

110. See *id.* at 2678–85.

111. *Id.* at 2679 (finding that “[t]he notion that this definition [of the legislature as the ‘power that makes laws’] corresponds to the entire population of a State is strained to begin with, and largely discredited by the majority's own admission that ‘[d]irect lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted.’” (quoting *id.* at 2659 (internal quotation marks omitted))).

112. *Id.* at 2680 (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)); see also THE

The dissent also cited provisions of the Constitution that similarly define legislature as a representative body that makes laws.<sup>113</sup> The dissent recognized what it contended is a significant flaw in the majority's analysis.<sup>114</sup> Though the majority observed that the legislature of a state "may perform different functions under different provisions of the Constitution," the majority leaped from this premise "to the conclusion that 'the Legislature' assumes different *identities* under different provisions."<sup>115</sup> Despite the legislature serving different functions throughout the Constitution, the dissent argued that the relevant precedent never suggested that the actual substantive *meaning* of legislature could vary as well.<sup>116</sup> Citing *Hawke*, the dissent concluded that, there, the Court found that the legislature "refers to a representative body, *whatever its function*."<sup>117</sup>

Finally, the dissent opined that the majority decision leads to an impermissible violation of the Elections Clause by removing the legislature from the lawmaking process altogether.<sup>118</sup> The Court's decision in *Hildebrant*, the dissent suggested, cannot be interpreted as stating that the legislature can be displaced from

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FEDERALIST NO. 27, at 135 (Alexander Hamilton) (Ian Shapiro ed., 2009) (describing "the State legislatures" as "select bodies of men"); *id.* NO. 60, at 305 (Alexander Hamilton) (contrasting "the State legislatures" with "the people"); NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "legislature" as "[t]he body of men in a state or kingdom, invested with power to make and repeal laws").

113. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2680–81 (2015) (Roberts, C.J., dissenting) ("The Constitution includes seventeen provisions referring to a State's 'Legislature.' Every one of those references is consistent with the understanding of a legislature as a representative body."). However, the dissent noted that "the most powerful evidence of all comes from the Seventeenth Amendment," where "[u]nder the original Constitution, Senators were 'chosen by the Legislature' of each State while Members of the House of Representatives were chosen 'by the people.' That distinction was critical to the Framers." *Id.* at 2681 (internal citations omitted).

114. *See id.* at 2682.

115. *Id.*

116. *See id.* at 2682–83 ("The Court in *Hawke* never hinted that the meaning of 'Legislature' varied across those different provisions because they assigned different functions.").

117. *Id.* at 2683 (emphasis added) (citing *Hawke v. Smith*, 253 U.S. 221, 228 (1920)). The dissent also cited *Smiley* as embracing the decision in *Hawke*. *Id.* ("As this Court said in *Hawke* . . . the term was not one of 'uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purposes of interpretation. A Legislature was then the representative body which made the laws of the people.'" (quoting *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke*, 235 U.S. at 227))).

118. *See id.* at 2686.

the redistricting process altogether; nor did *Hildebrant* hold—“as the majority today contends—that ‘the word [“Legislature” in the Elections Clause] encompassed a veto power lodged in the people.”<sup>119</sup> Rather, *Hildebrant* “simply approved a State’s decision to employ a referendum *in addition to* redistricting by the Legislature.”<sup>120</sup> Similarly, the dissent cited *Smiley* for the proposition that legislature refers to the representative lawmaking body, but also emphasized that *Smiley* did not suggest that the legislature could be displaced or redefined by a non-legislative commission.<sup>121</sup>

In sum, regarding the definition of the legislature within the Elections Clause, the dissent found the majority’s interpretation of the relevant precedent and constitutional history to be misguided—“a judicial error of the most basic order.”<sup>122</sup> The dissent then found the majority’s definition of the legislature not only erroneous, but also an impermissible displacement of the legislature from the redistricting process by adopting a non-legislative independent commission.<sup>123</sup>

## 2. THE MAJORITY’S UNNECESSARY AND UNCONSTITUTIONAL APPLICATION OF 2 U.S.C. § 2A(C)

In analyzing whether 2 U.S.C. § 2a(c) permits AIRC to adopt congressional districts, the dissent argued first that § 2a(c) was not applicable to the case at hand.<sup>124</sup> Second, the dissent argued that even if § 2a(c) was applicable, it was likely unconstitutional under the majority opinion.<sup>125</sup> The dissent’s argument that § 2a(c) did not apply to *AIRC* is founded on the statute’s language which provides that the default federal rules governing the election of representatives apply “[u]ntil a state is redistricted in

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119. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2686–87 (2015) (Roberts, C.J., dissenting) (quoting *id.* at 2666 (majority opinion)).

120. *Id.* at 2686 (citing *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916)). The dissent noted that “[t]he result of the decision [in *Hildebrant*] was to send *the Ohio Legislature* back to the drawing board to do the redistricting.” *Id.*

121. *Id.* at 2686–87 (“As in *Hildebrant*, the legislature was not displaced, nor was it redefined; it just had to start on a new redistricting plan.”).

122. *Id.* at 2687.

123. *See id.* (“In short, the effect of the majority’s decision is to erase the words ‘by the Legislature thereof’ from the Elections Clause. That is a judicial error of the most basic order.”).

124. *Id.* at 2688.

125. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2688–89 (2015) (Roberts, C.J., dissenting).

the manner provided by the law thereof.”<sup>126</sup> In *AIRC*, because the Commission *had* engaged in redistricting, the dissent found that § 2a(c) was inapplicable.<sup>127</sup>

The dissent’s second argument was that the majority’s reading of § 2a(c) likely violated the Constitution in three ways.<sup>128</sup> First, the majority interpreted § 2a(c) as allowing the Commission to retain redistricting authority; this construction “would seemingly authorize Congress to [impermissibly] alter the Elections Clause.”<sup>129</sup> Second, the majority’s reading of § 2a(c) allows “Congress to delegate federal redistricting authority to a state entity other than the one in which the Elections Clause vests that authority: ‘the Legislature.’”<sup>130</sup> Such a delegation of authority runs afoul of the “well-accepted principle . . . that Congress may not delegate authority to one actor when the Constitution vests that authority in another actor.”<sup>131</sup> Finally, the dissent would find that the majority’s interpretation of § 2a(c), by allowing Congress to *adopt* state law, violates recent Elections Clause precedent, explaining, “the power the Elections Clause confers [on Congress] is none other than the power to pre-empt.”<sup>132</sup>

#### IV. ANALYSIS

The majority’s ruling in *AIRC* will undoubtedly have significant effects on the American electoral process on multiple grounds. First, *AIRC* will likely have a strong positive impact on efforts at congressional electoral reform. *AIRC*’s expansion of the definition of the legislature within the Elections Clause to include legislation adopted by ballot initiative will allow states that reserve the right for direct initiative the opportunity to enact independent redistricting commissions similar to Arizona’s model. Though the effectiveness of independent commissions is open for debate, *AIRC* will certainly allow other states the

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126. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2687–88 (2015) (Roberts, C.J., dissenting) (emphasis added) (quoting 2 U.S.C. § 2a(c)).

127. *Id.* at 2688 (“So by its terms, Section 2a(c) does not come into play in this case.”).

128. *Id.* at 2688–89.

129. *Id.*

130. *Id.* at 2689.

131. *Id.*

132. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2689 (2015) (Roberts, C.J., dissenting) (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013)).

opportunity to improve the independent commission model in an effort to mitigate the detrimental effects of gerrymandering. Second, the Court's affirmation of the power of the ballot initiative within the Elections Clause to adopt legislation aimed at electoral reform could additionally impact presidential election reform by empowering more states to adopt the National Popular Vote Interstate Compact—effectively dissolving the Electoral College.

### A. AIRC'S IMPACT ON CONGRESSIONAL ELECTORAL REFORM

Arizona's enactment of an independent redistricting committee was premised on the belief that such a commission would limit the practice of gerrymandering, thus improving voter and candidate participation in elections and ensuring that congressional districts remain fair and competitive.<sup>133</sup> This section discusses the likely impact AIRC will have on gerrymandering—and the tentative effects this impact could have on congressional electoral reform at the national level.

#### 1. THE DETRIMENTAL EFFECTS OF GERRYMANDERING ON AMERICA'S POLITICAL CULTURE: CLEAR CUT OR OPEN FOR DEBATE?

The consensus among legal scholars and political experts has long been that gerrymandering has had a disastrous impact on the democratic political process in America.<sup>134</sup> Historically, the most insidious use of gerrymandering has been the practice of districting along racial lines to disenfranchise minority voters with the creation of “majority-minority” districts.<sup>135</sup> Opponents of

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133. Brief for Appellees at 8, *Ariz. State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13-1314).

134. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Kenneth W. Shotts, *Gerrymandering, Legislative Composition, and National Policy Outcomes*, AM. J. POL. SCI. 398, 398 (2002).

135. Racial districting and the creation of “majority-minority” districts was first visited by the Court in *Shaw v. Reno*, 509 U.S. 630 (1993). There, the Court found that racial districting “demands close judicial scrutiny,” noting “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . .” *Id.* at 657. Indeed, this practice has not disappeared, as the Court just recently ruled on a claim of racial districting. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (vacating the district court's judgment which erroneously applied the relevant law to a gerrymandering claim that Alabama's 2012 redistricting plan added more minority voters than needed to maintain minority voting strength in existing majority-minority district).



gerrymandering also argue that the practice drastically reduces the competitiveness of elections, often leading to the unopposed election of incumbents or landslide victories against challengers.<sup>136</sup> In turn, this fosters an atmosphere wherein incumbents are unaccountable to their electorate and the democratic legislative process eventually stalls as representatives fall out of tune with the electorate's popular opinion.<sup>137</sup> Critics further contend that gerrymandering has all but eliminated ideological heterogeneity within districts and has created a sharply politically polarized electorate and Congress.<sup>138</sup>

The criticisms of gerrymandering seem perfectly logical: elected politicians in the majority party intentionally draw district lines in such a way as to alienate voters of the opposing party in an effort to virtually ensure the incumbent's success in future elections.<sup>139</sup> The effect is the creation of districts of ideologically homogenous voters, a more polarized electorate, and an unaccountable class of politicians.<sup>140</sup>

Despite the prevalence of popular anecdotal evidence implicating gerrymandering's devastation of the democratic process,<sup>141</sup> there is a growing body of empirical research suggesting that such criticisms may be overstated and

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136. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 429 (2004) (noting that in the 2000 congressional elections, 98.5% of incumbents won their elections, and 75% of the winners defeated the challenger in a landslide (defined as twenty percentage points or greater)).

137. See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 487 (2004) ("Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion, and thus frustrates the change and creates undemocratic slippage between the people and their government.").

138. *Id.* at 490.

139. See Issacharoff, *supra* note 136, at 429.

140. See, e.g., Ortiz, *supra* note 137, at 476–90.

141. Anecdotaly, this line of reasoning seems to be upheld by the results of the 2000 presidential election. In 2002, in states where Republicans controlled the redistricting process, Republicans won 66.7% of congressional elections. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 200 (2003). Intuitively, George W. Bush should have garnered a similar proportion of Republican voters. However, in 2000, President Bush received only 51.3% of the vote in these same districts. *Id.* Scholars contend that such an example is illustrative of the detrimental effects of gerrymandering, wherein the median point of political ideology has been deliberately shifted to either extreme to create more polarized—and electorally favorable—districts. Ortiz, *supra* note 137, at 482–83.

oversimplified.<sup>142</sup> Though the systematic use of gerrymandering has been demonstrated to yield negative effects on electoral competition, scientific studies have failed to reveal the supposed negative effects of gerrymandering on polarization and ideological homogeneity.<sup>143</sup> Rather, researchers have hypothesized that polarization is not a function of redistricting, but a function of the natural phenomenon of voter realignment.<sup>144</sup>

Despite popular opinion of gerrymandering's disastrous effects on American democracy, there is in reality little empirical research that supports the full extent of these claims.<sup>145</sup> Notwithstanding the body of research to this effect, there is something intuitively and fundamentally unsettling with the notion of a republican system in which elected incumbent officials in the majority party have the ability to design their own districts.

## 2. THE IMPACT OF *AIRC* ON CONGRESSIONAL GERRYMANDERING

Assuming the premise that gerrymandering is fundamentally unfair to a democratic system, this section explores the impact that the *AIRC* decision might have on restoring a more heterogeneous electorate and a more accountable class of elected officials.

### a. The Case for Independent Redistricting Commissions

The attempt to remove congressional representatives from the redistricting process was nothing new at the time Arizona enacted its own independent redistricting commission in 2000.<sup>146</sup>

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142. See, e.g., Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 667 (2009).

143. See, e.g., *id.* at 678–79; Thomas L. Brunell & Bernard Grofman, *Evaluating the Impact of Redistricting on District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962–2002*, in DESIGNING DEMOCRATIC GOVERNMENT: MAKING INSTITUTIONS WORK 117, 133–36 (Margaret Levi et al. eds., 2008).

144. Brunell & Grofman, *supra* note 143, at 134 (“To the extent that redistricting effects are real, we believe that they are more likely to be indirect, tied to realignment.”). Support for this finding is demonstrated by the fact that “the Senate has undergone an increase in polarization and a decrease in competition in the last decade or two, without the benefit of redistricting or an increase in district homogeneity.” *Id.* at 133–34.

145. McCarty et al., *supra* note 142, at 667.

146. Prior to Arizona's enactment of Proposition 106, seventeen states had established redistricting commissions for state and congressional elections:

Redistricting commissions have historically varied widely in terms of the membership of the commission, the political boundaries the commission may redistrict, and the level of autonomy the commission has in drawing maps without the legislature's approval or disapproval.<sup>147</sup> Generally, redistricting commissions fall into four main types: (1) advisory commissions that advise the legislature; (2) backup commissions that enact districts by default if the legislature fails to adopt a plan; (3) politician commissions composed of elected or designated officials autonomous from the legislature; and (4) independent citizen commissions.<sup>148</sup> The commission model furthest removed from the legislature and thus most insulated from political influence is the independent citizen commission.<sup>149</sup>

Arizona's model of an independent redistricting commission is novel in that it is composed of five "independent" citizens, with no two being from the same political party, chosen by legislative leaders from a pool of citizens who have never held public office.<sup>150</sup> Once formed, the Arizona commission is completely

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Arkansas, Colorado, Connecticut, Hawaii, Illinois, Iowa, Michigan, Mississippi, Missouri, Montana, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Washington. Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 842 n.28 (1997).

147. See Cain, *supra* note 93, at 1813–21.

148. For a detailed discussion of these four types of commissions, see *id.* at 1813–19.

149. The only commission model more removed from potential legislative conflicts of interest than Arizona's is the California model. See *id.* at 1819. In this model (similarly adopted by voter initiative), the elected state auditor creates a pool of commissioner candidates after a detailed vetting process that removes potentially biased candidates. CAL. GOV'T CODE § 8252(a)–(d) (West Supp. 2015). The legislature's only involvement occurs when legislative leaders are given the opportunity to each strike two candidates from the three subpools composed by the auditor. *Id.* § 8252(e). Additionally, the commission statutes of most states impose mandatory criteria for redistricting to restrict the ability of commissioners to gerrymander. See Kubin, *supra* note 146, at 851–52 ("These parameters do not eliminate gerrymandering, but they restrict the gerrymander's options."). Most commonly, these criteria include "(1) contiguous and compact districts, (2) respect for political subdivisions (especially counties), (3) respect for geographical or natural boundaries, and (4) coterminality between state house and state senate districts." *Id.* at 851.

150. ARIZ. CONST. art. IV, pt. 2, § 1. To describe the theoretical effect that the independent commission can have on gerrymandering, one scholar has coined the term "legislative conflict of interest" (LCOI). See Cain, *supra* note 93, at 1817–18 (arguing that enacting a commission that, as in Arizona, is drafted from a pool of independent citizens creates "four degrees" of LCOI separation in the redistricting process).

autonomous from the state legislature.<sup>151</sup>

Despite the numerous layers of attempts to remove all bias and partisanship from the redistricting process, the practice of redistricting by independent commissions is currently far from perfect. Empirical research suggests that Arizona's independent commission has not yet created demonstrably more competitive electoral districts.<sup>152</sup>

There are several potentially detrimental features of independent commissions that do not completely insulate them from partisan bias.<sup>153</sup> First, commissioners routinely rely upon the technical skills of staff in actually drawing the districts and conducting statistical studies.<sup>154</sup> Additionally, commissioners depend on the knowledge of legal counsel throughout the districting process.<sup>155</sup> Though the commissioners themselves may be insulated from partisan pressure, these critical staff members could unwittingly offer ideologically skewed advice.<sup>156</sup> Second, scholars highlight the unavoidable challenge to the legitimacy of an entity that acts as a substitute for the legislative process—particularly an entity composed of autonomous, independent, unelected citizens.<sup>157</sup> Notwithstanding these well-placed criticisms of independent commissions, the independent model is inarguably a well-intentioned and reasonable improvement of the status quo of redistricting efforts.<sup>158</sup>

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151. See ARIZ. CONST. art. IV, pt. 2, § 1(17) (“The provisions regarding this section are self-executing. The . . . commission shall certify to the secretary of state the establishment of congressional and legislative districts.”).

152. Barbara Norrander & Jay Wendland, *Redistricting in Arizona*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 177, 193 (Gary F. Moncrief ed., 2011). Similarly, reaction to the early work of California's commission was fraught with criticism from various political groups. See Nadra Kareem Nittle, *Latest CA Redistricting Maps Satisfy Most Minorities—But Not Latinos*, NEW AM. MEDIA (Aug. 1, 2011), <http://newamericamedia.org/2011/08/latest-ca-redistricting-maps-satisfy-most-minoritiesbut-not-latinos.php>.

153. See Cain, *supra* note 93, at 1833.

154. See *id.*

155. See *id.*

156. See *id.* (noting that even if the technical staff does *not* offer skewed advice, the “suspicion that they might do so is poisonous”); see also Justin Levitt, Essay, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 540 (2011) (“[A] commission of poorly trained citizens, or those who lack confidence in the task, may simply defer to staff for substantive judgments; if staff members are beholden to particular incumbent legislators, such deference would merely replicate the conflict of interest discussed extensively above.”).

157. See Levitt, *supra* note 156, at 532.

158. As Jeffrey C. Kubin notes, commission-based redistricting “represents a

**b. The Future of Independent Redistricting Commissions  
As a Result of *AIRC***

The impact of *AIRC* on the redistricting process will be seen in the future ability of an increasing number of states to enact commission models similar to those of Arizona and California. By expanding the definition of the legislature under the Elections Clause to include the authority of the voter initiative, the Court's decision in *AIRC* will allow the voters of more states to propose similar ballot measures aimed at electoral and redistricting reform. As one scholar has noted, politicians are understandably uncomfortable with vesting the power to draw district lines in an autonomous commission.<sup>159</sup> As a result, there is typically an inverse correlation between the degrees to which a commission is removed from the legislature and the autonomy that commission has in drafting congressional redistricts.<sup>160</sup> After *AIRC*, the ability of a voter initiative to enact popular legislation that creates fully—or nearly—autonomous independent commissions could have the effect of dissolving such an inverse relationship between independence and autonomy. Currently, twenty-four states have adopted the ballot initiative and fourteen states reserve for citizens the right to propose state statutes through a direct initiative.<sup>161</sup> Effectively, *AIRC* would allow the other twelve states (Arizona and California excluded) to adopt independent redistricting commissions directly through a ballot initiative.

Though the effectiveness of the Arizona model is open for debate, the proliferation of independent commissions in other states has the potential to improve upon the imperfections of the *AIRC* and other state commissions. Undeniably, the redistricting process will be eternally imperfect as it is inherently political and must balance a complex array of competing legal, ideological, geographical, and cultural interests. However, the expansion of the definition of the legislature within the Elections Clause has the potential to lead to improvements of the independent

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practical reform measure, not a miraculous cure for all that ails a state's decennial effort to draw new district lines." See Kubin, *supra* note 146, at 872.

159. See Cain, *supra* note 93, at 1819.

160. See *id.*

161. These fourteen states are Arizona, Arkansas, California, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Washington. *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/states.cfm> (last visited Apr. 16, 2016).

redistricting commission model in other states in an effort to mitigate the effects of gerrymandering. Voters will likely never see the creation of a perfectly apportioned district, but any improvement is better than the status quo.

## B. AIRC'S IMPACT ON PRESIDENTIAL ELECTORAL REFORM

*AIRC* could also prove to have a resounding impact on presidential election reform through its expanded scope of the legislature under the Elections Clause.<sup>162</sup> This section first discusses the growing movement surrounding the National Popular Vote Interstate Compact (NPV). This section also examines the potential implications of *AIRC* on the adoption of the National Popular Vote Interstate Compact and the potential future dissolution of the Electoral College.

### 1. THE NATIONAL POPULAR VOTE COMPACT

The Constitution mandates that the President of the United States be chosen by a majority vote of the Electoral College.<sup>163</sup> The Electoral College is composed of electors from each state and the District of Columbia—the number of electors representing each state equal to the sum of the representatives and senators of the state.<sup>164</sup> Since its inception, the Electoral College has been plagued by criticisms, and there have been over one thousand constitutional amendments introduced to amend or abolish the entity.<sup>165</sup>

Despite the failure of past attempts at reform, the organization National Popular Vote announced a proposed piece of legislation in 2006 that would effectively replace the Electoral College with a system wherein the president is elected by a simple national popular vote.<sup>166</sup> The legislation functions by

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162. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2670–71 (2015) (refusing to agree with the “wooden interpretation” “that the first part of the Elections Clause, vesting power to regulate congressional elections in State ‘Legislature[s],’ precludes Congress from allowing a State to redistrict without the involvement of its representative body”).

163. See U.S. CONST. art. II, § 1, cl. 3.

164. See *id.* art. II, § 1, cl. 3; *id.* amend. XXIII, § 1.

165. See Stanley Chang, Recent Development, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 210 (2007).

166. *Election of the President by Popular Vote* (C-SPAN television broadcast Feb. 23, 2006) (statement of Sen. Birch Bayh, Nat'l Popular Vote Advisory Board Member), <http://www.c-span.org/video/?191353-1/election-president-popular-vote>.

creating the National Popular Vote Interstate Compact (the Compact) among its signatory states.<sup>167</sup> Under the Compact each state agrees to allocate its electoral votes to the candidate who has garnered the majority of the national popular vote.<sup>168</sup> Once enough states have signed the Compact to reach a total of 270 votes (a majority threshold in the Electoral College), the Compact will effectively dissolve the Electoral College by ensuring that the newly elected president is the candidate who received the majority of the national popular vote.<sup>169</sup> Though the constitutionality of the Compact has garnered much debate,<sup>170</sup> to date eleven states—or sixty-one percent of the needed 270 electoral votes—have adopted legislation approving the Compact.<sup>171</sup>

Proponents of the Compact argue that a national popular vote will dramatically improve the presidential electoral system by eliminating “misfires,”<sup>172</sup> expanding the scope of presidential campaigning from only a few battleground states to the entire nation,<sup>173</sup> minimizing the current practice of candidates campaigning to small minority special interest factions within swing states, increasing voter turnout, and increasing the competitiveness of third-party candidates.<sup>174</sup> While there are many opponents of the Compact, it is certain that the presidential electoral system and the American political landscape will be

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167. *See Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com/pages/explanation.p> hp (last visited Feb. 26, 2016) [hereinafter *NPV Agreement*].

168. *Id.*

169. *See id.*

170. The question of the constitutionality of the Compact arises from the Compact Clause, which restricts the ability of states to enter any joint compact without congressional consent. U.S. CONST. art. I, § 10, cl. 3. There has been much debate surrounding whether the Compact is constitutional without congressional consent. Compare Michael Brody, *Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause*, 5 LEGIS. & POL'Y BRIEF 33, 48 (2013) (arguing that the Compact will “pass constitutional muster” without congressional consent) with Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 372 (2007) (arguing that the Compact will be unconstitutional without receiving congressional consent).

171. *See NPV Agreement*, *supra* note 167.

172. *See* Brody, *supra* note 170, at 39. A “misfire” occurs when the candidate chosen by the Electoral College is not the same candidate who garnered the majority of the national vote. *Id.* at 34 n.2. This has occurred four times throughout history: 1824, 1876, 1888, and 2000. *Id.*

173. *See NPV Agreement*, *supra* note 167.

174. *See* Chang, *supra* note 165, at 216–28.

forever changed if the signatory states reach a 270-vote majority.

## 2. THE POTENTIAL IMPACT OF *AIRC* ON THE NPV COMPACT

The Court's interpretation of the definition of the legislature in *AIRC* could have tremendous implications on the expansion of the Compact through ballot initiative. The legal foundation for the Compact is found in the "Method of Choosing Electors" Clause, of the U.S. Constitution, which provides: "Each State shall appoint, in such Manner as *the Legislature thereof* may direct, a Number of Electors . . ." <sup>175</sup> The Compact takes advantage of the power Article II grants to each state in independently determining how to award its respective electoral votes. <sup>176</sup>

To date, eleven states have chosen to award their electoral votes in future presidential elections pursuant to the Compact—yet, the Compact requires 105 more electoral votes to meet the 270-vote majority threshold. <sup>177</sup> The use of a voter initiative in states that have yet to enact the Compact may be necessary to fill the gap in signatory states and ensure the Compact's success. <sup>178</sup>

Most importantly, the Court's interpretation of the scope of the legislature in *AIRC* could be instrumental in ensuring that voters may constitutionally enact legislation adopting the Compact in their respective states. In *AIRC*, the Court determined that the power of the state legislature to enact legislation amending state congressional redistricting regulations under § 2a(c) and the Elections Clause includes the power of the ballot initiative. <sup>179</sup> The Court's reasoning largely hinged on the

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

176. See Chang, *supra* note 165, at 211–12.

177. See *NPV Agreement*, *supra* note 167.

178. Some political experts have noted the current dilemma in popular legislative support for the Compact: all of the current signatory states are overwhelmingly blue. See Nate Silver, *Why a Plan to Circumvent the Electoral College is Probably Doomed*, FIVETHIRTYEIGHT (Apr. 17, 2014), <http://fivethirtyeight.com/datalab/why-a-plan-to-circumvent-the-electoral-college-is-probably-doomed/>. Experts note that for the Compact to achieve its goal, it must attract the support of some red states, which for unknown reasons has failed to materialize. See *id.* Despite the fact that popular Republican opinion is overwhelmingly in support of abolishing the Electoral College, no red state has yet to adopt legislation approving the Compact. See *id.*

179. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015) (“[W]e hold that lawmaking power in Arizona includes the initiative process, and that both § 2a(c) and the Elections Clause permit use of the *AIRC* in congressional districting in the same way the Commission is used for Arizona’s own legislature.”); see also *supra* Part III. A. 2.



language of § 2a(c), which provides in part: “until a State is redistricted in the manner provided by the law thereof.”<sup>180</sup> The Court determined that the statute’s phrasing, “provided by the *law thereof*,” necessarily invokes the state’s ballot initiative as a source of legislative authority if the state reserves that power for the voters in its own laws.<sup>181</sup>

An analysis of the Method of Choosing Electors Clause under the *AIRC* precedent would likely similarly conclude that a state’s voters may properly enact legislation approving the Compact through ballot initiative. The phrasing of the clause, providing that “Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors . . .” likely implicates an analysis nearly identical to the Court’s analysis in *AIRC*.<sup>182</sup> Because Article II delegates the authority to apportion electors within the manner prescribed by the legislature of each state, if the state provides for the ballot initiative as a means of enacting legislation, then any ballot initiative enacting the Compact should survive constitutional muster under *AIRC*.

The ability of states to adopt ballot initiative legislation enacting the Compact could prove instrumental to its success. Of the fourteen states that currently provide for a direct ballot initiative, only one has adopted legislation approving the Compact.<sup>183</sup> The cumulative sum of the electoral votes of the remaining thirteen states is an additional seventy-four electoral votes.<sup>184</sup> Though this sum is still thirty-one votes short of the 105 votes needed to fill the gap to achieve a national popular vote, the ability of states to enact legislation adopting the Compact by ballot initiative would certainly make the ultimate goal of 270 votes more attainable.

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180. 2 U.S.C. § 2a(c) (2012); see *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668–71 (2015); see also *supra* Part III. A. 2.

181. See *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2670 (“So long as a State has ‘redistricted in the manner provided by the law thereof’—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map.”); see also *supra* Part III. A. 2.

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

183. See *infra* note 161 (listing the fourteen states). Washington is the only one of these fourteen states to have adopted the Compact. See WASH. REV. CODE § 29A.56.300 (2015).

184. See *Distribution of Electoral Votes*, U.S. NAT’L ARCHIVES, <http://www.archives.gov/federal-register/electoral-college/allocation.html> (last updated Dec. 10, 2010).

## V. CONCLUSION

The legal impact of the Court's decision in *AIRC* is an expansion of the scope of the legislature within the Elections Clause and § 2a(c) to include the legislative authority of the ballot initiative in adopting congressional electoral districts through the enactment of independent redistricting commissions. Though popular anecdotes foretelling the detriments of gerrymandering are not fully supported by empirical research, and the effectiveness of independent commissions in making congressional districts more competitive and heterogeneous has not yet been fully realized, the ability of independent commissions to adopt congressional districts is certainly an improvement upon the status quo of congressional districting. The effect of *AIRC* on congressional electoral reform will be an increased ability for states that reserve for its citizens the legislative power of the ballot initiative to improve upon the independent commission model, ideally shaping a fairer and more competitive congressional electoral system.

Furthermore, the *AIRC* majority's rationale could have the effect of empowering states that have yet to adopt the National Popular Vote Interstate Compact to support the national popular vote by ballot initiative. This will allow the Compact signatories to close the gap in reaching a 270-vote majority threshold in the Electoral College, effectively dissolving the current presidential electoral system. While the benefits and detriments of a post-*AIRC* congressional and presidential electoral system have yet to be fully realized, what is certain is that *AIRC* could have the effect of bringing an age of unprecedented change to America's political establishment.

T. Hart Benton