

## ARTICLES

### THE ORIGINAL SCOPE OF THE CONGRESSIONAL POWER TO REGULATE ELECTIONS

*Robert G. Natelson*<sup>\*</sup>

*Courts testing the constitutionality of federal campaign finance laws usually focus on First Amendment issues. More fundamental, however, is the question of whether campaign finance laws are within Congress's enumerated power to regulate the "Times, Places and Manner of holding Elections." This Article is an objective examination into the intended scope of this congressional power, using numerous sources overlooked by other legal writers. The Article concludes that the intended scope of the power was wide enough to authorize most modern congressional election statutes, but not wide enough to support modern federal campaign finance laws.*

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<sup>\*</sup>Senior Fellow in Constitutional Jurisprudence, the Independence Institute, Golden, Colorado; Professor of Law (ret.), The University of Montana School of Law. I am grateful to Geri Fox at The University of Montana School of Law for administrative assistance and to Daranne Dunning, UM School of Law Class of 2010, for research assistance.

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I. INTRODUCTION<sup>1</sup>A. *Reasons for this Inquiry*

*Citizens United v. Federal Election Commission*<sup>2</sup> was the latest of several cases<sup>3</sup> in which the Supreme Court has tested federal campaign finance laws against the First Amendment of the United States Constitution. Not discussed in *Citizens United*, however, is a more fundamental question: Does the Constitution's scheme of enumerated congressional powers grant Congress power to regulate political

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<sup>1</sup> *Bibliographical Note.* This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

ANNALS OF CONG. (Joseph Gales ed., 1834) (multiple vols.), available at <http://memory.loc.gov/ammem/amlaw/tvac.html> [hereinafter ANNALS OF CONG.].

DETERMINATIONS OF THE HONOURABLE HOUSE OF COMMONS, CONCERNING ELECTIONS, AND ALL THEIR INCIDENTS (London 1774) [hereinafter DETERMINATIONS].

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976) (multiple vols. projected; not all completed) [hereinafter DOCUMENTARY HISTORY].

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836) (multiple vols.) [hereinafter ELLIOT'S DEBATES].

THEODORE FOSTER'S MINUTES OF THE CONVENTION HELD AT SOUTH KINGSTON, RHODE ISLAND, IN MARCH, 1790 (R.I. Historical Soc'y 1929) [hereinafter FOSTER'S MINUTES].

THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909) (multiple vols.) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

THE FEDERALIST (Alexander Hamilton et al.) (George W. Carey & James McClellan eds., 2001) [hereinafter THE FEDERALIST].

GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) [hereinafter LAWSON ET AL., ORIGINS].

Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*].

Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) [hereinafter Natelson, *Founders' Hermeneutic*].

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937 & Supp. 1987) [hereinafter FARRAND'S RECORDS and FARRAND, SUPPLEMENT, respectively].

THE REMEMBRANCER; OR, IMPARTIAL REPOSITORY OF PUBLIC EVENTS (London 1775–84) (multiple vols.) [hereinafter THE REMEMBRANCER].

<sup>2</sup> 130 S. Ct. 876 (2010).

<sup>3</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (largely sustaining campaign finance laws); *Buckley v. Valeo*, 424 U.S. 1 (1976) (partly sustaining campaign finance laws); cf. *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 120–24 (1948) (finding it unnecessary to reach First Amendment issues, but sustaining the holding of the lower court, which had invalidated an early federal campaign law on First Amendment grounds).

campaigns at all? If not, such regulations are, of course, invalid, and it is unnecessary to consider First Amendment issues.<sup>4</sup>

The reputed basis for federal authority over congressional campaigns is the enumerated power granted by Article I, Section 4, Clause 1<sup>5</sup> and its incidents under the Necessary and Proper Clause.<sup>6</sup> The modern Supreme Court sometimes calls Article I, Section 4, Clause 1 the “Elections Clause,”<sup>7</sup> but it is more accurately called the “Times, Places and Manner Clause,” since it is only one of many constitutional provisions governing elections.<sup>8</sup>

In this Article, I report on my investigation into the scope of congressional power under the Times, Places and Manner Clause, according to its original understanding and meaning. I designed this investigation to be objective; in other words, unlike much constitutional writing, this is *not* a brief for or against particular laws, proposals, or modes of interpretation.<sup>9</sup>

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4 *But see* *Burroughs v. United States*, 290 U.S. 534, 545–46 (1934) (recognizing, in an opinion by Justice Sutherland, an apparently extra-constitutional power in Congress to regulate presidential elections). The *Burroughs* reasoning bears some similarity to the more famous Sutherland “inherent sovereign authority” opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317–18 (1936). However, the doctrine of extra-constitutional powers in the federal government is contradicted by the wording of the Tenth Amendment. *See* *Kansas v. Colorado*, 206 U.S. 46, 89–90 (1907).

5 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 [sic] Senators.”).

6 *Id.* § 8, cl. 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

7 *E.g.*, *McConnell*, 540 U.S. at 134.

8 There are at least eleven other “elections clauses.” *See* U.S. CONST. art. II, § 1, cls. 2, 3 (describing the procedure for presidential elections); *id.* amend. XII (revising that procedure); *id.* amend. XV, § 1 (preventing discrimination in voting based on “race, color, or previous condition of servitude”); *id.* amend. XVII (providing for direct election of U.S. Senators); *id.* amend. XIX (preventing discrimination in voting based on sex); *id.* amend. XX (term-limiting the President); *id.* amend. XXIII, § 1 (allowing electors in the District of Columbia to vote for presidential electors); *id.* amend. XXIV, § 1 (banning discrimination in voting based on payment of tax); *id.* amend. XXV, § 2 (providing for election of a Vice President to fill a vacancy); *id.* amend. XXVI, § 1 (limiting age discrimination in voting). As made clear later in the text, constitutional provisions governing qualifications for and terms of office may be added to the list. *E.g.*, *id.* art. I, § 2, cls. 1–3 (providing for qualifications of electors and members of the House of Representatives and for allocation of Representatives among states).

9 On the defects in “originalist” writings caused by the desire of legal writers to argue a cause rather than engage in honest historical investigation, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 377–78 (1981).

### B. Text and Post-Founding History

The text of the Times, Places and Manner Clause is as follows:

“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 [sic] Senators.”<sup>10</sup>

As this provision seems to contemplate, historically the states have been the chief regulators of congressional elections. Yet Congress has intervened on important occasions. The first time was in 1842, when Congress mandated that states electing more than one member of the House of Representatives do so by districts rather than at-large.<sup>11</sup> Congress enacted other regulatory statutes during the Reconstruction Era<sup>12</sup> and at various points during the twentieth century.<sup>13</sup> The most recent interventions are the Help America Vote Act<sup>14</sup> and the Bipartisan Campaign Reform Act,<sup>15</sup> both adopted in 2002. The last was partially invalidated by *Citizens United*. With few exceptions,<sup>16</sup> the purported basis for these statutes was the Times, Places and Manner Clause.

Although the Supreme Court has heard several challenges to these statutes,<sup>17</sup> it never has examined thoroughly the intended scope

<sup>10</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>11</sup> 1842 Apportionment Act, ch. 47, 5 Stat. 491.

<sup>12</sup> Enforcement Act of 1870, ch. 114, 16 Stat. 140; Force Act of 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

<sup>13</sup> *E.g.*, Tillman Act, ch. 420, 34 Stat. 864 (1907); Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (adopted in its initial form in 1910 as 36 Stat. 822); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of U.S.C.); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended in 42 U.S.C. § 1973gg (2006)).

<sup>14</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in 42 U.S.C. § 15301 (2006)).

<sup>15</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of U.S.C.).

<sup>16</sup> The Reconstruction Era laws, *see* sources cited *supra* note 12, were adopted wholly or entirely under the powers given Congress by the U.S. Constitution’s Fourteenth and Fifteenth Amendments. U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2. *United States v. Wurzbach*, 280 U.S. 396 (1930), sustained the application to federal employees of the Federal Corrupt Practices Act, 43 Stat. 1070, as justified by congressional implied powers over federal employees. It declined to reach the issue of whether the Act was within the scope of the Times, Places and Manner Clause. *Wurzbach*, 280 U.S. at 396.

<sup>17</sup> *E.g.*, *McCormell v. Fed. Election Comm’n*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Classic*, 313 U.S. 299 (1941); *Smiley v. Holm*, 285 U.S. 355 (1932); *Newberry v. United States*, 256 U.S. 232 (1921); *United States v. Gradwell*, 243 U.S. 476 (1917); *Ex parte Yarbrough* (Ku-Klux Cases), 110 U.S. 651 (1884); *United States v. Gale*, 109 U.S. 65 (1883); *Ex parte Clarke*, 100 U.S. 399 (1879); *Ex parte Siebold*, 100 U.S. 371 (1879).

of the congressional power under the Times, Places and Manner Clause. Some of the Court's pronouncements have asserted extensive congressional power without citing much authority.<sup>18</sup> Others have asserted extensive congressional power while relying only on cases that themselves cited little authority.<sup>19</sup> Occasionally, the Court has derived conclusions about eighteenth-century understanding from fragmentary evidence of scant probative value, as when it relied on the definition of "election" appearing in a nineteenth-century dictionary.<sup>20</sup>

In only one case, *Newberry v. United States*,<sup>21</sup> a 1921 decision written by Justice McReynolds, has the Court made some effort to reconstruct the Founding-Era record—and the results were distinctly different from the results of the Court's other cases.<sup>22</sup> The issue in *Newberry* was whether the Times, Places and Manner Clause was broad enough to authorize Congress to regulate primary elections as well as general elections. The Court concluded that the power was not sufficiently broad. Justice Pitney, writing for himself and two colleagues, dissented from that part of the opinion; but as has been true of other justices taking an expansive view of the Clause, he cited little Founding-Era material.<sup>23</sup> When the Court overruled *Newberry* two decades later, it relied on Pitney's *Newberry* opinion, citing no additional Founding-Era evidence.<sup>24</sup>

Not even the *Newberry* Court's survey of the evidence was particularly thorough. For example, the Court did not discuss eighteenth-

18 The treatment of Founding-Era understanding in *Yarbrough*, 110 U.S. at 660–61, was summary, as was that in *Classic*, 313 U.S. at 317–18. Other cases construing or applying the Times, Places and Manner Clause have not examined the Founding-Era understanding at all. See, e.g., *McConnell*, 540 U.S. at 93; *Siebold*, 100 U.S. at 371.

19 E.g., *Buckley*, 424 U.S. at 14 n.16 (citing cases); *Smiley*, 285 U.S. at 366–67 (citing cases, some not relevant); *Gradwell*, 243 U.S. at 482 (citing cases); *Gale*, 109 U.S. at 66 (citing cases).

20 *Foster v. Love*, 522 U.S. 67, 71 (1997).

21 256 U.S. at 232.

22 *Id.* at 250–51, 255–56.

23 However, he did deal briefly with some of the majority's arguments based on the Federalist Papers. *Id.* at 283–91 (discussing *The Federalist No. 60* (Alexander Hamilton), *supra* note 1).

24 *United States v. Classic*, 313 U.S. 299 (1941). The Court in *Classic* actually said it was unnecessary to overrule *Newberry* because Justice McReynold's decision spoke for only four justices. *Id.* at 317. However, Justice McKenna (the fifth vote) had concurred with the portion of the opinion construing the original meaning of the Times, Places and Manner Clause, so it really was an overruling. *Newberry*, 256 U.S. at 258. Justice Stone's opinion for the Court in *Classic* promised a review of "the words of the Constitution read in their historical setting as revealing the purpose of its framers," but failed to deliver. *Classic*, 313 U.S. at 317.

century election laws, understandings, or practices. Moreover, as explained below, the *Newberry* conclusion was erroneous.<sup>25</sup>

Scholarly commentary on the original understanding or original meaning of the Times, Places and Manner Clause has been brief and usually has marshaled Founding-Era sources primarily to serve a larger argument. The most complete examination, by Professor Stephen J. Safranek, appeared in an article contending for the constitutionality of a Colorado term-limits initiative.<sup>26</sup> Professor Safranek relied on the ratification-era debates to conclude that the Constitution's reservation to the *states* of power to regulate the "manner" of elections was broad enough to justify application of the term-limits initiative to congressional candidates.<sup>27</sup> Similarly, a student author used the same sort of material to construct a case for the constitutionality of the National Voter Registration Act.<sup>28</sup> Although neither of those treatments was truly comprehensive, others have been even briefer.<sup>29</sup>

### C. *The Interpretive Method Employed in this Article and the Evidence of Original Public Meaning*

In order to recreate the original force of the Times, Places and Manner Clause, one must take account of maxims of textual interpre-

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<sup>25</sup> *Infra* note 209 and accompanying text.

<sup>26</sup> Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321, 327–43 (1993).

<sup>27</sup> The analysis would seem unnecessary since the Tenth Amendment reserves all undelegated power to the states and people; hence, state regulations, unlike congressional regulations, should not be confined by the constitutional meaning of "Manner of holding Elections." *Cf.* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). There is no requirement that states actually have been exercising a power (in this case, control over federal elections) at the time the Tenth Amendment was adopted for that power to be reserved; otherwise, any police power unexercisable in 1791 (*e.g.*, regulation of automobiles) could not be exercised today. Nevertheless, current Supreme Court doctrine is that the "grant" to states by the Times, Places and Manner Clause is their exclusive source of authority over federal elections. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (following *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995)); *cf. Newberry*, 256 U.S. at 281 (Pitney, J., concurring in part).

<sup>28</sup> Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 51–60 (1996) (discussing National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended in 42 U.S.C. § 1973gg (2006))).

<sup>29</sup> *E.g.*, Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 289–90 (1989) (citing the Clause in arguing how the Founders' designed the Constitution to respond to social change); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1750–51 (2002); Anthony Peacock, *Election Regulations*, in THE HERITAGE GUIDE TO THE CONSTITUTION 71–73 (Edwin Meese III et al. eds., 2005).

tation current in the eighteenth century. Modern commentators tend to be skeptical of such maxims, but in the Founding Era, judicially-approved rules of construction enjoyed great standing.<sup>30</sup>

Among the most important of the interpretive rules was that textual uncertainties in a document (including a constitution) should be resolved in accordance with “the intent of the makers.”<sup>31</sup> In the constitutional context, the “makers” were the ratifiers, and their “intent” was their subjective understanding.<sup>32</sup> If the subjective understanding (which I refer to in this Article as *original understanding*) was either not recoverable or not coherent, then one marshaled available evidence to infer an objective substitute for subjective intent—a construct modern writers call the *original public meaning*.<sup>33</sup> The original public meaning is defined as how the text “would have been understood by a hypothetical, objective, reasonably well-informed reader”<sup>34</sup> at the time of ratification.

A person employing the Founding-Era interpretive method may begin *either* with evidence of original understanding, filling any gaps with evidence of public meaning, *or* with evidence of public meaning, amending it with any inconsistent understandings. The ultimate result of the inquiry should be the same using either method. In my investigation, I began by seeking evidence of original public meaning. For the Times, Places and Manner Clause, that evidence encompasses:

- Contemporaneous writings referencing the “manner” of elections;
- British parliamentary statutes regulating the times, places, and manner of elections (as former British subjects knowledgeable in the law

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30 1 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 6 (1772) (“Maxims . . . are of the same Strength as Acts of Parliament when once the Judges have determined what is a Maxim . . .”); *accord* State v. \_\_\_\_\_, 2 N.C. 28, 1794 WL 87 (N.C. Super. L. & Eq. 1794).

31 Natelson, *Founders’ Hermeneutic*, *supra* note 1, at 1249–55.

32 *Id.* at 1288–89 (citation omitted) (internal quotation marks omitted), 1297–03.

33 *Id.* at 1286.

34 See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (“[H]ow the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted. . . . We call this approach *original, objective-public-meaning textualism*.” (citations omitted)). Kesavan and Paulsen offer this definition as part of the common argument that constitutional interpretation should be guided by original meaning textualism rather than by original intent of the drafters or original understanding of the ratifiers. After Kesavan and Paulsen wrote, however, I undertook a review of eighteenth-century interpretive method that left little doubt that the Founders granted original understanding (when coherent and available) primacy over original meaning. See generally Natelson, *Founders’ Hermeneutic*, *supra* note 1.

of the British Empire, the Founders were familiar with British election laws and discussed them during the ratification controversy);<sup>35</sup>

- Provisions in contemporaneous state constitutions regulating the times, place, and manner of elections;
- Early state statutes designed to comply with the mandate of the Times, Places and Manner Clause. This category includes only statutes (a) adopted by states that already had ratified the Constitution (b) during the period before all the original thirteen had ratified—i.e., before Rhode Island’s ratification on May 29, 1790; and
- The drafting, text, and structure of the Constitution.

After collecting evidence of original public meaning, I then turned to the ratification record to determine if the ratifiers adopted any special understandings inconsistent with the original public meaning. I concluded that the ratifiers’ understanding did not differ from the original public meaning, except in one particular: The conventions of several states ratified only after being assured—and in some cases stating the understanding explicitly—that congressional power under the Times, Places and Manner Clause would be construed narrowly.

## II. THE “MANNER OF ELECTION” IN THE EIGHTEENTH CENTURY

### A. Documents Referenced

Eighteenth-century English-language writings contain many occurrences of the phrase “manner of election,” and some occurrences of its synonym, “mode of election.”<sup>36</sup> A Gale Company database, *Eighteenth-Century Collections Online*, contains a fairly good sample of these, although I found numerous instances elsewhere as well. My conclusions of original meaning were based on documents that (1) referred to the “manner” or “mode” of election, (2) offered illustrations of what the phrase meant, (3) were prepared prior to May 29, 1790, the

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<sup>35</sup> For example, participants in the ratification debates often referred to an incident in which Parliament had lengthened terms in the House of Commons from three to seven years. *E.g.*, Agrippa, *Letter XIII*, MASS. GAZETTE, Jan. 22, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 770 (referring to “the usurpation by which they continued themselves from three to seven years”).

<sup>36</sup> For references to the “mode of election,” see, e.g., 4 ELLIOT’S DEBATES, *supra* note 1, at 52 (reporting remarks by Samuel Spencer at the North Carolina ratifying convention); FOSTER’S MINUTES, *supra* note 1, at 44 (quoting John Sayles at the first sitting of the Rhode Island ratifying convention as using “Mode of Election” when discussing the Times, Places and Manner Clause); and Ordinance of the Convention of New-York, for Settling the New Form of Government of that State (May 8, 1777), *in* THE REMEMBRANCER, *supra* note 1, at 238, 240. *See also infra* notes 66 & 69; *cf.* FOSTER’S MINUTES, *supra* note 1, at 88 (referring to the “Mode of Putting the Vote”).

day Rhode Island became the thirteenth state to ratify the Constitution, and (4) were prepared within the geographic limits of what had been Great Britain's Atlantic empire—that is, England, Scotland, Ireland, and (before 1776) British North America. Some of the documents are discussed in the text below while others are referenced only in footnotes.

*B. Documents from England, Scotland, and Ireland*

The Royal Charter of the Dublin Society<sup>37</sup> stated that the Society's "manner of election" included time limits, qualifications, and a procedure for selecting a voting place.<sup>38</sup> William Coxe's English work, *Sketches of the Natural, Civil, and Political State of Swisserland*<sup>39</sup> [sic] described "[t]he manner of election" for office in a Swiss canton as involving popular election of five candidates, and choice of a final victor from them by lot. Similarly, Philip Morant described the "manner of election" of an English mayor as involving an election by the burgesses, "or the major part of them, in common Hall assembled [who] nominated and returned two Aldermen to the bench of Aldermen: who, retiring into the Council, or Record-room, chose one of the two to be *Mayor* for the year ensuing."<sup>40</sup> Rules pertaining to the "manner of election" in London prescribed the election of candidates from districts, the qualifications of the electorate, the choice of candidate, and methods of certification.<sup>41</sup> *A History of Great Yarmouth* described

<sup>37</sup> The Royal Charter of the Dublin Society (1785).

<sup>38</sup> *Id.* at 5, 7, 9 (providing for "such others as shall from Time to Time be elected in the Manner herein after directed," and stating that the aforesaid "Manner" was that the members designated "within forty Days next after the Date of this our Grant, to meet together at such Time and Place . . . to the said Members, or such of them as live within our City, or Liberties of our City of *Dublin* . . . where they, or the major Part of them then present, may nominate, elect and chuse [sic] new Members" and "that the said Corporation, or any seven or more of them, whereof the President, or one of the Vice-Presidents, to be one, shall have full Power to elect such Persons to be Members of the said Society").

<sup>39</sup> WILLIAM COXE, *SKETCHES OF THE NATURAL, CIVIL, AND POLITICAL STATE OF SWISSERLAND* 54 (1779) (referring to election in a Swiss canton); see also AEOLUS: OR, THE CONSTITUTIONAL POLITICIAN 30 (1770) (stating, "Plutarch goes on—'The manner of their Election was as follows[]'" and further stating that the people were called together, locked together in a room so they could not see outside, and generally decided according to shouts of the people); REV. T. WILSON, *AN ARCHAEOLOGICAL DICTIONARY* 234 (1783) (stating that "the manner of their election" was drawing by lots from a particular body).

<sup>40</sup> 1 PHILIP MORANT, *THE HISTORY AND ANTIQUITIES OF THE COUNTY OF ESSEX* 98 (London, 1768).

<sup>41</sup> *THE LAWS AND CUSTOMS, RIGHTS, LIBERTIES, AND PRIVILEGES, OF THE CITY OF LONDON* 39–40 (1779) ("[T]he manner of which election has several times varied: but in the year 1714 . . . it was enacted, that . . . there shall be chosen only one citizen by the inhabitants of every ward destitute of an alderman, and the person so elected to be returned by the

the “[m]anner of electing, sending, and receiving the Port Bailiffs” as involving an election in June or July by the common assemblies of the particular towns whose turn it was to send [the Port Bailiffs],” followed by presentation

to the general assembly of the Cinque Ports, and the towns of Rye and Winchelsea, on Tuesday after the feast of St. Margaret, to be by them approved, acknowledged, confirmed, and deputed . . . . And if any objection appeared to either of the persons elected, an order was given for another to be elected in his stead.<sup>42</sup>

To a considerable extent, Parliament had standardized regulations for the “manner of election” to the House of Commons. Parliamentary legislation governing the choice of burgesses prescribed public notice and proclamations, times and places of voting, the identity, duties, and oaths of the supervising officers, *viva voce* voting (alterable to secret ballot if the assembled voters requested it), generation and retention of a list of qualified and disqualified voters, adjudication of disputed elections, and punishment for selling one’s vote.<sup>43</sup> The “Manner of the Election of Knights” to the Commons also included provisions for the forms and substance of writs, proclamations, times, and for a written and sealed ballot.<sup>44</sup>

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lord mayor (or other returning officer, duly qualified to hold a court of wardmore) to the court of lord-mayor and aldermen, by whom the person so returned is to be admitted, and sworn into the office of alderman.”); *see also* CHARLES BURLINGTON ET AL, THE MODERN UNIVERSAL BRITISH TRAVELLER [sic] 264 (1779) (stating that the Lord-Mayor of London “is elected in the following manner” and that the livery chose two aldermen, the body of aldermen selected one from them, the chancellor gave his approval, and the designee was sworn in).

<sup>42</sup> THE HISTORY OF GREAT YARMOUTH 269–70 (1776).

<sup>43</sup> *E.g.*, DETERMINATIONS, *supra* note 1, at 42–79; *see also* 4 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 330–32, 557 (1780) (indexing the “Manner of Election” for Burgesses in Parliament to include proclamation, voting in person, sheriff as officer in charge, hours of voting, time of voting, place of voting, voting either “by Hearing of the Voices, or View of the Hands held up” provision for a poll (secret ballot), appointment and duties of clerk, swearing of clerks, naming of inspectors, timely process, delivery of a copy of the poll to anyone who desired and paid for it, delivery of “check-books” to the clerk of the peace, erection of polling booths, and the requirement that the sheriff list the towns from which each booth was appointed and deliver a copy of the list to any candidate on request); A GENTLEMAN OF THE INNER-TEMPLE, LAWS CONCERNING THE ELECTION OF MEMBERS OF PARLIAMENT 84 (1774) (reporting that the “Manner of Election” referred to the Sheriff receiving an election writ and directing election of commissioners, who then chose representatives in Parliament).

<sup>44</sup> 1 THE STATUTES AT LARGE 469–70 (1768–70) (mentioning and giving, in 8 Hen. IV, c. XV, “The Manner of the Election of Knights of Shires for a Parliament,” the form of the writ, proclamation of day and place of Parliament and of election of knights, free election of the full county, and the names of persons chosen to be written in an indenture under seals of those who chose them).

This standardization was not complete, however. The “manner of election” to the Commons varied somewhat according to locale. John Impey’s treatise *The Office of Sheriff* explained that in Scotland also the “manner” included provision for writs of election, oaths administered to electors, designation of the sheriff as the officer who gave notice of the time of election, the meeting of freeholder-electors, returns of elections, and punishment for defaulting officials.<sup>45</sup> Scotland differed from England in that the Scottish “manner of election” to the House of Commons often was indirect—that is, the voters chose “commissioners” who actually elected the Member of Parliament.<sup>46</sup> The “manner of election” varied in Ireland as well.<sup>47</sup>

These English, Scottish, and Irish sources used the phrase “manner of election” to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot). “Manner of election” included regulation of elections decided in two tiers, as when one group chose electors and the electors chose the winner, or when a group selected several candidates and the winner was chosen by lot. However, regulations of the “manner of election” in these documents seem not to have included governance of campaigns.

### C. “Manner of Election” in America

Americans ascribed the same general content to the phrase “manner of election” as the English, Irish, and Scots did. The *Transactions* of Benjamin Franklin’s American Philosophical Society provided for the “manner of . . . election” of officers, and for the time and place of election, notice to electors one week before the election,

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<sup>45</sup> JOHN IMPEY, *THE OFFICE OF SHERIFF* 303–10 (1786); *see also* GEORGE CHALMERS, *THE HISTORY OF THE UNION BETWEEN ENGLAND AND SCOTLAND* 498 (1786) (describing proceedings of Scottish Parliament on Jan. 29, 1707, as determining the “manner in which the burrows shall elect their representatives to the House of Commons of Great Britain” to include districting for election of Scots representatives); *DETERMINATIONS*, *supra* note 1, at 82–84 (providing for “[t]he Manner of & Proceeding at the Election of the Commoners for Scotland” to include writs of election, precepts to boroughs to elect commissioners, punishment for defaulting sheriff, punishment for defaulting chief magistrate of borough, summoning council of the borough, appointment of day for election, and prescribing two days between the date on which the time of election was appointed and the actual election of commissioners and commissioners’ election of the member of Parliament).

<sup>46</sup> *Id.*

<sup>47</sup> 9 *THE STATUTES AT LARGE, PASSED IN THE PARLIAMENTS HELD IN IRELAND* 68 (1786) (statute passed in 1763, referring as the “same manner of election” a master gathering together a minimum number of voters and their election).

choice of election judges, appointment of secretaries for recording the names of voters, voting by ballot or written ticket rather than *viva voce*, and for breaking tie votes by lot.<sup>48</sup> A 1721 South Carolina election code described “the Manner and Form of electing Members” to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days. Within the code also were provisions for writs of election, times for elections, oaths and enrollment of electors, the choice of election managers and the conduct of voter assemblies (which were to continue for no more than two days). Voting was by paper ballot. Ballots were deposited in designated boxes, which were then sealed. Double ballots were invalid. The winner was determined by a majority rather than a plurality. The code specified punishment for corrupt election officials and persons who disrupted elections.<sup>49</sup>

Connecticut’s royal charter provided that there was to be “One Governor, One Deputy-Governor, and Twelve Assistants, to be from time to Time constituted, elected and chosen out of the Freemen of the said Company for the Time being, in such *Manner and Form* as hereafter in these Presents is expressed.”<sup>50</sup> The “Manner and Form” included meetings of the citizens on the second Thursday of October and the second Thursday of May, and selection by majority votes of two persons in each “Place, Town, or City” to serve in the General As-

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48 2 TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY vi–vii (1786). For another example of “manner” as including the method of balloting in a private organization, see THE LIFE AND ADVENTURES OF MR. BAMPFYLDE-MOORE CAREW 48 (1786), describing an imaginary “manner of election” by which the voter puts a white ball in the box designated for his candidate and a black ball in the other candidates’ boxes.

49 S.C. STAT. 113–15 (1721) (“An Act to ascertain the Manner and Form of electing Members . . . in the Commons House of Assembly.”).

50 CHARTER OF CONN. 1662, reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 530 (emphasis added). The charter stated as follows:

[T]here shall be One Governor, One Deputy-Governor, and Twelve Assistants, to be from time to Time constituted, elected and chosen out of the Freemen of the said Company for the Time being, in such Manner and Form as hereafter in these Presents is expressed, . . . And further we . . . Do ordain and grant, That the Governor . . . shall and may from Time to Time upon all Occasions, give Order for the assembling of the said Company, and calling them together to consult and advise of the Business and Affairs of the said Company, and that for ever hereafter, twice in every Year, *That is to say*, On every Second Thursday in *October*, and on every Second Thursday in *May*, or oftener in case it shall be requisite; the Assistants, and Freemen of the said Company, or such of them (not exceeding Two Persons from each Place, Town, or City) who shall be from Time to Time hereunto elected or deputed by the major Part of the Freemen of the respective Towns, Cities, and Places for which they shall be elected or deputed, shall have a General Meeting or Assembly . . . whereof the Governor or Deputy-Governor, and Six of the Assistants at least, to be Seven, shall be called the General Assembly, and shall have full Power and authority to alter and change their Days and Times of Meeting .

*Id.* at 530–31.

sembly, which in turn was to elect the governor. The charter of Rhode Island prescribed “manner” regulations of the same general kind.<sup>51</sup>

After independence, Connecticut and Rhode Island continued to operate under their charters, with some amendments. The other states drafted new constitutions for themselves. Several of these constitutions explicitly regulated the “manner” of elections. The provisions governing “manner of election” varied in scope, although their subject-matter was generally consistent. The Constitution of North Carolina provided that the “manner” of election of delegates to the Continental Congress would be for them to be “chosen annually by the General Assembly, by ballot; but may be superseded [i.e., replaced in office], in the mean time, in the same manner.”<sup>52</sup> Georgia’s “manner” rules for selecting state representatives were as follows:

The manner of electing representatives shall be by ballot, and shall be taken by two or more justices of the peace, in each county, who shall provide a convenient box for receiving the said ballots; and, on closing the poll, the ballots shall be compared in public with the list of votes that have been taken, and the majority immediately declared; a certificate of the same being given to the persons elected, and also a certificate returned to the house of representatives.<sup>53</sup>

The 1780 Massachusetts Constitution described the “manner” by mandating the time of election (annually, on the first Monday of April), property and age qualifications of electors, a notice of election, and who would serve as election judges.<sup>54</sup> It also required that the “Legislature shall, by standing laws, direct the time and manner of convening the electors, and of collecting votes, and of certifying to the Governor the officers elected.”<sup>55</sup> The “manner” regulations in Maryland’s constitution<sup>56</sup> included voter qualifications,<sup>57</sup> time and frequency of elections,<sup>58</sup> the identity of the election judges,<sup>59</sup> *viva voce* majority voting for senatorial electors,<sup>60</sup> secret ballot plurality voting

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51 CHARTER OF R.I. AND PROVIDENCE PLANTATIONS 1663, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 3215.

52 N.C. CONST. of 1776, art. XXXVII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 2793.

53 GA. CONST. OF 1777, art. XIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 1, at 780.

54 MASS. CONST. of 1780, ch. 1, § 2, arts. II, IV (setting forth manner of election for state senators).

55 *Id.* ch. 2, § 1, art. X.

56 MD. CONST. of 1776.

57 *Id.* arts. II, IV, XII.

58 *Id.* arts. II, XIV (one and five years for different legislative houses).

59 *Id.* arts. VI, IX, XVII.

60 *Id.* art. XIV.

among those electors for senators,<sup>61</sup> and oaths for electors.<sup>62</sup> The New Hampshire constitution provided for election to the state council “in the following manner,” and then specified how many council members were to come from each county.<sup>63</sup> The “manner” of electing the governor of New Jersey was by a majority vote of a joint ballot of the two legislative houses, with service for a one-year term.<sup>64</sup> The constitutions of the other states all defined the manner of election in ways consistent with the illustrations just given.<sup>65</sup>

State election laws adopted after Independence employed “manner of election” and its variants in the same general way. The “mode of holding elections” in a 1777 New York statute<sup>66</sup> provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It specified the places for election, the supervising officers and election judges, times of no-

61 *Id.* arts. XV, XVI.

62 *Id.* art. XVIII.

63 N.H. CONST. of 1776.

64 Article VII of The New Jersey Constitution of 1776 provides:

VII. That the Council and Assembly jointly, at their first meeting after each annual election, shall, by a majority of votes, elect some fit person within the Colony, to be Governor for one year, who shall be constant President of the Council, and have a casting vote in their proceedings; and that the Council themselves shall choose a Vice-President who shall act as such in the absence of the Governor.

N.J. CONST. of 1776 art. VII. Article XII provides:

XII. That the Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years: and the Provincial Treasurer shall continue in office for one year; and that they shall be severally appointed by the Council and Assembly, in *manner* aforesaid.

N.J. CONST. of 1776 art. XII (emphasis added).

65 DEL. CONST. of 1776, art. 27 (specifying “manner” to include choice of election inspectors and assessors and use of secret ballot); N.Y. CONST. of 1777, arts. VI–VII, X, XII (prescribing “manner and form” of election by *viva voce* or by ballot; providing for “election of senators . . . after this manner,” and dividing states into senatorial districts, proportioning by census, electing by freeholders, and providing term limits); PA. CONST. of 1776, § 19 (providing for “manner” and “mode” of electing supreme executive council: districting the state and selection by ballot by freemen for particular terms); S.C. CONST. of 1778, arts. XXVII–XXIX (including in “manner” of elections the choice by ballot, term of office and identity of electors); S.C. CONST. of 1776, arts. II, III, XIII, XXI, XXVII (providing for “manner” of election of legislative council, state president, and sheriffs, including selection by ballot, quorum, and qualification of electors); VT. CONST. of 1786, ch. II, arts. VII, X (similarly outlining “manner” of elections); VT. CONST. of 1777, ch. II, §§ XVI, XVII, XLIV (including in “manner” of elections the choice of two representatives from each town, frequency of elections, ballot voting, sealing of ballots, vote counting, majority voting); VA. CONST. of 1776 (including in “manner” of elections legislative districting, qualifications of voters, returns by election officers, and terms of office).

66 Ordinance of the Convention of New-York, for Settling the New Form of Government of that State (May 8, 1777), in THE REMEMBRANCER, *supra* note 1, at 238–43.

tice, returns of poll lists, declaration of winner, and some voter qualifications.<sup>67</sup>

A 1781 Maryland law mandated that certain special elections “be held in county in manner and form following,” and prescribed the time and place of election, the issuance of notice, the formalities pertaining to election officials, the administration of oaths, the announcement of the results, and that a plurality should determine the victor.<sup>68</sup> A 1787 New York statute prescribed as the “Mode of conducting every such Election,” the delivery of a paper ballot with the names of the candidates, the voter’s receipt of the ballot in the presence of inspectors, the folding and closing of the ballot, its placement in a box to be locked, who was to keep the key, inspection of the poll lists, protection of ballot boxes, the disposition of voter challenges, oaths to voters of questionable loyalty, the opening and counting of ballots, the punishment of corrupt officials and of persons disrupting an election, and the qualifications of voters.<sup>69</sup> In this particular statute, the location of the voting was designated separately.<sup>70</sup> States that did not use the precise phrase “manner [or mode] of election” adopted analogous measures.<sup>71</sup>

By its terms, the Constitution was to come into effect upon ratification by nine states.<sup>72</sup> While the Constitution was still pending elsewhere, some of the ratifying states adopted statutes whose recited purpose was to comply with the state’s duty under Article I, Section 4 to prescribe the times, places, and manner of election.<sup>73</sup> The South

<sup>67</sup> *Id.* at 241–42.

<sup>68</sup> An Act for Holding Special Elections in Caecil County, 1781 Md. Laws, ch. IX; *see also* An Act to Alter the Place of Holding the Elections for Members of the Legislature, and Parish Officers for the Parish of Saint John, Colleton County (Feb. 27, 1788), *reprinted in* PUBLIC LAWS OF SOUTH CAROLINA 440 (1790).

<sup>69</sup> An Act for Regulating Elections (Feb. 13, 1787), § VI, *reprinted in* 2 LAWS OF THE STATE OF NEW YORK 27, 29–30 (1789).

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g.,* An Act Concerning Election of Members of General Assembly (Dec. 20, 1785) *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 22–26 (1790) (specifying qualifications of electors, a fine for failing to vote, privilege from arrest for voters, secret polls if live voting was not practical, extension of voting up to four days, resolution of conflicts, the oath for electors, the form of certification of election, writs of election in the event an office was vacant, punishment for a disobedient sheriff, and punishment for those who buy votes).

<sup>72</sup> U.S. CONST. art. VII, cl. I.

<sup>73</sup> An Act for Prescribing on the Part of this State, the Times, Places, and Manner of Holding Elections for Representatives in the Congress, and the Manner of Appointing Electors of a President of the United States (Nov. 4, 1788), *reprinted in* PUBLIC LAWS OF SOUTH CAROLINA 462 (1790); *see also* An Act Directing the Times, Places and Manner of Electing Representatives in this State, for the House of Representatives of the Congress of the United States of America (Jan. 27, 1789), 1789 N.Y. Laws, c. XI, *reprinted in* 2 LAWS OF THE

Carolina measure, for example,<sup>74</sup> divided the state into five districts, with one federal Representative to be elected by a plurality in each district. The law also provided that the place of election was to be the same as for the state house, and that the election was to be regulated and conducted under the same rules. The law identified the conducting officials, specified how they were to make returns, and required examination of the returns by the governor. It provided for proclamation of election, the deposit of original poll with the secretary of state, and a procedure in case the same person was elected in more than one district. It further provided for the choice of presidential electors, to be appointed by legislature on the first Wednesday of the following January, and required them to take an oath.

*D. Summary of the Evidence on “Manner of Election”*

The foregoing sources—British, Scottish, Irish, and American—all used the phrase “manner of election” (or a close variant) and specified one or more components of that phrase. The sources tend to supplement and reinforce rather than contradict each other. Considered in the aggregate, they suggest that regulating the “manner of election” encompassed the following:

- Fixing the qualifications of the electors and of candidates;
- Setting the time of the election, including terms of office;
- Fixing the place of election, including description of district boundaries;
- Determining whether election was to be a single-tier or double-tier process—i.e., whether voters decided the winner directly, or merely selected a class of people who either selected the ultimate winner or from whom the ultimate winner was chosen by lot;
- Setting the rules for both tiers of a double-tier process;
- Determining whether the victor needed a majority or a plurality;
- Regulating the mechanics of voting, including provisions for notice, returns, ballots or *viva voce* voting, and counting;

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STATE OF NEW YORK 395 (1789). This law divided the state into six representative districts, provided that each elector was entitled to vote for one person, provided for signing of poll lists, opening of election box, delivery to Sheriff, transmittal of box unopened to Secretary of State, canvassing procedure, election by plurality, certification, an oath for canvassers, dates of election, a vacancy procedure, penalties for bribery and corrupt conduct and for failure of administrator to perform his duty, no calling of militia during election or with twenty days before, and no service of civil process on elector on election day or day preceding.

<sup>74</sup> An Act for Prescribing on the Part of this State, the Times, Places, and Manner of holding Elections for Representatives in the Congress, and the Manner of appointing Electors of a President of the United States (Nov. 4, 1788), *reprinted in* PUBLIC LAWS OF SOUTH CAROLINA 462, 463–63 (1790).

- Erecting procedures to resolve election disputes; and
- Regulating Election Day behavior—e.g., providing for freedom for civil process and for punishment of Election Day misconduct.

With this background, we proceed to examine the electoral provisions the Framers actually drafted.

### III. THE FRAMING AND LANGUAGE OF THE TIMES, PLACES AND MANNER CLAUSE

#### A. *Drafting History*

Although the intent of the Constitution's drafters—the Framers—is not as authoritative as the original understanding and original public meaning,<sup>75</sup> their intent is useful evidence as to both since the Framers were part of the wider public and, in many cases, were influential ratifiers. This section, therefore, reviews the drafting history of the Times, Places and Manner Clause.

After the Constitutional Convention achieved a quorum on May 25, 1787, it debated and adopted a series of resolutions designed to serve as the basis for the new Constitution.<sup>76</sup> On July 26, the tired delegates adjourned for a ten-day recess, leaving behind them a “Committee of Detail” to convert the resolutions into a draft constitution. The committee consisted of five members. One was Nathaniel Gorham of Massachusetts, a merchant who had been president of Congress and was then chairman of the Convention's Committee of the Whole. The other four consisted of some of America's most distinguished lawyers. One was the committee chairman, John Rutledge of South Carolina, then serving as the state's chancellor. The remaining three were Edmund Randolph of Virginia, then his state's governor and a former attorney general; James Wilson, one of Pennsylvania's foremost legal practitioners; and Judge Oliver Ellsworth of Connecticut.

If construed literally, one of the convention's resolutions would have bestowed almost unlimited authority on the new government: It granted to Congress, in addition to the powers the Confederation Congress had enjoyed, authority “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the

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<sup>75</sup> See *supra* Part I.C.

<sup>76</sup> The convention resolutions for the Committee of Detail are collected at 2 FARRAND'S RECORDS, *supra* note 1, at 129–33.

United States may be interrupted.”<sup>77</sup> However, that resolution had been adopted rather early in the process, and by the latter part of July, a growing number of delegates apparently were having second thoughts about giving the new Federal Congress so much power.<sup>78</sup> The Committee of Detail decided to follow the trend rather than the resolution, substituting a list of discrete enumerated federal powers.<sup>79</sup> On the list was an early version of the Times, Places and Manner Clause.

The Committee of Detail’s “times, places and manner” clause granted to the “Legislature of the United States” authority to alter any state rules regulating the “Times and Places and Manner of holding the Elections of the Members of each House.”<sup>80</sup> A few days later, James Madison and Gouverneur Morris moved to add a proviso exempting from congressional control the places for electing Senators.<sup>81</sup> They believed that because Senators were to be elected by the state legislatures, it would not be proper for Congress to dictate where a state legislature was to convene.<sup>82</sup> Although this proviso was voted down at the time, the Convention reversed itself the following month,<sup>83</sup> and the final version of the Clause was fixed.

The constitutional language governing congressional elections differed from usual eighteenth-century “manner of election” provisions in two important respects. First, the usual “manner of election” provision included elector and candidate qualifications, times of election (including terms of office), places of election (including district boundaries), as well as other administrative details.<sup>84</sup> The Constitution, on the other hand, listed qualifications, times, and places sepa-

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77 2 FARRAND’S RECORDS, *supra* note 1, at 131; *see also* Natelson, *Enumerated*, *supra* note 1, at 472.

78 Natelson, *Enumerated*, *supra* note 1, at 472–73.

79 *Id.* at 473.

80 The committee version read: “The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States.” 2 FARRAND’S RECORDS, *supra* note 1, at 165 (reporting records of the Committee of Detail). The committee reported to the convention on August 6, 1787.

81 On August 9, James Madison and Morris moved to add a proviso exempting the places of electing Senators, which was voted down. *Id.* at 240.

82 3 ELLIOT’S DEBATES, *supra* note 1, at 366 (reporting remarks of James Madison in the Virginia ratifying convention).

83 The latter vote was unanimous. 2 FARRAND’S RECORDS, *supra* note 1, at 613 (Sept. 14, 1787).

84 *See supra* Part II.

rately from “Manner.”<sup>85</sup> Second, after providing for qualifications, times, and places, the Constitution described the residuum as “the Manner of *holding* Elections.” This precise phrase seems to have been newly coined<sup>86</sup> to denote a subset of traditional “manner” regulation. Unlike the phrase “manner of elections,” it excluded qualifications, times, and places.

In view of the legal qualifications, experience, and abilities of the men primarily responsible for this language, it is unlikely that the Constitution’s reference to “Manner of holding” rather than the traditional “manner of elections” was accidental or unconsidered. Indeed, the Constitution’s counterpart for presidential elections, set forth in Article II, confirms this.

The Article II counterpart to “Manner of holding” was *not* the Article II phrase that actually employed the word “Manner”—“Each State shall appoint, in such *Manner* as the Legislature thereof may direct, a Number of [presidential] Electors.”<sup>87</sup> That phrase referred to a manner of *appointment* rather than election, and permitted states to dispense with election of presidential electors entirely in favor of another mode of choice, such as designation by the governor.<sup>88</sup> It was an acknowledgment of state power to fix the qualifications (or identity) of the person or persons appointing the presidential electors, and as such it served as the counterpart to the provision in Article I authorizing the states to set the qualifications of persons choosing the House of Representatives.<sup>89</sup>

85 U.S. CONST. art. I, § 2, cl. 1 (two-year terms for Representatives and qualifications of voters for Representatives), *id.* cl. 2 (qualifications of Representatives); *id.* art. I, § 3, cl. 1 (terms of Senators; their electors to be state legislators), *id.* cl. 3 (qualifications of Senators); *id.* art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own members . . .”).

86 A Jan. 28, 2010 search in the Gale Database, *Eighteenth Century Collections Online*, which covers nearly 200,000 works of the era (including most leading legal works), uncovered no instances of phrases with the words “manner,” “holding,” and “election(s)” within three words of each other before the publication of the Constitution in 1787. A 1777 New York election law had labeled its “manner” regulations as covering the “mode of holding elections,” and a 1787 New York law referred to the “mode of conducting” elections. See *supra* notes 66 & 69 and accompanying text.

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

88 *Id.* But see Kesavan, *supra* note 29, at 1750 (arguing that “[t]here is little reason to suppose that the word “Manner” in the Times, Places and Manner Clause has a substantially different meaning from the word “Manner” in Article II, Section 1, Clause 2”). As explained in the text, however, the Article II use of “Manner” is broader than its use in the Times, Places and Manner Clause.

89 U.S. CONST. art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

Rather, the presidential counterpart to the Article I “Manner of holding” was the list of residual election regulations that makes up most of Article II, Section 1, Clause 3.<sup>90</sup> Like Article I, Article II provided separately for times,<sup>91</sup> places,<sup>92</sup> candidate qualifications,<sup>93</sup> and elector qualifications.<sup>94</sup> The residuum (most of Article II, Section 1, Clause 3) consisted of whom electors could vote for; how many candidates each could vote for; creation of a voting list; signing, certifying, and transmitting the list; the identity of the presiding election official; formalities of opening of the certified lists; the requirement that the victor obtain a majority; and procedures for selection if no candidate received a majority.<sup>95</sup> As the counterpart to Article I’s “Manner of holding,” this list strongly suggests the sort of rules the Framers had in mind when they used that phrase in Article I. Moreo-

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<sup>90</sup> Article II, Section 1, Clause 3 provides:

The Electors shall . . . vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse [sic] by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse [sic] the President. But in chusing [sic] the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

*Id.* art. II, § 1, cl. 3.

<sup>91</sup> *Id.* art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”); *id.*, art. II, § 1, cl. 1 (“He shall hold his Office during the Term of four Years.”).

<sup>92</sup> *Id.* art. II, § 1, cl. 3 (“The Electors shall meet in their respective States.”).

<sup>93</sup> *Id.* art. II, § 1, cl. 5 (“No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

<sup>94</sup> *Id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

<sup>95</sup> *Id.* art. II, § 1, cl. 3.

ver, when added to qualifications, times, and places, the list corresponds closely to what other contemporary sources have to say about regulating the “manner of elections.”<sup>96</sup>

*B. Significance of the Constitutional Plan: The Original Public Meaning*

Part II described the understood scope of regulating the “manner of election” in Anglo-American legal practice. That scope included the qualifications of electors and elected; terms of office and other issues of time; legislative districting and other issues of place; and rules of decision and other Election Day conduct. “Manner of election” also included procedure for both single-tier and double-tier elections.

Part III.A showed how the Framers divided traditional “manner of election” rules into qualifications, times, places, and a residual phrase of narrower scope: “Manner of *holding* Elections.” The results may be represented in formulaic terms as follows:

“Manner of election” = Qualifications + Times + Places + “Manner of holding.”

Or, if one prefers:

“Manner of holding” = “manner of election” – qualifications – times – places.<sup>97</sup>

From the foregoing, we might describe the *original public meaning* of congressional power under the Times, Places and Manner Clause as follows:

- Subject to some override (see below), the Clause left untouched the states’ reserved police power to regulate elections. State laws were not necessarily limited to the understood scope of “manner of election” regulations. States might adopt other kinds of laws, even if they affected federal elections. For example, a state might alter the composition of its legislature in a way that influenced the election of Senators.<sup>98</sup>
- The Constitution withheld from both state and congressional control the qualifications and terms of office for Senators and Representatives.

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<sup>96</sup> *Supra* Part II.

<sup>97</sup> The accuracy of this formula was confirmed in the ratification debates by Federalist spokesman Tench Coxe. *Infra* note 153 and accompanying text; *see also* FOSTER’S MINUTES, *supra* note 1, at 44 (quoting Federalist Henry Marchant at the first sitting of the Rhode Island ratifying convention as correcting an Anti-Federalist by excluding qualifications of electors from the Times, Places and Manner Clause).

<sup>98</sup> *Cf. Newberry v. United States*, 256 U.S. 232, 257 (1921) (“Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these.”).

- The Constitution withheld from congressional control the qualifications of electors for Senators and Representatives and the places of choosing Senators.
- Subject to the last two exceptions, the Clause granted Congress power to override state “manner” regulations.
- Because congressional authority was limited by the terms of the grant, however, the Clause gave Congress no authority to regulate subjects outside of the understood scope of “manner of election” regulation.

#### IV. THE TIMES, PLACES AND MANNER CLAUSE IN THE RATIFICATION DEBATES

##### A. *The Level of Controversy and the Sources*

During the ratification debates, the Times, Places and Manner Clause proved to be one of the most controversial provisions in the new Constitution. At the Virginia ratifying convention, delegate George Nicholas fairly described the extent of the controversy when he said that objections against the Clause had “echoed from one end of the continent to the other.”<sup>99</sup> Because the Times, Places and Manner Clause was so controversial, the historical record contains a massive number of references to it. For example, the transcript of the Massachusetts ratifying convention contains several days of debate on the subject.<sup>100</sup>

This embarrassment of riches presents a dilemma. In articles of this type, my practice has been to provide fairly exhaustive citation for every historical conclusion, so readers readily can check the sources for themselves. In the case of the Times, Places and Manner Clause, exhaustive citation is not possible—footnotes would completely overwhelm the text. Therefore, many of the footnotes below include illustrative citations only. Readers can access further examples by checking the indices of standard sources.<sup>101</sup>

##### B. *The Arguments in the Ratification Debates*

One of the political principles to which both Anti-Federalists and Federalists were committed was that of “sympathy” between govern-

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<sup>99</sup> 3 ELLIOT’S DEBATES, *supra* note 1, at 9 (reporting remarks by George Nicholas at the Virginia ratifying convention).

<sup>100</sup> Debate on this and related election provisions dominated the debate from January 11, 1788 through January 17. 2 ELLIOT’S DEBATES, *supra* note 1, at 5–39.

<sup>101</sup> See, e.g., ELLIOT’S DEBATES, *supra* note 1; DOCUMENTARY HISTORY, *supra* note 1.

ment officials and governed.<sup>102</sup> Today we might say “empathy” rather than “sympathy,” but the general idea was that there should an identity of interest and ideals between public officials and the people as a whole.<sup>103</sup> Favorite devices for effectuating sympathy were large legislatures with members elected from small districts and frequent—usually annual—elections.<sup>104</sup>

Anti-Federalists argued that the Constitution would not sufficiently assure sympathy. The Senate was to be small, indirectly elected, and installed for long terms. The President was to be indirectly elected for a four year term, without the check of an elected executive council. In such a government, the people’s primary hope would lie with the House of Representatives.<sup>105</sup> But the House initially was to consist only of sixty-five members, and never more than one representative for every thirty thousand people. A body of such small size, the Anti-Federalists argued, easily could be “corrupted”—diverted from its duty to serve as the people’s guardians, servants, agents, and trustees.<sup>106</sup>

Anti-Federalists did not claim that *every* session of Congress would be so corrupted. But any congressional majority could employ the Times, Places and Manner Clause to overrule state election laws so as to ensure its own perpetuity and convert the government into a here-

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102 See generally, Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2002–03).

103 *Id.* at 358.

104 *Id.* at 367–72.

105 4 ELLIOT’S DEBATES, *supra* note 1, at 55 (reporting remarks of Timothy (or James; which is not certain) Bloodworth in the North Carolina ratifying convention: “The House of Representatives is the only democratical branch. This clause may destroy representation entirely”); Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 240, 241 (“[I]f they will have any security at all in this government, [they] will find it in the house of representatives.”).

106 A COLUMBIAN PATRIOT (Mercy Otis Warren), OBSERVATIONS ON THE CONSTITUTION (Feb. 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 272, 281 (stating that “[o]ne Representative to thirty thousand inhabitants is a very inadequate representation; and every man who is not lost to all sense of freedom to his country, must reprobate the idea of Congress altering by law, or on any pretence [sic] whatever, interfering with any regulations for the time, places, and manner of choosing our own Representatives”); see also 2 ELLIOT’S DEBATES, *supra* note 1, at 326 (reporting Governor Clinton, an Anti-Federalist, defending the proposed federal Senate: “It was true, he said, the representatives of the people, and the senators, might deviate from their duty, and express a will distinct from that of the people, or that of the legislatures; but any body might see that this must arise from corruption”); cf. 2 ELLIOT’S DEBATES, *supra* note 1, at 32 (reporting remarks by William Widgery at the Massachusetts ratifying convention on the small size of the representation).

ditary aristocracy.<sup>107</sup> This was exactly why, they asserted, Baron Montesquieu viewed a republic's election laws as "fundamental."<sup>108</sup>

In what ways could Congress manipulate the election laws to assure its own perpetuity? Some of the Anti-Federalist answers were not tenable from a fair reading of the constitutional text. Among these was the claim that the Times, Places and Manner Clause would enable Congress to extend its own terms indefinitely,<sup>109</sup> just as Parliament previously had extended the terms of the House of Commons from

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107 The alleged aristocratic tendencies of the Times, Places and Manner Clause—and, indeed, of the entire Constitution—were a common Anti-Federalist theme. *E.g.*, Cincinnatus, *Letter VI: To James Wilson, Esquire*, N.Y. J., Dec. 6, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 360, 363; *cf.* Centinel, *Letter VIII*, PHILA. INDEP. GAZETTEER, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 231, 232 (“[T]hat which gives Congress the absolute controul [sic] over the time and mode of its appointment and election, whereby, independent of any other means, they may establish hereditary despotism . . .”). For more information, see the Anti-Federalist satire written by “Aristocrotis,” who discussed how the Times, Places and Manner Clause could be used to create a hereditary aristocracy. ARISTOCROTIS (William Petrikin), THE GOVERNMENT OF NATURE DELINEATED; OR AN EXACT PICTURE OF THE NEW FEDERAL CONSTITUTION (1788), *cited in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 229, *reprinted in* 2 MFM. SUPP. Pa. 661.

108 THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 13, 24 (quoting Montesquieu); Federal Farmer, *Letter XII*, Jan. 12, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 310 (“It is well observed by Montesquieu, that in republican governments, the forms of elections are fundamental; and that it is an essential part of the social compact, to ascertain by whom, to whom, when, and in what manner suffrages are to be given. Wherever we find the regulation of elections have not been carefully fixed by the constitution, or the principles of them, we constantly see the legislatures new modifying its own form, and changing the spirit of the government to answer partial purposes.”); *see also* *Address of the Minority of the Md. Convention*, ANNAPOLIS GAZETTE, May 1, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 242, 246 (“The second objection respecting the power of congress to alter elections, they thought indispensable. Montesquieu says, that the rights of election should be established unalterably by fundamental laws in a free government.”).

109 Agrippa, *Letter I*, MASS. GAZETTE, Nov. 23, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 303, 305 (“Should the people cry aloud the representative may avail himself of the right to alter the *time of election* and postpone it for another year.”); Centinel V, PHILA. INDEP. GAZETTEER, Dec. 4, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 343, 347; Samuel, INDEP. CHRON., Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 678, 680 (“And there is nothing to hinder, but ample provision made, for Congress to make themselves perpetual. For by Art. I, Sect. 4 the Congress may at any time, make and alter the time, place and manner of choosing Representatives; and the time and manner of choosing Senators.”); *see also* 4 ELLIOT’S DEBATES, *supra* note 1, at 52 (reporting remarks by Samuel Spencer at the North Carolina ratifying convention); THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *supra* note 108, at 23; 2 DOCUMENTARY HISTORY, *supra* note 1, at 426 (reporting remarks by Robert Whitehill at the Pennsylvania ratifying convention).

three to seven years.<sup>110</sup> Anti-Federalists argued that Congress could impose additional qualifications on voters and candidates for office,<sup>111</sup> rip the choice of Senators away from the state legislatures,<sup>112</sup> and eventually annihilate the states.<sup>113</sup> When the Federalists pointed out that such apprehensions were contradicted by the text,<sup>114</sup> some Anti-

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110 Anti-Federalists frequently cited this precedent. See, e.g., 4 ELLIOT'S DEBATES, *supra* note 1, at 61–62 (reporting remarks by David Caldwell at the North Carolina ratifying convention); Agrippa, *Letter XIII*, *supra* note 35, at 770; Centinel III, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 55, 60.

111 Cornelius, HAMPSHIRE CHRON., Dec. 18, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 410, 413 (“By this Federal Constitution, each House is to be the judge, not only of the elections, and returns, but also of the *qualifications* of its members; and that, without any other rule than such as they themselves may prescribe.”). For another entrant in this Anti-Federalist parade of horrors, see Agrippa, *Letter XIII*, *supra* note 35, at 770 (By altering the time they may continue a representative during his whole life; by altering the manner, they may fill up the vacancies by their own votes without the consent of the people; and by altering the place, all the elections may be made at the seat of the federal government). See also 3 ELLIOT'S DEBATES, *supra* note 1, at 175–76 (reporting remarks of Patrick Henry at the Virginia ratifying convention on voter qualifications, citing precedent of ancient Rome).

112 Letter from Samuel Osgood, to Samuel Adams (Jan. 5, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 263, 265 (“How far the Word ‘Manner’ extends I know not—But I suppose, if Congress should determine, that the People at large, or a certain Description of them, should vote on the Senators, it would only be altering the Manner of choosing them—If this be true, Congress will have the exclusive Right of pointing out the Qualification of the Voters for Senators . . .”).

113 Luther Martin, *Genuine Information IV*, BALT. MD. GAZETTE, Jan. 8, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 296, 299 (claiming that the Times, Places and Manner Clause was designed to annihilate the state governments); 2 DOCUMENTARY HISTORY, *supra* note 1, at 397–98 (reporting remarks by Robert Whitehill at the Pennsylvania ratifying convention).

114 E.g., 3 ELLIOT'S DEBATES, *supra* note 1, at 202–03 (reporting remarks of Edmund Randolph at the Virginia ratifying convention); 4 ELLIOT'S DEBATES, *supra* note 1, at 53 (reporting remarks of James Iredell at the North Carolina ratifying convention); *id.* at 60–61 (reporting remarks by William Davie at the North Carolina ratifying convention); *id.* at 63 (reporting remarks by [probably William rather than Archibald] MacLaine at the same convention); A Citizen of New Haven (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 280, 282 (“[T]he qualifications of the electors [for House of Representatives] are to remain as fixed by the constitutions and laws of the several states.”); THE FEDERALIST NO. 60 (Alexander Hamilton), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 195, 199; A Freeman (Tench Coxe), *Letter II*, PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 508, 509 (“The elections of the President, Vice President, Senators and Representatives, are exclusively in the hands of the states, even as to filling vacancies. The smallest interference of Congress is not permitted, either in prescribing the qualifications of electors, or in determining what persons may or may not be elected. The clause which enables the foederal [sic] legislature to make regulations on this head, permits them only to say at what time in the two years the house of representatives shall be chosen, at what time in the six years the Senate shall be chosen, and at what time in the four years the President shall be elected; but these elections, by other provisions in the constitution, must take place every two, four and six years . . .”).

Federalists responded that the Times, Places and Manner Clause trumped the Constitution's language governing qualifications and terms because that Clause appeared later in the instrument.<sup>115</sup> To be sure, this reading contradicted the rules of construction in force during the Founding Era.<sup>116</sup> But, as one North Carolina Anti-Federalist suggested, "sophistry would enable them to reconcile them."<sup>117</sup> As far-fetched as these Anti-Federalist claims may have been, they were grounded in the public meaning of what it was to regulate the "manner of election."<sup>118</sup> One problem, however, is that they were not encompassed by the phrase the Constitution actually used: "Manner of holding Elections."<sup>119</sup>

Other Anti-Federalist concerns were more consistent with the text. Some of the Constitution's opponents observed that the Clause was not particularly well-drafted, leaving it open to misconstruction.<sup>120</sup> Federalists do not seem to have addressed that concern. Other Anti-Federalists expressed apprehension that Congress might fix the date and place of election to benefit the powerful and employ plurality-winner rules and *viva voce* voting to assure the election of favored candidates.<sup>121</sup>

These latter concerns were realistic in a world in which electors convened in open meetings in central locations to vote and in which

115 *E.g.*, Consider Arms, Malachi Maynard & Samuel Field, *Dissent to the Massachusetts Convention*, NORTHAMPTON HAMPSHIRE GAZETTE, April 9 & 16, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 42, 44 ("[Y]et all this is wholly superseded by a subsequent provision, which empowers Congress at any time to enact a law, whereby such regulations may be altered, except as to the places of chusing [sic] senators.").

116 One example of such a rule is the rule of construction against surplus. *See* TIMOTHY BRANCH, PRINCIPIA LEGIS ET AEQUITATIS 134 (London 1753) (*Sic interpretandum est ut Verba accipiantur cum effectu*—that is, "One should interpret so that words are received with an effect" (translation by the author)); *see also id.* at 117 (*Verba aliquid operari debent,—debent intelligi ut aliquid operentur*—"Words should have some effect; they should be understood to have an effect (translation by the author)). Thus, Federalist Robert Steele could ask the North Carolina ratifying convention: "Is it not a maxim of universal jurisprudence, of reason and common sense, that an instrument or deed of writing shall be so construed as to give validity to all parts of it, if it can be done without involving any absurdity?" 4 ELLIOT'S DEBATES, *supra* note 1, at 71.

117 4 ELLIOT'S DEBATES, *supra* note 1, at 106 (reporting remarks of William Taylor at the North Carolina ratifying convention).

118 *See supra* Part II.

119 U.S. CONST. art. I, § 4, cl. 1.

120 *E.g.*, 4 ELLIOT'S DEBATES, *supra* note 1, at 54–55 (reporting remarks of Samuel Spencer at the North Carolina ratifying convention); A FEDERAL REPUBLICAN, A REVIEW OF THE CONSTITUTION (1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 255, 262–63 (attacking the ambiguity of the Clause, and stating that it cannot be merely to provide regulations if a state refuses to do so, because if the state does not hold an election, there can be nothing to regulate).

121 *Infra* notes 123–27 and accompanying text.

people living in remote areas might spend several days traveling to the designated location. If Congress were to decree that elections were to be held in the middle of winter or during harvest time, many voters would be effectively disenfranchised.<sup>122</sup> Moreover, there was no requirement that Representatives be elected in districts. Congress could decide that a state's entire delegation would be selected at large<sup>123</sup> and designate a single location for voting in each state.<sup>124</sup> A Congress dominated by the merchant class might select a seacoast location in each state (for example, Boston or New York City), thereby making it easy for merchants and their allies to vote and very difficult

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122 Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 240, 241 ("Congress may establish a place, or places, at either the extremes, center, or outer parts of the states; at a time and season too, when it may be very inconvenient to attend; and by these means destroy the rights of election" (emphasis added)).

123 2 ELLIOT'S DEBATES, *supra* note 1, at 327 (reporting remarks of Melancthon Smith at the New York ratifying convention); Federal Farmer, *Letter III*, Oct. 10, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 30, 31.

124 Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 105, at 240, 241-42 ("It is a good rule, in the construction of a contract, to suppose, that what may be done will be; therefore, in considering this subject, you are to suppose, that in the exercise of this government, a regulation of congress will be made, for holding an election for the whole state at Poughkeepsie, at New-York [sic], or, perhaps, at Fort-Stanwix [sic]: who will then be the actual electors for the house of representatives?"); see also Cumberland County Petition to the Pennsylvania Convention, Dec. 5, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 1, at 309, 311 ("Here appears to be scarcely the shadow of representation provided, because the Congress may at their pleasure, order the election for the Representatives of the State of Pennsylvania, to be held in Philadelphia, where it will be impossible for the people of the state to assemble for the purpose; and thus the citizens of Philadelphia would be represented, and scarcely any part else of the commonwealth. The MANNER and TIME may prevent three-fourths of the present electors of the state, from giving a vote as long as they live.").

As "Cato's" comment about Fort Stanwix illustrates, some Anti-Federalists suggested that elections might be held only in remote, inconvenient areas. *E.g.*, Anonymous, *Blessings of the New Government*, PHILA. INDEP. GAZETTEER, Oct 6, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 345-46 (satirically claiming, "Among the blessings of the new-proposed government our correspondent enumerates the following. . . . Elections for Pennsylvania held at Pittsburg, or perhaps Wyoming [Pennsylvania]"); see also 2 ELLIOT'S DEBATES, *supra* note 1, at 30 (reporting remarks by Charles Turner at the Massachusetts ratifying convention as saying the elections might be held at the "extremity of a state"); 4 ELLIOT'S DEBATES, *supra* note 1, at 55 (reporting remarks of Timothy (or James; which is not certain) Bloodworth in the North Carolina ratifying convention: expressing similar sentiments); Letter from Richard Henry Lee, to James Gordon, Jr. (Feb. 26, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 1, at 210, 212 (suggesting that Virginia's elections might be held at Cape Henry).

for back-country farmers to do so.<sup>125</sup> Anti-Federalists alleged that this already had proved a problem in some states.<sup>126</sup>

The Anti-Federalist essayist calling himself “The Federal Farmer” emphasized the danger from a plurality-victor rule. In a scattered field of candidates, a relatively low percentage of the vote might amount to a plurality. A small but organized commercial or “aristocratic” faction could easily elect an unpopular candidate in a crowded field, particularly if the polls were located in a city dominated by that faction.<sup>127</sup> To show that this was not a chimerical fear, the Federal Farmer cited precedents.<sup>128</sup> Other Anti-Federalists pointed to Congress’s power to mandate *viva voce* voting, thereby better enabling dominant factions to control election results.<sup>129</sup>

“Brutus,” one of the best of the Anti-Federalist writers and a common foil for the “Publius” of the Federalist Papers,<sup>130</sup> summarized these concerns:

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- 125 See, e.g., *Vox Populi*, MASS. GAZETTE, Oct. 30, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 168, 170 (“Supposing Congress should direct, that the representatives of this commonwealth should be chosen all in one town, (Boston, for instance) on the first day of March—would not that be a very injurious institution to the good people of this commonwealth?—Would not there be at least nine-tenths of the landed interest of this commonwealth entirely unrepresented? . . . What, then, would be the case if Congress should think proper to direct, that the elections should be held at the north-west, south-west, or north-east part of the state, the last day of March? How many electors would attend the business?”); see Cornelius, HAMPSHIRE CHRON., Dec. 18, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 410, 413–14 (discussing the risk that mercantile interests will dominate elections located in seaport towns); see also 3 ELLIOT’S DEBATES, *supra* note 1, at 60 (reporting remarks by Patrick Henry at the Virginia ratifying convention expressing similar fears); AMERICAN HERALD, Jan. 14, 1788, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 1, at 709, 711 (expressing similar fears); Cato (N.Y. Gov. George Clinton), *supra* note 105, at 242 (“And would not the government by this means have it in their power to put whom they pleased in the house of representatives?”).
- 126 Centinel I, PHILA. INDEP. GAZETTEER, Oct. 5, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 326, 334 (“[T]he inhabitants in a number of larger states, who are remote from the seat of government, are loudly complaining of the inconveniencies and disadvantages they are subjected to on this account, and that, to enjoy the comforts of local government, they are separating into smaller divisions.”).
- 127 Federal Farmer, *supra* note 123, at 31. Lee argued that the Constitution should have required single-member districts and that Representatives reside in their districts. *Id.* at 32. His most complete treatment is in Federal Farmer, *supra* note 108, at 311–15.
- 128 Federal Farmer, *supra* note 108, at 314 (referring to British and American precedents).
- 129 Centinel III, *supra* note 110, at 59 (stating that Congress could abolish the secret ballot); see also Letter from William Symmes, Jr., to Peter Osgood, Jr. (Nov. 15, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 107, 110 (stating that instead of allowing Congress to prescribe the manner of holding elections, the Constitution should have specified the manner, such as the secret ballot).
- 130 “Brutus” may have been Judge Robert Yates, who had served as a federal convention delegate from New York, but left the convention early in dissatisfaction.

It is clear that, under [the Times, Places and Manner Clause] the foederal [sic] legislature may institute such rules respecting elections as to lead to the choice of one description of men. The weakness of the representation [i.e., small size of the House], tends but too certainly to confer on the rich and *well-born*, all honours; but the power granted in this [section], may be so exercised, as to secure it almost beyond a possibility of controul [sic]. The proposed Congress may make the whole state one district, and direct, that the capital . . . shall be the place for holding the election; and the consequence would be, that none but men of the most elevated rank in society would attend . . . They may declare that those members who have the greatest number of votes, shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order or profession, residing in populous places, by uniting their interests, might procure whom they pleased to be chosen—and by this means the representatives of the state may be elected by one tenth part of the people who actually vote.<sup>131</sup>

Accordingly, Anti-Federalists urged that the Constitution either be rejected, accepted after removal of the Times, Places and Manner Clause, or amended to weaken congressional control over elections.<sup>132</sup> If the final say over federal elections had to be lodged somewhere,

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131 Brutus, *Letter IV*, N.Y. J., Nov. 29, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 297, 301–02; *see also* 2 ELLIOT’S DEBATES, *supra* note 1, at 11 (reporting remarks by remarks of Ebenezer Peirce [sic] at the Massachusetts ratifying convention).

132 *E.g.*, Agrippa, *Letter XVI*, MASS. GAZETTE, Feb. 5, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 863, 865 (proposing that “the [C]onstitution . . . be received only upon” condition that it be amended to limit congressional power to “fining such state as shall neglect to send its representatives or senators, a sum not exceeding the expense of supporting its representatives or senators one year”); Federal Farmer, *supra* note 108, at 318 (“[A]t most, congress ought to have power to regulate elections only where a state shall neglect to make them.”); Robert Whitehall, *Reporting Remarks*, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 598 (observing “that the several states shall have power to regulate the elections for Senators and Representatives, without being controlled either directly or indirectly by any interference on the part of Congress”). George Mason suggested as part of a proposed bill of rights that

Congress shall not exercise the [Times, Places and Manner Clause], but in Cases when a State neglects or refuses to make the Regulations therein mentioned, or shall make Regulations subversive of the Rights of the People to a free and equal Representation in Congress agreeably to the Constitution, or shall be prevented from making Elections by Invasion or Rebellion; and in any of these Cases, such Powers shall be exercised by the Congress only until the Cause be removed.

Letter from George Mason to John Lamb (June 9, 1788) (enclosure), *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 40, 44. A caucus of Pennsylvania citizens proposed another amendment to similar effect. Proceedings of the Meeting at Harrisburg, Sept. 3, 1788, *reprinted in* 2 ELLIOT’S DEBATES, *supra* note 1, at 542 (“That Congress shall not have power to make or alter regulations concerning the time, place, and manner of electing senators and representatives, except in case of neglect or refusal by the state to make regulations for the purpose; and then only for such time as such neglect or refusal shall continue.”); *see also* 2 ELLIOT’S DEBATES, *supra* note 1, at 325–26 (reporting remarks of Samuel Jones at the New York ratifying convention).

they said, lodging it in the state legislatures was a less risky alternative than placing it in Congress. State legislatures were more numerous bodies, usually elected annually, and thus more likely to be in sympathy with the interests of the people.<sup>133</sup> In addition, state lawmakers were familiar with local conditions.<sup>134</sup>

Anti-Federalist arguments about the Times, Places and Manner Clause resonated even with some of those otherwise committed to the Constitution; indeed, a number of important Federalists acknowledged the force of those arguments. Noah Webster (the future lexicographer) wrote an influential pamphlet<sup>135</sup> praising every aspect of the Constitution, but criticizing the Times, Places and Manner Clause as unclear and potentially dangerous.<sup>136</sup> He argued that the Clause could be read as giving a power to Congress to make regulations “prescribed ‘in each State by the Legislature thereof,’”<sup>137</sup> a phrase he said made no sense. He added that to the extent the Clause gave Congress power to “alter” regulations already prescribed, it “put[] the election of representatives *wholly*, and the senators *almost wholly*, in the power of Congress.”<sup>138</sup> “I see no occasion,” he wrote, “for any power in Congress to interfere with the choice of their own body . . . . [T]he clause . . . gives *needless* and *dangerous* powers . . . .”<sup>139</sup>

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133 Republican Federalist, *Essay VI*, MASS. CENTINEL, Feb. 2, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 843, 847; *see also* Brutus, *supra* note 131, at 302; Federal Farmer, *supra* note 108, at 317.

134 Agrippa, *supra* note 132, at 864 (“As in every extensive empire, local laws are necessary to suit the different interests, no single legislature is adequate to the business. All human capacities are limited [sic] to a narrow space; and as no individual is capable of practising [sic] a great variety of trades no single legislature is capable of managing all the variety of national and state concerns. Even if a legislature was capable of it, the business of the judicial department must, from the same cause, be slovenly done. Hence arises the necessity of a division of the business into national and local.”); *see also* Letter from William Symmes, Jr., to Peter Osgood, Jr., *supra* note 129, at 107–16 (stating that he did not think Congress would have the wisdom to make regulations within the states); *Vox Populi*, *supra* note 125, at 170 (“And it is a little remarkable, that any gentleman should suppose, that Congress could possibly be in any measure as good judges of the time, place and manner of elections as the legislatures of the several respective states.”).

135 Letter from James McClurg to James Madison (Oct. 31, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 406 (implying the importance of the pamphlet).

136 A Citizen of America (Noah Webster), *An Examination into the Leading Principles of the Federal Constitution* (1787), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, at 373 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

137 *Id.* at 387. At least one Anti-Federalist repeated Webster’s points about the vagueness of the Clause. Expositor, *Essay II*, N.Y. J., Apr. 28, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 823, 828–29.

138 A Citizen of America, *supra* note 136, at 387 (emphasis in original).

139 *Id.*

Webster urged that the ratifying conventions accept the rest of the Constitution but reject that provision.<sup>140</sup>

Webster was then a young political newcomer, but some seasoned Federalists shared his doubts as well—among them, James McClurg, who had served as a delegate to the federal convention.<sup>141</sup> Some Federalists suggested that the Clause be amended to scale back congressional control over federal elections.<sup>142</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> Letter from James McClurg to James Madison, *supra* note 135, at 406. Another Federalist skeptic was David Ramsey, a former president of Congress and leading supporter of the Constitution in South Carolina. Letter from David Ramsey to Benjamin Rush (Nov. 10, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 83, 84; *see also* FOSTER'S MINUTES, *supra* note 1, at 44 (quoting Federalist Benjamin Bourn at the first sitting of the Rhode Island ratifying convention as conceding, "this is the most except[ion]al part of the Constitution" [meaning the most exceptionable part]); Letter from George Cabot, to Theophilus Parsons (Feb. 28, 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 248, 249 (suggesting that some uniform rules could have been put in the Constitution rather than relying wholly on the discretion of Congress and the states); Letter from John Brown Cutting, to William Short (Dec. 13, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 475, 479 (without mentioning Webster, echoing that writer's views about the Times, Places and Manner Clause); Letter from Walter Minto, to the Earl of Buchan (Oct. 28, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 505 (complaining of the same lack of clarity Webster cited; generally supporting the Constitution, but stating of the Times, Places and Manner Clause, that "[t]here are three or four things in it that I do not like. Of these there is one which *must* be thrown out"); Letter from George Lee Turberville, to James Madison (Apr. 16, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 23, 24 (Robert A. Rutland & Charles F. Hobson eds., 1977) (lavishly praising Constitution in general, but decrying the lack of clarity of Times, Places and Manner Clause); *see also* *Many Customers*, INDEP. GAZETTEER, Dec. 1, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 306, 307–08 (acknowledging that the Constitution has many virtues but proposing omitting the Times, Places and Manner Clause). The young John Quincy Adams also was doubtful. Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 222 ("Why must congress have the power of regulating the times, places, and manner of holding elections; or in other words, of prescribing the manner of their own appointments. This power is insidious, because it appears trivial, and yet will admit of such construction, as will render it a very dangerous instrument in the hands of such a powerful body of men."). His correspondent favored a power to regulate time in the interest of uniformity, but saw no reason for place and manner powers. Letter from William Cranch, to John Quincy Adams (Nov. 26, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 224, 225.

<sup>142</sup> *E.g.*, Hampden, MASS. CENTINEL, Jan. 26, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 806, 808 (proposing adopting the Constitution with an amendment striking the Clause and inserting: "But if any State shall refuse to prescribe time and place for such elections, Congress shall provide therefor [sic] by laws made for that purpose"). The author added the following "Remark": "this amendment takes off the main objection made to this article, and gives Congress power to perpetuate its own existence." *Id.*; *see also* Letter from David Ramsey to Benjamin Rush (Nov. 10, 1787), *supra* note 141, at 84 (favoring amendment to make the Times, Places and Manner Clause applicable only if states failed to make regulations).

Those defenders of the Constitution who did not share Anti-Federalist doubts argued that the inherent legislative responsibility to “Judge of the Elections, Returns, and Qualifications of its own Members”<sup>143</sup> included authority to ensure that elections were conducted fairly.<sup>144</sup> They added that the Clause would enable Congress to fix nationally-uniform election days,<sup>145</sup> thereby forestalling opportunities for intrigue by factions and the well-connected.<sup>146</sup> At least some Anti-Federalists agreed with the latter idea,<sup>147</sup> but pointed out that the scope of the Clause far exceeded the power to fix such a day.<sup>148</sup> If the latter were the Framers’ goal, then why had they not merely fixed a day in the Constitution,<sup>149</sup> or at least granted Congress power to do so using language similar to that in the Time Clause of Article II?<sup>150</sup>

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143 U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members.”).

144 2 ELLIOT’S DEBATES, *supra* note 1, at 537 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention); *see also id.* at 510 (reporting remarks by James Wilson at the Pennsylvania ratifying convention).

145 *E.g.*, THE FEDERALIST NO. 61 (Alexander Hamilton), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 214, 216; 2 DOCUMENTARY HISTORY, *supra* note 1, at 413 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention).

146 3 ELLIOT’S DEBATES, *supra* note 1, at 10–11 (reporting remarks by George Nicholas at the Virginia ratifying convention); *id.* at 367 (reporting remarks by James Madison in the Virginia ratifying convention); 4 ELLIOT’S DEBATES, *supra* note 1, at 105 (reporting remarks by James Iredell at the North Carolina ratifying convention); 2 DOCUMENTARY HISTORY, *supra* note 1, at 413 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention).

147 2 DOCUMENTARY HISTORY, *supra* note 1, at 510 (quoting the notes of William Findley, an Anti-Federalist leader at the Pennsylvania ratifying convention).

148 Letter from William Cranch to John Quincy Adams (Nov. 26, 1787), *supra* note 141, at 225 (favoring a power to regulate time in the interest of uniformity, but opposing place and manner powers).

149 Anonymous, *Strictures on the Proposed Constitution*, PHILA. FREEMAN’S J., Sep. 26, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 243, 245 (“The *time*, then, might as well have been fixed in Convention—not subject to *alteration* afterwards.” (emphasis in original)). Hamilton responded that this “was a matter which might safely be entrusted to legislative discretion; and that if a time had been appointed, it might upon experiment have been found less convenient than some other time.” THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 145, at 216; *see also* 3 ELLIOT’S DEBATES, *supra* note 1, at 367, 408 (reporting remarks of James Madison in the Virginia ratifying convention, expressing similar sentiments). Edmund Randolph’s initial outline of a constitution for the Committee of Detail (before emendations by John Rutledge) had mandated a uniform day: “The elections shall be *biennially* held on the *same* day through the state(s): except in case of accidents, and where an adjournment to the succeeding day may be necessary.” 2 FARRAND’S RECORDS, *supra* note 1, at 139 (reproducing records of the Committee of Detail).

150 U.S. CONST. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing [sic] the Electors, and the Day of which they shall give their Votes; which Day shall be the same throughout the United States.”).

Federalists responded in a number of ways. First, they emphasized the purely residual nature of the power to regulate the “Manner of holding” congressional elections. As Tench Coxe, perhaps the most influential Federalist essayist at the time,<sup>151</sup> remarked:

Congress therefore were [sic] vested also with the power . . . of prescribing merely the circumstances under which the elections shall be *holden* [sic], not the qualifications of the electors, nor those of the elected—nor the duration of the senate—nor the duration of the representatives. These are prescribed by the constitution, *unalterably by Congress.*<sup>152</sup>

To Anti-Federalist suggestions that Congress might abuse its authority, the friends of the Constitution responded with scenarios of their own. The state legislatures might run amok if left in unchecked control of federal elections.<sup>153</sup> They might require electors to assemble in a remote location.<sup>154</sup> They might draw congressional districts in grossly unfair ways.<sup>155</sup> They might mandate *viva voce* voting.<sup>156</sup> They might rig the election rules so that state legislatures controlled the House of Representatives as well as the Senate.<sup>157</sup>

Federalists supplemented their case by adding that congressional abuse of the Times, Places and Manner Clause was unlikely because of a lack of motive,<sup>158</sup> because the diverse interests of states and “fac-

151 JACOB E. COOKE, *TENCH COXE AND THE EARLY REPUBLIC* 111 (1978).

152 *A Pennsylvanian to the New York Convention*, PA. GAZETTE, Jun. 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1145 (italics in original).

153 *E.g.*, THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 145, at 214–15; Rufus King and Nathaniel Gorham, *Response to Elbridge Gerry's Objections* (Nov. 3, 1787), *reprinted in* FARRAND, SUPPLEMENT, *supra* note 1, at 280, 281–82; *see also* 2 ELLIOT'S DEBATES, *supra* note 1, at 27 (reporting remarks by Theophilus Parsons at the Massachusetts ratifying convention).

154 2 ELLIOT'S DEBATES, *supra* note 1, at 441 (reporting remarks by James Wilson at the Pennsylvania ratifying convention); *id.* at 303 (reporting remarks by Charles Coatsworth Pinckney during the South Carolina legislative debates preparatory to calling a state ratifying convention); FOSTER'S MINUTES, *supra* note 1, at 45 (quoting Federalist William Barton at the first sitting of the Rhode Island ratifying convention as defending the Clause as a way for Congress to prevent states from fixing an inconvenient voting place).

155 2 ELLIOT'S DEBATES, *supra* note 1, at 50–51 (reporting remarks by Rufus King at the Massachusetts ratifying convention); 3 ELLIOT'S DEBATES, *supra* note 1, at 367 (reporting remarks of James Madison in the Virginia ratifying convention).

156 2 DOCUMENTARY HISTORY, *supra* note 1, at 413 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention).

157 2 ELLIOT'S DEBATES, *supra* note 1, at 441 (reporting remarks by James Wilson at the Pennsylvania ratifying convention); *id.* at 26 (reporting remarks by Theophilus Parsons at the Massachusetts ratifying convention). This concern also had been expressed at the federal convention. 2 FARRAND'S RECORDS, *supra* note 1, at 240–41 (recording comments by James Madison and Gouverneur Morris).

158 A Citizen of New Haven (Roger Sherman), *supra* note 114, at 282 (“[W]hat motive can either [the state legislatures or Congress] have to injure the people in the exercise of that right?”); Letter from Roger Sherman to Unknown Addressee (Dec. 8, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 386, 388; *see also* THE FEDERALIST NO. 60 (AL-

tions” would prevent it from happening,<sup>159</sup> because such a move would ignite popular outrage,<sup>160</sup> and because the Senate would represent the interests of the state legislatures.<sup>161</sup> They also noted that Congress’s power over “manner” would be no greater than that exercised by the states.<sup>162</sup>

None of these was the proponents’ decisive argument, however. Their decisive argument was one that had first been raised at the federal convention:<sup>163</sup> that the Times, Places and Manner Clause was needed to enable Congress to preserve its own existence. In absence of a congressional power to regulate congressional elections, a group of states could destroy the House of Representatives by refusing to provide for those elections or by creating regulations designed to sabotage them. As a precedent, the Federalists alleged that Rhode Island had damaged the operations of the Confederation Congress by refusing to send delegates to that body.<sup>164</sup> The Federalists made this argument over and over, using it to sway votes in crucial states.<sup>165</sup>

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exander Hamilton), *supra* note 114, at 196. Hamilton and others suggested that a ruthless Congress with an army behind it would not seize power by the indirect method of rigging the election laws. *Id.* at 199; *see also* 3 ELLIOT’S DEBATES, *supra* note 1, at 10 (reporting remarks of George Nicholas at the Virginia ratifying convention).

159 4 ELLIOT’S DEBATES, *supra* note 1, at 303 (reporting remarks by Charles Coatsworth Pinckney during the South Carolina legislative debates preparatory to calling a state ratifying convention as stating, “it cannot be supposed that any state will consent to fix the election at inconvenient seasons and places in any other state, lest she herself should hereafter experience the same inconvenience”); THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 114, at 196; *cf.* 2 ELLIOT’S DEBATES, *supra* note 1, at 510 (reporting remarks by James Wilson at the Pennsylvania ratifying convention as stating, “the general government will be more studious of the good of the whole than a particular state will be”).

160 *E.g.*, THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 114, at 196; *cf.* 3 ELLIOT’S DEBATES, *supra* note 1, at 408 (reporting remarks of James Madison at the Virginia ratifying convention); Letter from Timothy Pickering, to Charles Tillinghast (Dec. 24, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 193, 196–97 (claiming that Congress would have nothing to gain from abusive regulations, that it would cost Senate and President their seats).

161 THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 114, at 27 (reporting remarks by Theophilus Parsons at the Massachusetts ratifying convention).

162 4 ELLIOT’S DEBATES, *supra* note 1, at 61 (quoting William Davie at the North Carolina ratifying convention, “Congress has ultimately no power over elections, but what is primarily given to the state legislatures”).

163 2 FARRAND’S RECORDS, *supra* note 1, at 240–41 (recording comments by Rufus King and Gouverneur Morris).

164 *E.g.*, A Friend of Society and Liberty (Tench Coxe), PA. GAZETTE, Jul. 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 280; A Landholder (Oliver Ellsworth), Letter IV, Nov. 26, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 231, 233–34 (citing the case of Rhode Island); A Pennsylvanian to the New York Convention (Tench Coxe), *supra* note 152, at 1144–45 (citing the case of Rhode Island). Anti-Federalists responded that the depiction of Rhode Island’s malefactions was greatly overdrawn. *E.g.*, 2

In New York, for example, Alexander Hamilton developed the “congressional self-preservation” argument at length in Number 59 of *The Federalist*.<sup>166</sup> He suggested that foreign influence might induce some states to try to destroy the central government by sabotaging elections for the House of Representatives.<sup>167</sup> Hamilton acknowledged that a group of states also could destroy the central govern-

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ELLIOT’S DEBATES, *supra* note 1, at 23 (reporting remarks by Phanael Bishop at the Massachusetts ratifying convention); Agrippa, *supra* note 132, at 863. *But see id.* (reporting remarks by Rufus King and Nathaniel Gorham assuring Bishop of the accuracy of the charge against Rhode Island, to Bishop’s satisfaction); *id.* at 24 (reporting remarks of Caleb Strong at the Massachusetts ratifying convention).

165 *E.g.*, Cassius, *Letter VI*, MASS. GAZETTE, Dec. 17, 1788, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 423, 425–426 (“What is intended, by saying that Congress shall have power to appoint the place for electing representatives, is, only to have a check upon the legislature of any state, if they should happen to be composed of villains and knaves, as is the case in a sister state; and should take upon themselves to appoint a place for choosing delegates to send to Congress; which place might be the most inconvenient in the whole state; and for that reason be appointed by the legislature, in order to create a disgust [i.e., distaste] in the minds of the people against the federal government, if they themselves should dislike it.”). Besides those mentioned in the text, additional examples of Federalist use of this argument were as follows:

*Massachusetts*: Rufus King and Nathaniel Gorham, *Response to Elbridge Gerry’s Objections* (Nov. 3, 1787), *reprinted in* FARRAND, SUPPLEMENT, *supra* note 1, at 280, 281–82.

*New York*: Fabius, ALBANY FED. HERALD, Mar. 17, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 862, 863 (expressing similar sentiments); Albany Federal Committee, *An Impartial Address* (1788), *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 1, at 1388, 1391; *A Pennsylvanian to the New York Convention* (Tench Coxe), *supra* note 152, at 1145.

*North Carolina*: 4 ELLIOT’S DEBATES, *supra* note 1, at 53–54 (reporting remarks of James Iredell at the North Carolina ratifying convention); *id.* at 59 (reporting remarks of William Davie at the North Carolina ratifying convention).

*Pennsylvania*: 2 DOCUMENTARY HISTORY, *supra* note 1, at 544 (reporting remarks by Thomas McKean at the Pennsylvania ratifying convention); 2 ELLIOT’S DEBATES, *supra* note 1, at 440–41 (reporting remarks by James Wilson at the Pennsylvania ratifying convention).

*Virginia*: 3 ELLIOT’S DEBATES, *supra* note 1, at 9–10 (reporting remarks by George Nicholas at the Virginia ratifying convention); *id.* at 367 (reporting remarks of James Madison in the same convention).

*See also* Remarker, INDEP. CHRON., Jan. 17, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 734, 738 (“[T]he obstinacy of one State might lead them to refuse to elect at all. In others, perhaps, the legislature might abuse the inhabitants, by appointing a place for holding the elections, which would prevent some from attending, and burthen others with very great inconveniences.”); Letter from Timothy Pickering to Charles Tillinghast (Nov. 24, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 193, 196–97 (expressing similar sentiments). A variation of this argument was that congressional power to regulate congressional elections was necessary to the independence of Congress. A Friend to Good Government, POUGHKEEPSIE COUNTRY J., Apr. 15, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 917, 918–19.

166 THE FEDERALIST NO. 59 (Alexander Hamilton), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 185, 186.

167 *Id.* at 189.

ment by refusing to elect Senators.<sup>168</sup> But he pointed out that destroying the government by refusing to elect Senators would be more difficult than doing so by refusing to elect members of the House: The terms of only a third of the Senators would expire at any one time, so destruction of the upper chamber would take several years. The terms of the entire House expired at once, so that body could be obliterated at once.<sup>169</sup>

In Maryland, convention delegate James McHenry added that the risk to the federal government might not arise from state malice: An insurrection or rebellion might prevent a state legislature from administering an election.<sup>170</sup> As James Iredell told the North Carolina ratifying convention, “[a]n occasion may arise when the exercise of this ultimate power in Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina, and occasionally of some other states, during the late war).”<sup>171</sup>

Anti-Federalists observed that the terms of the Times, Places and Manner Clause did not limit congressional power to emergency use.<sup>172</sup> Nevertheless, the congressional self-preservation argument seems to have convinced many. Noah Webster, for one, resorted to it

168 The Anti-Federalist “Federal Farmer” had pointed this out. Federal Farmer, *supra* note 108, at 316 (“Should the state legislatures be disposed to be negligent, or to combine to break up congress, they have a very simple way to do it, as the constitution now stands—they have only to neglect to chuse [sic] senators.”). It was conceded by former federal convention delegate William Davie at the North Carolina ratifying convention. 4 ELLIOT’S DEBATES, *supra* note 1, at 58.

169 THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 166, at 188 (“But with regard to the Fœderal [sic] House of Representatives, there is intended to be a general election of members once in two years.”).

170 James McHenry, Speech Before the Maryland State House of Delegates (Nov. 29, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 279, 282 (stating that the “Convention had in Contemplation the possible events of Insurrection, Invasion, and even to provide against any disposition that might occur hereafter in any particular State to thwart the measures of the General Government”).

171 4 ELLIOT’S DEBATES, *supra* note 1, at 53–54.

172 Luther Martin, Speech Before the Maryland State House of Delegates (Nov. 29, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 285, 289 (stating “if it was intended to relate to the cases of Insurrection or Invasion, why not by express words confine the power to these objects?”). Of course, the Suspension Clause had been so limited. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *see also* 2 ELLIOT’S DEBATES, *supra* note 1, at 23, 25 (reporting remarks of Phanael Bishop at the Massachusetts ratifying convention); 3 ELLIOT’S DEBATES *supra* note 1, at 403 (reporting remarks of George Mason at the Virginia ratifying convention); 4 ELLIOT’S DEBATES *supra* note 1, at 56–57 (reporting remarks of William Goudy and William McDowell at the North Carolina ratifying convention).

in a tract in which he reversed his earlier opposition.<sup>173</sup> However, the congressional-preservation argument carried with it a corollary: If Congress's power to fix the "Manner of holding Elections" was designed principally to preserve Congress from destruction or serious prejudice, then perhaps the power should be construed as applying *only* in situations that threatened destruction or serious prejudice.

Some Anti-Federalists proposed constitutional amendments to write this corollary into the document.<sup>174</sup> Notable advocates of the Constitution signaled that they would be open to such amendments—among them James Iredell<sup>175</sup> and David Ramsey,<sup>176</sup> leading Federalist spokesmen in North and South Carolina, respectively. Accordingly, the ratifying conventions of Massachusetts,<sup>177</sup> South Carolina,<sup>178</sup> New Hampshire,<sup>179</sup> Virginia,<sup>180</sup> New York,<sup>181</sup> North Carolina,<sup>182</sup>

173 America (Noah Webster), *To the Dissenting Members of the Late Convention of Pennsylvania*, N.Y. DAILY ADVERTISER, Dec. 31, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 194, 195 (stating "the time and manner of exercising that right [election] are very wisely vested in Congress, otherwise a delinquent State might embarrass the measures of the Union. The safety of the public requires that the Federal body should prevent any particular delinquency").

174 *Supra* note 132; see also 2 ELLIOT'S DEBATES, *supra* note 1, at 552 (reproducing an amendment proposed by the minority at the Maryland Ratifying Convention, "[t]hat the Congress shall have no power to alter or change the time, place, or manner of holding elections for senators or representatives, unless a state shall neglect to make regulations, or to execute its regulations, or shall be prevented by invasion or rebellion; in which cases only, Congress may interfere, until the cause be removed").

175 4 ELLIOT'S DEBATES, *supra* note 1, at 54 ("I should, therefore, not object to the recommendation of an amendment similar to that of other states—that this power in Congress should only be exercised when a state legislature neglected or was disabled from making the regulations required.").

176 Letter from David Ramsey to Benjamin Rush, *supra* note 141, at 84 ("If the clause which gives Congress power to interfere with the State regulations for electing members of their body was . . . altered so as to confine that power simply to the cases in which the States omitted to make any regulations on the subject I should be better pleased.").

177 2 ELLIOT'S DEBATES, *supra* note 1, at 177, reprinted in 16 DOCUMENTARY HISTORY, *supra* note 1, at 68 (quoting Massachusetts amendments).

178 18 DOCUMENTARY HISTORY, *supra* note 1, at 71–72 ("Whereas it is essential to the preservation of the rights reserved to the several states, and the freedom of the people under the operations of a general government that the right of prescribing the manner, time and places of holding the elections to the federal legislature, should be for ever inseparably annexed to the sovereignty of the several states. This Convention doth declare, that the same ought to remain to all posterity a perpetual and fundamental right in the local, exclusive of the interference of the general government, except in cases where the legislatures of the states shall refuse or neglect to perform and fulfill the same, according to the tenor of the said constitution.").

179 18 DOCUMENTARY HISTORY, *supra* note 1, at 187–88 ("That Congress do not exercise the powers vested in them by the 4th section of the first article, but in cases when a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations contrary to a free and equal representation.").

and Rhode Island<sup>183</sup> all proposed such amendments. The Massachusetts amendment is illustrative:

That Congress do not exercise the powers vested in them by the 4th section of the 1st article but in cases where a state shall neglect or refuse to make regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the constitution.<sup>184</sup>

Leading Federalists argued that, even without amendment, the Clause should be construed as limited to emergencies. Alexander Contee Hanson, a member of Congress whose pamphlet supporting the Constitution proved popular,<sup>185</sup> stated flatly that Congress would exercise its times, places, and manner authority only in cases of invasion, legislative neglect or obstinate refusal to pass election laws, or if a state crafted its election laws with a “sinister purpose” or to injure the general government. “It was never meant,” Hanson wrote, “that congress should at any time interfere, unless on the failure of a state

180 3 ELLIOT’S DEBATES, *supra* note 1, at 661, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 205 (“That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.”).

181 The New York ratification instrument provided as follows:  
[T]hat the Congress shall not make or alter any Regulation in any State respecting the times places and manner of holding Elections for Senators or Representatives, unless the Legislature of such State shall neglect or refuse to make Laws or Regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the Premises; provided that Congress may prescribe the time for the Election of Representatives.

Ratification of the Constitution by the State of New York (July 26, 1788), *available at* [http://avalon.law.yale.edu/18th\\_century/ratny.asp](http://avalon.law.yale.edu/18th_century/ratny.asp).

182 4 ELLIOT’S DEBATES, *supra* note 1, at 249 (“The Congress shall not alter, modify, or interfere in the times, places, or manner, of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled by invasion or rebellion, to prescribe the same.”).

183 The Rhode Island ratification instrument provided as follows:  
Congress shall not alter, modify or interfere in the times, places or manner of holding elections for Senators and Representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion to prescribe the same; or in case when the provision made by the states, is so imperfect as that no consequent election is had, and then only until the legislature of such state, shall make provision in the premises.

Ratification of the Constitution by the State of Rhode Island (May 29, 1790), *available at* [http://avalon.law.yale.edu/18th\\_century/ratri.asp](http://avalon.law.yale.edu/18th_century/ratri.asp).

184 2 ELLIOT’S DEBATES, *supra* note 1, at 177, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 68 (quoting Massachusetts amendments).

185 On March 27, 1788, Hanson wrote to Tench Coxe of “the avidity, with which I am informed my humble essay has been bought up.” Letter from Alexander Contee Hanson to Tench Coxe (Mar. 27, 1788), *in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 520, 521 (internal citations omitted).

legislature, or to alter such regulations as may be obviously improper.”<sup>186</sup>

Federalist Jasper Yeates made a similar representation to the Pennsylvania ratifying convention: “Sir, let it be remembered that this power can only operate in a case of necessity, after the factious or listless disposition of a particular state has rendered an interference essential to the salvation of the general government.”<sup>187</sup> John Jay implied as much at the New York convention.<sup>188</sup>

Accordingly, the ratifying conventions of three states—New York,<sup>189</sup> North Carolina,<sup>190</sup> and Rhode Island<sup>191</sup>—adopted resolutions of understanding limiting the scope.

186 Aristides (Alexander Contee Hanson), *Remarks on the Proposed Plan* (Jan. 31, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 522, 526.

187 2 DOCUMENTARY HISTORY, *supra* note 1, at 437 (reporting remarks by Jasper Yeates at the Pennsylvania ratifying convention).

188 2 Elliot’s Debates, *supra* note 1, at 326 (“Suppose that, by design or accident, the states should neglect to appoint representatives; certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have power, by law, to support the government, and prevent the dissolution of the Union. He believed this was the design of the federal Convention.”)

189 The New York ratifying convention resolved as follows:

In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make Laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises.

Ratification of the Constitution by the State of New York (July 26, 1788), available at [http://avalon.law.yale.edu/18th\\_century/ratny.asp](http://avalon.law.yale.edu/18th_century/ratny.asp). The New York convention added this paragraph as well:

WE the Delegates of the People of the State of New York . . . [d]o declare and make known. . . . That nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing Laws at its discretion from time to time to divide such State into convenient Districts, and to apportion its Representatives to and amongst such Districts.

*Id.*; see also 18 DOCUMENTARY HISTORY, *supra* note 1, at 301–02.

190 4 ELLIOT’S DEBATES, *supra* note 1, at 246 (“That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe the same.”).

191 The Rhode Island ratification instrument stated in part:

We the said delegates . . . ratify . . . [i]n full confidence nevertheless . . . [t]hat the Congress will not make or alter any regulation in this State, respecting the times, places and manner of holding elections for senators or representatives, unless the legislature of this state shall neglect, or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that n [sic] those cases, such power will only be exercised, until the legislature of this State shall make provision in the Premises.

Ratification of the Constitution by the State of Rhode Island (May 29, 1790), available at [http://avalon.law.yale.edu/18th\\_century/ratri.asp](http://avalon.law.yale.edu/18th_century/ratri.asp).

C. *Observations on the Ratification Debates: The Original Understanding*

With respect to other federal powers granted in the proposed Constitution, Anti-Federalists made exaggerated claims as to the scope of federal authority.<sup>192</sup> But their claims about the substantive power granted by the Times, Places and Manner Clause were more limited. That is, the Anti-Federalists assumed that the Clause enabled Congress only to adopt regulations customarily associated with regulating the “manner of election”—including a few denied by the constitutional text. Anti-Federalists did not suggest that the provision would empower Congress to tax anyone, or regulate speech or the press, or adopt a comprehensive criminal code, or favor some religions over others, or control finances. All of their scenarios were based on apprehensions about how Congress might manipulate the date and place of elections, the composition of legislative districts, the form of the vote, and the rules of decision. This strongly suggests that all sides understood the Clause to authorize Congress to do nothing outside the scope of accepted “manner” regulation.

This inference is supported further by other remarks made by leading figures throughout the Founding Era. At the federal convention, James Madison characterized “times, places & manner” as “words of great latitude,” but cited only examples of standard manner-of-election rules.<sup>193</sup> During the ratification fight, Tench Coxe cited as an example of the “Manner of holding” only the choice of *vi-va voce* or secret ballot voting.<sup>194</sup> During the first session of the First Congress, Senator William Maclay referred to the “mode” of congressional voting as *viva voce* or by ballot.<sup>195</sup> During the same session,

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192 For example, the Anti-Federalists portrayed the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, and the General Welfare Clause, *id.*, art. I, § 8, cl. 1, as having very great sweep. See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in LAWSON, ET AL., ORIGINS, *supra* note 1, at 94–96 (summarizing Anti-Federalist claims about the Necessary and Proper Clause); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 30–38 (2003) (summarizing Anti-Federalist claims about the General Welfare Clause).

193 At the federal convention, James Madison said of what became the Times, Places and Manner Clause:

These were words of great latitude. . . . Whether the electors should vote by ballot or *vivâ voce*[sic], should assemble at this place or that place; should be divided into districts or all meet at one place, shd [sic] all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the [state] Legislatures.

2 FARRAND, RECORDS, *supra* note 1, at 240–41.

194 Tench Coxe, *supra* note 152, at 1145.

195 *The Diary of William Maclay and Other Notes on Senate Debates* (Kenneth R. Bowling & Helen E. Veit eds., 1988), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 81 (Johns Hopkins Univ. Press 1988).

Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies.<sup>196</sup> During the ensuing floor discussion, the only examples given of congressional power under the Clause were deciding between secret ballot and *viva voce* voting,<sup>197</sup> fixing polling places,<sup>198</sup> and legislative districting.<sup>199</sup>

The real Founding-Era debate over the Clause, therefore, was not about whether it gave Congress unfamiliar powers. It was over three other issues. The first was whether the Clause granted Congress some traditional “manner” powers (over terms of office and voter and candidate qualifications) actually denied by other provisions of the Constitution. The second issue was whether Congress would abuse the authority that all conceded Congress would enjoy under the Clause: Would Congress hold elections on days convenient for all? Would it choose polling places and draw legislative districts fairly? Would it replace secret ballot voting with *viva voce* voting or majority-victor rules with plurality rules?<sup>200</sup>

The third issue was whether the Clause granted Congress authority to act in non-emergency situations. Anti-Federalists said it did. Some Federalists thought so, some not. A limiting amendment would have resolved this question authoritatively, and several states proposed such amendments, but none was adopted.<sup>201</sup> Yet in several key states, ratification was secured only after Federalists represented that the Clause was limited to emergencies, and three state conventions ratified only on the explicit understanding that the Clause was so limited.<sup>202</sup>

While the ratifying conventions’ resolutions of understanding are not absolutely binding determinants of the Clause’s legal effect, those resolutions—especially when coupled with Federalist representations in key states such as Pennsylvania—are persuasive evidence of how

196 1 ANNALS OF CONG. 768 (1789) (Joseph Gales ed., 1834).

197 *Id.* at 798 (quoting Rep. Elbridge Gerry). Another example: Richard Symmes, a young Massachusetts lawyer (and a moderate Anti-Federalist who eventually voted for the Constitution in his state’s ratifying convention), thought of “manner” mostly in terms of *viva voce* or secret ballot voting. Letter from William Symmes, Jr. to Peter Osgood, Jr., *supra* note 129, at 110.

198 1 ANNALS OF CONG. 799 (1789) (Joseph Gales ed., 1834) (quoting Rep. Elbridge Gerry).

199 *Id.* at 801 (quoting Rep. Thomas Tudor Tucker).

200 *E.g.*, 4 ELLIOT’S DEBATES, *supra* note 1, at 60 (reporting remarks by William Davie at the North Carolina ratifying convention: “At present, the manner of electing is different in different states. Some elect by ballot, and others *viva voce*. It will be more convenient to have the manner uniform in all the states”).

201 *Supra* notes 177–183.

202 *Supra* notes 185–88 and accompanying text.

the Clause should be construed. Indeed, the Supreme Court often considers such evidence in deciding whether to interpret a provision narrowly or broadly.<sup>203</sup> In the case of the Times, Places and Manner Clause, many of the leading Founders—Federalists and Anti-Federalists alike—were gravely concerned about the danger that a self-dealing Congress might abuse its “manner of election” power. In response, leading Federalists represented that the power could not be used except in cases of serious need. If not for such representations, the Constitution may never have been ratified. Of course, others may point out that the “emergency only” rule was never formally written into the Constitution, presumably because some people thought it was undesirable and others thought the ratification-era understanding made it unnecessary. Perhaps the best way to balance these concerns is not to apply a literal “emergencies only” limitation, but to construe the grant of congressional authority narrowly, so that doubts as to the scope of the power are resolved against coverage. That certainly was the least for which the skeptical ratifiers bargained.

#### V. CONCLUSION: IMPLICATIONS FOR MODERN “MANNER” LEGISLATION

Historical evidence does not always offer clear guidance on the constitutionality of modern legislation, but in this case, it does. The Times, Places and Manner Clause gave Congress authority to regulate the manner of election within the widely accepted meaning of that concept, excepting only the qualifications of electors and candidates, the terms of office, and the places for electing Senators. The grant of power to set “Times” enabled Congress to establish the dates and hours for federal elections. The grant of power to determine “Places” authorized Congress to fix the locations for voting for Representatives and the contours of congressional districts. The “Manner of holding” grant bestowed the residuum of manner-of-election regulation. It conferred authority over voter registration,<sup>204</sup> appointment

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<sup>203</sup> Thus, the Court interprets the Equal Protection Clause of the Fourteenth Amendment more broadly in cases of race than in other sorts of cases because that Amendment’s ratification history shows that its core purpose was to assure racial equality. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 695 (3d ed. 2006) (discussing justifications for strict scrutiny analysis of race classifications). Similarly, the Court has developed the “dormant commerce clause” branch of Commerce Clause interpretation because of the historical purposes behind the Commerce Clause and allied provisions. *Id.* at 421–22 (discussing the Framers’ intent to “prevent state laws that interfered with interstate commerce” as justification for the dormant commerce clause).

<sup>204</sup> *E.g.*, The Enforcement Act of 1870, ch. 114, 16 Stat. 140 (imposing penalties for obstruction of voting rights and allowing use of military force to enforce the law).

and qualifications of election administrators,<sup>205</sup> delineation of the form of the ballot and the method of voting,<sup>206</sup> notices and deadlines, rules of decision (majority or plurality), procedures for resolving contests, and punishment of crimes in election administration.<sup>207</sup> The “Manner of holding” grant further authorized regulation of two-tier election procedures, which surely included governance of primary as well as general elections.<sup>208</sup>

Authority over the normal conduct of political campaigns<sup>209</sup> was outside the accepted scope of “manner-of-election” regulation. As such, that authority was outside the power literally conferred by the Times, Places and Manner Clause. Congress could regulate campaigns, therefore, only if campaign regulation qualified as an incidental power under the Necessary and Proper Clause.

Then, as now, campaigns affected elections. Under the law of the time, however, for a power to qualify as incidental required more than an effect or other factual connection between the incidental and principal power. The law also required that the putative incident be less (in the language of the day) “worthy” than the principal.<sup>210</sup> In other words, regulation of the outside activity had to be less important—less socially or economically significant—than regulation of the principal activity. Moreover, the agent claiming a power was incidental had to demonstrate either that the lesser power was a *customary* way of carrying out the principal power or, alternatively, that inability to exercise the incidental power would result in *great prejudice* to the exercise of the principal power.<sup>211</sup> These requirements served the ultimate purpose of assuring that the claimed incident was within the

205 *E.g.*, The Force Act of 1871, ch. 99, 16 Stat. 433 (banning the use of terror, force, or bribery to prevent citizens from voting).

206 *E.g.*, Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 2, 5, 36, and 42 U.S.C.) (requiring states to replace punch card and lever voting and imposing federal standards for voting systems and instructions).

207 *E.g.*, ch. 114, 16 Stat. at 433.

208 *Cf.* United States v. Classic, 313 U.S. 299, 315–21 (1941) (upholding such regulations). There is an irony here: By far the Supreme Court’s most thorough analysis of the Founding-Era meaning of the Times, Places and Manner Clause is Justice McReynold’s opinion in *Newberry*. Yet because the opinion did not examine contemporaneous usages of the term “manner of election,” it reached the wrong conclusion (*i.e.*, holding that Congress could not regulate federal primary elections).

209 The normal conduct of political campaigns was not understood to include corrupting the election machinery by direct bribery of voters or election officials. *See supra* note 73.

210 The discussion in this part generally follows the discussion in Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in LAWSON, ET AL., ORIGINS, *supra* note 1, at 52–83.

211 *Id.* at 61.

actual or presumed intent of the grantors.<sup>212</sup> Founding-Era lawyers sometimes summed these requirements by saying that an incident could not be a “different thing” or have a “different nature” from its principal.

Consider a hypothetical federal law altering the composition of state legislatures. Since under the unamended Constitution state legislatures elected United States Senators, this law might affect the election of Senators; indeed, it might be designed to do so. The factual connection, however, would not have rendered the power to pass such a law incidental to the express power to regulate the “Manner of holding” senatorial elections. Altering the composition of state legislatures would have been seen as a “different thing” having a “different nature” from the principal power, and thus not within the Necessary and Proper Clause.

The governance of congressional campaigns was similarly outside the scope of incidental congressional power.<sup>213</sup> Governance of congressional campaigns is an endeavor at least as ambitious as (as “worthy” as) regulating election mechanics: It is a more complicated enterprise, entailing the regulation of far more resources than are devoted to mere election administration. Furthermore, even if campaign governance were deemed less “worthy” than election administration, Founding-Era law would require a showing *either* of a customary connection between campaign regulation and manner-of-election regulation *or* of “great prejudice” to the former from absence of the latter. However, the eighteenth-century materials reveal no customary or legal connection between campaign rules and manner-of-election regulation. To be sure, campaign discourse was a subject of legal governance, but that governance was carried out through the wholly separate area of defamation law<sup>214</sup>—a subject the Federalists explicitly assured the ratifying public was reserved exclusively for state, not federal, oversight.

The absence of a customary connection thus leaves one to argue that without the power to regulate campaigns, Congress would suffer “great prejudice” in the administration of electoral mechanics. This is a difficult case to make, since unfair advertising and unrestricted

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<sup>212</sup> *Id.* at 66, 82–83.

<sup>213</sup> That is, other than by expulsion from Congress of the offending candidate. *See* U.S. CONST. art. I, § 5, cl. 2 (empowering each chamber of Congress to expel a member “with the Concurrence of two-thirds”).

<sup>214</sup> On the eighteenth-century law of defamation, *see*, for example, ANONYMOUS, A DIGEST OF THE LAW CONCERNING LIBELS (W. Owen et al. eds., 1770) and 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 490–98 (John Exshaw ed. 1781).

campaign spending do not greatly impede the conduct of such operations as erecting polling booths, maintaining voter registration lists, or counting the ballots. In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed.<sup>215</sup>

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215 *Supra* text accompanying note 202.